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THE MAKERERE LAW JOURNAL

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The Journal is manned by students of law and is independent of the school of law administration. Submissions are reviewed, edited and published by the student editors who are specifically selected, trained and equipped with the requisite skills. Through an intense editorial process, they work with the author to edit a submission until it is ready for publication.

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Editor-In-Chief's Note

It has often been said, in the words of George R.R. Martin, that *"a reader lives a thousand lives before he dies. The man who never reads lives only one."* In many ways, writing offers us the same gift - the ability to live, think, and experience twice: once in the moment, and again in reflection. The Makerere Law Journal has, since its inception, served as a space where legal thought is captured, shared, and re-lived, allowing each new reader to step into the minds of those who dare to question, analyse, and propose solutions to the "immense problems of Law," as our pioneer Chief Editor, Omara Atubo, so aptly described.

This volume stands as a testament to that enduring vision. It showcases a remarkable diversity of legal scholarship, with contributions from across Africa on pressing contemporary issues - from Human Rights and Arbitration to Land Fraud, Revenue Law and Taxation, Environmental Justice, and beyond. It also features works from the symposium organised in collaboration with the Public Interest Law Clinic (PILAC) and the School of Law, a partnership that brought together scholars, practitioners, and students to engage in rigorous debate on contemporary legal issues. The papers presented at the symposium, now captured in this volume, reflect the richness of those discussions.

I extend my deepest gratitude to Dr. Dianah Ahumuza Ateenyi, Dr. Patricia Atim and the entire PILAC staff for their instrumental role in making the symposium possible, and to the Makerere Law School administration headed by Dean Prof. Ronald Naluwairo for their steadfast support in ensuring this volume's success.

Special recognition must be given to our Deputy Editor-in-Chief, Julius Ainomugisha, for his exceptional dedication; to our committed Editors - Conrad Albert Akankwatsa, Cynthia Amiri, James Kamanzi Zawadi, Ruth Kirabo, Mary Sheila Ankunda, Liz Atukwase, and Keisha Galabuzi - whose keen eyes and tireless work ensured the highest standard on every page; and to our talented Associate Editors - Blessing Olga Asianut, Hannah Clarice Mirembe, Sweetie Ogwal, Adrian Mukasa, Shawn Musinguzi Solomon, Sharon Sasha Asianzu, Felex Erongu, and Alicia Atukwatse - whose enthusiasm and diligence brought invaluable depth to our editorial process.

To all our authors, thank you for trusting us with your ideas. To our reviewers and readers, thank you for engaging with them critically and keeping the conversation alive. Each of you has contributed to making the Makerere Law Journal not just a publication, but a living archive of legal thought and a symbol of excellence in legal scholarship.

It is my hope that the articles in this volume do more than inform - that they challenge assumptions, inspire new debates, and encourage innovation within and beyond our borders. In reading them, may you live, think, and experience twice.

Calvin Stewart Obita
Editor-in-Chief
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FREEDOM OF ASSOCIATION AND THE LGBTQ+ COMMUNITY IN UGANDA: AN EXAMINATION OF FRANK MUGISHA AND TWO OTHERS V UGANDA REGISTRATION SERVICES BUREAU

John Martin Muwanguzi

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FREEDOM OF ASSOCIATION AND THE LGBTQ+ COMMUNITY IN UGANDA: AN EXAMINATION OF FRANK MUGISHA AND TWO OTHERS V UGANDA REGISTRATION SERVICES BUREAU

John Martin Muwanguzi*

ABSTRACT

This paper explores the resistance faced by the LGBTQ+ community in Uganda in asserting their right to freedom of association. It focuses on two key judicial decisions—one from Uganda and the other from Kenya—alongside rulings from other jurisdictions, to provide a broader perspective on the LGBTQ+ community's right to associate. The Court of Appeal of Uganda took a narrow approach in deciding whether the Registrar of Companies acted lawfully in refusing to reserve the name "Sexual Minorities Uganda." While the court emphasised the Registrar's discretion, the key issue was whether that discretion was lawfully exercised. The paper argues that the decision marked a significant setback in the LGBTQ+ community's efforts to realise their constitutionally guaranteed rights, hindering their ability to organise and associate freely.

1.0 INTRODUCTION

The American pop-star, Selena Gomez has opined in one of her famous songs that "the heart wants what it wants".[1] In the same light, it has been asked in a famous play that *"What is in a name? That which we call a rose by any other*

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1 Selena Gomez "The Heart Wants What it Wants" available at <https://www.youtube.com/watch?v=ij_0p_6qTss> [Accessed on 6th June 2024]

name would smell as sweet".[2] These phrases point to the concept of romantic love; one which has existed for the entirety of mankind. The notion of love brings out the very best in us (at times even the worst) that to deny its existence, is to be disingenuous. The strength of love as an emotion can be seen from the various movies, songs, books and plays written; leading to the creation of a multibillion-dollar industry across the globe.

Though popular and having been experienced by nearly everyone on the face of the planet, its expression has found its way before the courts of law. The propriety of love has been challenged especially that which is experienced by the LGBTQIA+ community. When love meets the law (particularly same-sex love), the outcomes have differed from jurisdiction to jurisdiction. In some instances, it has been decided that this kind of love is no different, and is in fact protected by the constitution. In other countries, the courts have held that this kind of love is not only immoral, but even those that profess it are not protected by the constitution.

Uganda falls into the latter category. On 3rd April 2024, the Constitutional Court of Uganda delivered its ruling in the case of *Fox Odoi and Others v Attorney General.*[3] In this decision, the court ruled that the Anti-Homosexuality Act, 2023 was constitutional in so far as it criminalised homosexual behaviour. The ruling received mixed reactions from Ugandans, civil society and the international community. Many, such as politicians across Uganda's political divide, welcomed the decision as being a shield to protect the traditional African family, traditional religious beliefs and children; while members of civil society and the international community expressed their disappointment with the ruling as they

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2 A soliloquy from Romeo and Juliet, spoken by Juliet in Act 2 Scene 2.

3 Consolidated Constitutional Petitions Nos. 14,15,16 and 85 of 2023.

found the law to be draconian. The decision has in fact been described as Uganda's *Dred Scott v. Sandford*.[4]

This paper seeks to review a number of Court decisions that have had an impact on the right to association of assembly of the LGBTQ+ community. It seeks to offer insight into a number of decisions by Uganda's Court of Appeal and Constitutional Court. This is done by examining the Court of Appeal decision of *Frank Mugisha and 2 Others v Uganda Registration Services Bureau*[5] (the SMUG case) and the Kenyan Supreme Court decision of *NGOs Co-ordination Board v Eric Gitari and 5 Others*.[6] These cases are critical in addressing the question of whether the state can lawfully prohibit the association of people on the basis of their sexual orientation. By adopting a comparative jurisprudence approach to this question, we can gain more intimate understanding of the extent of limitation to the expression of same-sex love and the constitutional implications thereof.

2.0 FRANK MUGISHA AND 2 OTHERS V. UGANDA REGISTRATION SERVICES BUREAU: A BRIEF BACKGROUND

The appellants applied to the Respondent for the reservation of the name "Sexual Minorities Uganda" (SMUG) with a view to incorporating it as a company limited by guarantee. The respondent however declined to reserve the name on the ground that the name was against public policy and labelled criminal under section 145 of the Penal Code Act Cap.120.

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4 Dr Busingye Kabumba while analysing the decision in the Observer newspaper has equated the decision to *Dred Scott v Sandford*. His analysis is available at: <https://observer.ug/index.php/> [Accessed on 6th June 2024] *Dred Scott v John F.A. Sandford* [60 U.S. 393] was a landmark decision of the United States Supreme Court that held that the US Constitution did not extend American citizenship to people of black African descent, and therefore they could not enjoy the rights and privileges the constitution conferred upon American citizens. The decision is widely considered the worst in the court's history, being denounced particularly for its racism.

5 Civil Appeal No.223 of 2018.

6 Petition No.16 of 2019.

The Appellant, by way of judicial review, sued the Respondent citing violation of their human rights and freedoms particularly Articles 20, 21, 29 and 42 of the 1995 Constitution of the Republic of Uganda. Their application was dismissed on the basis that the decision was justified as it was taken in public interest, and was within the ambit of Article 43 of the Constitution. The Appellants decided to appeal.

The Court of Appeal decided to limit its finding to whether the Registrar had the mandate to decline reservation of a name. Accordingly, the court found that the Registrar General had the mandate to assess the name presented by interested applicants and had the discretion to disallow it if found undesirable. According to the court, the authorities relied on by the Appellants were quite persuasive but not relevant to the instant appeal. *'The appeal was not about the abrogation of any particular behaviour in our society',* and therefore failed. As this paper will show later, the narrow and restrictive approach adopted by the court led to a result which as shall be elaborated, is considered problematic in light of the human rights framework in Uganda.

The decision of the Registrar and that of the Court of Appeal discussed above, do not come as a surprise to many Ugandans, especially those involved in advocacy for the LGBTQIA+ community. Arimoro for example, points out that criminalisation of LGBTQIA+; particularly same-sex relations is traceable to colonial laws received from Britain.[7] Whereas Britain repealed her anti-homosexuality laws in 1967 following the Wolfenden Commission Report,[8] her former territories such as Uganda continue to criminalise same-sex relations and LGBTQIA+ activities generally.

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7 Augustine Edobor Arimoro, Interrogating the Criminalisation of Same-Sex Sexual Activity: A Study of Commonwealth Africa (Liverpool Law Review, 42(3) 2021) 379-399.

8 Internet Archive. (19570. The Wolfenden Report of The Committee on Homosexual Offenses and Prostitution Image Large: UK Government: Free Download, Borrow, and Streaming: Internet Archive. [Online] available at <https://archive.org/details/the-wolfenden-report-report-of-the-committee-on-homosexual-offenses-and-prostitution-image-large> [Accessed on 3rd October 2024].

3.0 NGOS CO-ORDINATION BOARD V ERIC GITARI AND 5 OTHERS: A SUMMARY

The petition arose from a letter written by the Appellants refusing to reserve any of the 1st Respondent's proposed names to register a Non-Governmental Organisation (NGO) seeking to champion the rights of Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTIQ) persons in Kenya. The 1st Respondent sought to reserve for registration of an NGO in any of the names: Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; Gay and Lesbian Human Rights Organisation; Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council; and Gay and Lesbian Human Rights Collective. However, the Appellant's Executive Director declined to approve any of the proposed names on the grounds that Sections 162, 163 and 165 of the Penal Code of Kenya criminalised Gay and Lesbian liaisons.

Aggrieved by this decision, the Respondent filed a petition to the High Court of Kenya alleging that the Appellant's refusal to register the intended NGO contravened the provisions of Articles 20(2), 31(3), 27(4), 28 and 36 of the Kenyan Constitution, 2010.[9]

The trial court and the Court of Appeal both found that there had been an infringement of the 1st Respondent's rights under the Kenyan Constitution. On further appeal to the Supreme Court, it was held that Article 36 of the Kenyan Constitution guaranteed the right to freedom of association to all Kenyans, and whereas it is not an absolute right and could be subjected to limitation, the interference with the Respondent's right to freedom of association did not pursue any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights and freedom of others. As such, the court held that just like everyone else,

[9] Constitution of Kenya, 2010. (n.d.) available at: <https://kdc.go.ke/wp-content/uploads/2021/12/Constitution-of-Kenya-2010-min.pdf> [Accessed on 8 October 2024)

LGBTQ have a right to freedom of association which includes the right to form an association of any kind.

It is important to note that the Ugandan Court of Appeal decision is contained in only 19 pages whereas that of the Kenyan Supreme Court is contained in 77 pages. The courts' respective decisions have had a resounding impact on the rights of sexual minorities in both countries; particularly the right to freedom of association. The fairly short decision by Uganda's Court of Appeal calls for the evaluation of the constitutional implications that the decision has had on the LGBTQ community, particularly their freedom of association. An analysis of the ratio decidendi of both courts can provide some insight as illustrated below.

4.0 THE RIGHT OF THE LGBTQ COMMUNITY TO ASSOCIATE IN HUMAN RIGHTS LAW

The 1995 Constitution of the Republic of Uganda protects the right to associate.[10] Every person has the right to associate which includes the freedom to form and join associations or unions, including trade unions and political and other civic organisations.[11] The Constitution of Kenya also recognises the right of every person to associate which includes the right to form, join or participate in the activities of an association of any kind.[12]

It suffices to note that that the right to freedom of association is also recognised in international and regional human rights instruments which Uganda has ratified. The right to freedom of association is provided for under Article 22 (1) of the International Covenant on Civil and Political Rights (ICCPR). It states:

> "*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*"

10 Article 29(1)(e) of the 1995 Constitution of Uganda.
11 Ibid.
12 Article 36(1) of the Constitution of Kenya.

Similarly, Article 10 (1) of the African Charter on Human and Peoples Rights (ACHPR) provides inter alia:

"*Every individual shall have the right to free association provided he abides by the law*".

The Universal Declaration of Human Rights (UDHR) also recognises that everyone has the right to freedom of peaceful assembly and association.[13]

This therefore begs the question whether, upon the reading of the aforementioned provisions, the *"person(s)"* or *"everyone"* includes LGBTQ persons? The literal reading of those provisions is that LGBTQ persons are not excluded as persons that can associate with one another.[14]

One of the arguments raised by the appellants in the SMUG case was that the right to freedom of association applies to every person including LGBTQ persons, and that it was not criminal to promote and protect the rights of such persons, as Sexual Minorities Uganda sought to do.[15] It was also argued that Uganda was bound by international obligations enshrined in international treaties; specifically, the ICCPR, and ACHPR which all recognised freedom of association.[16] The court however found that the appeal before it pertained to reservation of a name. The court adopted a narrow approach and decided that the appeal was not about the abrogation of any particular behaviour in our society. Accordingly, the Respondent was well within its mandate to disallow the name proposed by the Appellants under section 36(2) of the Companies Act. This was an escapist approach by the learned Justice. Before pointing out the

13 Article 20(1) of the UDHR.

14 In *Eric Gitari's* case (supra), the Supreme Court of the Republic of Kenya applied the same reasoning in interpreting Article 36 of the Kenyan Constitution, 2010. The court further found that the right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

15 SMUG case, at p.4.

16 Ibid, 15.

problematic aspects of this reasoning, it suffices to examine section 36 of the Companies Act.

Section 36 of the Companies Act, 2012 states that:

1. *The registrar may, on written application, reserve a name pending registration of company or a change of name by an existing company, any such reservation shall remain in force for thirty days or such longer period, not exceeding sixty days as the registrar may, for special reasons, allow and during that period no other company is entitled to be registered with that name.*
2. ***No name shall be reserved and no company shall be registered by a name, which in the opinion of the registrar is undesirable***.
3. *Upon registration, a limited liability company shall add the initials "LTD" or the word "Limited" at the end of its name.*

A reading of section 36(2) of the Act reveals that the law confers upon the registrar wide discretion to reject names which are *"undesirable".* The Act does not define what would amount to undesirable. Is the standard objective or subjective? Is the law giving the registrar leeway to include their moral convictions in decision making? In the SMUG case, the registrar declined to register the name on grounds that the activities of the LGBTQ community were against government policy and were considered unlawful in Uganda. The basis of the decision was that the Penal Code criminalises homosexual conduct; and therefore, the organisation was intending to promote unlawful conduct. The court accepted this argument too and ruled that the right to freedom of association of the LGBTQ community was justifiably limited. Again, this was a problematic interpretation and application of the law.

It is important from the onset to acknowledge that the right to freedom from association is not an absolute right. It can be limited in a number of situations. Limitation of rights is provided for under Article 43 of the 1995 Constitution of Uganda. It states:

1. *In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*

2. Public interest under this article shall not permit-
a) Political persecution;
b) Detention without trial;
c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this constitution.

The parameters of legislative limitation with regard to the right to associate has engaged the minds of judges in many jurisdictions, in both international and domestic courts. The standard against which every limitation on the enjoyment of fundamental rights and freedoms as set out in Article 43(2) (c), is an objective one. This legal principle was enunciated in the case of *Onyango-Obbo & another v Attorney General.*[17] Mulenga JSC who wrote the lead judgment with which other members of the court, said that:

> *"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 applications, the democratic values remain the same."*

The learned justice further stated:

> *"Under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. The court must be guided by the values and principles essential to a free and democratic society. In Mark Gova & Another v Minister-of Home Affairs & Another; [S.C.36/200: Civil Application No.156/99] the Supreme Court of Zimbabwe formulated the following summary criteria, with which I agree for justification of law imposing limitation on guaranteed rights-*
> *The legislative objective which the limitation is designed to promote must be sufficiently important to warrant over riding a fundamental right;*
> *The measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*
> *The means used to impair the right of freedom must be more than necessary to accomplish the objective."*

[17] Constitutional Appeal No.2 of 2002.

In the case of *Sidiropoulos and Others v Greece,*[18] the European Court of Human Rights (ECJ) held that:

> *"The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly, States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions."*

Furthermore, the Supreme Court of Canada in the case in *R v Oakes*[19] developed principles for consideration when determining whether a limitation of a right is justifiable, namely; a) there has to be a pressing and substantial objective for the law or government's action; b) the means chosen to achieve the objective must be proportional to the burden on the rights of the claimant; c) the objective must be rationally connected to the limit on the Charter right; d) the limitation must minimally impair the Charter right; and e) there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

It should also be remembered that according to the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights,[20] clause 3 and 4 in the General Interpretative principles relating to the justification of limitations section, provides that *"all limitations shall be interpreted strictly and in favour of the right at issue and in the light and context*

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18 (57/1997/841/1047).

19 [1986] 1 S.C.R 103.

20 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights American Association for the International Commission of Jurists. (n.d.), available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> [Accessed 3 Oct 2024]

concerned."[21] The burden of justifying a limitation upon a right guaranteed under the ICCPR therefore lies on the state.

In *S v Makwanyane and Another*,[22] Chaskalson, P stated that (at paragraphs 103 & 104):

> "*The criteria prescribed by section 33(1) for any limitation of the rights contained in section 11(2) are that the limitation must be justifiable in an open and democratic society based on the freedom of equality, it must be both reasonable and necessary and it must not negate the essential content of the right…The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. … The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question*".

In the *SMUG* case, the registrar declined to reserve the appellant's name *"SMUG (Sexual Minorities Uganda*)" for reasons that the company was formed to advocate for the rights and wellbeing of lesbians and gays among others, which persons are engaged in activities labelled criminal under section 145 of the Penal Code Act. The same reason was fronted in the *Eric Gitari* case by the appellant in declining to register the 1st Respondent's organisation. According to the Appellants, Sections 162, 163 and 165 of the Kenyan Penal Code criminalise[d] gay and lesbian liaisons as the same goes against the order of nature. As pointed

21 Ibid.
22 [1995] ZACC 3.

out earlier, the courts came to different conclusions; with the latter's marking a step in the right direction for the protection and recognition of LGBTQ rights in Kenya, while the former's decision served as a setback to the rights of sexual minorities in Uganda.

Section 145 of Uganda's Penal Code Act provides that:

> *Unnatural offences*
> *Any person who-*
> *a) Has carnal knowledge of any person against the order of nature;*
> *b) Has carnal knowledge of an animal; or*
> *c) Permits a male person to have carnal knowledge of him or her against the order of nature, commits an offense and is liable to imprisonment for life.*

From the foregoing provision, although section 145 prohibits any person from committing acts that go against the order of nature; the said section does not distinguish between heterosexual or homosexual offenders. The section does not limit the perpetrators of such acts to persons who are LGBTQ; indeed, the words, *"any person",* connote a potential offender under the section who may very well be heterosexual, homosexual, intersex or otherwise.

The Supreme Court of Kenya in the *Eric Gitari* case followed the same reasoning as pointed out above and found that although sections 162, 163, and 165 of Kenya's Penal Code prohibit any person from committing acts that go against the order of nature, the sections did not exclusively apply to the LGBTQ community. They did not in any way express the intention to limit LGBTQ's right to freedom of association. Likewise, the sections did not specify the nature and extent of the limitation of the freedom of association, if any.[23]

Frank Mugisha and Others intended to register an organisation to champion for the rights of LGBTQ. There was no correlation whatsoever with the offenses articulated under section 145 of the Penal Code. It has already been pointed out

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[23] Ibid (n6), 62-64.

that the power of the Registrar to reject a name on the basis of its undesirability is wide and can be used arbitrarily; as can be seen in the instant case. The Registrar in declining to reserve a name was not pursuing any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals and the protection of the rights and freedom of others.

Other jurisdictions have also considered the right to freedom of association of LGBTQ persons. In *Gay Alliance of Students vs. Mathews*,[24] the Court held that the University's refusal to register the Alliance hindered its efforts to recruit the new members and denied to the Alliance the enjoyment of the University's services, which other registered student organisations was afforded, thereby violating their freedom of association. Furthermore, the European Court of Human Rights in *Zhdanov and Others vs. Russia,*[25]found that the Russian courts' decisions refusing registration had interfered with the freedom of association of the Applicant organisations and their founders or presidents, the individual applicants. The Court was not convinced that refusing to register the organisations had pursued the legitimate aims of protecting morals, national security and public safety, and the rights and freedoms of others. The only legitimate aim put forward by the authorities for the interference, which the Court assumed to be relevant in the circumstances, was the prevention of hatred and enmity, which could lead to disorder. In particular, the authorities believed that the majority of Russians disapproved of homosexuality and that therefore the Applicants could become the victims of aggression.

In the *People v. Siyah Pembe Üçgen Izmir Association ("Black Pink Triangle")*,[26] the Court observed that it was not possible to characterise as immoral the fact that someone had a particular involuntary sexual orientation or the use of words such as lesbian, gay, bisexual, travesty or transsexual nor was being gay,

24 United States Court of Appeal [4th Cir. 1976)
25 Application No. 12200/08, 35949/11 and 58282/12.
26 Izmir Court of First Instance No. 6, Turkey.

lesbian, travesty or transsexual prohibited under national law, therefore the use of such terms in Black Pink Triangle's statute could not be considered immoral or contrary to law. The Court also reasoned that, to characterise an association's aims as immoral, it had to be shown that those aims were against strictly determined morals that are accepted by the whole society. The general aim of the Black Pink Triangle was to strengthen solidarity among LGBT persons, cultivate a freer environment in society, and end discrimination against LBGT individuals. In declining to dissolve the association and affirming that lesbian, gay, bisexual, travesty, and transsexual individuals have the same rights as everyone else to form an association, the court noted that Turkish laws did not prevent LGBT persons from forming an association.

Closer to home, within the African continent, the Court of Appeal of Botswana in case of the *Attorney General of Botswana v. Thuto Rammoge and 19 Others,*[27] grappled with a similar question. The case concerned the constitutionality of the refusal by Botswana's Department of Civil and National Registration to register a civil society group, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) which had sought to register as a society under Botswana's Societies Act. The refusal to register LEGABIBO was on the basis that same-sex conduct was at the time criminalised by sections 164 and 167 of the Penal Code of Botswana. The Court held that the right to freedom of assembly and association protected the rights of Lesbians, Gays, Bisexuals and their supporters to register a society to promote the rights of the members of the grouping and to lobby for legal reform. Significantly, the Court noted that even though Botswana's Penal Code then prohibited same-sex sexual acts, that did not extend to preventing gay and lesbian individuals from associating with one another.

It should therefore be pointed out that the Registrar under the Companies Act is a public officer who is mandated by the Constitution to uphold national values and principles of governance such as human dignity, equity, social justice,

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27 Civil Appeal No. 128 of 2014.

inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised. It is in that spirit that the Constitution provides that the rights and freedoms of the individual and groups enshrined therein shall be respected, upheld and promoted by all organs and agencies of government and by all persons.[28] The freedom of association is vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms.

A comparison of the highlighted cases from other jurisdictions and the SMUG case shows no stark differences. The Court of Appeal's approach in determining whether the Registrar could decline to register a name was narrow. The question before the learned justices was not whether the Registrar had the power to decline to reserve the name but rather that in the exercise of that power, they acted arbitrarily and unlawfully. The court, with all due respect resolved an issue not put before it. Clearly, the appellants were aware of the power to reserve the name as is conferred by the Act. They sought to examine the propriety of the exercise of that power.

As the above discussion reveals, the Registrar was duty bound to recognize that the freedom to associate is inherent in everyone irrespective of whether the views they are seeking to promote are popular or not. It cannot be legal, let alone constitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the Applicants. The refusal by the Registrar to register the name of the Appellants was not only an improper exercise of discretion, it was also unreasonable and justified. The Court of Appeal should have overturned the decision of the High Court. What section 145 of the Penal Code criminalises is sexual acts (carnal knowledge); had the Appellants engaged in such sexual acts as prohibited by the section, then perhaps the Registrar could have been justified in declining to register the name. What was done in this instance, in the opinion of the author, was retrogressive,

[28] Article 20(1) Constitution of Uganda 1995.

and clearly unconstitutional; the Appellants were convicted before they contravened the law.

5.0 DEVELOPMENTS AFTER THE SMUG CASE

At the time of writing this paper, Uganda's Constitutional Court rendered its judgment regarding the constitutionality of the Anti-Homosexuality Act and found it to be constitutional. The Act essentially renders the right of the LGBTQ community to associate nugatory. The Act criminalises the *"promotion"* of homosexuality and provides for a punishment of up to 20 years imprisonment.[29] The law criminalises the advertising, publication, printing, broadcasting of any material promoting or encouraging homosexuality.[30] Whereas it is beyond the scope of this paper to offer an insightful critic of this decision, it remains to be said that the said decision is a legal restraint placed upon the homosexual community to organise and associate with one another in a bid to raise their voices and enjoy the other rights and freedoms as enshrined in the constitution and other human rights instruments.

Further exploration of the challenges faced by the LGBTQIA+ community reveals that the marginalisation of the LGBTQIA+ community in Uganda is not only a legal issue but also a deeply cultural and religious one. There is no gainsaying the fact that religion plays a major role in the way of life of most Ugandans. Religion influences the public discourse on sexuality in general and on views regarding homosexuality. It is indeed trite that Ugandans are notoriously religious. This religious influence could have contributed to the nature of the decision of the High Court, the Court of Appeal as well as that of the Registrar of URSB.

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29 Section 11 (2)(a) of the Act in particular states; *a person promotes homosexuality where they encourage or persuade another person to perform a sexual act or do any other act that constitutes an offense under the Act.*

30 Ibid.

Arimoro notes that there is no universally accepted definition of the term 'religion.'[31] For simplicity, we can define it as belief in deities. Religions in Uganda and globally preach concepts such as eternal life, immortal battles of good versus evil, as well as, a devotion to that which is considered divine. Religions in fact involve mundane aspects of everyday human behaviour, and activities such as sexual behaviour. From the foregoing, it can be inferred that is why LGBTQIA+ activities are criminalised; they are reduced to mere sexual activity which is against religious beliefs that are held dear by many Ugandans.

The main religions in Uganda include the Abrahamic faiths (Christianity and Islam) and African traditional beliefs. Whereas African traditional beliefs have experienced decline in their practice over the years, the Abrahamic faiths influence the law-making process. Christians refer to several Biblical passages which include Noah and Ham;[32] Sodom and Gomorrah;[33] Levitical laws also condemn same-sex relationships such as Leviticus 18:22 which states that: *"Do not have sexual relations with a man as one does with a woman; that is detestable".* In the New Testament, 1 Corinthians 6:9–10 states:

> "*…Or do you not know that wrong doers will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral…nor men who have sex with men [emphasis mine] … will inherit the kingdom of God."*

1 Timothy 1:9-10 also says;

> "*We also know that the law is made not for the righteous but for law breakers…for the sexually immoral, for those practicing homosexuality…"* [emphasis mine].

The foregoing verses indicate the strong intolerance for homosexuality.

It is therefore difficult to foresee a situation where lawmakers will accept a change of the law as far as the criminalisation of homosexual behaviour is concerned. Politicians, particularly the Members of Parliament, fear that they

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31 Ibid (n 7).
32 Genesis 9:20–27 of the Bible.
33 Genesis 19:1–11 of the Bible.

will lose the support of the electorate if they decide against the wishes of the people. Arimoro therefore concludes that the rights of sexual minorities continue to be sacrificed on the altar of religious beliefs.[34] Uganda goes further to declare homosexuality unconstitutional.[35] Ironically, Uganda holds itself out as a secular state.

Article 7 of the 1995 Constitution of Uganda unequivocally states that Uganda shall not adopt a State religion. Clearly, the framers of the constitution entrenched the position that the adoption of a state religion would be unconstitutional. It should follow as well that given the secular nature of Uganda, religion should not form the basis of the criminalisation of an act or omission especially if the prohibition of the act or omission violates the fundamental rights of citizens even if they happen to be a minority.

Consequently, the theory that has developed in Uganda's social circles is that homosexuality is un-African. For example, a Ugandan tabloid (Rolling Stone) published the names, addresses and photographs of alleged homosexuals under the banner 'Hang Them'. This led to the killing of several alleged homosexuals including David Kato, a Ugandan gay-rights activist who was bludgeoned to death in his home in 2011.[36]

Therefore, the court's decision to deny registration to SMUG citing the promotion of illegal activities, perpetuates institutional homophobia and undermines the constitutional guarantee of equality and human rights. By upholding discriminatory laws and policies, the judiciary reinforces a system that denies LGBTQIA+ individuals their fundamental human rights, including the right to

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34 Ibid (n7), 387.

35 Article 31(2)(a) of the Constitution of Uganda provides that marriage between persons of the same sex is prohibited.

36 This culminated into the tabloid being sued in *Kasha Jacqueline Vs Rolling Stone Limited & another,* Misc. Cause 163 of 2010 wherein the High Court of Uganda ruled that Rolling Stone threatened the Applicants' rights to human dignity and protection from inhuman treatment, as well as their right to privacy of the person and home. The Court issued the injunction sought by the applicants, restraining the Respondents from publishing more information about the identities and addresses of Ugandan gays and lesbians.

associate, assemble, and express themselves freely. This not only perpetuates a culture of fear and marginalisation, but also contributes to a broader societal attitude that views LGBTQIA+ individuals as second-class citizens. Such decisions have far-reaching consequences, emboldening further discrimination and violence against the LGBTQIA community.

6.0 CONCLUSION AND RECOMMENDATIONS

The right to freedom of association is a fundamental human right that allows individuals to join groups, organisations and unions. It enables one to associate with those with whom he or she shares the same ideas, interests, beliefs and way of life. This right inheres in everyone irrespective of sexual orientation. The powers conferred upon the registrar of companies under the Companies Act though discretionary must not be exercised arbitrarily. This Article finds that the approach adopted by the Court of Appeal in Uganda in dealing with refusal by the registrar to register the Appellants' name was very restrictive and escapist when compared to that of our neighbour, Kenya. It argues that the Court was duty bound to address the elephant in the room and find whether the registrar had acted arbitrarily in refusing the name. The Appellants never argued that the registrar did not have the power to refuse reservation of the name. Throughout their submissions, they maintained that the power to refuse the reservation was exercised arbitrarily and had no rational basis.

The realisation of human rights for the LGBTQIA community remains an elusive dream when religion, culture, and discriminatory laws converge. This toxic mix perpetuates a culture of intolerance, further marginalising an already vulnerable group. It is imperative that the courts, as guardians of the constitution, construe laws in a manner that brings them into conformity with the guarantees of equality and expression. By doing so, they can help dismantle the institutional barriers that prevent the LGBTQIA community from enjoying their fundamental human rights. The judiciary must rise to the challenge, upholding the

constitution's promise of equality and justice for all, regardless of sexual orientation or gender identity.

The Article was completed at the time the Constitutional Court of Uganda had declared the Anti-Homosexuality Act to be constitutional and concedes that the right to associate of the LGBTQ community is going to suffer a larger setback. It nevertheless intended to contribute to the continuing struggle by the LGBTQ community to be recognised in their various capacities and enjoy the various rights as are spelt out in the Constitution and international human rights law.

Public interest litigation, has been utilised in the context of enforcement of other rights, such as health, women's rights among others, and it has provided welcome results. Its utilisation in enforcing the rights of the LGBTQIA+ community is bound to deliver positive results in the long run. Strategically litigating and advocating for rights such as association, will elevate the LGBTQIA+ community to in Uganda to the same level of constitutional equality and dignity like the rest of the citizens.

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THE RIGHT TO SELF-DETERMINATION AND TERRITORIAL INTEGRITY CONFLICT: A CONUNDRUM FOR SECESSION IN POST-COLONIAL AFRICAN STATES

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THE RIGHT TO SELF-DETERMINATION AND TERRITORIAL INTEGRITY CONFLICT: A CONUNDRUM FOR SECESSION IN POST-COLONIAL AFRICAN STATES

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ABSTRACT

In the aftermath of colonialism, the quest for secession has been one of the major challenges facing Africa. While secession claims have been resolved in several sovereign states, they linger in several others. The paper explores the application of the two concepts of the right to self-determination and territorial integrity to secession claims in Africa. The paper finds that the right to self-determination exists under the African Charter but it does not prevail over the territorial integrity principle unless the seceding people can establish concrete evidence of grave human rights violations. The paper concludes that the internal arrangement between the seceding group and the sovereign state from which they intend to secede is the most viable route for secession.

1.0 INTRODUCTION

The right to self-determination is not only a human right[1] but also one of the most widely contested human rights in international law. The controversies surround its meaning, nature, scope, and enforceability,[2] especially within a domestic sovereign state.[3] Self-determination means different things to different

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1 NA Iguh and ME Alita, 'Critical Examination of the Concept of Right in Right to Self-Determination Under International Law' (2022) 3(3) *Law and Social Justice Review* 43-49.

2 RM Hanna, 'Right to Self-determination in Re Secession of Quebec' (2009) 23(1) *Maryland Journal of International Law and Trade* 214.

3 J Summers, 'Peoples and International Law' (2nd edn, Nijhoff, 2014) 39.

people.[4] However, one of the most controversial aspects of the right to self-determination that has garnered global attention in the 21st century is its application and enforcement in a post-colonial state.[5] Johan argues that according to the source document on the right to self-determination, the right has no universal endorsement but may only be used for decolonization and nothing more[6]. The concept has birthed several states, especially between the nineteenth and twentieth centuries.[7] Historically, the right to self-determination was first used around the middle of the 19th century as a philosophy or principle rather than a right[8] until the execution of the United Nations Charter of 1945 at the end of World War II.[9] Many academicians have linked the American and French revolutions at the close of the 18th century to the development of the right to self-determination, which was at best seen as a principle that ensures democratic consent inside newly formed political institutions.[10]

Since the end of colonialism, several African States have experienced several calls for secession by different groups within their States though it is a valid claim that a violent free secession in Africa is rarely seen.[11] Several lives have been lost to the failed secession struggles in different parts of Africa such as

4 RS Jaffery & K Tripathy, 'Kosovo's Right to Self-Determination: A Critical Analysis' (2013) 1(1) *Galgotias Journal of Legal Studies* 117.

5 JD Van der Vyer, 'The Right to Self-Determination and Its Enforcement' (2004) 10 *ILSA Journal of International and Comparative Law* 421-434.

6 Ibid.

7 TD Musgrave, 'Self Determination and National Minorities' (New York: Oxford University Press Inc., 1997), p. 1.

8 M Batistich, 'The Right to Self-Determination and International Law' (1995) 7(4) *Auckland University Law Review* 1015; N. Jones, "Self-Determination and the Right of Peoples to Participate in International Law-Making" (2021) British Yearbook of International Law, 1-33, p. 7.

9 C Walter & A von Ungern-Sternberg, and K. Abushov (ed), 'Self-Determination and Secession in International Law' (Oxford: Oxford University Press, 2014), p. 2.

10 TM Franck, 'The Emerging Right to Democratic Governance' (1992) 82(1) *American Journal of International Law,* pp. 46-912.

11 AC Ekeke & N Lubusi, 'Secession in Africa: An African Union Dilemma' (2020) 28(3-4) *African Security Review,* pp. 245-260.

Biafra in Nigeria,[12] Southern Cameroon,[13] Casamance in Senegal,[14] Katanga people in Zaire,[15] and many more. The recent Eritrea secession from Ethiopia occasioned an estimated figure of about 100, 000 lives lost[16] while over 1.5 million people also died in the South-Sudan 39 years struggle for secession from Sudan.[17] The African states have always suffered much from the use of the right to self-determination as a means to secede from a sovereign state

According to Article 20 of the African Charter on Human Peoples' Rights,[18] the right to self-determination is inalienable though its interpretation over the decades has been a subject of serious concern to scholars of international law. It has been as difficult as brushing a crocodile's teeth because the African Union and the African Commission on Human and Peoples' Rights consider that the territorial integrity of African States supersedes the self-determination of people in line with the Cairo resolution of 1964 wherein all Member States affirm their commitment to upholding territorial integrity and the ideals of sovereignty outlined in the Organisation of African Unity (OAU) Charter by pledging to respect the borders that predate their attainment of national independence.[19]

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12 R Akresh, S Bhalotra, M Leone & UO Osili, "War and Stature: Growing Up during the Nigerian Civil War" [2012] 102(3) *American Economic Review: Papers & Proceedings* 273.

13 MO Mhango, 'Governance, Peace and Human Rights Violations in Africa: Addressing the Application of the Right to Self-Determination in Post-Independence Africa' (2012) 5 *African Journal of Legal Studies* 199–214.

14 A Ngom and I Sene. 'The Casamance Conflict and its Displaced Persons: An Overview' (2021) 11(8) *International Journal of Humanities and Social Science* 20-27

15 MO Mbango, 'Recognizing the Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights: Katangese People v Zaire' (2007) 14(2) *Human Rights Brief* (2007) 11-15..

16 WF Bezabih, 'Fundamental Consequences of Ethio-Eritrean War [1998-2000]' (2014) 5(20) *Journal of Conflictology* 39-47, 43

17 A Kumsa, 'South Sudan Struggle for Independence and Implications for Africa' (2017) 17(4) *RUDN Journal of Sociology* 513-523; C Sandu, "Was Separatism a Viable Solution for the Sudan-South Sudan Conflict?" [2014] *Conflict Studies Quarterly,* p. 54

18 African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67 /3/Rev. 5, reprinted in Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights, O.A.U. Doc. CM/1149 (XXXVII) (Annex II) (1981).

19 Resolution on Border Disputes Among African States, AHG/Res 16(1) 1964, Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo, UAR, From 17 to 21 July 1964. Available at <https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf> [accessed 7th August 2023]; Saadia Tauval, 'The Organization of African Unity and African Borders' (Cambridge University Press, 1976), pp. 102-127.

This paper, therefore, examines the twin concepts of territorial integrity of a sovereign state and the right to self-determination to appreciate the extent to which the former is an obstacle to the latter. At what stage does territorial integrity give way to the right to secession? While the right to self-determination has both internal and external categorisation,[20] the external aspect of the right to self-determination otherwise called "secession" is the main focus of this paper.

2.0 THE MEANING AND CONCEPT OF THE RIGHT TO SELF-DETERMINATION

The idea of self-determination was conceived originally as a political principle but it metamorphosed into a human right after World War II by its inclusion in several human rights instruments. The United Nations (UN) Charter of 1945 by virtue of Articles 1 and 55 is the first international instrument that recognises the right to self-determination.[21] Though the preamble emphasises tolerance and promotion of economic and social advancement of all peoples,[22] Article 1 Paragraph 2, and Article 55 reaffirm the commitment of the United Nations to the self-determination of all peoples. Article 1 paragraph 2 provides that the purpose of the Charter is:

> "…to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

While Article 55 clearly shows the commitment of the United Nations to international economic and social cooperation as:

> "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations

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20 R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43(4) *International and Comparative Law Quarterly* 857–885

21 M Freeman, "The Right to Self-Determination in International Politics: Six Theories in Search of a Policy" [1999] 25 *Review of International Studies* 355-370.

22 Preamble of United Nations Charter, 1945. Available at <https://www.un.org/en/about-us/un-charter/full-text> [Accessed 27th March 2023)

> based on respect for the principle of equal rights and *self-determination of peoples*, the United Nations shall promote".[23]

Unfortunately, the UN Charter fails to define what "peoples" and 'self-determination" mean in the Charter. This omission has caused an unsettled controversy amongst scholars on the exact status of self-determination in international law today. The concept is therefore plagued with difficulties in meaning, scope, and application.[24] This uncertainty and ambiguity in the meaning, scope, and application of the right to self-determination in the Charter led to the call from some member states to remove self-determination from the UN Charter before the final resolution and adoption of the Charter.

Unfortunately, however, the concept was maintained in the final text of the Charter without clarification on what "peoples' and "self-determination" mean.[25] Furthermore, Article 1 of the International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR) both of 1966, the two major international instruments formulated through resolution 220A (XXI) of the United Nations General Assembly on the right to self-determination[26] also recognise the right to self-determination. The instruments are founded on the commitment to the UN Charter. Similar to the United Nations Charter, these two instruments lack clarity on the scope of the right to self-determination.

There have been insinuations and postulations that the UN Charter does not create a legal right to self-determination[27] because of the lack of clarity of the

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23 HA Wilson, "International Law and the Use of Force by National Liberation Movements" (New York: Oxford University Press, 1988) 58-59.

24 P Raj, "Right to Self-Determination as Human Right" [2020] 9 *Rajiv Gandhi National University of Law* 1-11.

25 P Kilian, 'Self-Determination of Peoples in the Charter of United Nations' Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD) (2019) 3, p. 345.

26 United Nations General Assembly Resolution 220A (XXI), availabvle at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [Accessed 5th February 2023]

27 YZ Blum, 'Reflections on the Changing Concept of Self-Determination' (1975) 10 ls-L-R. pp. 509-511; A Kiss, 'The Peoples' Right to Self-Determination' (1986) 7 *Human Right Law Journal* 165, pp. 173-174.

concept. The proponents of this school of thought postulate that its inclusion in the UN Charter is conceived as a goal to be pursued.[28]

The basis for this conclusion is that not every political statement made in the UN Charter can be said to have created a legal obligation[29] and how the Charter expresses self-determination makes it inconceivable that the UN intended that it create a binding legal obligation on members rather it is an expression of political principle.[30] This assertion is anchored more strongly on the consideration that the proposal of Dumbarton Oaks that formed the original basis for the UN Charter lacks any specific Article on self-determination. Wilson confirmed it when he stated that "it was not until the San Francisco consultations that the Soviet Union proposed an amendment which included in the text of Article 1(2) and Article 55 the words 'based on respect for the principle of equal rights and self- determination of peoples."[31]

Furthermore, there is neither a specific reference to "the right to self-determination" in the UN Charter nor is there any clarification on "who the 'self' is that enjoys this principle which should be respected by nations"[32]. This legal lacuna is the basis upon which Burak Cop and Doan Eymirliolu concluded that the manner the UN Charter positioned and convey the right to self-determination makes it convenient to concluded that it is not a binding legal norm but a political expression.

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28 H Quane 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 *International and Comparative Law Quarterly* p. 547.

29 MN Shaw, 'International Law' (5th ed Cambridge: Cambridge University Press, 2003) 225 cited in B COP & D Eymirlioglu, 'The Right to Self-Determination in International Law Towards the 40th Anniversary of the Adoption of ICCPR and ICESCR' 118. Available at <hthettps://dergipark.org.tr/en/download/article-file/816601> [Accessed 2nd February 2023]

30 Ibid.

31 Heather A. Wilson, International Law and the Use of Force by National Liberation Movements (New York: Oxford University Press, 1988), pp. 58-59.

32 Ibid 59.

Since the inception of self-determination as a political principle[33] and, more recently, as a human right, the meaning, nature, and extent of the right to self-determination have been at the core of significant arguments[34] despite its increasing significance on a worldwide scale.[35] Self-determination has been given several definitions. Unsurprisingly, all definitions offered on self-determination take on the garment of those who want to exercise it.

Therefore, it is a complex term, and 'like a chameleon its colour changes with the profile of those who invoke it.'[36] Crawford posits that the right to self-determination has no generally accepted definition, albeit, there are many views on what the concept should look like.[37] Therefore, self-determination is always changing. He defines it as the right of a community to have a unique identity that is reflected in the institutions by which it is governed.[38] It is also described as peoples' right to choose their political status and voluntarily pursue their economic, social, and cultural development.[39]

According to Lenin, self-determination has both political and cultural perspectives. Political self-determination, which Lenin defined as the right to secede and create an independent state, is what he meant by *"self-*

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33 L Dembiński, 'Self-Determination in the Law and Practice of the United Nations' (Warsaw, 1969) p. 35.

34 T Gadkowski, Nations and Other Entities Authorized Under the Right of Self-Determination, 2016, p. 144 cited in Prithivi Raj, "Right to Self-Determination as Human Right" [2020] 9 *Rajiv Gandhi National University of Law* 1-11.

35 H Hannum, 'Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights' (2nd ed, University of Pennsylvania Press 1990) p. 27.

36 DCJ Dakas, 'The Right to Self-Determination and the Spectre of Balkanization Post-Colonial African States: The Challenges of Nationhood and Imperative of Good Governance in Nigeria' (Paper delivered at the Annual Law Week of the Nigerian Bar Association, Jos Branch, held at Crest Hotel & Garden, Jos, November 25-27, 2009) 2.

37 J Crawford, 'Brownlie's Principles of Public International Law' (8th ed, Oxford University Press 2012) p. 647 cited in SD Ojukwu, 'A Critical Appraisal of The Right of Self Determination Under International Law' (2021) 12 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 131.

38 Ibid.

39 FM Cruz, 'The Right to Self-determination of Peoples: Notes on Its Compatibility with Three Models of Global Order' (2018) 11(1*) Mexican Law Review* 85-101, p. 89.

determination," but *"cultural self-determination"* is just the freedom of speech.[40] Lenin proposed in the early 20th century that a sincere conception of the right of countries to self-determination, free from abstract interpretation, must entail the political dissociation of nations from other national groups to establish an independent national state.[41] Johan, however, postulates that the definition of the right to self-determination means the rights of peoples *to "freely determine their political status"* and to *"freely pursue their economic, social, and cultural development"* does not represent a general endorsement of the right, but rather needs to be understood in the context of the original document, or the document from which the right was derived.[42] He contends that the utilisation of the right to self-determination should be limited to decolonisation.[43]

Accordingly, the definitions of the right to self-determination in international agreements are not meant to jeopardise a state's territorial integrity. Johan opposes the right to secession as a means of self-determination.[44] To him, it is important to prevent any political community that supports a plural society from being destroyed.[45]

Archibugi[46] gives three possible definitions of the right to self-determination: (a) the right of a colonial people to become a state; (b) the right of a state's (or more than one state's) minority to become an autonomous state (or join another state); and (c) Ethnic minorities' eligibility to receive certain collective rights. Sterio, on the other hand, defines the right to self-determination as a political and

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40 VI Lenin, 'National Liberalism and The Right of Nations to Self-determination' V.I. Lenin Collected Works, 1913-1914 (Progress Publishers, Moscow) Vol. 20, 56-58. Available at https://www.marxists.org/archive/lenin/works/cw/pdf/lenin-cw-vol-20.pdf [22nd November 2022]

41 VI Lenin, 'The Right to Self-Determination' Journal Prosveshcheniye Nos. 4, 5 and 6 (Progress Publishers, 1914) Vol. 20, 397.

42 JD Van der Vyer, (n 3) 421-434, available at <http://www.core.ac.uk/download/pdf/51096638.pdf>[Accessed 2nd May 2022]

43 Ibid.

44 Ibid.

45 Ibid 429.

46 D Archibugi, 'Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective' (Blackwell Publishing Ltd, 2003) Vol. 10(4) 493.

representative right that belongs to a minority group with a central state or in a very extreme case may result in secession for independence as a remedial option and the last resort in appropriate circumstances[47]. Some scholars posit that the meaning of the right to self-determination should be confined to the source documents on the right, they postulate that self-determination has a post-colonial context to which it applies provided that the beneficiaries of this right can establish an egregious violation of their rights by the sovereign state.[48] This accounts for Robert McCorquodale's observation that;

> *"…perhaps no other question of political philosophy, or international law, pregnant with such unutterable calamities, has ever been so partially and superficially examined as the right of secession."*[49]

The International Court of Justice in Western Sahara's case,[50] while interpreting the source documents on the right to self-determination states that the right to self-determination may not be available for persons who have a link with a sovereign state to protect the territorial integrity of such state. Therefore, the right cannot be expressed in a post-colonial state. Contrarily, the Canadian Supreme Court in *Re: Secession of Quebec Case,*[51] acknowledges that the right to self-determination can be exercised by the people within the sovereign state under carefully defined circumstances but must not prejudice the territorial integrity of such a sovereign state.

The lack of clarity on the scope of the right to self-determination under international law has engineered the massive increase in the agitations for secession by minority groups in various countries across the globe including

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47 M Sterio, 'Self-Determination and Secession under the International Law: The New Framework' (2015) 21(2) *ILSA Journal of International & Comparative Law*, p. 299-303

48 SB Lugard, M Zachariah, & TM Ngufuwan, 'Self-Determination as a Right of the Marginalised in Nigeria: A Mirage or Reality' [2015] 1(1) *Journal of International Human Rights Law* 127-158, p. 131

49 AT Bledsoe, 'Is Davis a Traitor; Or Was Secession a Constitutional Right Prior to the War of 1861?' (New York: Innis & Company, 1866) 1

50 Western Sahara, ICJ Report 1975 P 12 and 33 http://www.icj-cij.org/docket/files/61/6195.pdf [Accessed 28th January 2022]

51 (1998) 161 DLR (4th) 385, 436, 438 cited in MN Shaw, 'International Law' (6th ed Cambridge University Press, 2008) 523

Africa.[52] These agitations[53] have generated a tense atmosphere and violence in most of these countries because the sovereign states harbouring these minority groups often repel the agitations to protect their territorial integrity.[54] This is the standard approach under international law.[55] Though international agreements frequently support a mild kind of self-determination which ostensibly does not acknowledge or permit secession, it asserts that only in situations of colonial occupation, trust, and non-self-governing territory may self-determination be exercised.[56]

Milano Sterio emphasises the neutrality of international law on secession and he notes that:

> *"International law is mostly neutral on the issue of secession. While international law embraces the right to self-determination for all people, and while this right can effectively translate into remedial secession, international law positively allows for this outcome only in the case of decolonization and, perhaps, occupation. Other than these two relatively rare instances, international law does not affirmatively authorize groups to seek secession."*[57]

Thus, the extension of the right to self-determination to people who form part of a sovereign state will automatically birth secession which will impact the territorial integrity of such a sovereign state.[58] Therefore, the right to self-determination has a territorial consideration which means that the exercise of

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52 M Manan, 'The Right of Self-Determination: Its Emergence, Development, and Controversy' (2015) 12(1) *Jurnal Konstitusi*, p. 11.

53 There have been calls for self-determination in different parts of the world. The cases of Eritrea and South Sudan in Africa before secession occasioned the loss of thousands of lives. Also, there are ongoing agitations for self-determination from the Yoruba people and Igbo people in Nigeria for secession which has caused the loss of thousands of lives and the destruction of properties. The case of the Ogoni people of Rivers State in Nigeria also occasioned the death of hundreds of persons.

54 G Kim, 'Irredentism in Disputed Territories and its Influence on the Border Conflicts and Wars' (2016) 3(1) *Journal of Territorial and Maritime Studies* 87-101, p. 89.

55 Ibid.

56 DJ Harris, 'Cases and Materials on International Law' (6th ed., Sweet & Maxwell 2004) p. 362 cited in SB Lugard, M Zachariah, & TM Ngufuwan (n 46) p. 128.

57 Ibid (n 47) 699.

58 HO Agarwal, International Law and Human Rights (17 eds. Central Law Publications 2010), p. 362; DS Kapoor, '*International Law & Human Rights'* (18th ed Central Law Agency, 2011) p. 500.

the right impacts on the territorial integrity of a sovereign state.[59] This justifies the reason why the constitution of most sovereign states excludes the right to self-determination.[60] Therefore, there is an unending debate among scholars concerning which of the concepts of self-determination and territorial integrity is superior. While scholars agree that there is an interrelationship between self-determination and territorial integrity, the area of conflict is that the right to self-determination prevails over territorial integrity.[61] On the other hand, some scholars posit that where the struggle is a decolonization struggle, self-determination outweighs territorial integrity, while in a non-colonial struggle, territorial integrity overrides self-determination[62]. To this day, this controversy persists.

3.0 CATEGORISATION OF THE RIGHT TO SELF-DETERMINATION

The right to self-determination is categorised into internal and external. The internal self-determination aspect of the right refers to a territory's citizens' ability to select their political status and system of government.[63] Internal self-determination enables the populace to exercise decision-making authority and control over a certain area of the laws that can be implemented in their state.[64] External self-determination on the other hand is most frequently used in colonial contexts, it always has an impact on the territory of a state.[65] On one hand, it

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59 M.E. Ozei, 'Self-determination and Right to Secession' (2004) the International Political Review, available at <www.theinternationalpoliticalreview.com> [Accessed 21st January 2022]; TD Musgrave (n 7) p. 181.

60 A Kreptul, 'The Constitutional Right of Secession in Political Theory and History' (2004) 17(4) *Journal of Liberation Studies* 71 cited in SB Lugard, M Zecharia & TM Ngufwan (n 46) p. 129.

61 V Gudelevicuite, 'Does the Principle of Self-Determination Prevail over the Principle of Territorial Integrity?' *International Journal of Baltic Law*, [2009] 2(2), 28-74, p. 50 available at <http://www.ceeol.com/search/article-detail?id=242745> [Accessed on 27th May, 2022]

62 M Batistich (n 8), p. 1018; Vladyslav Lanovoy, "Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right" [2015] 4(2) *Cambridge Journal of International and Comparative Law* pp. 388-404.

63 R McCorquodale (n 20) pp. 857–885.

64 Ibid 864.

65 Ibid 863.

may result in a state's territory being divided, expanded, or changed, and on the other, it may change how that state interacts with other nations globally.

Furthermore, the establishment of an independent state, integration with an independent state, or free association with an independent state are all possible ways for external self-determination to occur.[66] Particularly in colonial territories, external self-determination does not require the consent of all citizens before changes to the area are undertaken.[67] Manufrizal Manan[68] and Eban Ebai[69] also consider that whereas external self-determination, also known as secession, limits a people's right to independence and freedom from outside intervention, internal self-determination is a collective right of the people that provide the people with security within the state.

A group's right to self-determination can be realised through self-government, autonomy, free association, and in the most severe circumstances, independence, according to Sterio's theory.[70] Internal self-determination occurs when individuals with the right to political autonomy, self-government, and the freedoms of religion, culture, and language coexist within a larger central state[71] provided the mother state is willing to allow such people to exercise such rights internally.[72]

This paper cannot exhaust the works of scholars on the categories of the right to self-determination, however, the observable difference between the two categories of internal and external self-determination is that the former usually does not affect the territory of a state while the latter affects the state territory.[73]

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66 Ibid.
67 Ibid.
68 M Manan, 'The Right of Self-Determination: Its Emergence, Development, and Controversy' (2015) 12 (1) *Jurnal Konstitusi*, p. 14.
69 S. Eban Ebai, 'The Right to Self-Determination and the Anglophone Cameroon Situation' (2009) 13(5) *International Journal of Human Rights,* pp. 635-637.
70 M. Sterio (n 48) pp. 303-305.
71 Ibid.
72 Ibid.
73 SM Weldehaimanot, 'The ACHPR in the Case of Southern Cameroons' (2012) 9(16) *SUR-International Journal on Human Rights,* p. 89.

It is noteworthy that the various postulations of scholars on the categories of self-determination indicate that external self-determination is the same as secession.

3.1 UNDERSTANDING THE MEANING AND CONCEPT OF SECESSION

The right to self-determination is often linked with the concept of secession because of the relationship between the two concepts in international law. Scholars have propounded several definitions and understanding of secession in both its broad and narrowed senses but an honest definition of the concept connotes leaving or withdrawing from a place.[74] Peter Radan, Georg Nolte, and Bruno Coppieters express quite similar understanding of the concept. While Peter Radan's idea of secession has to do with *"the creation of a new State upon territory previously forming part of, or being a colonial entity of, an existing State"*[75], Georg Nolte considers it to mean *"the – not necessarily forceful – breaking away of an integral part of the territory of a State and its subsequent establishment"*[76] which will make the remaining portion of the State to maintain the legal identity of the parent State.[77] Bruno Coppierters, however, defines it as the *"withdrawal from a State or society through the constitution of a new sovereign and independent State".*[78]

There is sentiment against secession in international debates and the problem with the sentiment can be understood by the fact that secession challenges what are possibly the two most important elements of international law; a state's

74 P Radan, 'The Definition of "Secession" (2007) *Macquarie Law Working Paper Series* 2.

75 Ibid. 2.

76 G Nolte, 'Secession and External Intervention' in M.G. Kohen (ed.) *Secession International Law Perspectives* (Cambridge University Press, Cambridge, 2006) 65.

77 P Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission' (2000) 24 *Melbourne University Law Review* 56; David Raič, '*Statehood and the Law of Self-Determination* (Kluwer Law International, The Hague 2002) 359; M Weller, 'The Self-Determination Trap' (2005) 4 *Ethnopolitics* 8.

78 B Coppieters, 'Introduction' in B Coppieters and R Sakwa (eds) '*Contextualizing Secession Normative Studies in Comparative Perspective*' (Oxford University Press, Oxford 2003) 4.

sovereignty; and territorial integrity.[79] The phrase is frequently used in a pejorative sense and is connected to disorder, schism, fragmentation, and instability.[80] The obvious lack of definition of the term in international law has subjected the term to different definitions by scholars. Glen Anderson defines secession from the lens of international law and relations as *"the withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state."*[81]

Haverland[82] defines secession as the separation of part of the territory of a state carried out by the resident population to create a new independent State or accede to another existing state while Dugard and Raic[83] jointly opine that though not the only way, secession is a method by which external self-determination is achievable. Other ways include: dissolution and merger or union. Clearly, secession is a procedure that results in an outcome, it is not an outcome itself.[84] Marcelo Kohen accurately notes that secession is not a thing that occurs instantly.[85] It always entails a difficult set of claims and choices, discussions, and/or conflicts, which may or may not result in the foundation of a new State.[86] Though conducted domestically, there has been more and more international concerns.[87] This is a crucial conceptual issue.[88]

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79 Glen Anderson, 'Secession in International Law and Relations: What Are We Talking About?" [2013] 35(3) *Loyola of Los Angeles International and Comparative Law Review* 343.

80 Bertus De Villiers, 'Secession: The Last Resort for Minority Protection' [2012] 48(1) *Journal of Asians and African Studies* 81-96.

81 Ibid n(79) 344.

82 C Haverland, 'Secession', in: Encyclopedia of Public International Law, Vol. 10 (Amsterdam: Elsevier Science Publishers B.V., 1987) 384.

83 John Dugard and David Raic, 'The Role of Recognition in the Law and Practice of Secession' in (eds) Marcelo G. Kohen, '*Secession: International Law Perspectives'* (Cambridge University Press, 2006) 101-102.

84 Aleksandar Pavković and Peter Radan, '*Creating New States: Theory and Practice of Secession'* (Hampshire, UK: Ashgate Publishing, 2007) 7.

85 Marcelo G Kohen, 'Introduction' in (eds) '*Secession: International Law Perspectives'* (Cambridge University Press, 2006) 14.

86 Ibid.

87 Ibid.

88 Ibid n(79) 349.

The growing trend of secession claims in Nigeria and some parts of Africa such as Cameroon, South Sudan, Eritrea/Ethiopia, and other areas is a serious challenge to global peace. Arguably, there is no definite legal norm in international law to address these secession claims. The various agitations for secession in different parts of the world is not in itself the problem but the lack of specific legal norms within international law to resolve secession claims when it raises its ugly head. This problem is the centre of Sterio's attention in his work. Sterio vehemently canvasses an argument that there is a need to develop a new legal framework in international law on secession to address various secessionist problems across the globe and to adopt true legal norms for the resolution of secessionist struggles instead of exposing secessionist situations to the whims and caprices of the Great Powers to play their politics.[89]

Sterio questions the inadequacy of international law in addressing and resolving issues of secession when he opines that international law as presently constituted cannot competently tackle and resolve secessionist situations, because while international law recognises respect for territorial integrity and the right to self-determination, it fails to pointedly address the question of whether or not a non-colonised group of people is entitled to the exercise of the right to self-determination through secession from its mother state.[90] To address this inadequacy, Sterio suggests that it is either an effort is put forth to create an appropriate standard framework under international law on secession that permits secession, but only upon the fulfilment of specific criteria that would be determined when considering the legitimacy of a quest for secession; or international law stays neutral on secession to be adequately situated for deciding secessionist situations.[91]

89 Milena Sterio, 'Self-Determination and Secession under International Law: The Cases of Kurdistan and Catalonia' [2018] 22(1) *American Society of International Law Insights* 294.
90 Ibid.
91 Ibid 303.

There is the need to create an outlook for the normative framework for secession by stating firstly, that the quest for secession must conform with the domestic constitutional framework of the mother state and presumably be consented to by the mother state before it becomes legal.[92] There must be an absence of oppression from the mother state.[93]

On the contrary, where the mother state is ruled under dictatorship, lacks a democratic constitutional structure, and has been oppressive towards the minority group then, other variables must be considered to determine the legality of the secession.[94] This includes investigating whether the mother state has respected such minority right to autonomy by allowing it to have its own political right to form a government, and respect for its cultural, linguistic, and religious rights which includes the right to freedom of speech and expression through possessing its radio, television and newspaper media and respect for other rights such as linguistic, cultural, ethnic and religious rights[95]. Also, the group must be able to operate schools and conduct its cultural practices.[96]

Accordingly, when there is a quest for secession the issue of territorial claim always comes to bear as both the separationist and the mother state always contest the claim of territory. In determining the territorial claims of both the mother state and secessionist, and whose claim is valid, there is the need to consider the question of when the secessionist came to possession and if they consistently been vocal about their territorial claim.[97] To this end, international law must be fair in addressing the issue of secession while resolving whether it is proper to disallow a group from exercising its right to secession to form its

92 Ibid 303.
93 Ibid 303.
94 Ibid.
95 Ibid.
96 Ibid 304.
97 Lea Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' [1991] 16 *Yale Journal of International Law* 177.

independent state or whether it is fair to allow the secessionist group to secede and alter the territory of the mother state.[98]

Against the background of the above controversies, this paper deciphers three categories of secession: unilateral secession; constitutional secession; and consensual secession, which are discussed below;

3.1.1 UNILATERAL SECESSION

Unilateral secession is the commonest and arguably the most debated form of secession. It is different from other forms of secession because while it is exercised without approval, other forms are either with mutual consent of the people breaking away, and the parent State or through laid down constitutional procedure. Sterio considers unilateral secession to mean the formation or creation of a newly independent nation through the withdrawal of a portion of a current state's territory against the will of the parent state.[99]

The notable distinguishing feature of unilateral secession is that it is not permitted without the approval of the parent state or domestic constitutional authority.[100] However, Adimassu, identified a form of unilateral secession which he described as a remedial secession. According to him, it is a form of unilateral secession that is implemented as a direct response to oppression, violations of human rights, or exclusion from participation in the governance or growth of the parent state.[101] One instance of unilateral secession is Kosovo's secession from Serbia.

According to Buchheit, the reaction of the international community to secession situations across the globe suggests the unilateral secession is recognised as a self-help in situations of extreme oppression.[102] However, in less critical

98 Ibid n(89)304.
99 Ibid.
100 YG Adimassu, 'The Essence of Remedial Secession: From the Perspectives of Human Right and Preservation of Natural Resources' [2021] 12 *Beijing Law Review* 1254.
101 Ibid.
102 LC Buchheit, '*Secession: The Legitimacy of Self-Determination'* (New Haven and London: Yale University Press, 1978) 221-222.

circumstances, the application of mild remedies such as regional and economic autonomy is required.[103] Raic states that if the right to self-determination is significantly violated by the State's authority and there is no viable and practical way to resolve the conflict peacefully, there is going to be little left of the right's justification and aim. A right to unilateral secession in certain circumstances is a last-ditch reaction to grave injustices because international law has failed to provide remedies by which the right to self-determination may be enforced.[104] Dietrich Murswiek, on the other hand, considers that the right to self-determination means nothing unless unilateral secession is allowed in exceptional situations.[105]

3.1.2 CONSENSUAL SECESSION AND CONSTITUTIONAL SECESSION

This form of secession alludes to the division of a portion of the country with the previous approval of the national authority.[106] It also means the process of creating a new independent state through the withdrawal of a portion of an existing state's territory with the consent of both the resident population of that portion of the territory and the parent state.[107] Driest describes it as the *"separation of part of the territory with the prior consent of the central government."*[108] Anderson states that constitutional secession requires the consent of the state without the use of threat or force which he further divided into subcategories of negotiated and explicit.[109] It is negotiated where it takes

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103 Simeon van den Driest, "Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices" (2013) 61 *School of Human Rights Research*, 10.

104 David Raič, "*Statehood and the Law of Self-Determination* (Kluwer Law International, The Hague 2002) 362-369.

105 D Murswiek, 'The Issue of a Right of Secession - Reconsidered' in C Tomuschat (ed.) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht 1993) 26; Sami M Dudar, 'Speaking of Secession: A Theory of Linguistic Secession' [2012] 40(2) *Georgia Journal of International and Comparative Law* 556-581.

106 Ibid n(103) 87.

107 Ibid (n 100) 1255. The secession of Eritrea from Ethiopia and South Sudan from the Sudan Republic are significant examples of consensual secession. These cases of Eritrea and South Sudan demonstrate that consensual secession often occurs through referendum. However, Adimassu believes it is more of a parliamentary decision or the head of government's decision.

108 Ibid (n 103) 87.

109 Ibid (79) 350.

place under the confines of the state's current constitution, notwithstanding the absence of any particular constitutional provisions regarding it.[110] According to Anderson, the lack of constitutional provision for secession would call for a negotiated constitutional amendment that would enable the secession of part of the territory.[111]

While Berlin sees consensual secession as requiring the state's consent, he, just like Anderson divides this concept into constitutional secession and politically-negotiated secession. Berlin posits that constitutional secession and politically negotiated secession are two forms of consensual secession.[112] While in the case of constitutional secession, the constitution of a sovereign state contains provisions that allow the separation of part of its territory through a domestic legal mechanism, politically negotiated secession is completed through diplomatic negotiations.[113]

4.0 THE CONCEPT OF TERRITORIAL INTEGRITY OF STATE

Territorial integrity is one of the most vital principles that determine the quality of peace and stability in the world[114] and it is a recognised principle in international law.[115] It is a very sacrosanct principle that is solid in international

110 Ibid.

111 In Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), the decision of the Supreme Court of Canada allows for any group who desires to secede from Canada to do so once a constitutional amendment is negotiated in this regard. This decision was affirmed by the Clarity Act, 2000, c. 26, Art. 1.

112 Ilya Berlin Unilateral Non-Colonial Secession: An Affirmation of the Right to Self-Determination and a Legal Exception to the Use of Force in International Law" (A Thesis Submitted in Partial Fulfillment of the Requirements for the Master of Studies in Law degree in Studies in Law, University of Western Ontario, 2017) 6.

113 Ibid.

114 V Gudeleviciute, 'Does the Principle of Self-Determination Prevail Over the Principle of Territorial Integrity?' (2005) 2(2) *International Journal of Baltic Law,* pp. 48-50

115 United Nations General Assembly Resolution, 2625 (XXV) on Declaration on the Principles of International Law Concerning Friendly Relations, 1970, International Covenant on Civil and Political Rights of 1966, International Covenant on Economic, Social and Cultural Rights, 1966, General Assembly Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960, The Vienna Declaration and Programme of Action 1993.

law.[116] Article 10 of the UN Covenant of the League of Nations[117] emphasised the need for members to respect the territorial integrity of all members which had existed since political independence. The Covenant secures the territory of members against external aggressions. Also, Article 2(4) of the UN Charter of 1945 provides:

> *'all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".*

Furthermore, the notion of territorial integrity is advanced in various regional legal and political instruments, including the Helsinki Final Act (Principles I, II, IV, and VIII), the Organization of American States Charter (Articles 1, 12, and 20), the Organization of African Union Charter (Preamble), and the Charter of Paris (Principle III: Friendly Relations among Participating States). Furthermore, it is thought that the territorial integrity principle is a part of the sovereign equality concept because it is mentioned in the Friendly Relations Declaration (Principles I, V, paragraphs 7 and 8, and Principle VI(d)).[118]

The incorporation of the principle of territorial integrity in international law documents is a deliberate effort to ensure the safeguarding of the territorial integrity of all states. Therefore, no matter how strong a state may be, international law protects its territorial integrity[119] though there have been several violations of this legal instrument. Furthermore, the continuous existence of a state in its current borders is dependent on the state's territorial integrity. This is why unilateral intrusion into the territory of another state is a

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116 TD Musgrave (n 7) p. 181.

117 The Treaty of Versailles was signed in the Palace of Versailles Hall of Mirrors on 28 June 1991. The Covenant of the League of Nations was integrated into the Treaty and all other peace settlements signed in Paris after World War I available at <https://www.ungeneva.org/en/about/league-of-nations/covenant> [Accessed 21 April 2023]

118 SF van den Driest, 'Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?' (Cambridge: Intersentia Ltd, 2013), p. 143.

119 M Christian, 'The Concept of Territorial Integrity in International Law – What are the Implications for Crimea?' (2015) *Heidelberg Journal of International Law,* p. 2. Available at <https://ssrn.co,/abstract=2515911> [Accessed on 26th January 2024]

violation of international law.[120] One of the essential tenets of the statehood system upon which international law is based is the fundamental tenet of reverence for the territorial integrity of States.[121] This is why Thomas Musgrave suggested that secession is the antithesis of the principle of territorial integrity.[122] It occurs when a vital component of an independent state or a non-self-governing region uses its right to secede from the entire to establish an independent state.[123]

Scholars like Gudeleviciute argue that under international law, the word "*members",* which refers to states was used repeatedly in the United Nations Charter. Therefore, the principle of territorial integrity only applies to states and not within a state.[124] Accordingly, respecting a state's territorial unity or integrity by its citizens is a domestic matter and is outside the purview of international law.[125] This view finds support in the *Kosovo advisory opinion of the International Court of Justice (ICJ)* that territorial integrity is limited to the relations between states.[126] Contrarily, some scholars have argued that the scope of territorial integrity goes beyond a state's relation with other states. It has been included that it can occur through the exercise of self-determination within a sovereign state.[127] The Canadian Supreme Court in *Re: Secession of Quebec* confirmed this position.[128] The exercise of the right to self-determination by ethnic groups within a state is an unpardonable attack on the territorial integrity of a sovereign state.[129] This accounts for the attempts from various states to curtail the

120 Ibid 3.
121 AP Arifin, 'Rethinking the History: Does the Principle of Self-Determination Entail a Positive Entitlement to Secession?' (2022) 4(2) *Awang Long Law Review* 474-481, p. 479.
122 Ibid (n7) 15.
123 Ibid 181.
124 Ibid (n 115) 50.
125 Ibid.
126 I.C.J. Reports 2010, 437, para. 80.
127 A Cassese, 'International Law' (2nd ed, Oxford University Press 2005) 63.
128 Malcom Shaw, 'International Law' (6th ed, Cambridge University Press 2008) 523.
129 OD Ojukwu, 'A Critical Appraisal of the Right to Self-Determination Under International Law' (2021) 12(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence.* pp. 127-138.

secessionist movements within their state to forestall the dismemberment of their territories[130]. Sterio equally states that:

> "Secession inherently undermines the territorial integrity of the mother state, and international law has for centuries espoused the principles of state sovereignty and territorial integrity. Embracing the right of secession would jeopardize the above-mentioned principles and could, as critics assert, potentially lead to global chaos caused by an incessant redrawing of boundaries."[131]

5.0 RESOLVING THE CONFLICT BETWEEN THE RIGHT TO SELF-DETERMINATION AND TERRITORIAL INTEGRITY IN POST-COLONIAL AFRICAN STATES

International fora, the secession attempts of Kosovo, South Ossetia, and Abkhazia in 2008 instigated debates on the issue of self-determination and territorial integrity. Though these cases are symbolic of the clash between self-determination and territorial integrity,[132] it is believed that the right of states to territorial integrity is not absolute since *"the development of international human rights law has in many respects limited the concept of state sovereignty."*[133]

The exercise of the right to self-determination and the principle of territorial integrity has been a major area of controversy amongst scholars since the inception of the right to self-determination as a legal right in international law.[134] External self-determination which means secession cannot be invoked without tampering with the territorial borders of a sovereign state. This is why arguments abound that the post-colonial construct of the right to self-determination is harmful to a sovereign state because of the unavoidable distortion of its territorial integrity. The proponents of this school of thought argue that the right

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130 Ibid.
131 Ibid (n47) pp. 293-306
132 L. Laurinavicuite and L. Bieksa, "The Relevance of Remedial Secession in the Post-Soviet "Frozen Conflicts' (2015) 1 *International Comparative Jurisprudence*, pp. 66-75
133 J Vidmar, 'Remedial Secession in International Law: Theory and (Lack) of Practice' (2010) 6(1) *St. Anthony's International Review*, pp. 37-56
134 Ibid (n 8) p. 1026.

to self-determination should be confined to decolonisation and since there are no more colonised territories, the right has outlived its purpose. To this school of thought, the territorial integrity of a sovereign state supersedes the right to self-determination in international law.[135]

On the contrary, other scholars hold the view that the right to self-determination has assumed the status of a human right, hence, it is inalienable, undeniable, and must not be violated.[136] To them, the right to self-determination supersedes the territorial integrity of a state. While self-determination divides the territorial limits of existing states to create a new state by the desire of the people, territorial integrity maintains the territorial boundaries of existing states by calling for the observance of such boundaries.[137]

Article 20 (1) of the African Charter states that the right to self-determination is an unquestionable and inalienable right by which people can freely determine their political status and economic and social development. However, Article 20(2) indicates that the right to self-determination is only available to "*colonized or oppressed*" peoples and they are entitled to free themselves from the bonds of domination through whatever means recognized by the international community. Scholars have argued that the provision of Article 20 of the African Charter encompasses both those under colonialism and oppression and those who want to exercise their right to self-determination within the boundaries of

135 V Lanovoy, 'Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right' (2015) 4(2) *Cambridge Journal of International and Comparative Law*, pp. 388-404.

136 PA Aidonojie, OP Agbale, OA Odojor & OO Ikubanni, 'Human Rights: Between Universalism and Cultural Relativism' (2021) 5(1) *African Journal of Law and Human Rights,* pp. 97-101; PA Aidonojie, OO Ikubanni, & AA Oyebade, 'Legality of EndSars Protest: A Quest for Democracy in Nigeria' (2022) 2(3) *Journal of Human Rights, Culture and Legal System*, pp. 209-224.

137 Ibid.

their state[138]. The African Charter is no doubt a reflection of African colonial history.[139]

According to Mitchel Hill[140] and Lee C Bucheit,[141] Article 20(2) of the African Charter expands the scope of the right to self-determination from its decolonisation construct to the post-colonial construct since the right is available to colonised and oppressed peoples. The erudite scholars state that a government that oppresses its people is a colonial government, therefore, such oppressed people have the right to secede from such an independent state. Obinna buttresses this position when he says that under the African Charter, people who are undergoing oppression and domination in their state can exercise their right to secession.[142] Ekeke and Lubisi also buttress this position using the findings of the African Commission on Human and Peoples Rights in *Katanga Peoples' Congress v Zaire.*[143]

The African Commission on Human and Peoples' Rights, which is in charge of determining whether any rights under the African Charter have been violated, has examined the ongoing struggle between Africa's territorial integrity and the right to self-determination on multiple times. *The Katanga Peoples' Congress v. Zaire case,*[144] the Commission rejected the application for secession made when it noted that it is obligated to protect the territorial integrity and sovereignty of

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138 D Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105(1) *American Journal of International Law,* p. 64.

139 BO Obinna, 'Social and Economic Perspective of Human Rights in Africa' A paper Presented at the National Human Rights Commission Conference held at Sheraton Hotel, Abuja on the 10th December 1997, pp. 1-2.

140 LC Buchheit, "Secession: The Legitimacy of Self-Determination" (New Haven and London: Yale University Press, 1978), p. 84. The nature of the oppression indicates gross violation of human rights targeted towards a people or minority group such that the only viable option is to secede.

141 MA Hill, 'What the Principle of Self-Determination Means Today' (1995) 1 *ILSA Journal of International and Comparative Law,* p. 126.

142 BO Obinna (n 97) 15

143 AC Ekeke & N Lubisi. 'Secession in Africa: An African Union Dilemma' (2020) *African Security Review,* p. 4

144 Katangese Peoples' Congress v. Zaire Comm. No. 75/92 (African Commission for Human and Peoples' Rights 1995) in Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (1994–1995), ACHPR/RPT/8th, Annex VI (1995).

Zaire being a member of the Organization of African Unity (OAU) and a party to the African Charter.[145] However, the Commission states further that the Katanga People were unable to establish concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13 (1).[146]

Similarly, in *Kevin Mgwanga Gunme v Cameroon,*[147] the Commission in its decision maintains that the support for the secession of Southern Cameroon will violate or put in endanger the territorial integrity of the Republic of Cameroon.[148] However, if the people of Southern Cameroon can establish a severe violation of human rights, they should be entitled to the exercise of their right to self-determination. The Commission states:

> *"The Commission has so far found that the Respondent has violated Articles 2, 4, 5, 6, 7, 11, and 19 of the Charter. It is the view of the Commission, however that, in order for such violations to constitute the basis for the exercise of the right to self-determination under the African Charter, they must meet the test set out in the Katanga case, that is, there must be: "concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13 (1)."*[149]

The Commission held further that the respondent must satisfy the court that the two conditions of oppression and domination under Article 20(2) have been met,[150] before Article 20 on self-determination can be invoked in their favour. The two decisions above indicate that under the African Charter, the right to self-determination applies outside its decolonisation construct. While the territorial

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145 MO Mhango, 'Recognizing a Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights: Katangese Peoples' Congress v. Zaire' (2007) 14(2) *Human Right Brief*, pp. 11-15.

146 Mgwanga Gunme v. Cameroon (76) para. 194.

147 Comm. 266/2003, 26th ACHPR AAR Annex (Dec 2008 –May 2009). Available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2009/99> [Accessed 7th April 2023]

148 Ibid 189.

149 Ibid 194.

150 Ibid 197.

integrity of a sovereign state is sacrosanct, it can be called to question under Article 20(2) where there is concrete evidence of *"oppression and domination"* of a people by the sovereign state from which it is seeking to secede. However, to show the commitment of the Commission to safeguarding the territorial integrity of a sovereign state, it confirmed that even in the case of internal self-determination, a people cannot foist it on a state party neither can the Commission, it must be a desire expressed by the people through a referendum.[151]

The right to self-determination applies outside decolonisation through secession.[152] Scholars like Buchanan argue that people undergoing injustices have the right to secession as a remedial option[153]. The right to self-determination is a non-negotiable right that applies outside decolonisation[154].

The cases of Eritrea and South Sudan puts an end to the controversy surrounding the application of the right to self-determination in post-colonial African States. Before the secession of South Sudan from Sudan there was evidence of bloody wars that lasted 39 years and claimed the lives of over 3 million people.[155] The case of Eritrea was no different. In the two instances, there were strong and concrete evidence of accumulated cases of abuse, human rights violations, oppression, marginalisation, several instances of protests, and aggravated conflict.[156] In July 1991, a meeting on democracy and peace was held in Addis Ababa organised by the Ethiopian People Republic Democratic Front

151 SM Weldehaimanot (n 74) pp. 84-107

152 AP Arifin (n 79) 477

153 A Buchanan, 'Theories of Secession' (1997) 26(1) *Philosophy and Public Affairs*, pp. 31-61; YG Adimassu, 'The Essence of Remedial Secession: From the Perspectives of Human Right and Preservation of Natural Resources' (2021) 12 *Beijing Law Review*, p. 1254

154 M Manan (n 50) p. 11.

155 C Okeke, 'The Right to Self-Determination and Secession in Africa: The Case of South Sudan and Lessons for the Region' (2020) 6(5) *Journal of Legal Studies and Research,* p. 197-231; M Sterio, The Right to Self-Determination Under International Law' (Routledge, 2013) p. 161; M Silvio, 'After Partition: The Perils of South Sudan' (2015) 3(1) *University of Baltimore Journal of International Law,* p. 63.

156 AA Troco, 'Between Domestic and Global Politics: The Determinants of Eritrea's Successful Secession' (2019) 4(8) *Brazilian Journal of African Studies* 9-31, p. 13

(EPRDF) where Eritrea's secession and autonomy were declared alongside the legal recognition of the right of the Eritrean people to decide their political future through an internationally supervised referendum.[157] Finally, on May 24, 1993, in a United Nations supervised referendum, 99.8 percent of Eritreans voted for the independence of Eritrea, and Eritrea, with the support of the United States of America and other major powers, was officially welcomed into the international community of states. Consequently, the Organisation of African Unity (OAU) accords it the recognition as the 53rd African State,[158] just as Coggins observes that *"when a Great Power confers legitimacy upon a secessionist movement/state, its decision initiates a cascade of legitimacy throughout the* system's remaining members[159]

The secession of South Sudan took place in 2011 after an internationally monitored referendum was conducted which saw almost the whole of South Sudan voting in favour of secession. The referendum is lauded by many scholars because of its uniqueness in the history of Africa. It is noted as the first time the territorial integrity of an African state gave way for self-determination under the auspices of the United Nations with the support of the African Union.[160] There is no doubt that the secession of South Sudan from Sudan is the typical situation of secession outside decolonisation which the African Union and international community had previously stood against.

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157 AO Osunkoya & AS Basiru, 'Secession Outside Colonial Context: The Birth of Eritrea in Retrospect' (2018) 14 *Journal of International Studies*, p. 29; EJ Keller, 'Secessionism in Africa' (2007) 13(1) *Journal of African Policy Studies* pp. 1-26

158 J Paquin, 'A Stability-Seeking Power: U.S. Foreign Policy and Secessionist Conflicts' (Quebec: McGill-Queens University Press, 2010), p. 141

159 B Coggins, 'Friends in High Places: International Politics and the Emergence of States from Secessionism' (2011) 65(3*) International Organization* 50

160 DH Johnson, 'New Sudan or South Sudan? The Multiple Meanings of Self-Determination in Sudan's Comprehensive Peace Agreement' (2013)14(2) *Civil Wars* p. 141

Carley[161] observes that the successful secession of South Sudan under the auspices of the AU and the international community seems to be an acceptance of secession in a post-colonial African state which has begun a new chapter in the history of self-determination and secession in Africa. Bereketeab thinks that the South Sudan secession is a violation of the OAU/AU charter and the destruction of colonial borders and the principles about its sanctity which may not be mendable.[162] It must be stated that the Eritrean and South Sudan secession showed that the territorial integrity of a sovereign state may be questioned under Article 20(2) of the African Charter where there is concrete evidence of oppression, domination, and gross human rights abuses against a people.

6.0 CONCLUSION

The right to self-determination and the territorial integrity of a sovereign state are both fundamental principles in international law. Unfortunately, the enforcement of either of these principles automatically affects the other. The right to self-determination has grown to be a central tenet of nationalist political discourse, but as a legal right, it is of limited use and always at odds with the concepts of sovereignty and territorial integrity that make up the foundation of the international system of states.[163]

The decisions of the Commission on the interpretation of the provision of Article 20 on self-determination represent the status of both principles under the African Charter to today. The Commission recognises that a people have the right

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161 P Carley, 'Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession" (Washington, DC 20005-1708: United States Institute of Peace, 1996) p. 1 cited in A Mohammed & YT Baba, 'Secession and Border Disputes in Africa: The Case of Sudan and South Sudan Border' (2021) 15(4) *African Journal of Political Science and International Relations* p. 134

162 R Bereketeab, 'Self-Determination and Secession" In R. Bereketeab, 'Self-Determination and Secession in Africa: The Post-Colonial State' (New York: Routledge, 2015) p. 4.

163 CK 'Connolly, 'Independence in Europe: Secession, Sovereignty, and the European Union' (2013) 24(51) *Duke Journal of Comparative & International Law*, p. 53 cited in SB. Lugard, M Zechariah & TM Ngufwan (n 46) 157.

to self-determination, however, state territorial integrity must only give way to the right to self-determination when a people can prove with concrete evidence the persistent violation of human rights. The territorial integrity of a sovereign state is anchored on the doctrine of *uti possidentis* which means "*as you possess, so you will continue to possess*." It emerged basically to preserve the boundaries of colonies emerging as a State and has been adopted by the Organization of African Unity (predecessor of AU) to preserve the territories of African States.[164] The territory of the former colony becomes frozen, as it were, on independence, and any legislation on the boundary, either by the former colonial power or by a party to the dispute becomes a matter of evidence.[165]

Thus, the internal arrangement between the seceding group and the sovereign state from which they intend to secede from is the most viable route for secession as in the cases of Scotland/United Kingdom and South Sudan/Sudan or where the municipal law, especially if the constitution of the sovereign state provides for the right to secession with it laid down procedures. [166]

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164 UO Umozurike, 'Introduction to International Law' (Spectrum Books Limited, 2005) p. 75; OO Ikubanni and MOA Alabi, "The Yoruba People's Quest for Self-Determination within the Nigerian Constitution" (2024) 1(1) *Fountain Law Journal* 37-53.

165 Burkina Faso v Republic of Mali, ICJ Rep. (1986) 554, 565, 661-662 cited in UO Umoruzike (n 132) p.76

166 Ibid (n 46) p. 158.

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ABSTRACT

International Humanitarian Law (IHL) is developed to protect all individuals during armed conflict, with specific provisions addressing the conduct of hostilities and the protection of civilians. However, women, as a vulnerable group, disproportionately suffer gross human rights violations and long-term consequences during and after conflicts. This paper explores the concept of armed conflict and the legal frameworks established to safeguard civilians, particularly women. It critically examines the devastating impact of armed conflict on women and analyses existing international, regional, and domestic laws related to their protection. The paper further discusses the available legal redress for women violated during conflicts and assesses the prospects, challenges, and overall effectiveness of implementing these laws in Nigeria.

1.0 INTRODUCTION

In the annals of human history, armed conflicts have left behind a trail of devastation, suffering, and loss. Amidst the chaos and violence, women have often borne a disproportionate burden, facing unique and pervasive challenges. From sexual violence to forced displacement, women are not just passive victims but active agents in the aftermath of war. Recognising this, international law has

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evolved to provide protection for women caught in the crossfire. This paper therefore embarks on a comprehensive analysis of the legal framework designed to safeguard the rights and well-being of women as victims of armed conflict.

Through a critical examination of international conventions, treaties, and municipal laws, we seek to understand the extent to which these legal instruments address the multifaceted challenges women face during and after war. By shedding light on the existing strengths and gaps in the legal framework, this study aims to contribute to the ongoing discourse on the protection of women in situations of armed conflict, with the ultimate goal of fostering a safer, more just world for all.

2.0 INTERNATIONAL LAWS FOR THE PROTECTION OF WOMEN IN ARMED CONFLICT

There exist a number of international laws that have formed a significant part of International Humanitarian Law (IHL) and deliberately consider the need for special protection of women in times of conflict. Generally, IHL accords women protection on equal footing to those of men. There are equally humanitarian law treaties which recognise the need to give women special protection according to their special needs. This protection is enshrined in the four Geneva Conventions of August 1949, for the protection of war victims and their Additional Protocols of June 1977.

The Convention and Protocols protect women as members of the civilian population not taking part in an armed conflict, as well as, women who are members of the armed forces. Some of these laws even go further to make special provisions for pregnant women, female combatants and rape victims.

2.1 THE GENEVA CONVENTIONS OF 1949

In World War II, women participated in hostilities in greater numbers, although they did not commonly bear arms. In addition, there were many more civilian

victims than in the earlier conflict. Of the over 72 million persons killed, it was estimated that around 23 million were in the armed forces while 33 million were civilians, including many women.[1] The sexual enslavement by the Japanese forces in Asia of approximately 200,000 women (euphemistically referred to as *"comfort women"*) demonstrated a callous disregard for women, not only as human beings but as prisoners of war.[2] The scale of these atrocities underscored the need for new legal frameworks to address such crimes.

The Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, convoked by the Swiss Federal Council, depository of the Geneva Conventions, met from April to August 1949 in Geneva and drew up four Conventions which were adopted on 12 August of that year. These conventions are Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field; Geneva Convention II for the Amelioration of the condition of the Wounded, Sick and Shipwrecked in the Armed Forces at Sea; Geneva Convention III Relative to the Treatment of Prisoners of War and; Geneva Convention IV Relative to the Treatment of Civilian Persons in Times of War of 12th August, 1949.

The Third Convention, relative to the treatment of prisoners of war, and the Fourth Convention, relative to the protection of civilian persons in time of war contains some thirty articles of special concern to women. The proportions of civilians who have died in armed conflicts were in some instances as high as 90%.[3] These horrible totals were primarily as a result of new means and methods of warfare with indiscriminate effects. In addition, new types of conflict developed between regular armies and guerrilla or rebel forces which made it difficult to

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1 J.C Winston 'World War II Statistics: Second World War History' (2012), <https://www.secondworldwarhistory.com/world-war-2-statistics.asp> [Accessed 25th April, 2023]

2 Kenny Chmielewski, 'Casualties of World War II',<https://www.britannica.com/event/casualties-of-World-War-II-2231003> [Accessed 30th October, 2024]

3 Iman Zhianpour, Alireza Arashpour and Mosen Shekarchizadeh, 'Humanitarian Protection of Women in Armed Conflicts' *Mediterranean Journal of Social Sciences* (2015) 6 (3).

distinguish combatants from civilians, which renders civilians more vulnerable. In view of this new situation, the Conventions had to be supplemented.

Women and girls do sometimes serve as combatants, a growing reality which must not be overlooked. However, they most often fit into the civilian category. Thus, the Fourth Geneva Convention and the analogous provisions relating to internal armed conflict are particularly relevant to them. With the exception of Common Article 3 of the Geneva Conventions, the four Conventions relate exclusively to international armed conflict.

Less protection is afforded in internal conflict, which is covered only by Common Article 3 and Protocol II, than in international conflict.[4] Although the Geneva Conventions are generally applicable, there are some provisions that are gender-specific and it has been reported by The International Committee of the Red Cross (ICRC) that of the five hundred and sixty articles comprising the law of Geneva, approximately fifty provisions from the Conventions and Protocols deal with non-discrimination or otherwise provide *"special protection for women."*[5] The 1949 Conventions establish a principle of equality to the effect *that "no adverse distinction can be drawn between individuals on the basis of, inter alia, sex."*[6]

This principle is reflected, for example, in Article 12 of the First and Second Conventions, which require humane treatment of persons in the power of parties to the conflict. They prohibit any adverse distinction founded on sex or any other similar criteria in such treatment.[7] The 3rd Geneva Convention which relates to the treatment of prisoners of war stipulates that prisoners of war shall be treated humanely at all times. Besides this general protection, women are also afforded

4 Karima Bennoune, Do We Need New International Law to Protect Women in Armed Conflict, *Case Western Reserve Journal of International Law* (2007) 38 (2) 7.

5 C. Lindsey, Women and War' *International Review of the Red Cross* (2000) 82 (839) 572.

6 G. Judith, Gardam et. al, 'Women, Armed Conflict and International Law' *Kluwer Law International* (2001), <https://doi.org/10.1017/S092215650222022> [Accessed 25 April 2023]

7 Article 12 of Geneva I and Geneva II.

special protection based on the principle outlined as, “Women shall be treated with all the regard due to their sex.”[8]

The above principle is followed through in a number of provisions which expressly refers to the conditions of detention of women in prison camps. For example, the obligation to provide separate dormitories for women and men[9] and for separate sanitary convenience. The principle of differentiated treatment for women also resulted in the provision[10] relating to the separate confinement for women from men and the immediate supervision of women by women.

The major general protection accorded to women during armed conflict is the protection from sexual violence. Sexual violence remains an abhorrent practice in all corners of human society. Women remain the primary, but not exclusive, victims of sexual violence. Such acts are strictly prohibited under IHL, but also under international criminal law.

Under IHL, women must be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[11] The foundation for this approach is that persons shall be treated with all due regard to their sex.[12] According to Article 27 of the Fourth Geneva Convention, the fact that women enjoy additional protection under certain circumstances does not constitute discrimination on the basis of sex. The prohibition on discrimination does not mean that every differentiation is forbidden, but rather aims to prohibit adverse distinction. "Without prejudice to the provisions relating to their sex, all protected persons shall be treated with the same consideration by the Party to the conflict".[13]

According to Geneva Convention IV, women are granted protection against abusive treatment by the parties to the armed conflict and also against the effects

8 Additional Protocol I of 1977, Article 14 Paragraph 2.
9 Geneva Convention III Relative to the Treatment of Prisoners of War, Article 25(4).
10 *Ibid*, Article 25 (4).
11 Geneva Convention IV Relative to the Protection of Civilians, Article 27.
12 Article 12 (4) of Geneva Convention I and Article 14 of Geneva Convention III.
13 Geneva Convention IV Relative to the Protection of Civilians, Article 27.

of fighting. They are entitled to humane treatment, respect for their lives and physical integrity and to live free from torture, ill treatment, execution and harassment. Other provisions afford specific protection for women from rape, enforced pregnancy and other forms of assaults.

Furthermore, women civilian internees are afforded with special protection in a number of provisions relating to detention facilities, hygiene conveniences and supervision. For example, a woman civilian internee must not be searched except by a woman.

IHL also lays down special protection for pregnant women and mothers with small children, for example, Article 38 of Geneva Convention IV provides that pregnant and nursing women shall be given priority in the distribution of relief services, such as food and medicine.[14] The provision provides they shall benefit by any preferential treatment to the same extent as the nationals of the state concerned.

Pregnant women and nursing mothers shall be given additional food in proportion to their physical needs.[15] Pregnant women and mothers with dependent infants who are detained or interned should have their cases attended to with outmost priority,[16] and maternity cases must be admitted to any institution where adequate treatment can be given.[17] In the case of armed conflict not of an international character, Common Article 3 of all four Geneva Conventions of 1949 provide for the protection of victims of internal armed conflicts generally stating:

> "All persons not actively taking part in the hostilities shall in all circumstances be treated humanely without any adverse distinctions founded on race, colour, religion, or faith, sex birth or wealth or any other similar criteria."

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14 Children in this context are generally considered to be children less than seven years of age.

15 *Ibid.*

16 Article 76(2) of Additional Protocol I.

17 Article 91 of Geneva Convention IV.

It further outlined actions explicitly prohibited against persons not actively taking part in the hostilities, including murder, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatments and extrajudicial killings.

Sub-article 2 makes specific reference to women stating that women who do not take part in hostilities in non-international armed conflict do not have prisoner of war status when they fall into enemy hands and as such outrages upon their personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault are forbidden.[18]

Although women primarily take the role of civilians during armed conflict, there are many examples of women engaging in armed conflict as members of the regular forces or other armed groups. Involvement in the conflict can take various forms from carrying arms and directly participating in the hostilities to hiding, sheltering and feeding combatants. Participation can be both voluntary and involuntary. Some countries where women are obliged to serve in the military through conscription are Eritrea, Israel, North Korea and Libya. In many conflicts women are forced to assist armed groups or otherwise face threats to their health and life.

2.2. ADDITIONAL PROTOCOLS I AND II TO THE GENEVA CONVENTIONS, 1977

The ICRC took the initiative to ensure additional protection for women and children during armed conflict and as such, at the conclusion of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974-1977), two additional protocols were adopted in 1977. They are Additional Protocol I relating to the protection of victims of International armed conflicts and Additional Protocol II relating to the protection of victims of non-international armed conflicts. These supplemented the Conventions and

[18] Common Article 3 (2) of the Geneva Conventions of 1949.

offered better legal protection, primarily to the civilian population and thereby encompassing women and children. In addition, the rules governing non-international armed conflicts, contained in Article 3 common to all four Conventions, were developed and expanded in Protocol II, applicable in these situations.

The Additional Protocols contain provisions specifically covering the protection of persons during international and non-international armed conflicts. Article 75 of Additional Protocol I and Article 4 and 5 of Additional Protocol II provide rules protecting the personal safety of women and require belligerents to ensure the humane treatment of all persons within their power. This treatment must be guaranteed at all timed and includes security of life and person as well as fundamental judicial guarantees. Article 75 of Additional Protocol I contains a comprehensive statement on what constitutes humane treatment. Article 76 lays down extensive provisions for the protection of women. It provides that:

> "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority."[19]

Also, to the maximum extent feasible, the parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.[20] Article 48 is also relevant as it stipulates that during hostilities, the parties to an armed conflict must at all times distinguish between the civilian population and combatants and between civilians' objects and military objectives and accordingly shall direct their operations only against military objectives.[21]

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19 Article 76, Additional Protocol I.
20 Ibid (n6) 48.
21 Article 48 of Additional Protocol I.

Article 4 of the Additional Protocol II also contains similar provisions in relation to the protection of women in times of non-international armed conflict. Women are entitled to the same protection as provided under Article 3 common to the four Geneva Conventions. Additional Protocol II stipulates in general terms under Article 4(2)(e) that outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault are forbidden.[22]

Article 5(2)(a) also provides for special treatment of women who are arrested, detained, interned in relation to the hostilities. In such situation, except when men and women of a family are accommodated together, women shall be held in quarters, separated from those of men shall be under the immediate supervision of women.[23]

Women as members of the civilian population are also protected against the effects of hostilities in non-international conflicts. Article 13 provides that the civilian population, as well as, individual civilians shall not be the object of attack.[24]

It is to be noted however, that the Additional Protocols I and II have not been ratified and domesticated in Nigeria and so the enforcement of its provisions remains a challenge.

2.3. DECLARATION ON THE PROTECTION OF WOMEN AND CHILDREN IN EMERGENCY AND ARMED CONFLICT OF 1974

Another law that was created for the protection of women and children is the Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974. It was proposed by the United Nations Economic and Social Council, on the grounds that women and children are often the victims of wars, civil unrest, and other emergency situations that cause them to suffer "inhuman

22 Article 4 (2) (e) of Additional Protocol II.
23 Article 5 (2) (a) of Additional Protocol II.
24 Article 13 of Additional Protocol II.

acts and consequently suffer serious harm. It makes specific provisions for the protection of women in armed conflict.

The Declaration was adopted in response to concerns about the suffering of women and children in civilian populations, who frequently fall victim to inhumane acts during emergencies and armed conflicts, especially in struggles for peace, self-determination, and independence. The increasing awareness of their suffering, particularly in areas affected by suppression, aggression, colonialism, racism, and foreign domination, prompted the international community to take action, recognizing the need for special protection for women in these situations.[25]

Paragraph 1 of the Declarations prohibits and condemns attacks and bombings on the civilian population, inflicting incalculable suffering, especially on women and children.[26] The use of chemical and bacteriological weapons in the course of military operations is also strictly condemned as it inflicts heavy losses on civilian populations, including defenceless women and children.[27] It mandates all states to abide by their obligations under the Geneva Protocol of 1925 and the Geneva Conventions of 1949, as well as other instruments of international law relative to respect for human rights in armed conflicts, which offer important guarantees for the protection of women and children.[28]

States are also mandated to take all the necessary steps to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women and children.[29] The Declarations strictly prohibits and criminalises all forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting,

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25 *Ibid*

26 Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974, Paragraph 1.

27 *Ibid*, Paragraph 2.

28 *Ibid*, Paragraph 3.

29 *Ibid*, Paragraph 4.

mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories.[30]

Paragraph 6 enforces the rights of sustenance and survival. It provides that women and children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence, or who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights, in accordance with the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.[31]

It is however pertinent to note that this declaration is not binding on states.

By virtue of paragraph 6, it has the binding nature of Universal Declaration of Human Rights and other instruments of international law which are subject to ratification by states before they can be applied.

2.4. UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The United Nations Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW) provides a Bill of Rights for women and seeks to protect and promote the rights and welfare of women everywhere. Conflict situations provide the location and theatre in which the rights of women are most grossly violated. Conflict situations also directly truncate the rights of survival and development of women and children. In these situations, governments also find it difficult to protect the rights of women and children.

30 *Ibid*, Paragraph 5.
31 *Ibid*, Paragraph 6.

The legal framework within which women and children in these situations fall therefore needs elaboration.

Women and children in conflict situations can be classified into four main categories: those in actual conflict situations; those displaced from external conflicts (i.e., refugees); those displaced from internal conflicts (i.e., internally displaced persons) and; those affected by environmental conflicts.

Internal conflicts have been responsible for massive displacement of civilian populations including women and children. Internally displaced persons end up living in refugee-like situations. Their plight is even worse than that of refugees, because the United Nations High Commission for Refugees does not, for example, become involved in their welfare, since they are not, in strict sense, refugees.[32]

Article 6 of the Convention also provides that States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. This provision is also applicable in times of armed conflict and implores state governments to ensure the protection of women from exploitation, trafficking and violence in times of conflict through any appropriate measure, including through legislation. This opens a gateway for countries to enact laws or ratify and domesticate any treaties or conventions that may be relevant and useful in ensuring the protection of women.

Nigeria ratified CEDAW in 1985 without reservation and signed the Optional Protocol to the Convention in 2000 and ratified same in 2004.[33] Unfortunately, this piece of legislation has not had much impact in Nigeria towards the protection of women as it is yet to be domesticated in accordance with the

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32 M. Mwagiru, 'Women and Children in Conflict Situations: The Culture of Rights as a Missing Link in Africa.' (2000), <http://digital.lib.msu.edu/projects/africanjournals/> [Accessed 25th April, 2023]

33 Identifying Nigeria's Commitment to the Convention on the Elimination of all forms of Discrimination against women (CEDAW), <https://cirddoc.org/wp-content/uploads/2016/10/CEDAW-Identifying-Nigerias-Commitment-PLANNED.pdf> [Accessed 30th October, 2024]

provision of the Constitution of the federal Republic of Nigeria.[34] The domestication and incorporation of the convention into the constitution is fundamental towards achieving the protection of women in Nigeria.

2.5. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325

In October 2000, the United Nations Security Council adopted Resolution 1325 which calls upon all parties to armed conflicts to fully respect international law provisions relating to the rights, and protection, of women and girls, and to take special measures to protect them from gender-based violence, particularly rape and other sexual abuse. It also highlights the problem of impunity for international crimes such as genocide and crimes against humanity, including crimes relating to sexual violence against women.

Furthermore, the resolution emphasises the importance of gender mainstreaming in all United Nation's conflict prevention, resolution and reconstruction missions. Almost 25 years after resolution 1325, women's involvement in peace building is still an aspiration. The authoritarian leadership in most parts of Africa, Nigeria inclusive in the guise of democracy has given rise to internal conflicts and crises and this has increased the number of persons in need of humanitarian assistance all over. There is food crisis exacerbated by armed conflicts and situations of organized violence by various armed groups.

In this difficult situation, the number of women and girls living in conflict affected countries reached 614 million in 2022, 50 per cent higher than the number in 2017. In early 2022, the number of people forced to flee war, violence and persecution surpassed 100 million, and the Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that 117.2 million people will be forcibly displaced or stateless by the end of 2023.[35]

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34 Section 12 of the Constitution of the Federal Republic of Nigeria 1999 and amended.

35 Report of the Secretary-General on Women and Peace and Security (S/2023/725) [EN/AR/RU/ZH], <https://reliefweb.int/report/world/report-secretary-general-women-and-peace-and-security-s2023725-enarruzh> [Accessed 30th October, 2024]

The objectives of the Secretary-General with respect to women and peace and security for the decade leading up to 2030 provide a different path forward for building and sustaining peace. The international community has many opportunities to help implement this vision, from the proliferation of feminist foreign policies and the collective efforts of the Generation Equality campaign, to the explicit commitments on gender equality laid out in Our Common Agenda (A/75/982) and the policy brief on a New Agenda for Peace (A/77/CRP.1/Add.8), to the preparations for the Summit of the Future in 2024[36] and the twenty-fifth anniversary of the adoption of Security Council resolution 1325 (2000) in 2025.

Governments and international organizations are encouraged to follow the lead of the global women's rights movement, irrepressible and undeterred by either backlash or setbacks, in order retain the hope of seeing a radical change in protecting women.[37]

Women in Nigeria already face one of the highest maternal death rates in the world – a woman dies of pregnancy-related causes about every nine minutes in the country. The conflict has aggravated this dire situation, leaving an estimated 7.7 million people in need of assistance in Adamawa, Borno and Yobe States and 10.2 million people in need in north-east Nigeria. Millions have fled their homes, filling displacement camps and host communities.[38]

UNFPA estimates that 1.7 million affected women are of reproductive age, with 276,000 likely to become pregnant this year and will require reproductive health services and support.[39] There is an urgent need for health personnel to provide

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36 United Nations New York, 'Summit of the Future 2024'. This Summit held on 20-23 September 2024 and Resolution 79/1: A/RES/79/1 was adopted, <https://www.un.org/en/summit-of-the-future/> [Accessed 30th October, 2024]

37 Ibid (n35).

38 UNFPA, 'Delivering Supplies when crises strikes: Reproductive Health and Humanitarian Settings-Country Experience, Nigeria', <https://www.unfpa.org/sites/default/files/resource-pdf/18-291-DeliveringSuppliesCrisis-Nigeria-finalweb.pdf> [Accessed 30th October 2024]

39 Ibid.

reproductive health services, including obstetric emergency obstetric care and treatment for survivors of sexual violence.

2.6. UNITED NATIONS DECLARATION ON THE PROTECTION OF WOMEN AND CHILDREN IN EMERGENCY AND ARMED CONFLICTS

War atrocities are seen as mass violations of human rights. They affect all members of the society, regardless of their gender, age, skin colour, nationality or ethnic origin. Women however, were and still are particularly vulnerable to all forms of such violations, in particular becoming victims of various forms of violence. Throughout history, wars have been accompanied by atrocities, enormous cruelty and violence, which from the contemporary legal perspective seen as mass violations of human rights.

In this context, the UN General Assembly, while considering the recommendation of the Economic and Social Council contained in its Resolution 1861 (LVI) of 16 May 1974, expressed concern over the sufferings of women and children belonging to the civilian population who in periods of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence are too often the victims of inhuman acts and consequently suffer serious harm.

The Declaration further acknowledged the suffering of women and children in many areas of the world, especially in those areas subject to suppression, aggression, colonialism, racism, alien domination and foreign subjugation, who despite general and unequivocal condemnation, colonialism, racism and alien and foreign domination are still subjected to incalculable sufferings, especially women and children.

Conscious of its responsibility for the destiny of the rising generation and for the destiny of mothers, who play an important role in society, in the family and particularly in the upbringing of children, and bearing in mind the need to provide special protection of women and children belonging to the civilian population, the General Assembly of the United Nations Organization made the

following Declaration on the Protection of Women and Children in Emergency and Armed Conflicts and calls for the strict observance of the Declaration by all Member States as follows;

Attacks and bombings on the civilian population, inflicting incalculable suffering, especially on women and children, who are the most vulnerable members of the population, shall be prohibited, and such acts shall be condemned.

The use of chemical and bacteriological weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva Protocol of 1925, the Geneva Conventions of 1949 and the principles of international humanitarian law and inflicts heavy losses on civilian populations, including defenceless women and children, and shall be severely condemned.

All States shall abide fully by their obligations under the Geneva Protocol of 1925 and the Geneva Conventions of 1949, as well as other instruments of international law relative to respect for human rights in armed conflicts, which offer important guarantees for the protection of women and children.

All efforts shall be made by States involved in armed conflicts, military operations in foreign territories or military operations in territories still under colonial domination to spare women and children from the ravages of war. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women and children.

All forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.

Women and children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence, or who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights, in accordance with the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.

3.0 NIGERIAN LAWS FOR THE PROTECTION OF WOMEN IN TIMES OF ARMED CONFLICT

In Nigeria, the relevance of laws that seek to protect women in times of conflict cannot be over-emphasised. While most of these laws, as a whole, are not gender specific but state general provisions seeking to protect both men and women, Nigeria has taken steps in legislation to make provisions for the protection and rehabilitation of women in times of internal conflict. The UN Women's Handbook for Legislation on Violence against Women notes that states have clear obligations under international law to enact, implement and monitor legislation addressing all forms of violence against women.[40]

It is important to note that Nigeria, as a member state of the ICRC, has ratified and domesticated the provisions of the 1949 Geneva Conventions. As a result, the Geneva Convention Act is now part of Nigerian law, enacted to give effect to these international conventions adopted on August 12, 1949. Additionally, other laws in Nigeria contain provisions relevant to the protection and rehabilitation of women during armed conflicts.

3.1. GENEVA CONVENTIONS ACT

Nigeria domesticated the Geneva Conventions through the promulgation of the Geneva Convention Act in 1960. It was re-enacted in 2004 as the Geneva

[40] UN Women, Handbook for Legislation on Violence against Women, (2012) 1.

Conventions Act, CAP G3, LFN, 2004. This Act is a reflection of the provisions of the Geneva Conventions of 1949 and its additional protocols. It also makes direct reference to the provisions of the Act, specifically the grave breaches which are cited under Section 3 of the Act.[41]

These grave offences, include acts committed against persons or property protected by the Convention, such as wilful killing, torture, inhuman treatment (including biological experiments), causing great suffering or serious injury to body or health, unlawful deportation or confinement, compelling a protected person to serve in hostile forces, denying fair trial rights, taking hostages, and the extensive unlawful destruction and appropriation of property not justified by military necessity.

Section 3, sub-section 1 of the Act provides that if any person within or outside Nigeria, whatever the nationality, commits, aids, abets or procures any other person to commit any of the grave breaches contained in Article 50 of the First Geneva Convention, 1949; Article 51 of the Second Geneva Convention, 1949; Article 130 of the Third Geneva Convention, 1949 and Article 147 of the Fourth Geneva Convention, 1949:

> *"He shall, on conviction in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the Convention in question, be sentenced to death, and in the case of any other such grave breach, be liable to imprisonment for a term not exceeding fourteen years."*

From this provision, the Act makes reference to persons protected by its provisions. In relation to the protection of women during internal armed conflict, this Act is majorly applicable as it marks as grave offences, most of the atrocities women suffer in times of internal conflict. Offences like displacement, murder, torture, kidnap and sexual violence ought to be prevented by this Act. However, a major challenge to the implementation of this Act is that the provisions of the Additional Protocols were not domesticated along with the Act therefore, the

41 Geneva Conventions Act, Section 3.

more salient and comprehensive laws in relation to non-international armed conflict are not in force.

3.2. TRAFFICKING IN PERSONS (PROHIBITION) LAW ENFORCEMENT AND ADMINISTRATION ACT (NAPTIP)

During armed conflicts, most of the victims are women and children, and upon capture or abduction, become victims of human trafficking. Thus, The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act[42] which was enacted in 2003, together with the National Agency for the Prohibition of Traffic in Persons and Other Related Matters, became the relevant tools in ensuring the release and safe return of these girls that are sold into slavery by their abductors.

Sections 11 to 24 of the Act prescribe offences that attract grievous penalties. From these offences, it can be seen that the interest of women and girls were covered as they are the primary victims. Section 11 establishes it a crime to export from Nigeria to any place outside Nigeria, any person under the age of eighteen years with intent that such person or knowing it to be likely that such person will be forced or seduced into prostitution in that place.

Section 12 goes on to state that any person by use of deception, coercion, debt bondage or any means whatsoever induces any person under the age of eighteen years to go from one place to another to do any act with intent that such person, may be, or knowing that it is likely that the person will be forced or seduced into illicit intercourse with another person, would be liable to imprisonment for ten years.

Sections 13 and 14 contain similar provisions in relation to the encouragement, seduction, procurement and prostitution of any persons under the age of eighteen years.

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42 Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, CAP T23, Laws of the Federation of Nigeria, 2004.

Section 15 contains provisions specifically relevant to the protection of women in times of armed conflict. It provides that any person who-

a. *procures, uses or offers any person for prostitution, or the production of pornography, or for pornographic performance;*

b. *keeps a brothel;*

c. *allows a person under the age of eighteen years to be in a brothel or trades in prostitution;*

d. *procures, uses or offers any person for the production and trafficking in drugs;*

e. *Traffics any person for the purpose of forced or compulsory recruitment use in armed conflict, commits an offence and is liable on conviction to imprisonment for fourteen years without an option of fine.*

Section 15 (b) makes specific reference to armed conflict. Not making any direct reference to whether international or internal, the words of the Act are clear that it seeks to protect women.

According to a report by Wall Street Journal, some of the two hundred and seventy-six girls abducted by the Boko Haram insurgency sect on April 14, 2014, were either traded off as slaves and sent to Chad and other nearby countries, sold off to be married or were forced to join the sect as wives of insurgents, slaves or to join the cause.[43]

Section 15 of the NAPTIP Act specifically prohibits trafficking of persons for the purpose of forcing them to take up arms and partake in hostilities. This provision does not make any distinction between the combatants and so it can be said to prohibit the compulsory enlistment of civilians into the army.

[43] Joe Parkinson et. al, 'Freedom for the World's Most Famous Hostages.' *Wall Street Journal* (2017), <http://www.wsj.com/articles/two-bags-of-cash-for-boko-haram-the-untold-story-of-hownigeria-freed-its-kidnapped-girls-1513957354> [Accessed 25th April, 2023]

The Agency has taken some steps in ensuring the return of some of these victims although it is more of a herculean dream today, as after four years, it gets harder to rely on hope.

3.4. NATIONAL COMMISSION FOR REHABILITATION ACT

The National Commission for Rehabilitation Act was established in 1969 in the wake of the Nigerian civil war taking place at the time. It was created to provide for schemes of rehabilitation during and in the aftermath war. Section 2 states Commission is to be responsible for the supply of food, clothing, drugs and other essentials to needy persons in areas affected by the war and its aftermath; the determination of priority for all emergency relief operations and rehabilitation work in all parts of the Federation; the coordination of the activities of all voluntary agencies engaged in emergency relief operations and rehabilitation work and the facilitation of the field operations of those agencies in all parts of the Federation; the coordination of the activities of the States in the administration of properties abandoned by displaced persons in the Federation and the collection and distribution of emergency relief supplies of food, drugs and other humanitarian gifts from foreign governments and from international and non-governmental agencies.

A major challenge in the application of this law is that it does not elaborate on the concept of war thus excluding its relevance in the instance of all other situations of conflict including non-international armed conflicts. This is a major problem as the commission stands with a great opportunity to help the rehabilitation of all victims of armed conflict but its statute limits the scope of its jurisdiction.

Although the scope of this law is limited but the rights of victims in relation to humanitarian assistance in internal armed conflicts is enshrined in CA3 to the four Geneva Conventions which prohibits violence to life and persons. In particular, Article 18 of Additional Protocol II, which applies in times of internal armed conflict, establishes the right to humanitarian assistance imposing on the

parties to the conflict the obligation to accept humanitarian aid essential to the survival of the population.

Rule 32 of Customary International Humanitarian Law (CIHL) supports humanitarian assistance both in international and non-international armed conflicts and rule 53 prohibits starvation of the population and women and children fall within this category of the population as the most vulnerable in conflict situations. Rule 7 CIHL prohibits attacks on civilian objects. Rule 55 recognises the rights of protected persons in international humanitarian law such as women and children to humanitarian assistance.

Nigeria is yet to domesticate the Additional Protocols of 1977 but it does not derogate from the fact that Nigeria is bound to implement these customary rules of IHL. To that effect there is the National Emergency Management Agency (NEMA) responsible for the distribution of relief materials and assistance to victims of armed conflict and other disasters in Nigeria.

4.0 RECOMMENDATIONS

Based on the findings above, the paper makes the following recommendations;

4.1 STRENGTHEN IMPLEMENTATION OF EXISTING LEGAL FRAMEWORKS

Governments and international organizations should work to improve the implementation of existing legal frameworks such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and United Nations Security Council Resolution 1325. This includes ensuring that domestic laws and policies align with these international standards. There is an urgent need to enact a legislation that directly protects women and girls in times of armed conflict in Nigeria. Domestication of treaties ratified by Nigeria which specifically protects women should be domesticated without further delay. Of particular reference is the Gender and Equal Opportunities Bill 2020, which is the CEDAW domestication Bill should be given urgent attention and passed into Law without further delay.

4.2 EMPOWER WOMEN

Empowering women in conflict-affected areas, through targeted interventions that focus on education, economic opportunities, and involvement in peacebuilding. Mobile learning and remote education programs can provide women with essential knowledge and skills, while cash-for-work initiatives and micro-loans support their financial independence. Women's inclusion in peace negotiations and conflict resolution processes is crucial for lasting stability.

4.3 SUPPORT VICTIM SERVICES

Investing in comprehensive support services for women victims of armed conflict is essential for their recovery and empowerment. This can be achieved by providing accessible healthcare, including reproductive health services and trauma care, to address the physical and psychological impacts of violence. Psychosocial support, such as trauma counselling and community-based mental health programs, helps women cope with emotional trauma. Legal assistance ensures that survivors can seek justice, hold perpetrators accountable, and access reparations.

Additionally, economic rehabilitation through vocational training, microloans, and livelihood programs empowers women to regain financial independence and rebuild their lives. These services, tailored to the unique challenges of conflict, are crucial for long-term healing and reintegration.

4.4 IMPROVING DATA COLLECTION

Improving data collection on gender-based violence (GBV) and women's experiences in conflict zones requires a multifaceted approach. Collaborating with local NGOs and women’s organizations, which already have trust within the community, can help gather accurate information. Additionally, training local data collectors on ethical and sensitive methods is crucial to ensuring privacy and safety. Mobile data collection tools and secure online reporting platforms can enable real-time, anonymous reporting, even in remote areas. Establishing safe spaces for interviews, such as women’s centres or healthcare facilities,

where survivors can freely share their experiences, further ensures accurate data. This approach will enable evidence-based policymaking and a better understanding of GBV in conflict zones.

5.0 CONCLUSION

The legal framework for the protection of women as victims of armed conflict has come a long way, with the adoption of international agreements and resolutions. However, challenges persist in translating these legal instruments into effective protection on the ground. The paper has identified critical gaps and areas for improvement.

The problem or challenge with implementing these laws is corruption; persons in government who ought to follow through are rather interested in enriching themselves rather than empowering the vulnerable groups. Finally, it is essential for governments, international organizations, and civil society to collaborate in ensuring the comprehensive and meaningful implementation of these legal frameworks.

Women in conflict zones continue to face grave threats, and addressing this issue is not just a matter of legal compliance but a moral imperative for achieving peace, security, and justice in the world.

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THE LEAKING UMBRELLA: EVALUATING THE EFFICACY OF SEXUAL OFFENCES LEGISLATION IN UGANDA

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THE LEAKING UMBRELLA: EVALUATING THE EFFICACY OF SEXUAL OFFENCES LEGISLATION IN UGANDA

Julius Ainomugisha*

ABSTRACT

Globally, sexual offences and the methods by which they are perpetrated have evolved, leading to corresponding updates in legislation. However, in Uganda, the laws governing sexual offences have remained largely unchanged, despite a steady rise in reported cases, as reflected in Uganda Police annual reports. This stagnation has contributed to the increasing prevalence of sexual offences and complicated the notion of justice for victims. By tracing the historical origins and assessing the relevance of Uganda's sexual offences legislation, this article critically analyses the legal framework, court interpretations, and existing gaps. Through a comprehensive review of books, case law, legislation, reports, and related literature, the article offers informed recommendations for legal reforms to enhance justice for victims and better address the complexities of modern sexual offences.

1.0 INTRODUCTION

About 1 in 3 (30%) of women worldwide have been subjected to either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.[1] In Africa, more than 25% of the sexual offences were committed by partners on their victims, and less than 10% by non-partners.[2] More than

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1 World Health Organisation, 'Violence against women' <https://www.who.int/news/> [Accessed 25 May 2024]

2 World Bank. 'Violence against women and girls – what the data tell us' (2022), available at <https://liveprod.worldbank.org/en/data/> [Accessed on 25 May 2024]

thirty people are reported to be sexually assaulted each day in Uganda, and yet these numbers are themselves not conclusive.[3]

In Uganda, what is considered sexual offences, as found by the investigating agencies led by the Uganda Police Force, includes: defilement, aggravated defilement, and rape.[4] It is thought-provoking that many other offences in the Penal Code Act[5] are not captured under this category, and therefore not reflected in the official reported statistics.

This could be traced to the very origins of sexual offences as will be discussed later in the article but, suffice to note that, the Penal Code was inherited by Uganda from England where women were treated as chattels some centuries ago, and an attack on the woman was an attack on the property of the man. This dire situation has been attributed by various scholars to many factors including: upbringing,[6] type of marriage,[7] cultural norms, laws, and individual attitudes.[8]

In countries where the law regarding protection of women's rights is progressively enforced, the cases of sexual violence offences are minimal whereas in the countries where the enforcement of law has been lacklustre, the protection sought to be achieved from the law has also been less than optimal. Due to the fact that the law is generally enacted to provide justice to society –protection (and compensation) to victims and fair trial (and punishment and rehabilitation) to the perpetrators,[9] and in the case of

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3 Caroline Adoch, 'Access to Gender Justice in Uganda: A Feminist Analysis of the Experiences of Rape Victims in the Reporting and Prosecution Processes' (PhD Thesis, Makerere University 2022) p 137.

4 *Ibid.*

5 Penal Code Act, Cap 128, Laws of Uganda. Chapter XIV.

6 Johnson, K. and Kishor, S., 'Profiling domestic violence: a multi-country study' 2004.

7 Klugman, Jeni; Hanmer, Lucia; Twigg, Sarah; Hasan, Tazeen; McCleary-Sills, Jennifer; Santamaria, Julieth, Voice and Agency: Empowering Women and Girls for Shared Prosperity' 2014: World Bank Group. Available at <http://hdl.handle.net/> [Accessed 25 May 2024]

8 *Ibid.*

9 University of Lincoln, 'The value of law: understanding the purpose of laws and legal systems' 8 November 2022, available at <https://online.lincoln.ac.uk/> [Accessed 18 February 2025]

Uganda, this has not been the case (as seen from the statistics),[10] this scenario is likened to a "leaking umbrella" –made to shield the holder from scotching sun or rain and yet the holder, in this case, Uganda has to endure the heat or rain that escapes through the holes in the umbrella.

This article explores the gaps in the procedural and substantive law on sexual offences in Uganda by contextualising and defining the operative terms, tracing the origin of the current law, assessing the contribution of emerging contemporary issues, the procedure, and comparison of how the law applies in similar countries, and makes some recommendations.

2.0 WHAT ARE SEXUAL OFFENCES?

Save for the reference made to the right to life and property, dignity of women and children,[11] and power given to the Parliament to enact laws[12] for the actualisation of the spirit and letter in the Constitution, there is no express provision defining sexual offences. The broader context to be discerned therefrom is that expressed in majority of international human rights instruments on bodily integrity. Put differently, without the Penal Code that comes closest to giving more detail, sexual offences would be characterised as a violation of any other parts of the body. Even the Penal Code –the principal legislation on crimes –only defines some individual offences under the wider bracket of sexual offences by highlighting the ingredients that make up the offence(s).

Different jurisdictions name the offences differently especially those that have enacted specific legislation against them for example Sexual Offences Act,[13] but the overriding feature is that they mostly connote sexual violence because of the non-consensual nature they take. The elements of the crime of rape, for example, are invasion of a person's body by conduct resulting into

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10 The Uganda Police Force, *Annual Crime Report, 2023*, p. 24; Uganda Bureau of Statistics. (2016). Uganda Demographic and Health Survey 2016. Kampala. Uganda Bureau of Statistics.

11 The Constitution of the Republic of Uganda 1995 as amended. Articles 22-24; 33 (1); 32(2)

12 *Ibid* Article 79.

13 South Africa, Kenya, England, Tanzania among others.

penetration, however slight, of any part of that person's body with a sexual organ; and the circumstances in which this is done –that indicate a lack of consent on the part of the victim.[14]

Sexual offences are also broadly defined as all offences that are sexual in nature.[15] Offences generally to mean what's prohibited by law in a given society; and 'sexual' connoting acts which prohibit conduct, preparatory acts to the conduct, and acts that infringe on another person's body autonomy. It is clear that comprehensively speaking, the act in and of itself, within the context of its prevention, is not just what is done per se but the process leading to it and shortly thereafter.

The World Health Organization (WHO) defines sexual violence as:

> "Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."[16]

Article 1 (5) (a) of the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children defines sexual violence as:

> "Any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law, and goes ahead to itemise all other violence against women."

In the case of Uganda, throughout Chapter XIV of the Penal code, the offences considered sexual in nature, after the general principles of penetration and lack of consent, principally relate to the nature and type of persons. For example, rape, prostitution, bigamy and indecent assault for adults; defilement for children; incest for those considered to be related –in the ways prescribed by the Act.

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14 Lubaale, E. C., 'Limitations of the Ordinary-Crimes Approach to the International Crime of Rape: The Case of Uganda' 2020 African Journal of Legal Studies, 12(3-4), 266-297.

15 Green, S. P., 'What are the sexual offences?' (2016) The new philosophy of criminal law, 61-80.

16 World Health Organization (2014), 'World Report on Violence and Health' 149 <http://www.who.int/violence/> [Accessed on 24 May 2024]

The definitions above, and how judicial bodies (and/or cultural institutions) deal with transgressions against persons, are heavily influenced by what was considered to be the status of women –against whom most of the sexual offences are committed –for about 5000 years up to 20th Century when the Human Rights Movement registered significant successes towards equality and emancipation of women.[17]

3.0 BRIEF HISTORY OF SEXUAL OFFENCES LAW IN UGANDA

In order to understand the efficacy of legislation, courts have severally taken the view, it is important to trace it from its origin. In *Uganda Association of Women Lawyers (FIDA) & Ors v Attorney General*,[18] wherein court was invited to determine the constitutionality of various sections of the Divorce Act, Twinomujuni, JA who wrote the lead judgement, with whom the rest of the justices of Appeal agreed, highlighted the obtaining circumstances under which the law was enacted, its history, how it was imported to Uganda (and found them to be different from Uganda's, and highlighted the reality that in fact, England from where it was imported, had since amended it to reflect the changing times) and went ahead, in that context, to hold that the impugned sections were in fact obsolete and unconstitutional.

The overarching principle from that landmark case is that the law is nothing without context.[19] That to determine the origin, relevance and application of legislation, it is important to pay attention to the obtaining circumstances among the people it is sought to be enforced. This was even more aptly discussed by Lord Denning, in the famous case of *Nyali v Attorney General*,[20] where he likened application of common law principles in African legal

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17 Advent of the Universal Declaration of Human Rights, and the Human Rights Movement; Ishay, M., *The history of human rights: From ancient times to the globalization era* (University of California Press 2008) p287; Moyn, S., *The last utopia: human rights in history* (Harvard University Press 2011) 2-12.

18 [2004] UGCC 1

19 Selznick, P. (2003). "Law in Context" Revisited. Journal of Law and Society, 30(2), 177–186 available at <http://www.jstor.org/stable/1410767> [Accessed 18 February 2025].

20 (1956) 1 QB 1.

systems to transplanting an English Oak tree to African soil and expecting it to retain its tough character it would have in England.

Similarly, in *Patrick Mukasa v Andrew Douglas Kanyike*,[21] wherein court was invited to determine the applicability of *nemo dat quod non habet* to land transactions, Ekirikubinza, JSC who wrote the lead judgement traced the origins of the maxim in common law, how it applied in Australia among other jurisdictions and the subsequent transition to the Torrens system of land recordation in Uganda, and held that the maxim was no longer applicable in view of the Judicature Act, Cap 16 Laws of Uganda. Again, the learned Justice went as far as tracing the origins of the common law doctrine, and its application in the circumstances at the time, and held that where the circumstances are different, especially where the written law is such that where there are enough remedies in written law, common law can does not apply.

In the context of sexual offences, tracing the origins of the law as imported would be pivotal is examining whether the law was (or still is) applicable in our set of circumstances. Therefore, the author traces the history of sexual offences generally being inside criminal law in the beginning, and then split into sexual offences in modern times as discussed below.

3.1 BRITISH CRIMINAL LAW

The term *'crime'* has its etymology from the Latin word "crimen" which means "I give judgement."[22] Crime has been around for as long as life and by 3000 BC (when the first police department is believed to have been established in Egypt), codes of law were considered to be transgression against another person or their property.[23] Through the medieval times (5th Century up to 15th century), crime was likened to abomination for which there was trial by

21 [2024] UGSC 5 pp. 21-25.

22 Etymology of Crime <https://www.etymonline.com/word/crime/> [Accessed 27th May 2024]

23 Britannica, T. Editors of Encyclopaedia (2011, December 15). Egyptian law. Encyclopaedia Britannica <https://www.britannica.com/> [Accessed 27th May 2024]

various means (*iudicium dei*,[24] fire, water, combat, ordeal of blood, sacrament, spearing, duelling, shaming) with punishment as the main goal for it.

The (criminal) law had one arbiter –the king or leader by whatever name called –who would determine what compensation or punishment to give when certain perceived (and sometimes written) transgressions happened. In some cases, this power of the King was delegated to some of his chosen subjects to administer justice, and they kept a record of their previous decisions to help in determination of subsequent disputes and cases. Offences were named as such owing not just to the actions through which they were committed per se but generally to the effect they had on the victim's well-being, dignity and reputation.

In the 12th Century, after the Normandy conquest, major attempts were made to separate criminal from civil liability –the former referring to crimes against the Crown and later on her subjects but both being tried by the Crown; and the latter as liability attaching for interference with relationships between the crown's subjects.[25]

Sexual offences, traditionally and generally, formed part of criminal law and were severely punished.[26] Criminal law itself underwent several changes to make it fit for purpose throughout the evolution of society[27] up to date. What constituted crime in the 12th century (during the pre-medieval times) was different from what it did in the 18th century during the middle and industrial age.[28] Most of these changes were a reflection of the class of society, the effect

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24 Denoting divine intervention, in essence, that God would intervene to protect you from whatever the ordeal by trial was, be it fire, water of whatever.

25 Sharpe, J. A., 'The history of crime in late medieval and early modern England: a review of the field' 1982 Social History, 7(2), 187-203.

26 The medieval women who spoke out against sexual violence. (05 October 2021) available at <https://www.historyextra.com/period/> [Accessed 08 June 2024]. Reference is made to the names of victims, and not the perpetrators, including Isabella Plomet in 1292, one Rose in 13th Century, and Margaret Perman in 1438, among others.

27 David Mcculloch (February 28, 2023) A History of Crime: Investigations, Trials and Punishments; How the Code of Hammurabi Influenced Modern Legal Systems available at <https://www.history.com/news/hammurabi-code/> [Accessed on 08 June 2024]

28 Philips, D., 'Crime, law and punishment in the Industrial Revolution' 1993 The Industrial Revolution and British Society, 156-83. Emphasis mainly put on men and their property. During this time, women had latently pushed for their rights but with very little to no success; they were considered as property of the man.

of the classes in the law-making process and the interests to be protected. The reigning law as it was in England in 1902 was received in Uganda.[29]

The Penal Code, Cap 128 was itself enacted in 1950 when there was little or no representation in the Legislative council of the time, in the immediate aftermath of the *Bataka movement* that is considered as the precursor push towards independence of Uganda.[30] This ostensibly means that the voice of Ugandans (whose state was only 56 years old) was not effectively heard. It is widely believed that the success of the movement was attributed more to the discovery of what the colonialists could not do rather than the strength of the Africans. At the time of the enactment, the goal was more to leave behind a code whose application, and a structure whose effectiveness, would require consultation with the wider legal regime of the colonialists.[31]

Even when the Uganda Independence Act stipulated that no Act of Parliament of the United Kingdom passed after 1962 would apply to Uganda,[32] the Judicature Act[33] maintains applicability of statutes of general application (known as Applied Law)[34] and the Penal Code wherein meanings of the code are to be construed and given meaning in accordance with the English Criminal Law.[35]

3.2 THE LAW ON SEXUAL OFFENCES IN PRE-COLONIAL AFRICA

Many schools of thought have indicated that Africa ran the same system as England before the 12th Century; one of the law being that which –mainly anchored in natural law –is considered odd in a given society, and enforced

29 Morris, H. F. (1974). A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935

30 Mutibwa, P. M. (2016). "A" History of Uganda: The First 100 Years, 1894-1995. Fountain Publishers.

31 Ubink, J.M. and McInerney, T., 2011. Customary justice: perspectives on legal empowerment.

32 Morris, Henry Francis and James S Read. (1966). Uganda: The development of its laws and the Constitution. P.80; Uganda Independence Act, 1962 s.1(2).

33 Cap 16, Laws of Uganda.

34 *Ibid*, s.47.

35 Cap 128, Laws of Uganda. s.1.

by the King,[36] and called customary law, in modern day language. Sexual offences such as rape or defilement were considered an example of misfortune not just to the victim but the whole clan at large.[37] Clans would insist on avoiding cases against their own and would use all the influence they had to follow up the prosecution of the "accused" in case the offence was committed on their own.[38]

Defilement existed in traditional Africa, and in Buganda for example, girl virginity was valued so highly. A man who defiled a girl before she married was fined a goat, one cow, and two backcloths to give to her father.[39] Uganda and Africa generally avoided discussing sex issues in public. Family relations gave and passed sex education to the girl child only when she was ready for marriage.[40]

Whereas England (and the West) transitioned to capitalism and their body of laws changed –mainly viewing crime through the lenses of emphasis on individual persons; in Africa, communities continued to live in communist societies with many of the amenities of life shared. In pre-colonial Africa, sex was, and is to a large extent up to now, regulated by traditional norms and confined within marriage. There was no prescribed minimum age of consent to marriage: adolescents could marry soon after their initiation rites of passage (early adolescence).[41]

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36 White, L., 'They could make their victims dull": genders and genres, fantasies and cures in colonial southern Uganda' 1995 The American Historical Review, 1379-1402.

37 Wamoyi, J., Wight, D., and Remes, P., 'The structural influence of family and parenting on young people's sexual and reproductive health in rural northern Tanzania, (2015) Culture Health and Sexuality; 17(6): 718–732.

38 Ibid (n 4) 136-140.

39 Tamale, S., 'How old is old enough? defilement law and the age of consent in Uganda' 2001 East African Journal of Peace and Human Rights.

40 American Bar Association, Governance and Justice System Strengthening (2024). <https://www.americanbar.org/advocacy/> [Accessed on 01st June 2024]

41 Miroslava, P., 'Talking about sex: Contemporary construction of sexuality in rural Kenya' 2000 Africa Today 83-97.

The perception of the effect a sexual offence had (and in many ways, still has) on a victim can be found in the case of *Uganda v Apai Stephen*[42] where complainant could not give the detailed particulars of her nightmare in court, only choosing to say, "he made me his wife and worked on me." In *Uganda v Tumuheirwe*,[43] the victim, ashamed of giving the graphic details of how she was raped, said that as she was sleeping, she woke up only to find the accused on top of her, and the accused had entered his *omukira* (loosely translated as tail) into her vagina.

In *Kisingiri v Uganda*,[44] evidence of the victim that she was ashamed to report to police for fear of being despised, that was admitted by the trial court and led to the conviction of the accused, as rejected by the appellate court and the decision by the trial court reversed. These stereotypes (continue to) impede access to justice even to date albeit minimally now. This can clearly be seen in the 1989 case of *Uganda v Lt. Col Galungube*,[45] where Kityo, J held that a loose morals (to mean having sexual intercourse with many men) of victim constituted a possible defence to a charge of rape. Even in the eyes of court in that decision, the perception was that one who engages in sexual activity loses their bodily autonomy even in just one encounter.

Throughout this history, it is clear that sexual offences, as indeed all other crime, was envisaged as those whose punishment would be prescribed by the sovereign at the time personally (or through his appointed agents) and the punishment thereby given was deemed final and not appealable. Perhaps the most succinct departure between customary and criminal law is given by Prof. Du Yu,[46] when he concluded that criminal law rejects customary law (and the

42 Criminal Session Case No. 23 of 1994
43 Criminal case No. 296 of 1993
44 [2016] UGHCCRD 6
45 Criminal session Case No. 3 of 1989.
46 A distinguished legal scholar, Visiting Scholar at Stanford University (2014-2015) and Vice Dean and Professor of Criminal Law at Fudan Law School, who has dedicated his life to the study of Methodology of criminal law, criminal reconciliation and criminal customary law <https://law.fudan.edu.cn/> [Accessed 18 February 2025]

criminal law is an intersection between common and civil law jurisdictions but mainly inspired by natural law) (Emphasis mine).[47]

3.3 OTHER CONTEMPORARY ISSUES

Until recently (about two centuries ago), women were treated as property and no consent to sex was required from them. In *Miller v R* [1954],[48] court, in upholding the long-held position of law relating to married women and consent for sexual intercourse with their spouses, held that a husband could not guilty of raping his wife, that at marriage the wife consents to the husband exercising his marital rights of sexual intercourse.

Commission, and liability arising therefrom, of the sexual offence related more to the act itself but as society evolved, attention is paid to the effect it had on the victim. This position would later change albeit after many years of activism with many jurisdictions, including in the Commonwealth, departing from that position.

In *R v R*,[49] Lord Keith held that "common law was capable of evolving in the light of changing social, economic and cultural developments", and had in fact, changed. That in fact, marriage should be, and is now, looked at as a partnership of equals. This came on the heels of passionate activism from the women's movement,[50] and has since led to revolution in legislation regarding women's rights, climaxed by their inclusion in the Ugandan Constitution.[51]

The way sexual offences are now committed has itself changed owing to many factors including technological advancement. The lack of a common definition of technology-facilitated violence against women and girls impacts on the (lack of) comparable data at a global level. However, available evidence collected at

47 Du Yu, 'Customary Law in the Practice of Criminal Law: A Real and Powerful Role' 2013 Peking University Law Journal, 1:1, 37-68

48 All ER 529.

49 [1991] All ER 481; *HM Advocate V Duffy* (1989) SLT 469

50 Freeman, J., 'The origins of the women's liberation movement' 1973 American Journal of Sociology, 78(4), 792-811.

51 Constitution of Republic of Uganda 1995 as amended. Articles 21, 31, 33.

country and regional levels confirms high prevalence rates of sexual offences.[52]

The emergency of practices that have all along been considered outlawed, has further rendered the law (of old) as we knew it, obsolete. Examples of these include bestiality, homosexuality and generally, LGBTQI rights. Some scholars have actually said that, for example, some people are born with both genitals, and in some cases, the genitals for sex different from the one they identify with.[53]

The discussion of this, in wider detail, is beyond the scope of this article but suffice to say that the dynamism for their rights of different people as envisaged by the wider human rights movement cannot be ignored in the evaluation of the law on sexual offences. It would be interesting to think about who would be culpable if one who is known in society to be male, and says that they are female, and finally dwells with females, and sexually assaults them?

In Uganda, the Anti-Homosexuality Act, 2023 deals with this situation. The enactment of that legislation has been unsuccessfully challenged in *Fox Odoi and Ors v Attorney General and Ors*,[54] and there have been indications that the current position will be challenged in the apex court. This and many more leads to the discussion of the legal framework for the offences and how they are tried in Uganda, in the section below.

4.0 CURRENT LEGAL FRAMEWORK

4.1 SUBSTANTIVE LAW

Article 28(12) of the Constitution provides that no person can be convicted of (any) offence unless it, and its penalty, are codified. Decisions such as *Uganda*

52 UN Women (2023). Facts and figures: Ending violence against women. UN Women. <https://www.unwomen.org/en/> [Accessed on 02nd June 2024]

53 Roughgarden, J., 'Homosexuality and evolution: A critical appraisal' (2017) (pp. 495-516).

54 [2024] UGCC 10.

v Matovu Emmanuel Alias Sande[55] and *Uganda v Sande Richard*[56] where court convicted the accused on the basis of an old law when there was already an amendment; have been widely considered *per incuriam*. In Uganda, the principal legislation –the Penal Code Act –as it relates to sexual offences has been amended twice: 1990 (regarding the majority age below which criminal liability for defilement attaches)[57] and 2007 (regarding the review to grant jurisdiction and power to magistrate's courts)[58] to try defilement.

The Constitution has elaborate provisions, with reference to human rights of the accused, including how their rights should be respected and processes they need to go through –the safeguards for a fair hearing.[59] Very little is captured on the rights of the victims save for the general rights for all persons especially dignity and respect for human rights even in the trial process. In *Uganda v. Tumwesigye*,[60] the trial judge stated, "the doctor found that the hymen had been ruptured a year ago. ….. it could not be said it was the accused that had ruptured the hymen." This has ostensibly been left to the courts to develop, within the general constitutional framework, the principles of law to administer justice, and has thus been subject of discussion in various court decisions.[61]

What constitutes a sexual offence in Uganda, as laid out in the Penal Code Act,[62] Prevention of Trafficking in Persons Act,[63] Domestic Violence Act,[64] The Children's Act;[65] has been interpreted by the courts to generally be proof beyond reasonable (not a shadow of) doubt of penetrative sex in the vagina of

55 [2010] UGHC 139.
56 [2007] UGHC 15.
57 The Penal Code (Amendment) 1990, s.2. Also, in *Uganda v Kusemererwa Julius* HCCA No of 75 of 2004.
58 The Penal Code (Amendment) 2007, s.2. Available at <https://bills.parliament.ug/> [Accessed 08 June 2024].
59 Constitution of the Republic of Uganda 1995 as amended. Art. 28
60 *Uganda v Tumwesigye* Criminal session No. 40/90
61 *Senyondo Wilson v Uganda*, Criminal Appeal No. 40/03. See also *Basoga Patrick v Uganda*, Criminal Appeal No. 42 of 2002; *Ntambala Fred v Uganda*, SC Criminal Appeal No. 34 of 2015.
62 Cap 128, Laws of Uganda. Chapter XIV.
63 Cap 131, Laws of Uganda.
64 Cap 123, Laws of Uganda.
65 Cap 62, Laws of Uganda.

the victim, the penetrative sex was without consent and the accused is the one who (actively) participated in the Act.[66]

In interpreting the elements, courts, in following international law jurisprudence,[67] have held that penetration need not be deep –however slight will suffice as long as it is a male organ penetrating female one,[68] there need not be emission of seed,[69] there need not be ejaculation,[70] or even rupture of hymen.[71]

Furthermore, in interpreting consent, courts, in following the strict wording of Section 23 of the Penal Code, have taken the view that proof of (lack of) consent can be express (from the party) or obtained by means of threat or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or in the case of a married woman, by impersonating the husband, or by fraud.[72]

On the active involvement of the accused in the commission of the act, there is an apparent inconsistency. Chapter XIV provides for the involvement of one offender. In cases where more than one person is involved, determination of culpability has been varied and jurisprudence in Uganda, in this particular respect, has not yet developed that much.

It is apparent that what constitutes a sexual offence generally relates to the act *per se* of what constitutes the offence, and not the conduct or the performance of the act themselves. Whereas this gives the prosecution of the offences broadness without restricting the offence to the process, it has the effect of impairing or making difficult the actual prosecution in which the

66 *Katumba James v Uganda* Supreme Court Criminal Appeal No. 45 of 1999.
67 *Prosecutor v Akayesu,* Case No. ICTR-96-4, Judgment (Sept. 2, 1998). <http://hrlibrary.umn.edu/> [Accessed on 10 June 2024]
68 *Uganda v Odwong Dennis and Olanya Dickson,* (1992-93) HCB 71; *Uganda v Ddamulira Eriabu* Criminal Session No. 449/1995.
69 *Muzeeyimana Phillipo v Uganda* Criminal Appeal No 85 of 1999.
70 *Uganda v Mugoya*, Criminal Session No. 70 of 1993.
71 *Uganda v Stephen Mulengera* (1994-95) HCB 28 See also: *Mukasa Evaristo v Uganda* Criminal Appeal No. 53/1999.
72 *R v Jackson (1822) Russ. & Ry. 487.*

cardinal components of any crime (*actus reus* and *mens rea*) must be proved, beyond reasonable doubt.

Furthermore, the classification under the Penal Code Act, as offences against morality, from a feminist standpoint, and many scholars have argued, gives the offences (which are generally violent in nature and intended to denigrate the dignity of women and children –who have for long been considered vulnerable –a veneer of less seriousness because in fact all offences are "immoral."[73] That in fact, to the extent that the law only criminalises as rape is the insertion of a penis into a vagina and not other objects like sticks,[74] which themselves have the effect of violation of the woman's dignity and could even have more devastating effects on the woman, the law actually only regulates and does not criminalise the senseless acts.[75]

It is important to note that even when the PCA is supposed to be interpreted in accordance with English Criminal Law, little emphasis is put on the current state of the law especially regarding sexual offences. In England, for example, the law relating to sexual offences was amended in 1970 to decriminalise what is equivalent to unnatural offences in Cap 120,[76] but in Uganda, unnatural offences still hold fort in the law, in addition to many other related provisions.

As already discussed in the introduction to this article, only a few offences are investigated and therefore tried (or investigated) in Uganda. Additionally, as will be discussed later in this article, the minor adjustments in the positions of the law have been developed by the courts with little or no involvement of the legislature. The fate of the Bill(s) introduced in Parliament to amend the existing law or create a new one altogether have, as will be discussed in the article later, been futile thus far.

73 Ibid (n 4) 98-99.
74 *Uganda v Ojengol*, Criminal Session Case No.9 of 2011.
75 Ibid (n 4).
76 Cap. 128, s.145.

4.2 PROCEDURAL LAW

The general procedure through which criminal offences are tried is captured in Criminal Procedure Act, Police Act, Magistrates Courts Act, Trial on Indictments Act, Judicature Act.[77] The process starts with an aggrieved person (or one acting on their behalf) making a report to police in the area. It can be broken down into: pre-trial, trial and post-trial (sentencing).

4.2.1 PRE-TRIAL

The complaint is investigated by the police who forward the file to Director of Public Prosecution (DPP) for perusal and (if there is a strong case) prosecution in court.[78] This part includes assembling of evidence to be used at trial notably medical and other witness evidence. This is considered the stage at which most cases are won or lost because cases are won on the basis of application of the existing law to a given set of facts (proved in evidence). If the evidence is not meticulously collected, there are chances of miscarriage of justice.

In some cases, compromises are struck between adult relatives of the victim and suspect (for instance the victim is made to disappear –and yet in such cases, she is the prime witness).[79] Access to medical personnel in rural areas (where it has been reported that most of the defilement cases are committed) is also a challenge.[80] Adoch, in her report, states:

> "The decision whether to prosecute a case or not does not necessarily lie with the victim. It is heavily influenced by the power dynamics in the family and community, and the attitudes of the law

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77 Bisharira, S., '*Basics of Criminal Trial Procedures in the Courts of Law in Uganda*' 1999 Inspectorate of Government in conjunction with Friedrich Ebert Stiftung; Lubogo, I. C., 'Objection my Lord: legal practice demystified' (2022) Vol. 6.

78 With the exception of private prosecution under Magistrates Courts Act, Cap 19 ss. 42(1) (c), (3)-(6); 43 which provide for the institution of criminal proceedings by private person. However, such proceedings may be taken over by the DPP at any stage and the DPP may choose to discontinue or proceed with it at his discretion.

79 THE SEARCH FOR JUSTICE BY VICTIMS OF SEXUAL AND GENDER BASED VIOLENCE, Presentation at the 20th Annual Judges Conference, Speke Resort Munyonyo by Hon Lady Justice Henrietta Wolayo, Judge High Court of Uganda on 24th January 2018, available at <https://judiciary.go.ug/> [Accessed on 04 June 2024]

80 Ibid.

> enforcement personnel which often puts the victim at a higher possibility of secondary victimization."[81]

More harrowing stories about the troubles victims have to go through in order to get justice are captured in the report. One of the key observations Adoch makes in her report is that these are occurrences that are not considered usual but also regarded as a way of covering up for misfortune that is believed to accrue from the full-blown prosecution of the ca8se.

The inadequacies of the pre-trial procedure are quite many including arrest without proper investigations as stated by Odoki,[82] and appreciated in *Kalanima v Uganda,*[83] where the appelant was arrested on the complaint of the mother, from a child who had alleged that the appellant had defiled the child. Without proper investigation, the appelant was detained, only for the police to later find out that in fact the complainant confessed to having made a false allegation. Occurrences of this nature, which are quite common in Uganda,[84] have the effect of concentrating on one who did not commit the offence thereby orchestrating a miscarriage of justice.

4.2.2 TRIAL

During trial, the determination of any sexual offences case is on the basis of a competent court applying the law on a set of facts (proved in evidence) to reach a conclusion beyond reasonable (and not a shadow of) doubt. In adducing evidence, prosecuting most sexual offences relies on witness evidence from lay persons as well as experts. In the extraction of evidence, for most of the cases, the witnesses especially victims are exposed to untold victimisation and pain so much that some of them choose to abandon the matter, and yet when a case has no evidence to support it, it falls.

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81 Ibid (n4).

82 Benjamin J. Odoki, 'Reducing Delay in the Administration of Justice: The Case of Uganda' 1994 5 Crim LF 57; Oppenheimer, B. J., 'From arrest to release: The inside story of Uganda's penal system' 2005 *Ind. Int'l & Comp. L. Rev.*, *16*, 117.

83 [1971] HCB 210.

84 Karugonjo-Segawa, R., 'Pre-Trial Detention in Uganda' 2012 In *African Policing Civilian Oversight Forum Policy Paper*.

The rules of evidence regarding who can testify, what weight is attached to evidence, whether there is need for corroboration, etc as much as they serve the purpose of giving the accused a fair hearing, it is perceived that they serve the subtle purpose of delaying trial, and in fact have the "unintended" effect of justice not being seen to be done.

Courts have indeed relaxed most of the (traditional) rules of evidence and adopted circumstantial evidence[85] mostly because of the nature of sexual offences and how they are committed, the evolution of society especially use of technology to commit some of the crimes, the effect that the actions have on both the perpetrator and the victim, among others. The three main areas of focus in this respect have been on corroboration, evidence of penetration, of consent and that the accused is guilty.[86]

This discourse is perhaps most aptly amplified in *Ntambala v Uganda*,[87] wherein Prof Tibatemwa, JSC, in a second appeal, where the appellant appealed his conviction of 14 years for the offence of defilement handed down from the High Court. In that case, the appelant pleaded that there was no sufficient corroboration of evidence leading to his conviction. The issue was whether, based on the previous decisions (including of the Supreme Court), failure to corroborate evidence leading to conviction for the offence of defilement was fatal. In that case, the learned Justice distinguished the hitherto holding in *Chila and Anor v R*[88] that whereas corroboration is not a mandatory requirement, for sexual offences, if court in invited to convict on the basis of a single witness, it must warn itself of the inherent danger arising therefrom;[89] this rule, insofar as it is applicable only to sexual offences and against evidence from women, it is discriminatory;[90] and to that extent, just like it applies to all the other offences, evidence of one witness without

85 *Kayondo Robert v Uganda* Criminal Appeal No. 18 of 1996.
86 Tibatemwa-Ekirikubinza, L. (2005). Sexual assaults and offences against morality. Kampala. Fountain Publishers. p17.
87 2018 UGCA 83.
88 [1967] EA 722.
89 *Kibale Ishima v Uganda* Criminal appeal No.21 of 1998.
90 Article 1 of the UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW).

corroboration or even warning, if it is satisfactory, should be enough to sustain a conviction.[91] The learned Judge, pursuant to Art 132(d) of the Constitution[92] departed from the previous decisions, and dismissed the appeal accordingly.

Proof of penetration (or sexual intercourse generally) is done through the testimony of the victim, and other witnesses for example those who saw the act, the medical doctor who examined the victim.[93] Traditionally, a medical report was an absolute necessity in the prosecution, in addition to the testimony of the victim. But with time, courts have dispensed with the requirement for a medical report.

In *Oyeki Charles v Uganda*,[94] court held that whereas medical evidence is certainly the best evidence to prove sexual intercourse, it is by no means the only one; other cogent evidence could also do. In *Katumba James v Uganda*,[95] wherein court held that where the evidence of the witnesses is, in the opinion of court, cogent enough, a conviction can be sustained. In that case, another witness had found the appellant's penis still in the victim's vagina; and that was the only available cogent evidence, it was admitted to effectively lead to a conviction.

Proof of consent is, as a general rule, proved by testimony of the victim,[96] evidence of struggle[97] and state of the victim at the time of reporting the assault. Courts have, however, adopted other ways of proof of lack of consent based on the circumstances of the case inter alia alarm by the victim. In *Uganda v James Katumba*,[98] court relying on the alarm made by the victim –

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91 This was following the earlier persuasive holding in *Uganda v Peter Matovu* Criminal Case No. 146/2001 where Lugayizi, J held that the cautionary rule regarding the unreliability of evidence by/from women in sexual offences, as propounded in *Chila*, had no empirical basis and should be discarded. This would later be applied in *Basoga Patrick v Uganda* Criminal Appeal No. 42 of 2002; *Mukungu v R* (2003) 2 EA.

92 The Constitution of the Republic of Uganda, 1995 as amended.

93 Ibid.

94 Criminal Appeal No. 126 of 1999.

95 Ibid (n 66).

96 Ibid (n 86).

97 *Kyamusungu Ivan v Uganda* Criminal Appeal No. 67 of 1998; *Uganda v Makooba* Criminal session No. 55 of 1999.

98 Criminal Session Case No. 266 of 2014.

that was noticed even by the police who responded on the scene –held that there was proof of lack of consent.

Proof of identification of the accused can be done by testimony of the victim, conduct of the accused (before, during and after the assault), medical evidence and other witnesses,[99] circumstances favouring correct identification (victim's knowledge of accused, time of the offence, distance between accused and witnesses, length of time of observation).[100] Courts admit evidence of these events to fit all the circumstances because of the ways in which the assault is committed.

Whereas there is no need for having many witnesses,[101] and there is need corroboration of all witness evidence (as a rule of prudent judicial practice);[102] where the victim's evidence is so cogent, after careful evaluation of all the circumstances, court can convict the accused.[103] In *Katima John v Uganda*,[104] the accused (who was well known to, and 'detained' the victim for the whole night) was found guilty of the proved assault. The requirement is that the court must warn itself, and the assessors, of the danger of convicting without corroboration.[105]

Even then, most sexual offences being capital in nature (due the procedure for trial and the case backlog that Ugandan Judiciary is currently facing) for example rape, take more than one year to conclude except in cases that attract public outrage and advocacy,[106] and the outcome is uncertain.[107] It is

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99 Uganda Police Force. Police Public Forms. Police Form 24 , available at <https://upf.go.ug/police-public-forms/> [Accessed on 04 June 2024]

100 Kyamusungu (supra). See also *Uganda v GW Ssimbwa* Criminal appeal No. 37 of 1995; *Abdalla bin Wendo v R* [1953] EACA 20; *Uganda v Godfrey Agudi* Criminal Session No. 02 of 1997; *Ochit Lagol v Uganda,* Criminal Appeal No 21 of 1997; *Ntambi Francis v Uganda* Criminal Appeal No. 19 of 1998.

101 Evidence Act, Cap 8 Laws of Uganda. s.133.

102 *Chila & Anor v R* [1967] EA 722. See also *Remegious Kiwanuka v Uganda* Criminal Appeal No 41 of 1994; *Mugoya Wilson v Uganda* Criminal Appeal No 8 of 1999; *Kibale Ishima v Uganda* Criminal Appeal No 21 of 1998.

103 *Ndawula John v Uganda* Criminal Appeal No. 91 of 1999.

104 Criminal Appeal No 23 of 1999.

105 *Telesfora Alex & Anor v R* [1963] EA 141; *Katumba James v Uganda* Criminal Appeal No 45 of 1999.

106 Ibid (n 4).

107 Ibid (n4) 139.

this situation that has been seen to contribute to what is seen as less-than-justice even in the post-trial processes.

4.2.3 POST-TRIAL

After the conviction, the convict is sentenced to the prescribed punishment set out in the law under which he is convicted and the related guidelines.[108] For most sexual offences, the sentence is life imprisonment although this has been seen to be varying, with the current position being a highest sentence of 25 years for aggravated defilement.[109] Ugandan jurisprudence on sentencing is such that there is no mandatory sentence after *Attorney General v Susan Kigula & 417 Ors,*[110] and subject to the penalty provisions of the relevant Penal laws, the sentence imposed upon conviction is to the discretion of the trial judicial officer.[111]

On the one hand, this has an effect of creating an impression in the life of the victim that the sentence is too light to atone for the usually life-long psychological, emotional and sometimes biological pain inflicted on the victim.[112] This has the ripple effect of creating apathy in the victims thereafter: that in fact there is no need to report a sexual offence to the formal justice system and go through the full length of the trial because it does not yield what they define as justice.

On the other hand, the convict feels that a heavy sentence does not meet one of the cardinal objectives of criminal law –rehabilitation. As seen during sentencing, one of the mitigation factors is that the accused is a first-time offender, has a family, etc which all point to the fact that (s)he has an opportunity to reform. The need to balance aggravating and mitigating factors

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108 Penal Code, Trial on Indictments Act, The Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Direction, Legal Notice No. 8 of 2013. The background to the sentencing guidelines is captured in the report: Hon Rtd Justice Lameck Mukasa, Introduction to the Uganda Sentencing Guidelines, Its Use and Effectiveness,<https://judiciary.oo.ug/files/> [Accessed on 04 June 2024]

109 *Tiboruhanga Emmanuel v Uganda* CACA No. 655 of 2O14.

110 [2009] UGSC 6.

111 Ibid (n 108).

112 *Tiboruhanga Emmanuel v Uganda* CACA No. 655 of 2O14; *Matovu Yusuf v Uganda* [2022] UGCA 252.

during sentencing is canvassed in *State v Makwangave*,[113] where court emphasised that while sentencing, particular regard must be given to the special circumstances of a case on its own merits, and the sentencing power must be exercised judiciously.[114]

Therefore, courts have an uphill task to balance what justice means to the victim (and his family), and what it means to the perpetrator on the other. In *Biryomumaisho Alex v Uganda*,[115] the Court of Appeal held:

> *"We must note that interfering with the sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial judge flouted any of the principles of sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been trying the appellant."*

5.0 LEGAL FRAMEWORK IN COMPARATIVE COMMON LAW JURISDICTIONS

The assessment of whether an amendment in the law in Uganda requires a review of how the situation plays out in other like jurisdictions with somewhat similar characteristics –where there has either been amendment to the law on sexual offences or enactment of specific new legislation altogether. For this purpose, the author chose Kenya, South Africa and Tanzania, and below, briefly highlights the process of enactment of the law, the successes and/or failures so far. The summation of what is captured informs what the author has captured in the recommendations.

113 1995 (3) SA 391; *Kyalimpa Edward v Uganda* Supreme Court Criminal Appeal No. 10 of 1995.
114 *African Continents Bank v Nuamani* [1991] NWLI 486.
115 CACA No. 464 of 2O16.

5.1 KENYA

In Kenya, sexual offences are governed under The Sexual Offences Act,[116] subject to the Constitution of the Republic of Kenya. The primary objective of the Act, as captured in the long title, is to:

> make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.

It provides, in broad terms, for the offences as had been codified in the Penal code[117] but goes ahead to include provisions on evidence gathering and admissibility of evidence, jurisdiction of the courts, guide on the investigation by the police, consent, the interface between culture, religion and sexual offences, specific sexual offences related to children among others.[118] It should be noted that the Act was enacted hot on the heels of the high and escalating number of defilement cases which, it was deemed, were not appropriately managed under the Penal Code.[119]

Indeed, most of the decided cases relating to sexual offences have been relating to those involving minors. It received a lot of backlash from a wider section of the public especially opposition political parties but finally sailed through the process.[120] The Act has lived to its billing by providing the necessary framework and definitions of the offences, the victims, and the prescription of the sentences. Because of the time the country has spent after the enactment, jurisprudence has developed especially regarding the

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116 Act No. 3 of 2006, Laws of Kenya, as amended available at <http://www.kenyalaw.org/> [Accessed 06th June 2024]

117 Cap 63, Laws of Kenya.

118 Act No. 3 of 2006. ss 33-37; 41; 37; 42; 29; 7, 12-16.

119 Njoki Ndung'u, "Preventing and responding to violence against women and girls: From legislation to effective law enforcement: The Kenyan experience," (Regional Seminar for Asian Parliaments, Organised by The Inter Parliamentary Union (IPU) and the Parliament of India, New Delhi, 15-17 September 2011) <http://archive.ipu.org/> [Accessed 30 May 2024]

120 Association for Women's Rights in Development. (2007). Legislating against sexual violence in Kenya: An interview with the Hon. Njoki Ndung'u. Reproductive health matters, 15(29), 149-154.

sentencing of convicts,[121] refining of the definition and what constitutes sexual offences, among others.[122]

It has, however, almost in equal measure, been criticised as being intended to punish the perpetrator without paying attention to the reparation for the victim,[123] discrimination against the male gender,[124] not highlighting the need for policy and regulation for its implementation, not highlighting emerging offences such as marital rape which are currently on the rise, the requirement for corroboration in evidence. On the whole, however, it has been credited as progressive the other challenges notwithstanding.[125]

5.2 SOUTH AFRICA

In South Africa, unlike most of the other commonwealth jurisdictions, there was no codification of criminal law for the whole country. [126] However, the law against sexual offences was codified in The Sexual Offences Act,[127] which

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121 Kenya runs the federal system of justice administration with High Courts and Courts of Appeal at county level. The Act, under different sections, provides for mandatory minimum sentences for convicts thereunder, as opposed to the Penal Code which was creating maximum sentences, as discussed in *Maingi & 5 others v Director of Public Prosecutions & Anor* [2022] KEHC 13118 (KLR). This has been criticised for eroding the discretionary power of the courts as enshrined in the Judicature Act, and the decision in *R v Joshua Gichuki Mwangi,* wherein the AG sought to reverse the harsh sentence handed down by the court.

122 Kiarie, K. W. (2007). The Sexual Offences Act: Omissions and Ambiguities. Kenya Law Reports. Consent in relation to age was canvassed in *Bonu v R 2010 eKLR*; *Masha v R 2010 eKLR*; and *Ezekiel Cheruiyot Koros v R High Court of Kenya at Kericho, Criminal Appeal No. 5 of 2010*; where courts have held that even where customs would see it as permissible to have sexual intercourse with one below the age of eighteen, there is no consent since at that age, the victim would not have the capacity to form a sensible opinion.

123 Okumba Miruka December 27, 2023. Loopholes in Kenya's Sexual Offences Act leave room for abuse <https://nation.africa/kenya/news/> [Accessed 28 May 2024]. Okumbi emphasises the sections that create a challenge where an offence has different punishments in different statutes, among other challenges with the Act.

124 John Muthuri. July 04, 2020. Sexual Offences Act shouldn't be applied selectively available at <https://nation.africa/kenya/> [Accessed on 28 May 2024]; B Mutanu "Sexual offences law discriminative to boys, CJ Maraga says" (17 May 2019) Daily Nation (Kenya) <https://www.businessdailyafrica.com/> [Accessed 10 June 2024]; K Muthoni "CJ Maraga calls for change of law criminalizing teen sex" (17 May 2019) Standard Digital (Kenya) <https://www.standardmedia.co.ke/> [Accessed 25 May 2024]

125 Amboko, A. W. (2018). Combating Sexual Offences in Kenya: An Appraisal of the Implementation of the Sexual Offences Act (Doctoral dissertation, University of Nairobi). 74-89.

126 (1997). South African Journal of Criminal Justice, 10(3), 303-309.

127 Act No. 23 of 1957, Laws of South Africa.

generally prohibited prostitution and other related attendant acts. It was also (in)famous for the promotion of apartheid insofar as it prohibited sexual relations between whites and people of other races.

It underwent amendments in 1965, 1985, and in 2007, a more comprehensive and progressive Act,[128] which reflected the ideals in the Constitution of the Republic of South Africa, 1996, was enacted. The main objective of the Act is to be found in the long title thereof, to:

> To comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute.

The Act was enacted with a victim-centric approach and intended to foster collaboration among government agencies in providing justice to victims of sexual offences,[129] with even more emphasis on protection of children rights,[130] establishment of a sexual offenders' national register,[131] among others. There have been further amendments to establish sexual offences courts,[132] and protection of child sexual offenders. Whereas sexual offences are still committed, the trend has been reducing over time, and this is, in large part, attributed to the enabling legislation.

5.3 TANZANIA

In Tanzania, sexual offences were tried under the Penal Code Act,[133] until recently when all sexual offences are now tried under the Sexual Offences

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128 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Available at <https://www.justice.gov.za/legislation/acts/2007-032.pdf> [Accessed 28 May 2024]

129 The Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ANNUAL REPORT 2015/2016 <https://www.justice.gov.za/legislation/acts/2007-032.pdf> [Accessed 28 May 2024]

130 *State v Aaron Mokoena* CC7/07; *State v Albert Phaswane* CC 192/07; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8.

131 The Criminal law (n 116) Chapter 6.

132 The Judicial Matters Second Amendment Act (Act No.43 of 2013).

133 The Penal Code, 1945 Cap 16, Laws of Tanzania. Chapter XV. <http://www.parliament.go.tz/polis/> [Accessed 29 May 2024]

Special Provisions Act.[134] Unlike Kenya, the Act was an amendment of the Penal Code whose main object was:

> To amend several written laws,[135] making special provisions in direct laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children.[136]

The intended beneficiaries as seen above and indeed reflected in the Law Reform Commission Report, were women and children –implying victims.[137] The enactment of the law came on the heels of escalating cases of defilement, and was highly credited for the harshness of the sentences for convicts thereunder.

5.4 ENGLAND

For completeness, though most of the constituent parts of the evolution of what would later turn out as the Sexual Offences Act have been discussed above (in the history and thereafter), it important to sum up the law in England relating to Sexual Offences as one that is progressive –not as viewed from lenses of an African reasonable man but one in England –and captures the aspirations of the British.

This goes to stress the fact that there is excessive need for Uganda to urgently consider, beyond the expediency(ies) that have characterised the previous efforts to have the Bills passed by Parliament, and enact a specific legislation in this particular regard.

6.0 UGANDA'S SEXUAL OFFENCES BILL(S)

As discussed above, our Penal code which codifies criminal law in Uganda was enacted in 1950. Since then, many of the crimes of sexual nature have

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134 Act No. 4 of 1998, Laws of Tanzania. Available at <http://parliament.go.tz/polis/> [Accessed 29 May 2024]

135 Including Children and Young Persons Act; Criminal Procedure Act, Evidence Act, Minimum Sentences Act.

136 Ibid.

137 Law Reform Commission Report, 2009 available at <https://www.lrct.go.tz/uploads/> [Accessed 29 May 2024]

since evolved, and yet it has only been mildly amended.[138] Ironically, the Penal Code of England, insofar as it relates to sexual offences, has changed gradually with the most notable change being the enactment of the Sexual Offences Act, 1970 which legalised homosexuality. In Uganda, the 1990 and 2007 amendments were not going to the core of the offences themselves but the type and nature of victims.[139]

The first effort to enact a law consolidating all laws on sexual offences was in 2000 when government introduced the Sexual Offences (Miscellaneous Amendment) Bill to amend various laws on sexual offences. This did not materialise up to 2012, when the Sexual Offences Bill, 2012 was introduced in Parliament through a private members bill. On both occasions, the government moved swiftly to take over the bills and they did not go far.

Sexual Offences Bill, 2015 was introduced through a Private Members Bill by Hon. Amoding Monica, with the object being:

> to consolidate laws relating to sexual offences; combat sexual violence; provide for the punishment of perpetrators of sexual offences; provide for procedural and evidential requirements during trial of sexual offences and for other related matters.[140]

The Bill gained a lot of publicity but was received with mixed feelings[141] especially on the provisions relating to marital rape among others. Consultations were made by the Legal and Parliamentary Affairs Committee of Parliament, debated in the plenary and passed, but the president declined to assent to it calling many of its sections redundant since they were already provided for in other laws, and also saying that the input from government

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138 Parliament of Uganda Report available at <https://bills.parliament.ug/attachments/> [Accessed 02 June 2024]

139 The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2015 (Act 5 of 2015). Arising from, and in response to, the decisions in *Teddy Bear Clinic for Abused Children v the Minister of Justice and Constitutional Development & Ors* [2013] ZACC 35 (also called the "Teddy Bear Case"); *J v The National Director of Public Prosecutions & Ors* [2014] ZACC 13

140 Parliament of Uganda, 2024 <https://www.parliament.go.ug/> [Accessed 27 May 2024]

141 Human Rights Awareness and Promotion Forum (HRAPF), 2016. Legal Analysis of the Sexual Offences Bill 2015 and its implications on LGBTI Persons, Sex Workers and Persons living with HIV/Aids <https://hrapf.org/> [Accessed 27 May 2024]

(through Ministry of Justice and Constitutional Affairs) had not been considered.[142]

By law, when the president does not consent to the passing of a Bill passed by parliament, and raises comments, they are addressed, and the bill is sent to the President the second time. If he does not sign, and returns the Bill again, still with comments, they are addressed and the day it is passed, it becomes law. If there are no comments and the president still declines to sign (which is also within his mandate), it is debated and passed, and it becomes law on the day it is passed.[143] It is not clear why Parliament has not proceeded to follow the laid-out process and pass the law. Whereas the reasons for this are not known, and are perhaps beyond the scope of this article, suffice to note that the Bill is not *sui generis*; there are many Bills that have suffered the same especially those introduced by Private Members of Parliament.

The fourth attempt at enacting the law was made in 2019, under the same title; by the same Member of Parliament.[144] This time it was debated in Parliament and passed in May 2021, and this was welcome with mixed feelings but largely viewed as a vindication of cultural, religious and civil society sentiments.[145] But the President, again, did not assent to it. Before the debate in the plenary session of Parliament (for 3rd Reading), the discussions about the bill indicate, for all intents and purposes, that it was actually construed as an amendment of the Penal code and not necessarily a new law.

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142 Parliament Watch, 2015. Museveni rejects new on sexual offences, available at, <https://parliamentwatch.ug/news/> [Accessed on 27 May 2024]

143 Parliament of Uganda, 2024. How a Bill Becomes a Law – Kampala, available at <https://www.parliament.go.ug/sites/> [Accessed 10 June 2024]

144 Parliament of Uganda, 2019, Sexual Offences Bill, 2019 <https://bills.parliament.ug/> [Accessed on 27 May 2024]; Jenipher Tuyiringire (2021) "Uganda's Missed Opportunities Following the Rejection of the Sexual Offences Bill" Volume 24 Issue 2, Makerere Law Journal pp 538-558.

145 Parliament of Uganda, 2024. Tough Penalties on Sexual Offenders <https://www.parliament.go.ug/news/> [Accessed on 27 May 2024]; Editorial, 2024. Amoding sexual offences bill mover speaks on gains and misses <https://www.monitor.co.ug/uganda/> [Accessed on 29 May 2024]; Report on Justification and Recommendations for the enactment of Sexual Offences Bill <https://www.akinamamawaafrika.org/> [Accessed on 10 June 2024]

It is not clear what the motivation to assent to the Anti-Homosexuality Act, 2023 (which related to only a smaller part of the Sexual Offences Bill, 2015) was. While it is said that some human rights defenders advised the President that he should not sign the Bill,[146] it is not clear whether that was the basis. Additionally, a cursory reading of the report shows that in fact, the bill reviewed all the provisions by then and proposed additions.

There are recent prospects of reintroducing the Bill in Parliament of Uganda, to answer to address the evolving nature of sex crimes and the increase in cases of sexual violence. From the deliberations, it appears the motivations were only real in part –only to guide the effective prevention, protection [of victims], and prosecution of these offences.[147]

However, in light of what has been evolving jurisprudence about the required consultation for the passing of a bill,[148] more so one that touches on human rights; given that a huge number of potential stakeholders were not consulted, it is not clear whether the bill would not be found wanting, and in fact challengeable in courts. The offshoot therefrom has itself met resistance from parts of the public and is currently subject of determination in the Supreme Court.[149]

7.0 RECOMMENDATIONS

A comprehensive law on all sexual offences captured in Chapter XIV of the Penal Code should be enacted reflecting the times, the nature of the offence, how they are committed, etc. The feeble relationship between customary law

146 Uganda: Reject Sexual Offenses Bill. "Uganda: Reject Sexual Offenses Bill". Human Rights Watch. 6 May 2021. See also: https://www.pgaction.org/news/> [Accessed 30 May 2024]

147 Oluka Stephen, 'MP Adeke to reintroduce the Sexual Offences Bill' (The Daily Monitor, 24 May 2023) <https://www.monitor.co.ug/> [Accessed 27 May 2024]

148 In the absence of legislation to guide the modus operandi on how consultation should be done, it should be proved to the standard of the satisfaction of court in *Male Mabirizi & Ors v Attorney General* [2018] UGCC 4; *Hon. Fox Odoi & 21 Ors v Attorney General & 3 Ors* [2024] UGCC 10.

149 Jonathan Kamoga, 'Petitioners to appeal anti-gay law passed by Ugandan Court' (The East African, 06 April 2024) <https://www.theeastafrican.co.ke/> [Accessed 02 June 2024]

and criminal law[150] makes the prosecution of the offences tedious, especially given customs that sometimes constrain witnesses from giving evidence. This law should address the inadequacies recorded both in courts, the investigating machinery and a broad consultation with the population in order to capture the views of a wide spectrum of those who would be impacted by the new changes.

It can be deduced that a lot of discretion is given to the courts in determining especially the evidence to be taken. This has the effect of leading different courts to arrive at different (and sometimes incoherent) decisions. There is need for codification as is the case in the Sexual Offences Act of Kenya. This would also deal with the emerging trends inter alia marital rape. Increased partnership with Women's empowerment and sensitization initiatives on participation, rights, autonomy among others would bolster this move. It is, however, recommended that a baseline survey should be done first in order to create control data on the basis of which the success of subsequent interventions can be measured.

In general, as Uganda inches closer to the enactment of a Sexual Offences Act (or by whatever called), there is absolute need to assess the reasons why the Bill that was even passed by Parliament did not become law. The forces that caused the miscarriage of the process seem to still subsist. Unless and until they are addressed by a concerted effort from many players, there seems to be no breakthrough in sight.

In the interest of the East African Community, most states have enacted a particular Act for trying sexual offences and yet Uganda still prosecutes sexual offences under the Penal code as the main legislation. This is not at per with the guiding objectives of the Treaty establishing it. For a community that seeks to unite, offences that are most committed should be harmonised. The law on Customs, for example, in the East African countries is the same, and all offences related to customs are prosecuted under the East African

150 Objectives XIV, XXIV of the National Objectives and Directive Principles of State Policy in the Constitution of the Republic of Uganda 1995 as amended; Judicature Act, s.15.

Customs Management Act.[151] Even the effort to pass the East African Community Sexual and Reproductive Health Bill, 2021[152] which has several provisions protecting the dignity of women and children, have been futile. Owing to the general difficulty in passing legislation at a regional level,[153] it is important to consider legislating for Uganda as a country.

There is also need to conduct sufficient consultation with all the relevant actors and benchmark with countries in the commonwealth especially to avoid the pitfalls that those particular countries have had to endure during the implementation of the law, and wider administration of justice as a whole. This consultation would produce a robust guiding framework not just on what should be included in the law but also the guiding policy framework that would then inform budgetary allocations, resourcing of the institutional and other frameworks required to deal with not just the offences but the causation factors leading to, perpetuating, and in some cases, exacerbating the commission of sexual offences. It is the author's strong recommendation that this consultation would form also give rise to a robust awareness framework within sensitisation, monitoring, evaluation and control of the socio-economic context can be done.

From the jurisdictions discussed above, it is quite clear that the law on sexual offences have since been consolidated into one [central] legislation. The precipitating factors for this approach are not very different from those that have obtained (and, in many respects, continue to obtain) in Uganda, and therefore, owing to the resulting benefits, it can be deduced that the time for enacting a legislation governing the prosecution of sexual offences in Uganda is now.

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151 Available at <https://www.eac.int/documents/category/eac-customs-management-act [Accessed 04 June 2024]

152 Available at <https://www.eala.org/uploads/> [Accessed 05 June 2024]

153 Editorial, 'Why sexual and reproductive law for East African countries is being resisted' (The Conversation Newsletter, 19 July 2022) <https://theconversation.com/> [Accessed on 10 June 2024]

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COURT ORDERED INTERIM MEASURES IN FOREIGN-SEATED ARBITRATION

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COURT ORDERED INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

Vianney Sebayiga*

Abstract

The jurisdiction of Kenyan courts in granting interim measures in foreign-seated arbitrations remains a subject of judicial divergence. In Skoda Export Limited v Tamoil East Africa Limited, the High Court held that it lacked jurisdiction. However, in CMC Holdings Limited & CMC Motors Group Limited v Jaguar Land Rover Exports Limited and Isolux Ingeniera S A v Kenya Electricity Transmission Company Limited & 5 others, the courts held that the High Court has concurrent jurisdiction with the courts at the seat in granting interim measures in support of foreign-seated arbitrations. This paper examines this controversial issue, arguing that while courts at the seat have primary jurisdiction, their jurisdiction is not exclusive; other national courts also have concurrent jurisdiction to grant interim measures. It proposes criteria for courts to consider when determining whether to exercise jurisdiction in granting interim measures for foreign-seated arbitrations.

1.0 INTRODUCTION

Consent is the cornerstone of arbitration and embodies the autonomy of parties to choose how their disputes will be resolved.[1] It also enables parties to choose their preferred seat of arbitration directly or indirectly.[2] Parties may indirectly choose the seat when their arbitration agreement does not specify a legal place but adopts institutional rules that include a default provision

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1 Dana Renée Bucy. 'How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law' (2010) *American University International Law Review* 579,583. [Renee Bucy].

2 Peace Omotayo Adeleye, 'The Delimitation of Party Autonomy in National and International arbitration' (2019) 10 The *Gravitas Review of Business & Property Law*,76.

designating the seat. For instance, under Article 16.2 of the London Court of International Arbitration (LCIA) Rules, London (England) is the default seat of arbitration unless parties agree otherwise.

Under Rule 18(2) of the Nairobi Centre for International Arbitration Rules, the default seat is Nairobi, Kenya while Article 14.1 of the Hong Kong International Arbitration Centre (HKIAC) Arbitration Rule provides that failing agreement of the parties, the seat of arbitration shall be Hong Kong.

A seat of arbitration is the juridical home and legal place of arbitration.[3] It is distinguishable from a venue, which is the geographical location where arbitral hearings are conducted.[4]

The selection of a particular seat has significant implications.[5] To begin with, the law of the seat can directly or indirectly govern a number of issues, including (a) the national arbitration legislation applicable to the arbitration, (b) the procedural law governing the arbitration and (c) the law presumptively applicable to the substantive validity of the arbitration agreement.[6] Second, the law of the seat determines the interaction between arbitral tribunals and courts, including arbitrator appointment and removal.[7]

Additionally, the law of the seat nationalises an arbitral award, which means that an arbitral award can only be vacated or set aside by the courts of the seat of arbitration.[8] Third, and most relevant to this paper, the law of the seat empowers courts at the seat with supervisory jurisdiction over arbitral proceedings, including power to order interim measures.[9]

While party autonomy and consent are paramount in international arbitration, the absence of interim measures would make international

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3 Gary Born, *International Commercial Arbitration*, (3rd edn Wolters Kluwer, AH Alphen aan den Rijn 2021) 3208.

4 Ibid.

5 Ibid.

6 Ibid.

7 Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 *International and Comparative Law Quarterly* 517, 518.

8 *C v D* [2007] EWCA Civ 1282, para 17.

9 Colman J in *A v B* [2007] 1 Lloyds Rep 237 and *A v B* (No. 2) [2007] 1 Lloyds Rep 358, para 111.

arbitration and the resultant arbitral award futile.[10] An award creditor cannot enjoy the fruits of an arbitral award if the subject matter or assets are no longer existent or have been dissipated by the award debtor.[11] In this regard, interim measures enhance party autonomy, the agreement to arbitrate, and enable parties to get a final and binding determination of their dispute.[12]

By definition, an interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of an arbitral award, the arbitral tribunal or the court orders a party to: (a) maintain or restore the *status quo* pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.[13]

Interim measures are broadly divided into two categories: those aimed at avoiding prejudice, loss or damage, and those which are intended to facilitate later enforcement of the award.[14] Regarding the first category, such interim measures aim to avoid or minimize loss or damage of property and subject matter, for example, by preserving a certain state of affairs until a dispute is resolved through rendering of a final award and avoiding prejudice, for instance, through preserving confidentiality, orders of sale of perishable goods, appointment of an administrator to manage income-producing assets, and inspection orders, among others.[15]

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10 Peter Sherwin and Douglas Rennie, Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis (2020) 20 *The American Review of International Arbitration* 317, 317.

11 Ibid 320.

12 Marianne Roth, 'Interim Measures' (2012) *Journal of Dispute Resolution* 425, 426.

13 United Nations General Assembly (UNGA) Res 40/72 (Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law) (11 December 1985). (UNCITRAL Model Law) Article 17(2).

14 UNCITRAL Working Group II, *Settlement of Commercial Disputes*, Preparation of Uniform Provisions on Interim Measures of Protection, Note by the Secretariat, para 16, delivered to the General Assembly, U.N. Doc. A/CN.9/WG.II/WP.119 (30 Jan 2002) [hereinafter Settlement of Commercial Disputes].

15 Ibid para 17. Other orders that can be awarded under this category, include orders that the goods that are the subject matter of the dispute are to remain in a party's possession

The second category deals with enforcement facilitation measures and ensure that actions taken by an adverse party during the arbitration proceedings to avoid enforcement do not render the arbitral tribunal's final award meaningless.[16] These measures include freezing orders, security for the amount in dispute, and security for costs.[17]

As explained by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Betty Construction Ltd*, the purpose of interim measures of protection is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the arbitral award which finally determines the substance of the dispute.[18] Accordingly, interim measures are critical to the efficacy of any arbitration process because they compel parties to conduct themselves in a manner that is conducive to the success of arbitral proceedings thereby preserving the parties' rights, combating self-help, maintaining peace among the parties, and ensuring that the eventual final award can be implemented.[19]

Interim measures can be granted by arbitral tribunals (including emergency arbitrators as permitted by some international arbitration rules) and national courts.[20] Parties often choose international arbitration in order to avoid litigating their dispute before national courts and to centralise the resolution of all disputes in a single neutral forum.[21] This justifies why arbitrators are generally vested with broad powers to order interim reliefs.[22]

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but be preserved, and orders that the respondents hand over property to the claimant on condition that the claimant post security for the value of the property and that the respondent may execute upon the security if the claim proves to be unfounded.

16 Ibid para 18.

17 Ibid.

18 [1993] AC 334,365.

19 Stephen Benz, 'Strengthening Interim Measures In International Arbitration' (2018) 50 *Georgetown Journal of International Law* 143,145.

20 Ibid (n 12) 435. See for instance Article 28(1) of the ICC Rules 2021, Article 25(1) of the LCIA Rules 2020, Rule 27(1) of the NCIA (Arbitration) Rules 2015, and Rule 45(1) of the Singapore International Arbitration Centre (SIAC) Rules 2025. These institutional rules permit arbitral tribunals to grant interim measures.

21 Ibid (n 3) 3989.

22 Ibid.

Further, applying to arbitral tribunals for interim measures preserves confidentiality of sensitive information parties may want to keep private.[23] While that may be the preferred approach, there are instances in which requesting interim measures from national courts is necessary (*hereinafter "court ordered interim measures"*). This can arise where the arbitral tribunal has not yet been constituted.[24] Even when the arbitral tribunal is formed, it may not be able to act effectively.[25] Besides, an arbitral tribunal lacks coercive powers and cannot compel the attendance of witnesses or compel the production of documents.[26] Moreover, an arbitral tribunal is neither empowered to order interim measures against third parties nor to directly enforce the interim measures.[27] Lastly, a party may apply to court where there is a strong possibility that a counterparty will not voluntarily execute the arbitral tribunal's order.[28]

Whereas parties can approach national courts for court-ordered interim measures, complexities arise when an application for interim measures is made in national courts in aid of arbitrations with foreign seats (*hereinafter "foreign-seated arbitrations"*). Courts grapple with the question of which are the proper courts for entertaining and determining the application for interim measures and where the application should be filed. In Kenya, it is unclear whether the High Court has jurisdiction to grant interim measures in foreign-seated arbitrations.

On the one hand, the High Court in the case of *Skoda Export Limited v Tamoil East Africa Limited* held that the High Court lacks jurisdiction to grant interim measures in foreign-seated arbitrations.[29] Conversely, the courts in *CMC Holdings Limited & CMC Motors Group Limited v Jaguar Land Rover Exports*

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23 Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press,2008)105.

24 Sadra Mahabadi, The Need for the Harmonisation of Provisional Measures in International Commercial Arbitration in the European Union (PhD Thesis, University of Manchester 2015)11.

25 Ibid.

26 Ibid.

27 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 424. [Redfern and Hunter].

28 Ibid.

29 [2008]eKLR.

Limited[30], and *Isolux Ingeniera S A v Kenya Electricity Transmission Company Limited & 5 others*[31] held that the High Court has concurrent jurisdiction with the courts at the seat in granting interim measures.

This paper analyses whether Kenyan courts have jurisdiction to grant interim measures in aid of foreign-seated arbitrations. It is divided into six parts. Part I is this introduction on foreign-seated arbitrations and the significance of interim measures in international arbitration. Part II examines the international and domestic legal framework governing court-ordered interim measures in Kenya. In Part III, the paper contextualises and extensively examines the conflicting decisions among Kenyan courts in granting interim measures in aid of foreign-seated arbitrations. Part IV discusses the jurisdiction of English courts in granting interim measures in support of foreign-seated arbitrations. It highlights the factors considered by English courts before assuming jurisdiction to grant interim measures in foreign-seated arbitrations. In Part V, the paper proposes factors that should be considered by Kenyan courts in granting interim measures in support of foreign-seated arbitrations. Part VI concludes the paper.

2.0 LEGAL FRAMEWORK GOVERNING THE JURISDICTION OF KENYAN COURTS IN GRANTING INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

2.1 THE UNITED NATIONS COMMISSION ON TRADE LAW (UNCITRAL) MODEL LAW AND COURT ORDERED INTERIM MEASURES

The Model Law was adopted by the UNCITRAL on 21 June 1985 and was developed to address disparities in national laws on arbitration.[32] It seeks to create uniformity of the law of arbitral procedures and address the specific needs of international commercial arbitration practice.[33]

30 [2013]eKLR.
31 [2018]eKLR.
32 UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration*,2012,1. [UNCITRAL Digest].
33 UNCITRAL Model Law.

Kenya adopted the UNCITRAL Model Law and incorporated it into its 1995 Arbitration Act, as amended in 2009 (the "*Kenyan Arbitration Act*").[34] The Kenyan Arbitration Act contains numerous provisions that are *pari materia* with those of the UNCITRAL Model Law.[35] While commenting on the influence of the UNCITRAL Model Law on the Kenyan Arbitration Act, the Supreme Court in *Synergy Industrial Credit Limited v Cape Holdings Limited* observed that Kenya, by adopting the Model Law, incorporated international arbitration principles into its legal system, including expedition, party autonomy, procedural flexibility, finality, and the enhanced recognition and enforceability of arbitral awards, along with other best practices.[36] The apex court emphasized that the interpretation of the Kenyan Arbitration Act must always align with these objectives.[37]

Article 9 of the UNCITRAL Model Law provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.[38] This provision, which is addressed to state courts, emphasises the compatibility of an arbitration agreement and any interim measures that may be granted by any court, regardless of the seat of the arbitration.[39] Thus, under the UNCITRAL Model Law, a request for interim measures filed to a court in any state may not be interpreted as a waiver of or an objection to the existence or enforceability of the arbitration agreement.[40]

While Article 9 of the UNCITRAL Model Law has been incorrectly interpreted as a justification for national courts to assume jurisdiction to grant interim measures, it only addresses the effect of an arbitration agreement by stating that it is not incompatible with such an agreement for a party to request or a court to grant an interim measure of protection.[41] It does not confer on courts

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34 Francis Kariuki and Vianney Sebayiga, 'Arbitrability of Fraud in Kenya' (2022) 2 *Nairobi Centre of International Arbitration (NCIA) ADR Journal* 11,13.
35 Ibid.
36 [2019] KESC 12 (KLR).
37 Ibid.
38 UNCITRAL Model Law, Art 9.
39 UNCITRAL Digest (n 32) 52.
40 Ibid.
41 Ibid.

the powers to issue interim measures of protection in support of international arbitration.[42] This interpretation is evident in the working papers of the UNCITRAL Model Law Working Group.

In its report on the work of its eighteenth session, the Working Group observed that Article 9 merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by that court was compatible with the fact that the parties had agreed to settle their disputes by arbitration.[43] It does not regulate whether and to what extent court measures were available under a given legal system. Instead, it merely expressed the principle that any request for, and the granting of, such interim measure, if available in a legal system, was not incompatible with the fact that the parties had agreed to settle their dispute through arbitration.[44]

The underlying justification for Article 9 of the UNCITRAL Model Law is that interim measures are sometimes required from courts to ensure the arbitral tribunal's ability to dispose of the merits of the case fully and effectively.[45] This is because arbitral tribunals are sometimes unable to adequately respond effectively to a party's request for interim measures of protection.[46] Examples include cases where an interim measure is needed prior to the constitution of the arbitral tribunal, or where an interim measure needs to be ordered against a third party over which the arbitral tribunal has no authority.[47]

Notably, unlike the UNCITRAL Model Law, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Convention has no

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42 Ibid. See also the Singaporean Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] SGCA 42 where the court observed that Article 9 of the UNCITRAL Model Law was not intended to confer jurisdiction but to declare the compatibility between resolving a dispute through arbitration and at the same time seeking assistance from the court for interim protection orders.

43 *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session' UN Doc A/40/17*, (3 June to 21 June 1985) para 96, reprinted in [1985] Yearbook of UNCITRAL, vol XVI.

44 Ibid para 169.

45 UNCITRAL Digest (n 32) 53.

46 Ibid.

47 Ibid.

express provisions regarding conservatory, provisional, or interim measures granted by an arbitral tribunal or a court in support of arbitration.[48] As a result, their availability and procedure depend on the law of the court before which the measure is sought.[49]

2.2 THE KENYAN ARBITRATION ACT AND COURT ORDERED INTERIM MEASURES

Similar to the UNCITRAL Model Law, the Kenyan Arbitration Act provides that it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.[50] The statute gives the High Court wide powers to grant interim orders to maintain the *status quo* of the subject matter pending the determination of the dispute through arbitration.[51] Where a party applies to the High Court for an interim measure and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court is required to treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.[52]

The Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* laid down the factors which courts must consider before issuing interim measures of protection.[53] These are (i) the existence of an arbitration agreement; (ii) whether the subject matter of arbitration is under threat; (iii) in the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application; and (iv) for what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's

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48 Albert Jan van den Berg, 'The New York Convention of 1958: An Overview' <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf> [Accessed on 6 July 2024],12.

49 Ibid (n 3) 3974.

50 The Arbitration Act (CAP 49) Article 7(1).

51 Muigua Kariuki , *Settling Disputes Through Arbitration in Kenya*, (Glenwood Publishers Limited, Nairobi 2017) 172.

52 Arbitration Act, Article 7(2).

53 [2010] eKLR.

decision making power as intended by the parties?[54] In addition to the above factors, the court in *Futureway Limited v National Oil Corporation of Kenya* added that (i) the grant of an interim measure of protection is discretionary; (ii) the court should consider the urgency with which the applicant has moved to court; and (iii) whether there is the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection.[55]

A party seeking interim measures is required to approach the High Court as provided under the Kenyan Arbitration Rules by filing an application through summons in the suit.[56] This means that the application must be anchored on plaint. The Court of Appeal has held that the failure to adhere to the above mandatory procedure makes the application fatally and incurably defective.[57]

3.0 KENYAN COURTS AND INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

In this section, the paper contextualises the inconsistency among Kenyan courts by examining the cases where they have grappled with whether the High Court has jurisdiction to grant interim measures in support of foreign-seated arbitration.

3.1 SKODA EXPORT LIMITED V TAMOIL EAST AFRICA LIMITED [2008] EKLR (THE SKODA CASE)

3.1.1 FACTS AND BACKGROUND

The dispute was between Skoda Export Limited (Skoda), the Plaintiff, a company wholly owned by the Government of the Czech Republic, and Tamoil East Africa Limited ("Tamoil"), the Defendant, a limited liability company incorporated in the Republic of Uganda but having its place of business in Kenya.[58] In 2005, the Government of Kenya and Uganda through their joint co-ordinating committee (JCM) invited bidders to submit proposals for the development of the Kenya-Uganda oil product pipeline extension (the

54 Ibid.
55 [2017] eKLR para 35.
56 Rule 2 of the Kenyan Arbitration Rules 1997.
57 *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR
58 *Skoda Export Limited v Tamoil East Africa Limited* [2008] eKLR,1. [Skoda Case]

"Project") through a request for proposals (RFP).[59] The JCM had pre-qualified 12 firms including the Plaintiff and was invited by Tamoil to partner with it and a contract consultant, *Penspen Limited,* to form a consortium and submit a proposal to the RFP for the Project.[60]

The incentive for Skoda's partnership with Tamoil was based on a binding memorandum of understanding dated 29 October 2005, wherein Tamoil acknowledged that Skoda would be the engineering procurement and construction (EPC) contractor for the project in the event that the Defendant, which was the lead firm in the consortium won the tender.[61] By a letter dated 21 July 2006, JCM informed the Defendant that the proposal by Tamoil Group/Skoda Export and Penspen was most advantageous and invited the consortium to negotiations on the contract after the award of the tender.[62]

The parties among others had signed a comprehensive and substantive agreements between themselves in case a dispute arose concerning their relationship and, in the management, and operation of the project.[63] One of the agreements included an arbitration agreement dated 22 March 2007. Clauses 12 and 13 provided as follows:

Clause 12

> *"All and any dispute arising from and in relation to this contract that cannot be resolved by amicable agreement between the parties: (a)* ***shall finally be settled under the Rules of arbitration of the International Chamber of Commerce (ICC) Paris****; (b) the dispute shall be settled by one or more arbitrators appointed in accordance with these Rules;(c) the arbitration shall be conducted in the English language; and (d)* ***the place of arbitration shall be London, England****".*[64] *(emphasis added).*

Clause 13

> *"All relations between the parties under this contract and the legal consequences thereof, including the validity of this contract and the consequences of invalidity of this contract are* ***governed by and***

59 Ibid.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid 2.
64 Ibid 6.

construed in accordance with Laws of England and Wales".[65] *(emphasis added).*

The Plaintiff contended that pursuant to the arbitration agreement above, it had declared a dispute between the parties as a result of the Defendant's actions and had given notice to the Defendant, of its intention to commence arbitration proceedings.[66] In its application dated 13 December 2007, Skoda sought among other prayers (1) an injunction restraining the Defendant from inviting and or receiving any bids for the tender for the award of the EPC contract, pending the hearing and determination of the application and the reference to arbitration; and (2) pending the hearing and determination of the application and the reference to arbitration, the Defendant be restrained from breaching the agreements between the parties, and entering into an EPC contract with any other party other than the Plaintiff for the project.[67]

At the *interparties* hearing, the Defendant filed and served a Notice of Preliminary Objection stating that the court had no jurisdiction to entertain and determine either the suit or the application on grounds that (1) the Kenyan Arbitration Act had no application to the contract dated 22 March 2007; (2) The contract alleged to have been breached was made in Prague in the Czech Republic; (3) The Plaintiff was a Czech company while the Defendant was a Ugandan company; (4) The proper law of the contract was the Law of England and Wales and that the seat of the proposed arbitration was London, England; and (5) The curial law of the proposed arbitration proceedings was English law.[68]

3.1.2 ARGUMENTS BY THE PARTIES

The Defendant argued that the contract had no connection with Kenya and that since the parties had chosen the laws of England and Wales to apply to the contract, they had excluded the application of the Kenyan Arbitration Act.[69] Further, the Defendant cautioned that should the court assume

65 Ibid.
66 Ibid 2.
67 Ibid.
68 Ibid 3.
69 Ibid.

jurisdiction, entertain the application, and grant the prayers in the application, how was it going to supervise the proceedings, which would be conducted outside its jurisdiction.[70]

In response, the Plaintiff argued that since the parties were dealing with a contract for carrying out works in Kenya and Uganda, the performance of the contract was to take place in Kenya.[71] As a result, the subject matter of the dispute was being performed in Kenya.[72]

In addition, the Plaintiff submitted that the court has supervisory jurisdiction to supervise the acts and conducts of the parties as it pertains to any contractual dispute.[73] In further support of its submission, the Plaintiff contended that it was permitted by Article 23(2) of the ICC Rules to apply before a municipal court to obtain an interim measure of protection pending arbitration.[74] In its view, the laws applicable to arbitration agreements do not take away the jurisdiction of the High Court to grant interim measures and that if the parties had intended to take away the powers of the court then, they would have expressly provided in the contract.[75]

In summation, the Plaintiff submitted that the provisions of Section 7 of the Kenyan Arbitration Act empower the court to issue interim measures and that it did not matter whether the Plaintiff and or Defendant had a place of business in Kenya since they also do not have a place of business in United Kingdom, the seat of arbitration.[76]

3.1.3 DETERMINATION BY THE COURT

The key issue for determination was whether the court had jurisdiction to entertain the suit.[77] In addressing the issue, the court began by noting that

70 Ibid 4.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid 4.
76 Ibid.
77 ibid.

the parties had selected London as the seat of arbitration and that both parties were foreign owned and registered companies.[78]

According to the court *(Warsame J as he then was*), while the contract was being performed in Kenya, the performance of the contract and the place where the contract was to be completed cannot accord the court jurisdiction, which was mutually and consensually ousted by the parties.[79] In its view, a Kenyan court was not a competent judicial authority under Article 23 of the ICC Rules which allows parties to apply to any competent judicial authority for interim or conservatory measures. In the court's view, a court does not become a competent judicial authority by virtue of a party coming before it with a dispute which requires a judicial intervention.

On the contrary, the intervention of the court can only arise when there is judicial mandate to do so, which mandate in arbitration matters, is either given by statute or by consent of the parties, or where it is in the general interest of justice to intervene to give an interim measure of protection.[80] This was also based on the parties' choice that the agreement be construed and governed in accordance with the Laws of England and Wales, thereby excluding the application of any other laws including the laws of Kenya to the dispute.[81]

Therefore, according to the court, Kenyan courts can neither be moved under local laws for any relief pursuant to the agreement between the parties nor be called upon to adjudicate in support of a cause of action, which parties had agreed should be the subject of a foreign arbitration and exclusive jurisdiction of English courts.[82]

The court also observed that it cannot assert personal jurisdiction over parties who are foreigners and who have chosen foreign-seated arbitrations.[83] As

78 ibid 6.
79 ibid 7.
80 ibid.
81 ibid 8.
82 ibid.
83 ibid.

such, a Kenyan court has no territorial jurisdiction to enforce interim measures.[84]

In addition, while interpreting Section 2 of the Kenyan Arbitration Act[85], the court stated that this provision cannot be interpreted to mean that the Arbitration Act applies to all or any arbitration whether domestic or international.[86] According to the court, the exclusion given in Section 2 of the Arbitration Act supports the intention of the parties to have their disputes determined in Kenya whether the arbitration contract is entered in Kenya or outside. [87] The option and/or election to choose the relevant jurisdiction and the relevant applicable laws is reserved for the parties.[88]

The court was unconvinced that Parliament intended that the power to grant an interim relief by a Kenyan court should be exercised in respect of foreign-seated arbitrations for two reasons.[89] First, the chosen mechanism was to make those provisions into implied terms of the arbitration agreement and such terms could not be sensibly be incorporated into an agreement governed by a foreign arbitration law.[90] Second, the court could not see any justification as to why Parliament should have had the least concern to regulate the conduct of an arbitration process carried on abroad pursuant to a foreign arbitral law.[91] Lastly, the court underscored that despite the parties knowing that a substantial part of the main agreement was to be performed in Kenya and Uganda, they opted to limit and restrict the jurisdiction of courts in the two states. Therefore, the parties must confine themselves to their bargain.[92]

In conclusion, the High Court allowed the preliminary objection holding that the High Court lacks jurisdiction to grant the interim measures sought as the

84 ibid.
85 '*except as otherwise provided in particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration'*.
86 Skoda Case (n 58) 8.
87 ibid.
88 ibid 9.
89 ibid.
90 ibid.
91 ibid.
92 ibid.

seat of arbitration was London and the English courts had exclusive jurisdiction to grant interim measures.[93]

3.2 CMC HOLDINGS LIMITED & CMC MOTORS GROUP LIMITED V JAGUAR LAND ROVER EXPORTS LIMITED [2013] EKLR (THE CMC CASE)

3.2.1 FACTS AND BACKGROUND

By a Distributorship Agreement dated 12 December 1985, Land Rover Exports Limited ("Respondent") and CMC Motors Group Limited (previously known as Cooper Motor Corporation (Kenya) Limited) ("Applicant"), the latter was given the exclusive franchise to distribute, sell and service the Respondent's various brands of motor vehicles of the Land Rover brand outside the United Kingdom.[94] The agreement contained a dispute resolution clause below:

"*a. This Agreement shall be governed by and construed in all respects in accordance with the* ***Law of England****.*

b. The ***English courts (to whose jurisdiction the Company and the Distributor hereby submit)*** *shall be competent to entertain and adjudicate upon any matter arising out of or in connection with this Agreement.*

*c. In the event that any dispute or difference arises between the parties which cannot be settled by the amicably then the Company shall such dispute or reference be referred to arbitration…****Any such arbitration shall be conducted under the Rules of Conciliation and Arbitration of the United Nations Commission in International Trade Law and shall be held in London****.*

iv. Nothing in this clause shall prevent the Company from applying to ***the appropriate court in the Territory (Kenya) for any injunction or other like remedy to restrain the Distributor*** *from committing or continuing to commit any breach of this Agreement and for consequential relief*". (*emphasis added*)

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93 ibid.

94 *CMC Holdings Limited & CMC Motors Group Limited v Jaguar Land Rover Exports Limited [2013] eKLR.* [CMC Holdings Court of Appeal].

Another important clause was 2(A), which provided for the *'no fault termination clause'* of the agreement by either party who may wish to bring to an end the said business relationship which was otherwise open ended.[95] The said clause provided that the agreement may be *'terminated by either party giving the other six months prior notice to that effect expiring on any date.'*[96]

On 1 February 2009, a second non-exclusive Importer Agreement was entered into between Jaguar Cars Exports Limited and CMC Motors Group Limited concerning Jaguar vehicles, Jaguar parts and Jaguar accessories. The agreement was for a fixed term of three (3) years ending on 30 January, 2012.[97] Clause 26 in the Importer Agreement provided as follows: '***This Agreement shall be governed by and construed in accordance with English law***. *The parties irrevocably submit to the* ***exclusive jurisdiction of the English courts***. *All disputes or claims arising out, emanating from, or in connection with this Agreement including any question regarding its existence, validity or termination, or the legal relationship established by this Agreement shall be referred to and* ***finally resolved by arbitration under the Rules of London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.*** *The language of arbitration proceedings shall be English, and the arbitration shall take place in London'*.[98] (*emphasis added*).

Under the Importer Agreement, any party that wanted to terminate the agreement was required to give the other six (6) months' written notice and under clause 20.5, such a party would not be required to provide reasons for its decision to terminate the said agreement.[99] Even though the second agreement was supposed to lapse on 31 January 2012, the parties continued their working relationship even after that date; however, by a letter dated 3 August 2012, the Respondent invoked clause 20.1 of the Importer Agreement and gave the Applicants six (6) months' notice of termination of the

95 ibid.
96 ibid.
97 ibid.
98 ibid.
99 ibid.

agreement.[100] The agreement was therefore, expected to terminate on 2 February 2013.[101] In another letter dated 3 August 2012, the Respondent wrote to the Applicants citing clause 2A of the Distributorship Agreement and gave six (6) months' termination notice.[102] According to that notice which invoked the no fault termination clause, the agreement was similarly supposed to stand terminated on 2 February, 2013.[103]

The Applicants contested the validity of the above termination notices prompting them to file an application before the High Court (Kamau J) seeking an interim injunction restraining the Respondent from interfering with the exclusive Distributorship Agreement between the Applicants and the Respondent.[104]

On 4 January 2012, the Respondent filed a Notice of Preliminary Objection contesting the jurisdiction of the High Court stating that (i) the Kenyan Arbitration Act had no relevance or application to the contract between the parties; (ii) the contractual obligations between the parties excluded the Applicant from challenging the termination of the contract on the basis of appointment of a successor distributor, or the supply of any products following the service of a rumination notice; (iii) the contractual agreement between the parties provided that the disputes between them were to be resolved by arbitration under English law and not Kenyan law and reserved exclusive jurisdiction to English courts; and (iv) the Respondent was a foreign entity operating outside the jurisdiction of this court and the contracts underlying the suit and application were made outside the jurisdiction of this court.[105]

3.2.2 ARGUMENTS BY THE PARTIES

The Applicants argued that the Constitution conferred on the High Court of Kenya unlimited original jurisdiction to determine civil and criminal disputes

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100 ibid
101 ibid.
102 ibid.
103 ibid.
104 *CMC Holdings Limited & Another v Jaguar Land Rover Exports Limited* [2013] eKLR [CMC Holdings High Court].
105 ibid para 4.

and that every person has a right to access justice and to fair hearing under Articles 48 and 50 respectively of the Constitution.[106] In its response to the application, the Respondent argued that the Kenyan court lacked jurisdiction to determine the matter as jurisdiction was exclusively reserved for the English courts under the Distributorship Agreement.[107] The Respondent therefore argued that the court cannot re-write the contract between the parties which specifically provided for English law as the choice of law and the exclusive jurisdiction of the English courts.[108]

3.2.3 DETERMINATION OF THE COURT

There were two issues before the court; namely, whether the High Court was clothed with jurisdiction to determine the matter and whether the court can grant an interim injunction in favour of the Applicants pending reference to arbitration.[109]

i) *whether the High Court was clothed with jurisdiction to determine the matter*

In addressing the issue, the court began by agreeing with the submission of the Applicants that the High Court has unlimited original jurisdiction to determine civil and criminal disputes and that every person has the right to access justice.[110] The court then interpreted Section 2 of the Kenyan Arbitration Act and according to it, the Kenyan Arbitration Act confers jurisdiction on the High Court to hear matters arising out of domestic and international arbitrations.[111] Therefore, the court disagreed with the Respondents' contention that the Kenyan Arbitration Act was enacted with the sole purpose of dealing with domestic arbitration.[112]

While interpreting the arbitration clause in the Distributorship Agreement, the court observed that it permitted the Respondent to seek injunctive orders

106 ibid para 47.
107 ibid para 46.
108 ibid para 40.
109 ibid paras 32 and 60.
110 ibid.
111 ibid para 50.
112 ibid.

in Kenya in which proceedings the Applicants would be parties to.[113] In the court's view, the arbitration clause did not exclude the jurisdiction of the court to adjudicate over matters that it had jurisdiction over.[114] Therefore, on this issue, the court held that no contract can oust the jurisdiction of a Kenyan court and that it would be a great miscarriage and travesty of justice if the Applicants were shut out from Kenyan courts due to wording in their contracts.[115] The court, while commenting on the Importer Agreement, observed that the circumstances would be different as it exclusively limited the jurisdiction of the disputes between the parties to English courts.[116] That notwithstanding, the court maintained that it would still have jurisdiction as conferred by the Constitution and the Kenyan Arbitration Act.[117]

ii) whether the court can grant an interim injunction in favour of the Applicants pending reference to arbitration

The court began by observing that before granting interim measures, the court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.[118] After careful analysis of the circumstances, the court declined to grant the interim measures as prayed finding that a contract was not something that would be wasted if it was not conserved.[119] In addition, the Applicants intended to act on the contracts until the determination of the reference and as such, they would not remain static or in the same state they were in.[120] That being the case, the court held that granting the orders being sought by the Applicants would not only amount to preventing the Respondent from exercising its rights under the contract, but would also amount to interfering in issues that would rightly be before the arbitral tribunal or English courts and for which the court would not have jurisdiction to deal with.[121] In the court's view, the issue of whether the

113 ibid para 53.
114 ibid.
115 ibid para 54.
116 ibid para 55.
117 ibid.
118 ibid para 62.
119 ibid para 63.
120 ibid.
121 ibid.

Respondent was entitled to terminate the contracts cannot form part or the basis of an interim measure of protection.[122] Ultimately, the court dismissed the application for interim measures by the Applicants for lack of merit.[123]

3.3 ISOLUX INGENIERA S A V KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED (KETRACO) & 5 OTHERS [2018] EKLR (THE ISOLUX CASE)

3.3.1 FACTS AND BACKGROUND

Isolux Ingeniera S A, the Plaintiff was a Spanish company headquartered in Madrid, Spain and was a subsidiary of Grupo Isolux Corsan S A ("parent company") while KETRACO, the 1st Defendant, is a Kenyan corporate entity, wholly owned and controlled by the Government of Kenya.[124] On 20 December 2011, the parties entered into an EPC contract for the electricity transmission lines between Loyangalani and Suswa electricity substations, and the works included EPC, testing, and commissioning of approximately 428 km of a 400KV transmission-line connecting the national power grid to a wind power project located in the north-western part of Kenya, which was to be developed by Lake Turkana Wind Power Limited.[125] Some of the key clauses in the EPC contract included, provisions on contract price, part of which was to be paid in advance by KETRACO upon receipt of an invoice from Isolux, as well as receipt of a performance security in the amount of 10% of the contract price and an advance payment guarantee from a bank approved by KETRACO.[126]

The contract also provided for termination by either party on grounds of failure to pay the undisputed amount in time to non-compliance with various contractual conditions and obligations or where either party was unable to, pay its debts or became insolvent (including the parent company) or KETRACO.[127] In addition, both parties represented and warranted to each other that neither party was in liquidation or subject to an administration order and no administrator, administrative receiver or receiver had been

122 ibid.
123 ibid.
124 [2017] para 14.
125 ibid para 15.
126 ibid para 16.
127 ibid para 17. Clauses 15.2 and 16.2 of the EPC contract.

appointed over the whole or a substantial part of either Isolux's or KETRACO's property assets or undertaking.[128]

The contract provided that any dispute or difference arising out of or in connection with the contract was to be referred to and settled by arbitration under the ICC Rules of Conciliation and Arbitration by three arbitrators.[129] The seat of arbitration was agreed upon as London, England and that the contract was governed by and construed in accordance with the Laws of Kenya.[130]

Pursuant to the contract, Isolux Limited caused to be issued to KETRACO performance guarantees by the Bank of Africa and Commercial Bank of Africa Ltd on diverse dates.[131] On 20 July, 2017, Isolux wrote to KETRACO and informed it of the commencement of insolvency proceedings of the parent company as well as several of its subsidiaries including Isolux.[132] In its response dated 14 August 2017, KETRACO invoked the provisions of clause 15.2 (h) of the EPC contract and terminated the contract with immediate effect on grounds that the filing of the insolvency petition by the parent company was an event of breach of the terms of the said EPC contract.[133]

Therefore, it requested Isolux to urgently arrange for proper hand-over of the site and works and deliver any required goods, all contractor's documents and other design documents to ensure the protection of property and or for the safety of the works as provided in the EPC contract.[134] However, Isolux neither arranged for a proper hand-over of the site and works to KETRACO nor delivered any required goods and contractors documents or any documents to KETRACO as demanded.[135] Instead, by its letter of 16 August 2017, Isolux

128 ibid para 18. Clause 24.2 of the EPC contract.
129 ibid para 20.
130 ibid.
131 ibid para 23.
132 ibid para 24.
133 ibid.
134 ibid.
135 ibid para 25.

denied being in breach of the terms of the contract and reiterated its commitment to the contract.[136]

In its application before the High Court dated 24 August 2017, Isolux sought interim measures of protection pending arbitration namely; (i) that the court grants an interim measure of protection restraining the Defendant from assigning the contract to any other contractor or third parties; (ii) that the court grants an interim measure of protection restraining the Defendant from enforcing the calling of the bank guarantees in respect of the contract; and (ii) that an injunction be issued pending the reference to arbitration and the hearing of the arbitral proceedings restraining the Defendant from dealing with, releasing or taking possession of the Plaintiff's material on site and the drawing works in respect of the contract.[137]

In opposition, KETRACO contested Isolux's application on various grounds including grounds stated in the Notice of Preliminary Objection dated 22 August 2017 that the court lacked jurisdiction to entertain the applications for interim measures. In KETRACO's view, given the absence of any move to constitute an arbitral tribunal, the court lacked jurisdiction to entertain the applications by Isolux.[138] In addition it contended that since the parties had selected London as the seat of arbitration, the national courts of Kenya lacked the powers to grant the orders sought.[139]

3.3.2 DETERMINATION OF THE COURT

The main issue before the court was whether the court had jurisdiction to entertain the suit/applications.[140] The court began by acknowledging that the juridical seat of arbitration under the arbitration agreement between the parties was London.[141] The court then asked itself what national court was competent to grant interim measures of protection in an arbitration where the underlying contract is performed in Kenya.[142] In dealing with this question,

136 ibid.
137 ibid para 9.
138 ibid para 46.
139 ibid.
140 ibid para 45.
141 ibid para 51.
142 ibid.

the court found that, in the absence of any agreement by the parties to the contrary, there was no justification as to why the national courts of Kenya should not in full recognition of the doctrine of comity support arbitration scheduled to take place in London, England, especially where the law of the seat of arbitration and the rules of the relevant arbitral institution do not prohibit the national courts of any other country from granting the interim measures of protection.[143]

In addition, the court grounded its reasoning in Section 2 of the Kenyan Arbitration Act which stipulates that the statute applies to both domestic and international arbitration unless expressly provided otherwise.[144] Therefore, the court's wide powers to grant interim measures under Section 7 (1) of the Kenyan Arbitration Act are not limited to domestic arbitration and arbitrations in Kenya only.[145] On the contrary and in the court's view, Section 7 of the Arbitration Act extends to international arbitration.[146]

In concluding on the issue of jurisdiction, the court rightly held that there exists concurrent jurisdiction whereby either the arbitral tribunal once constituted or the national courts of the juridical seat of arbitration or the national courts of where the underlying contract was being performed, may as appropriate and depending on the urgency, entertain and grant an interim measure of protection pending arbitration.[147]

Ultimately, the court held that in the absence of any law of the seat of arbitration or rules of an international arbitration institution prohibiting Kenyan courts from exercising such jurisdiction, and in the absence of any agreement to the contrary by the parties, the High Court has both the substantive and territorial jurisdiction to deal with and determine the applications for interim measures of protection.[148]

143 ibid para 53.
144 ibid para 54.
145 ibid.
146 ibid.
147 ibid para 55.
148 ibid para 56.

3.4 OBSERVATION AND COMMENTS ON KENYAN JURISPRUDENCE ON THE JURISDICTION OF KENYAN COURTS TO GRANT INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

The narrow interpretation of Section 2 of the Kenyan Arbitration in the Skoda Case limiting the application of the statute to domestic arbitrations contradicts the express legislative intent by limiting the statute's application to domestic arbitrations, even though it is meant to apply to both domestic and international arbitrations. Unlike the Skoda Case, the courts in the CMC and Isolux Cases, properly interpreted the provision to apply to both domestic and international arbitration. As a result, a Kenyan court can grant interim measures under Section 7 of the Kenyan Arbitration Act in aid of foreign-seated arbitration. While this may be the case, the court in the Isolux Case rightly and persuasively cautioned that the exercise of such jurisdiction is dependent on the absence of any law of the seat of arbitration or rules of an international arbitral institution prohibiting Kenyan courts from exercising such jurisdiction, and in the absence of any agreement to the contrary by the parties.

Notably, the court in the Skoda Case appeared to have ignored a binding Court of Appeal decision in the case of *Tononoka Steels Limited v The Eastern and Southern African Trade and Development Bank* (the "Tononoka Case") in which Lakha JA rejected the submission that by providing in the agreements that parties would be governed and construed in accordance with the Laws of England, and that any dispute or difference between the parties shall be finally settled by the ICC Arbitration Rules in London, amounted to a complete ouster or exclusion of the jurisdiction of Kenya courts.[149]

According to the learned judge, while the jurisdiction to deal with substantive disputes and differences is given to the ICC in London, the Kenyan courts retain residual jurisdiction to deal with peripheral matters and ensure that

[149] [2000] 2 EA 536 (CAK) 549. This position has been followed by the High Court in *Indigo EPZ Limited v Eastern and Southern African Trade & Development Bank* [2002] eKLR where the court held that there was nothing in the arbitration clause that ousted the jurisdiction of the court and excluded the application by any party of interim measures under Section 7 of the Arbitration Act.

any disputes or differences are dealt with in the manner agreed between the parties under the agreements.[150] Notably, the arbitration clause in the Skoda Case was similar to the Tononoka Case in that London was the seat of arbitration and the ICC Rules were the selected arbitration rules.

Furthermore, beyond the fact that the parties in the Skoda Case were foreign registered companies, it appears that the court also predicated its decision to decline jurisdiction on the fact that since Skoda was owned wholly by the Government of Czech Republic, a foreign government which could not be the subject of proceedings before Kenyan courts.[151]

While the court in the CMC case is commended for exercising restraint and potentially usurping the powers of the arbitral tribunal in dealing with the issue of whether the termination of the agreements was valid, its reliance on the constitutional provisions to justify the assumption of jurisdiction to grant interim measures in a foreign-seated arbitration is contestable. This is because invoking constitutional arguments and articles in purely commercial matters between private parties undermines party autonomy and freedom of parties.[152]

Moreover, any dispute between parties can be framed as a constitutional dispute and traceable to the rights guaranteed under the Constitution. Therefore, it appears that if parties expressly excluded the jurisdiction of Kenyan courts in granting interim measures in a foreign-seated arbitration or restricted the application of interim measures to the court at the seat, the implication of the CMC Case is that the court can assume jurisdiction contrary to the parties agreement, an erroneous approach that contradicts party autonomy, the cornerstone of arbitration.

150 ibid.
151 Skoda (n 58) 9.
152 *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* [2020] eKLR.

4.0 CASE STUDY ON THE JURISDICTION OF ENGLISH COURTS IN GRANTING INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

4.1 POWER OF ENGLISH COURTS TO GRANT INTERIM MEASURES

Section 44 of the English Arbitration Act is the central provision that delimits the power of English courts to grant interim orders in support of arbitration agreements.[153] These measures include taking evidence from witnesses; preserving evidence; granting orders for the inspection, photographing, and preservation of property; and ordering interim injunctions or the appointment of a receiver.[154] The exercise of the court's powers under Section 44 of the English Arbitration Act applies even where the seat of the arbitration is outside England and Wales or Northern Ireland or where no seat has been designated or determined.[155] That notwithstanding, the court may refuse to exercise the powers to grant interim measures if it is inappropriate in such case.[156] The above provisions empower English courts to grant interim measures in support of foreign-seated arbitrations.[157]

While courts can grant interim measures, parties can expressly contract out of Section 44 in their arbitration agreement as it is a non-mandatory provision.[158] This issue arose in the case of *B v S* where the parties had a *Scott v Avery* clause barring the parties from bringing any court proceedings until a dispute was finally resolved by the arbitrator and that the arbitral award was a condition precedent to any legal proceedings.[159] The court found that by dint of the *Scott v Avery clause*, the parties had agreed to exclude the

153 The Arbitration Act, Chapter 23, 1996, Section 44. [the English Arbitration Act].
154 ibid Section 44(2) (a-e).
155 ibid Section 2(3)(b). Jonathan Schaffer-Goddard, 'Court Orders for Oral Evidence and Disclosure by Non-Parties in Support of Foreign Arbitration Proceedings: The Changing Picture in England' (2022) *New York university International Law and Politics* 1113,1117.
156 ibid.
157 Martin Davies, 'Court-Ordered Interim Measures in Aid of International Commercial Arbitration' (2008) 17 *The American Review of International Arbitration*,9.
158 English Arbitration Act (n 153) Section 4(1) and (2) and Schedule 1. See also Sadra Mahabadi, 'The Need for the Harmonisation of Provisional Measures in International Commercial Arbitration in the European Union' (PhD thesis, University of Manchester 2015) 114.
159 [2011] EWHC 691 (Comm).

court's powers under Section 44, and therefore the court could not entertain the application for a freezing injunction in favour of arbitration.[160]

Notably, the court is only entitled to exercise its powers under Section 44 of the English Arbitration Act to the extent that the arbitral tribunal or institution has no power, or is unable for the time being, to act effectively.[161] Before the court can exercise its powers to grant interim measures, there are some requirements that must be met, such as urgency. In urgent cases, a party or proposed party to arbitral proceedings, can apply to the court for an order for the purpose of preserving evidence or assets.[162] Conversely, in non-urgent cases, the court can only act on an application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) with the tribunal's permission or other parties' written agreement.[163]

For urgent cases, the English High Court in *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* observed that the exercise of the court's powers in urgent cases can only be invoked in exceptional circumstances where, for instance, critical evidence is about to be lost forever or where there is a risk that it will be destroyed or otherwise be tampered with, thereby making it of no probative value.[164] In the court's view, such power should not be used where, once arbitration proceedings start, the arbitrator can make precisely the same order as the court could under Section 44(2) of the English Arbitration Act.[165] Since there was no express evidence as to a particular risk of lost documents, or an imminent threat to the preservation of the evidence or the assets, the court held that there was no urgency, and therefore lacked power to make orders under Section 44(3) of the English Arbitration Act.[166]

Similarly, in *JOL and JWL v JPM* [2023] EWHC 2486, the English High Court dismissed an application for urgent interim injunctions as the requirement of

160 ibid para 88.
161 English Arbitration Act, Section 44(5).
162 ibid Section 44(3).
163 ibid Section 44(4).
164 [2010] EWHC 2455 (TCC), para 27.
165 ibid.
166 ibid para 28. See also *Mobil Cerro Negro Limited v PDVSA* [2008] 1CLC 542.

urgency had not been met.[167] The claimant had sought injunctions requiring the respondents to re-deliver two vessels or at least to take all and any steps to do so.[168] The court was not convinced that the mere fact that it will take longer to obtain any relief from the arbitral tribunal than seeking interim reliefs from the court was itself sufficient to establish urgency.[169] Further, there was no significant risk of physical deterioration or damage to the vessels as the arbitral tribunal could deliver the arbitral award between six and eight weeks.[170] To conclude on urgency, if the case is one of urgency, the court only has jurisdiction to make such orders as it thinks necessary for the purpose of preserving evidence or assets.[171] Assets are broadly interpreted to mean both tangible and intangible assets, including choses in action and contractual rights.[172]

4.2 THE POWER OF ENGLISH COURTS IN GRANTING INTERIM MEASURES IN SUPPORT OF FOREIGN PROCEEDINGS

As earlier highlighted, where the seat is outside England and Wales, the power to grant interim measures must only be exercised if it is appropriate to do so.[173] The power may also be exercised where the arbitration has no connection with England and Wales but there is a need to protect or preserve evidence in the jurisdiction.[174]

In *Company 1 v Company 2,* the English High Court dismissed an application for interim relief holding that it would be inappropriate to grant the reliefs where there was already litigation in the British Virgin Islands court and arbitration proceedings seated in Switzerland.[175] The court also found that it was inappropriate because of the tenuous link that the dispute had to England and Wales as none of the parties had any link with England.[176]

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167 EWHC 2486 (Comm).
168 ibid para 1.
169 ibid para 27.
170 ibid para 30.
171 *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618, para 76
172 ibid para 63.
173 English Arbitration Act, Section 2(3)(b).
174 Hakeem Seriki, *Injunctive Relief And International Arbitration (1st Edn, Informa Law from Routledge 2014)*86. [Seriki].
175 [2017] EWHC 2319 (QB), para 91.
176 ibid para 90.

Lastly, the court followed the guiding principle established in *Econet Wireless Ltd v Vee Networks Ltd* that the natural court for granting interim injunctive relief is the court of the country of the seat of arbitration.[177] (the "Econet Wireless Case").

In the Econet Wireless Case, the English High court set aside a freezing injunction and held that the English court was not the appropriate forum for an application for an injunction in aid of an arbitration, since the seat of the arbitration was Nigeria and not England.[178] In its reasoning, the court observed that there was no reason advanced in support of a proposition that the English court should make an order in support of a Nigerian arbitral process.[179] As a result, considering that neither the respondents had any connection with nor had assets in England and Wales, it was inappropriate for the injunction to have been granted in the first place.[180] The court also agreed with the submission that the natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration (in this case Nigeria), especially where the curial law of the arbitration is that of the same country.[181]

The principle in the Econet Wireless Case was extensively analysed in the case of *U&M Mining Zambia Ltd v Konkola Copper Mines PLC* (the "U&M Case") where an issue arose as to whether English courts had exclusive jurisdiction to grant interim measures in support of a London-seated arbitration pending the constitution of the arbitral tribunal.[182] In the case, both parties were incorporated under Zambian law and in their mining contracts, the parties had selected London as the seat of arbitration and Zambian law as the governing law.[183] The contracts also provided that the High Court of Zambia

177 [2006] EWHC 1568; Ibid para 81.
178 2006] EWHC 1568 (Comm), para 25.1. The Shareholders Agreement provided for Nigerian federal Law as the governing law and Nigeria as the seat of arbitration. In addition, the disputes resolution clause provided for arbitration in Nigeria in accordance with UNCITRAL Rules, by three arbitrators appointed by the Chief Judges of the Federal High Court of Nigeria.
179 ibid.
180 ibid para 19.
181 ibid.
182 [2013] EWHC 260 (Comm) paras 2 and 3.
183 ibid.

had exclusive jurisdiction to execute the arbitral award.[184] The claimant sought an interim anti-suit injunction to stop the Defendant from pursuing court proceedings in Zambia.[185] The court was not persuaded that the English court could, or if it could, would, make such an order in a dispute between two Zambian companies on the operation of a copper mine in Zambia. According to the court, Zambia was the natural forum for judicial assistance by way of interim measures pending the appointment of the arbitrators, and not in England [though the seat of arbitration was England].[186]

While concluding on the issue whether English courts had exclusive jurisdiction to grant interim measures in support of a London-seated, the court found that a party may exceptionally seek interim measures in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the arbitration agreement.[187] This means that the courts of the seat of arbitration do not have exclusive jurisdiction to grant interim measures.[188]

Although the reasoning of the court in the U&M Case may seem like an intrusion on party autonomy to choose the seat of arbitration, it is commercially pragmatic as it recognises the difficulty and impracticality in some cases to apply to courts at the seat for interim measure thereby making it more effective to apply for interim measures in courts in other jurisdictions.[189]

In addition to the factors already discussed in this section, English courts also take into account other considerations in determining whether it is appropriate to grant interim measures in support of foreign-seated arbitrations. For instance, the courts consider whether there is sufficient

184 ibid para 25
185 ibid para 1.
186 ibid para 71,
187 ibid para 63.
188 Seriki (n 174).
189 David Ndolo, 'Arbitration law and practice in Kenya as compared to the UK and US with specific focus on anti-suit injunctions and arbitrability of disputes' (PhD Thesis, Coventry University 2020) 142.

connection with England and Wales through the presence of defendants or their assets.[190]

However, even if there is sufficient connection, the English courts may decline to grant the interim measures where it is inappropriate to do so, especially if the foreign seat has similar procedural laws with England and for the purpose for which they are designed.[191] Second, the court also consider whether the claimant has taken proactive steps in commencing the arbitration proceedings in the foreign seat.[192] In the case of *Western Bulk Shipowning III A/S v Carbofer Maritime Trading APS*, the court found that it would be inappropriate to grant reliefs under Section 44 of the English Arbitration Act where neither arbitration in the foreign seat had been commenced nor any undertaking had been given to commence one.[193]

4.3 NOTABLE COMPARISON IN THE APPROACHES BETWEEN ENGLISH COURTS AND KENYAN COURTS IN GRANTING INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

English courts have consistently granted interim measures in support of foreign-seated arbitrations, developing logical and practical factors to guide their exercise of discretion. These include urgency, a sufficient connection with England and Wales, and appropriateness. In contrast, Kenyan courts have been inconsistent in their approach, resulting in the contradictory case law discussed in Part III.

In the author's view, the English courts' approach is primarily anchored in the clear and express provisions of the English Arbitration Act, a modern piece

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190 Davies (n 157) 9. See also Lord Mustill's observation in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, para 68 that since the English court had territorial jurisdiction against the defendants, it had the means of enforcing orders against them. See also *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) where Walker J overturned a freezing injunction given in support of claims to be resolved in a New York arbitration. Walker J held that in the absence of factors linking the defendants to the jurisdiction (such as domicile or the ownership of assets inside the jurisdiction), the English court should not intervene. Furthermore, the evidence did not show that granting the injunction would be just and convenient, or that there was a sufficient level of urgency.

191 See Justice Moore-Bick in *Viking Insurance Co. v Rossdale* [2002] 1 Lloyd's Rep. 219, 301.

192 Davies (n 157) 87.

193 [2012] EWHC 1224 (Comm), para 109.

of legislation that empowers them to grant interim measures in aid of foreign-seated arbitrations. This has led to rich jurisprudence on court-ordered interim measures in aid of foreign-seated arbitrations. On the other hand, the inconsistency and incoherence in Kenyan jurisprudence stem largely from the outdated Kenyan Arbitration Act, which does not expressly define the courts' jurisdiction to grant interim measures in foreign-seated arbitrations. This statutory gap has led to conflicting case law, necessitating the discussion in this paper.

5.0 FACTORS THAT SHOULD BE CONSIDERED BY KENYAN COURTS IN GRANTING MEASURES IN FOREIGN-SEATED ARBITRATIONS

As clearly demonstrated in Part III, there are conflicting decisions as to whether Kenyan courts can grant interim measures in foreign-seated arbitration. In this section, the paper proposes disjunctive factors that should be considered by courts before assuming jurisdiction to grant interim measures in aid of foreign-seated arbitration. These factors are partly influenced by the comparative study on the power of English courts to grant such measures in Part IV, practical considerations, as well as international best practices.

5.1 LAW OF THE SEAT

i) Is the law of the seat modelled on the UNCITRAL Mode Law? If so, the court may assume jurisdiction on the basis that Kenyan Arbitration Act has similar provisions with the law of the seat, and both statutes recognise the principle that it is not incompatible with the arbitration agreement for a party to apply for interim measures from court. In some cases where the law of the arbitral seat is not modelled on the UNCITRAL Model Law but has similar provisions to the Model Law, for instance the English Arbitration Act, the court may assume jurisdiction where there is no express restriction on the ability of the parties to apply for interim measures in a foreign court.

ii) Does the law of the seat prohibit obtaining interim measures from a national court? Where the law of the seat does not expressly restrict the application of interim measures to its own courts, Kenyan courts

can assume jurisdiction and grant interim measures in aid of the intended foreign arbitration.

iii) Whether the grant of the interim measures will interfere or usurp the supervisory jurisdiction of the courts of the seat of arbitration. Kenyan courts should be cautious not to encroach upon the default supervisory power of the courts at the seat when granting specific interim measures.

iv) Are the interim measures in Kenya available and enforceable at the seat of arbitration? Practically, national courts will apply their own law to the availability and form of court ordered interim measures.[194] However, national courts must ensure that the interim measure requested in aid of foreign-seated arbitration are available and recognised under the seat of arbitration.[195]

v) Does the law of the seat have enforcement provisions and mechanisms similar to Kenya such that the interim measures can be enforced at the seat? This is important because the party in whose favour interim measures are granted may seek enforcement in courts of the law of the seat.

5.2 ARBITRATION CLAUSE AND GOVERNING LAW

a) Does the arbitration clause expressly exclude applying to a court of competent jurisdiction for grant of interim measures? The court must ascertain whether the arbitration clause limits the parties to specific foreign courts where interim measures should be sought. Alternatively, the court should consider whether the arbitration clause expressly excludes the jurisdiction of Kenyan courts in granting interim measures.

b) Is the arbitration clause governed by Kenyan law? If the arbitration clause is expressly governed by Kenyan law. Then, notwithstanding the fact that the law of the seat may be foreign, the court may assume jurisdiction on the basis that Kenyan law, including the Kenyan Arbitration Act and its provision on interim measures, will be applicable to the arbitration clause.

194 Born (n 3) 3998.
195 ibid.

c) Have the parties expressly contracted out of the right to apply for interim measures before courts in their arbitration agreement? If so, the court should uphold the parties' autonomy to forego the right to apply for court-ordered interim measures in favour of centralising dispute resolution in a single arbitral forum and promoting efficiency.
d) Whether the arbitral rules permit a party to apply for interim measures from any competent authority? If so, the court should consider whether there are any conditions imposed by the rules before applying for interim measures before national courts. For instance, while the ICC Rules provide that before the file is transmitted to the arbitral tribunal, any party may apply to any competent judicial authority for interim or conservatory measures.[196] Even after the arbitral tribunal has been formed, a party may apply to a court for interim measures when it is appropriate to do so. The Secretariat must be notified without delay of such application. Similarly, the London Court of International Arbitration (LCIA) Rules permit a party to apply to a competent state court or other legal authority for interim or conservatory measures (i) before the formation of the Arbitral Tribunal and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award.[197]

5.3 SUBJECT MATTER

When presented with an application for interim measures, the court should consider the nature and location of the subject matter. In addressing this question, the court should ask itself the following questions:

a) Is the subject matter or the assets in Kenya? If so, the court may assume jurisdiction on the basis of territorial jurisdiction. This is because in some circumstances, the court where the assets are located is the only practically effective forum for applying for interim measures.[198]
b) Is the contract being performed in Kenya? While performance of the contract in Kenya does not mean automatic assumption of jurisdiction by

196 Article 28(2) International Chamber of Commerce (ICC) Rules 2021.
197 Article 25.3 London Court of International Arbitration (LCIA) Rules 2020. See also Article 30.3 of the Singapore International Arbitration Centre Arbitration Rules and Article 37(5) of the Stockholm Chamber of Commerce Arbitration Rules.
198 Born (n 3) 3989.

Kenyan courts, as parties can select foreign law to govern their contract and subject themselves to the jurisdiction of foreign courts, it may be impracticable in some circumstances to promptly and cost-effectively seek interim measures in those foreign courts. Furthermore, it is arguable that an arbitration clause cannot oust the territorial jurisdiction of Kenyan courts, especially where the contract is being performed in Kenya.[199]

c) Does one of the parties carry on business in Kenya and whether one of the parties to the arbitration agreement is a Kenyan or a Kenyan incorporated entity? The court may assume jurisdiction based on the fact that a state exercises jurisdiction over its nationals or legal persons incorporated in its territory.

d) Whether there is a real and substantial connection to Kenya. The real and substantial connection test has been extensively discussed by the Canadian Supreme Court in *Club Resorts Ltd v Van Breda* where it laid down the legal test for when a Canadian court should assume jurisdiction over an out-of-province defendant.[200] According to the Supreme court, in determining whether a court can assume jurisdiction over a certain claim, the preferred approach in Canada is to rely on a set of specific factors which are given presumptive effect, as opposed to a regime based on individualized judicial discretion.[201] These include: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the dispute arose from the territory of the state; and (d) a contract connected with the dispute was made in the province.[202] Where a connecting factor is established, a presumption of jurisdiction will arise, but that presumption may be rebutted by the party challenging jurisdiction.[203] The court noted that the list of factors is not exhaustive, and courts have the discretion to recognize additional factors.[204] It set out the following framework with respect to the evaluation of new presumptive factors:(a) Similarity of the connecting factor with the recognized

199 Malcom Shaw, International Law (6th edn Cambridge University Press, 2008) 652.
200 [2012] 1 S.C.R. 576.
201 ibid.
202 ibid.
203 ibid.
204 ibid.

presumptive connecting factors; (b) Treatment of the connecting factor in case law and statute; and (c) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.[205]

While the above case was specific to Canada, the principles laid down by the court can offer some guidance and persuasion to Kenyan courts and other courts globally, when establishing whether there is a real and substantial connection.

5.4 INTERIM MEASURE BEING SOUGHT

a) Is the application for interim measures urgent? In addition, whether the subject matter will be dissipated if the interim measures sought are not granted.
b) What form of interim measures is being sought and whether the purpose of interim measure sought is similar to the purpose at the seat of arbitration. In Commerce and *Industry Insurance Co of Canada v Lloyd's Underwriters* [2002] 1 Lloyds Rep 219, the court refused to exercise its power to order the examination of witnesses in England under section 44(2)(a) of the AA 1996, in a foreign-seated arbitration in New York. The court observed that as a matter of English law, the purpose of the examination was providing evidence for trial, whereas under the New York curial law, the purpose of the examination was investigating whether the witness might have any information relevant to the case.
c) Is it practical, convenient, and proper in the circumstances to apply for interim measures in Kenyan courts, as opposed to other national courts or the courts at the seat?
d) Does the grant of interim measures bind parties to their agreement to arbitrate? Where the interim measure sought aids a party to circumvent the agreement to arbitrate, then the court should decline to exercise its jurisdiction as this will be contrary to the parties' agreement to arbitrate.[206]
e) Is the grant of the interim measures contested by the parties? If the opposing parties do not contest the grant of interim measures, the court

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205 ibid.
206 Born (n 3) 3995.

may exercise discretion and grant the interim reliefs sought where the relevant tests for the specific interim measure are met. However, in practice, it is unlikely that the party on the other side of dispute does not challenge the application for interim measures.

f) Is it fair and just in the circumstances to grant the interim measures sought?

g) Does the grant of the interim measures or entertaining the application invite the court to examine the merits and usurp the powers of the arbitral tribunal?[207]

h) Whether the interim measures sought can only be maintained by pursuing the substantive claim before the court. In *SRS Middle East FZE v Chemie Tech DMCC*, the English High Court held that interim measures should not be granted where security or other interim protective measures can only be obtained or maintained by pursuing a claim on the merits in the court that granted those measures.[208] In the court's view, this contradicts the commencement of court proceedings for the sole purpose of obtaining interim measures in support of the arbitration.[209]

i) How long will the interim measures be in place? The court should consider the duration because granting interim measures for long periods of time may lead to enforcement issues at the seat of arbitration.

5.5 EXISTENCE OF APPOINTMENT OF AN EMERGENCY ARBITRATOR UNDER THE INSTITUTIONAL RULES GOVERNING THE ARBITRATION

a) Do the institutional arbitration rules governing the arbitration allow for the appointment of an emergency arbitration to grant the interim measures sought? While institutional arbitration rules do not prohibit parties from applying to national courts even with the existence of provisions on emergency arbitrator, the court may need to ask itself whether it is appropriate for it to grant the interim measures sought notwithstanding

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207 Al Jazy Omar Mashhoor Haditheh, 'Some Aspects of Jurisdiction in International Commercial Arbitration' (PhD Thesis, University of Kent 2000) 249. See also *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd [1993] AC 334, 358 (House of Lords).*

208 [2020] EWHC 2904 (Comm).

209 ibid.

the existence of other avenues, such as provisions of emergency arbitrators who may equally grant the interim reliefs sought.[210]

b) Will the emergency arbitrator's order be voluntarily executed.[211] This consideration emphasizes the limitation of emergency arbitrator provisions.

5.6 CONDUCT OF THE PARTIES

Has the party applying for interim measures taken steps to advance arbitration to indicate that there is an intention to respect the agreement to arbitrate.[212] This may take the form of presenting proof of filing the request for arbitration.[213]

5.7 ARBITRAL TRIBUNAL

a) Has the arbitral tribunal been constituted?

b) If so, whether the arbitral tribunal is able to grant the interim measures sought and whether it is able to act effectively?[214] Where the arbitral tribunal is in existence and is able to grant the interim measures or appointing an emergency arbitrator is possible and likely to be effective, it may be appropriate to apply first to that tribunal or emergency arbitrator for interim measures, unless international enforcement may be required.[215] Has the authorisation of the arbitral tribunal been obtained by the party seeking interim measures?[216]

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210 Article 29.7 ICC Arbitration Rules 2021. See also Article 9.1.3 of the LCIA Arbitration Rules which provides notwithstanding the provisions of emergency arbitrator in Article 9B, a party may apply to a competent state court or other legal authority for any interim or conservatory measures before the formation of the arbitral tribunal; and Article 9B shall not be treated as an alternative to or substitute for the exercise of such right. During the emergency proceedings, any application to and any order by such court or authority shall be communicated promptly in writing to the emergency arbitrator, the Registrar and all other parties.

211 Redfern and Hunter (n 27) 426.

212 ibid.

213 ibid.

214 William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) 28 *Brooklyn Journal of International Law*, 1059,1087

215 Redfern and Hunter (n 27) 426.

216 Article 25.3 of the LCIA Rules requires parties to seek the authorization of the arbitral tribunal where it has been formed before applying for interim measures in a state court.

6.0 CONCLUSION

Interim measures are an indispensable part of the arbitral process.[217] They maintain the *status quo* pending the determination of the dispute by the arbitral tribunal and ensure that actions taken by an adverse party during arbitration proceedings do not render the arbitral award futile. Court-ordered interim measures are necessary in circumstances where the arbitral tribunal is yet to be constituted or is unable to act. Besides, an arbitral tribunal can neither compel third parties nor enforce their orders. It is for this reason that the UNCITRAL Model Law and various arbitration institutional rules recognize that recourse to courts for interim measures is not an infringement or a waiver of the arbitration agreement.

Ordinarily, courts at the seat of arbitration are the natural forum for granting court-ordered interim measures. However, as demonstrated by this paper, such jurisdiction is not exclusive but is concurrent, as was held in the U&M Case. In some cases, it may be urgent yet impracticable and unrealistic to apply to the courts at the seat of arbitration to prevent the dissipation of assets. Moreover, it may not be rational or commercially viable to apply to the courts of the seat where the assets or performance of the contract are in Kenya or another country, among other factors.

As Kenya seeks to establish itself as a regional hub for international arbitration, its courts should have the power to grant interim measures in support of foreign-seated arbitrations. The Skoda Case contradicts this aspiration because the court held that the High Court lacks jurisdiction to grant interim measures in support of foreign-seated arbitrations and held that it was only the courts at the seat (London) that could grant the measures sought.

To be fair to the Skoda Case, the Kenyan Arbitration Act does not expressly provide that Kenyan courts have the power to grant interim measures in aid of foreign-seated arbitrations. This power is implied from the reading of Sections 2 and 7 of the Kenyan Arbitration Act. Therefore, there is a need to

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217 Ross (n 12) 421.

amend the Kenyan Arbitration Act and codify the positions in the CMC and Isolux Cases to expressly empower Kenyan courts to grant court-ordered interim measures in foreign-seated arbitrations. These amendments will create more certainty and promote international arbitration.

The current uncertainty surrounding the jurisdiction of Kenyan courts to grant interim measures in foreign-seated arbitrations poses practical challenges for parties and investors, who are often compelled to seek such orders from courts at the arbitral seat. This results in increased legal costs associated with seeking interim measures from the court at the seat. But most importantly, the inability to obtain interim relief locally, especially when the subject matter is in Kenya, poses a serious risk to the intended arbitration, as assets may be dissipated before proceedings even commence, ultimately frustrating the enforcement of the resultant arbitral award. In the author's view, Kenyan Courts have an international obligation stemming from the UNCITRAL Model Law and the New York Convention to facilitate the success of international arbitration. By granting interim measures in foreign-seated arbitrations, Kenyan courts would be fulfilling this commitment. Enhancing judicial support in this regard through sensitization and advanced training of judges would reinforce Kenya's position as an arbitration-friendly jurisdiction and promote confidence in its arbitration framework.

Other countries, such as India, amended her Arbitration and Conciliation Act to cure the uncertainty and provide that Indian courts have powers to grant interim measures in foreign-seated arbitrations.[218] The Arbitration and Conciliation (Amendment) Act, 2015 added a proviso to Section 2(2) of the Indian Arbitration and Conciliation Act 1996 that allowed Section 9 (provision relating to interim measures by court) to be applicable in support of foreign-seated arbitrations.[219] Tanzania recently enacted its Arbitration Act 2020, which has express provisions similar to the English Arbitration Act, allowing

218 On the general discussion of the power of Indian courts to grant interim measures in support of foreign-seated arbitrations. See Muskan Agarwal and Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7 *National Law School Business Law Review* 73.

219 ibid.

Tanzanian courts to grant interim measures in support of foreign-seated arbitrations.[220]

Until the Kenyan Arbitration Act is amended, the factors proposed by Part V of this paper will be a useful guide to courts when considering assuming jurisdiction to grant interim measures in support of foreign-seated arbitrations. Even after the amendment of the Arbitration Act, those factors remain important when courts are considering not to assume jurisdiction, especially where it would be inappropriate to do so.

220 See the Tanzanian Arbitration Act 2020, Sections 46, 5(3) and 5(4).

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UTI POSSIDETIS AND ISRAEL'S TERRITORY CLAIMS: A CRITIQUE OF VICE PRESIDENT SEBUTINDE'S DISSENTING OPINION

Mahad Kisuze Mugaya*

Abstract

Uti possidetis juris was historically developed to preserve colonial-era borders during decolonisation, ensuring territorial continuity and stability. However, its application to Israel's territorial claims in the Occupied Palestinian Territory (OPT) remains contentious. This paper critically examines Vice President Julia Sebutinde's dissent in the 2024 International Court of Justice Advisory Opinion, which invoked uti possidetis juris to justify Israel's presence in the OPT. Through an analysis of its historical origins, legal precedents, and scope, the paper argues that Sebutinde's interpretation is flawed as it misapplies uti possidetis beyond decolonisation, undermines Palestinian self-determination, and risks legitimising territorial acquisition by force. The paper further assesses the broader implications of her reasoning while exploring alternative legal and diplomatic pathways for resolving the Israel-Palestine dispute under international law.

1.0 INTRODUCTION

Millions of people in the Middle East dream of safe, quiet lives with minimum geopolitical conflict and violent deaths. In his book, The Question of Palestine, Edward W. Said, a US professor at Columbia University makes a point that the serious mistake made by the Israeli political élite and those who have always agreed with Israel's political and military choices is missing out on the fact that there was a Palestinian people in Palestine way before the foundation of the State of Israel. It is still there in spite of the State of Israel, and it steadily intends to survive, regardless of all the defeats, the

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humiliations, the bloody destruction of its goods, people and values.[1] Steven Ratner questions the response of the effective decision makers in the international community to the long-lasting ethnic conflict that has been ambiguous and inconstant with regard to peace and unity of all states.[2]

The last year of war, as bad as any other in the region in modern times, has shown yet again that dreams of peace cannot come true while deep political and strategic questions remain unanswered. As of the date of writing this article. over 50,933 people,[3] mostly civilians have been killed in Gaza alone by Israeli attacks within the past fifteen months from 7th October, 2023. Hamas went on the offensive on this day, killing 1,200 people, mostly Israeli civilians[4] prompting an Israeli military response that has been described by majority of the international community as overly excessive, brutal and genocidal.[5] This current war however is only a chapter in a conflict that is about seven decades long. The origin of the conflict being the competing claims to land mostly between the Jewish settlers and Arab Palestinians and the desire of both groups to have their own independent states on the same territory ever since 1947 to date.

On January 19, 2023, the Secretary-General of the United Nations (UN) officially informed the International Court of Justice (ICJ) about the General Assembly's decision to refer the inquiries specified in Resolution 77/247. The decision of the General Assembly requested the ICJ to provide an advisory opinion on the

[2] Steven Ratner, Drawing a better line: Uti possidetis and the borders of new states. The American Journal of International Law, 90(4) (Cambridge University Press 1996) 590–624. Also see Nguyen Quoc Dinh, D., Daillier, P., & Pellet, A. (Eds.). (1994). Droit international public (5th ed.). LGDJ.

[3] Al Jazeera. (2025, April 12). At least 500 Gaza children killed since Israel broke truce: Official. Al Jazeera <https://www.aljazeera.com/news/2025/4/12/at-least-500-gaza-children- killed-since-israel-broke-truce-official> [Accessed on 12th February, 2025]

[4] Bowen, Year of killing and broken assumptions has taken Middle East to edge of deeper, wider war. BBC News (2024, October 6), <https://www.bbc.com/news/articles/c781vgy3918o> [Accessed on 20th October, 2024]

[5] Amnesty International, Amnesty International concludes Israel is committing genocide against Palestinians in Gaza. (December 4th 2024). <https://www.amnesty.org/en/latest/news/2024/12/amnesty-international-concludes- israel-is-committing-genocide-against-palestinians-in-gaza/> [Accessed on

legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem[8] pursuant to the UN Charter provisions[9] and the Statute of the ICJ.[10] By a majority, the Court concluded, among other things, that Israel's continued presence in the Occupied Palestinian Territory is unlawful and that Israel has an obligation to end its unlawful presence in the territory as soon as possible, cease all new settlement activities immediately, and evacuate all settlers from the area. However, Justice Julia Sebutinde, the vice president of the ICJ disagreed with the majority decision citing *uti possidetis juris* among other considerations in her dissenting opinion to uphold Israel's right to the territory in question.[11]

Uti possidetis doctrine applies in determining borders of newly formed states and it holds that newly independent states inherit the borders of the preceding colonial or administrative territories.[12] Although traditionally associated with decolonisation, it has also been applied to states emerging from other forms of political restructuring, including League of Nations Mandates[13] like the British Mandate for Palestine that emerged out of the Ottoman Empire.[14]

This paper delves into the application of this doctrine to Israel's territorial claims, especially regarding Jerusalem and the West Bank, areas that have been at the heart of intense debates. Israel declared statehood in 1948 following the expiration of the British Mandate for Palestine.[15] Invoking the uti possidetis juris doctrine suggests that Israel inherited the borders of the Mandate, a view that

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8 Ibid.

9 The International Court of Justice is by virtue of Article 92 of the Charter the 'principal judicial organ of the United Nations'. It is also, as Judge Lachs put it, 'the guardian of legality for the international community, both within and without the United Nations'. (See The Lockerbie case, ICJ Reports, 1992, pp. 3, 26; 94ILR, pp. 478, 509).

10 Chapter IV, Articles 65-68 of the Statute of the ICJ and Part IV, Articles 102-109 of the Rules of Court concern advisory opinions.

11 Dissenting Opinion of Vice-President Sebutinde, Paragraph 70.

12 ICJ Reports, 1986, p. 566; 80 ILR, p. 459. This was reaffirmed by the Court in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) case, ICJ Reports,1992, pp. 351, 386–7; 97 ILR, pp. 266, 299–300.

13 Article 22 of the Covenant of the new League of Nations. Therefore, Mandates were a short- lived form of foreign rule of territory invented in the wake of World War I. They were created to dispose of the colonial and imperial possessions of the defeated German and Ottoman Empires.

Justice Sebutinde adopted in her dissenting opinion[16] but is widely disputed due to competing claims of the Palestinian right to self-determination.

This article critiques Vice-President Sebutinde's narrative on Palestinian and Israeli rights to Mandatory Palestine, arguing that despite the doctrine supporting Israel's territorial sovereignty in areas within the borders of the British Mandate, this interpretation contrasts with international opinions that often limit Israel's claims, particularly in territories like East Jerusalem and the West Bank. Despite the broader acceptance of *uti possidetis juris* in other international contexts, such as the dissolution of Yugoslavia[17] and the Soviet Union[18], its application to Israel remains contentious due to the region's complex political and historical landscape.

By closely analyzing her legal reasoning within the region's historical context, the article explores how her dissent influences current territorial disputes, claims of self-determination for the Palestinian people, and the enduring pursuit of peace in the region.

2.0 THE DOCTRINE OF UTI POSSIDETIS JURIS

Uti possidetis is a Latin phrase that literally translates to "*as you possess*".[19] It is a principle in international law that territory and other property remains with its possessor at the end of a conflict, unless otherwise provided for by treaty. If such a treaty does not include conditions regarding the possession of property and territory taken during the war, then the principle of *uti possidetis* will prevail. Originating in Roman law, the phrase is derived from the Latin expression *uti possidetis, ita possideatis*, meaning "*may you continue to possess such as you do possess*" (lit. 'as you possess, thus may you possess').[20]

In Roman times, uti possidetis was applied provisionally during litigation to grant possession of land to the current possessor unless that possession had been obtained through force, fraud, or revocable permission.[21] Over time,

16 Ibid.
17 Conference on Yugoslavia Arbitration Commission, Opinion No. 2 (Jan. 11, 1992)
18 Miklasova Julia, Dissolution of the Soviet Union Thirty Years on: Re-Appraisal of the Relevance of the Principle of Uti Possidetis Juris (2024).
19 Encyclopedia Britannica, Uti possidetis. <https://www.britannica.com/topic/uti- possidetis> [Accessed February 12, 2025]
20 Policy Commons, Uti possidetis.

however, the doctrine expanded in scope, becoming a critical component of international law, especially during the decolonization periods of the 19th and 20th centuries.[22] The concept as applied in international law holds that newly formed states should inherit the territorial borders that existed prior to their independence, typically based on colonial administrative boundaries. This transformation of the doctrine occurred most notably in Latin America during the early 19th century, as former Spanish colonies sought independence.[23] The leaders of these states chose to adhere to the administrative boundaries established by the Spanish colonial authorities, thus maintaining continuity and stability.[24]

However, there were some challenges. Many of the colonial boundaries had been poorly defined or were subject to change over time, resulting in ambiguities that caused disputes between neighbouring states. To address these issues, variations of the principle emerged, distinguishing between *uti possidetis juris*, which relied on legal documents to define boundaries, and *uti possidetis facto*, which focused on actual possession of the land. The two different versions of *uti possidetis* vied for supremacy.

Over time, *uti possidetis juris* became the more widely accepted interpretation, though in practice, compromises were often necessary to resolve disputes.[25] The application of *uti possidetis* became even more prominent in the 20th century, particularly in Africa, during the wave of decolonization that swept across the continent in the mid-century.[26] Prior to colonisation, African territorial boundaries were generally fluid, defined by zones of influence rather than fixed borders. However, European colonial powers imposed artificial boundaries that often disregarded ethnic, cultural, and geographic realities.[27]

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22 Suzanne Lalonde, Determining boundaries in a conflicted world: The Role of Uti Possidetis (p.31) (McGill-Queen's University Press 2002).

23 Steven Ratner, supra note 2, page 593-594.

24 Supra note 21).

25 U.N. Secretary-General, Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), ¶ 6 n.1, U.N. Doc. S/2000/590 (June 16, 2000) (The international boundary between Israel and Lebanon was established pursuant to the 1923 Agreement between France and Great Britain entitled 'Boundary Line between Syria and Palestine from the Mediterranean to El Hamme', which was reaffirmed in the 'Israeli-Lebanese General Armistice Agreement' signed on 23 March 1949.")

26 Steven Ratner, supra, note 2, page 595.

27 Thomas Pakenham, The scramble for Africa: White man's conquest of the dark continent

When these colonies gained independence, African leaders were faced with the dilemma of whether to maintain these colonial borders or to redraw them based on historical, ethnic, or tribal considerations.[28] In 1964, the Organization of African Unity (OAU) made a practical choice to maintain the colonial borders through the Cairo Declaration[29] in-order to prevent large-scale territorial conflicts. The principle was also referenced during the breakup of multi-ethnic states like Yugoslavia and the Soviet Union in the early 1990s to establish the borders of the newly independent states based on the internal administrative boundaries that had been in place within the former federations.

For instance, in Yugoslavia, the international community endorsed the notion that the republics that made up the Socialist Federal Republic of Yugoslavia should gain independence along their pre-existing administrative borders but this approach faced significant challenges, especially in regions where substantial ethnic minorities resided within the republics.[30] In Bosnia and Herzegovina, the application of *uti possidetis* was complicated by the significant presence of Bosnian Serb and Bosnian Croat populations, leading to a brutal conflict that necessitated international intervention[31] and ultimately resulted in the partitioning of the country under the Dayton Accords.[32] Similarly, the dissolution of the Soviet Union brought about complex boarder issues, especially in areas like Crimea and Nagorno-Karabakh, where internal Soviet boundaries had been redrawn multiple times and where ethnic and political tensions continued to exist.[33]

Legally, uti possidetis has been recognized as a general principle of international law, particularly in decolonization cases. The ICJ has emphasised its

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28 Resolutions Adopted by the All-African People's Conference, Accra, December 5- 13, 1958, in Colin Legum, Pan-Africanism: A Short Political. Guide 228, 231 (1962) (denouncing "artificial frontiers drawn by Imperialist powers to divide the peoples of Africa" and calling for "the abolition or adjustment of such frontiers at an early date").

29 O.A.U. Resolution on Border Disputes, 1964, in Basic Documents on African Affairs 360, 361 (Ian Brownlie ed., 1971). The resolution is often referred to by its OAU document number, AGH/RES.16(I).

30 Peter Radan, The Break-up of Yugoslavia and International law (London and New York: Routledge 2001) p. 160.

31 Steven, supra, note 2, page 596.

32 Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia

significance in maintaining stability during state formation processes. The question of uti possidetis was discussed by the Chamber of the International Court in *Burkina Faso v. Republic of Mali* where court stated:

"*The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign."*[34]

In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.

The precise legal status of *uti possidetis* remains somewhat ambiguous and its application is not without constraints. For instance, this doctrine does not inhibit states from peacefully modifying their borders via mutual consent and neither does it automatically nullify other legal assertions grounded in principles such as self-determination.[35]

Therefore, despite being of pronounced significance in regions like Latin America and Africa, *uti posseditis* has at times been criticised more so in circumstances where it undermines the pre-existing ethnic fabric of the societies in which it is applied just as was in the case of Yugoslavia and the Soviet Union discussed above. Similar ethnic tensions characterise the contest over the Occupied Palestine Territory hence making the application of uti possidetis juris there a problematic encounter.

3.0 THE ICJ ADVISORY OPINION AND JUSTICE JALIA SEBUTINDE'S DISSENT

3.1 OVERVIEW OF THE ICJ ADVISORY OPINION

In its Advisory Opinion on the legal consequences of Israel's occupation of the Palestinian territories,[36] the ICJ provided a comprehensive holding regarding Israel's policies, the legality of its presence in the Occupied Palestinian Territory,

34 ICJ Reports, 1986, p. 556.

35 Cox, L, Review of International law (6th ed.) by Malcom Shaw (International Journal of Legal Information 2009) 37(4), 399–400.

and the responsibilities of Israel, other States, and the UN. The questions before the court were framed as;

"(*a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?*

(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"[37]

The ICJ findings were to the effect that Israel's policies and practices in the Occupied Palestinian Territories constitute breaches of international law.[38] That these actions violate the fundamental principle that prohibits the acquisition of territory through force in addition to infringing upon the Palestinian people's right to self-determination,[39] a right that is very essential to international human rights law. The Court found that Israel's continued presence in the Occupied Palestinian Territories is unlawful. Israel's claims of sovereignty and attempts to annex parts of the occupied territory go against international law, which prohibits gaining territory through force.[40] The ICJ emphasised that Israel must end its occupation as quickly as possible as the protracted nature of the occupation undermines the Palestinian people's right to self-determination, thus leaving them in a state of ongoing uncertainty and suspension.[41]

The Court determined that such an occupation should not be employed to perpetually deny the Palestinian people their rights, all while assimilating portions of their territory into Israel's sovereign domain. The Court then specified Israel's obligations under international law to include ceasing its illegal policies

37 Supra, note 43, paragraph 1-21.
38 Supra, note 43, paragraph 285.
39 Ibid.

and practices (which encompass halting all settlement activities[42] without delay and dismantling existing settlements, rescinding laws that discriminate against the Palestinian people in the Occupied Palestinian Territories and providing reparations for the damage caused by its wrongful actions, which may involve restitution of property or, where restitution proves infeasible, monetary compensation.[43]

The ICJ then went ahead to scrutinise the responsibilities of various States concerning Israel's violations of international law[44] which are significant when one considers obligations erga omnes.[45] The Court concluded that all States must refrain from recognising Israel's annexation or any modifications to the status of the Occupied Palestinian Territory, abstain from offering aid or assistance to Israel in perpetuating the unlawful circumstances resulting from its occupation in addition to distinguishing between Israeli territory and the Occupied Palestinian Territory in their dealings with Israel. The purpose of the distinction is to ensure the full realisation of the Palestinian people's right to self-determination through collaboration with the United Nations to dismantle Israel's illegal presence in the Occupied Palestinian Territory.[46]

It was pointed out that the UN through the General Assembly and the Security Council must pursue additional measures to terminate Israel's unlawful occupation and promote a fair and lasting peace. The Court reiterated its call upon the UN to amplify its endeavours in addressing the Israeli-Palestinian conflict, which continues to threaten global peace and security as was stated in its Wall Advisory Opinion.'[47]

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42 European External Action Service, 2023 report on Israeli settlements in the occupied West Bank, including East Jerusalem (January–December 2023). <https://www.eeas.europa.eu/delegations/palestine-occupied-palestinian-territory-west- bank-and-gaza-strip/2023-report-israeli-settlements-occupied-west-bank including- EastJerusalem-january-december-2023_en?s=206> [Accessed October 9, 2024]

43 Supra, note 43 paras. 267-272.

44 Supra, note 43, paragraph 273- 279.

45 Essentially, the duties owed to the international community as a whole.

46 United Nations General Assembly. (1974, October 14). Invitation to the Palestine Liberation Organization (A/RES/3210(XXIX)) <https://unispal.un.org/> [Accessed October 9, 2024]; United Nations General Assembly. (1974, November 22). Observer status for the Palestine Liberation Organization (A/RES/3237(XXIX)) <https://www.un.org/> [Accessed October 9, 2024]

47 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, ICGJ 203

"The urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region".

The ICJ stated that creating two independent states, a state of Israel and a state of Palestine, living side by side, independently with secure and recognized borders is key to bringing peace and stability to the region.

In coming to this conclusion, the Court based on the prohibition against the acquisition of territory through force a principle that has been well-established in the UN Charter,[48] the inalienable right to self-determination[49] and key aspects of International Humanitarian Law (IHL), particularly the Fourth Geneva Convention,[50] which explicitly prohibits the settlement of an occupier's population in occupied territories.[51] The Convention imposes significant obligations on the occupying power to respect the rights of those who find themselves under occupation.[52] Israel's security justifications for annexation and continuous occupation, were rejected on the basis that cannot take precedence over international legal standards that pertain to territorial integrity and the right to self-determination.

3.2 KEY ASPECTS OF JUSTICE SEBUTINDE'S DISSENTING OPINION

In her dissenting opinion, Vice-President of the ICJ, Justice Sebutinde articulated several critical concerns regarding the ICJ's Advisory Opinion on Israel's presence in the Occupied Palestinian Territory. She contends that the Court's conclusions are founded on incomplete and somewhat imbalanced information. This, she argues, renders it impossible to arrive at a fair and informed judgement on the highly contested factual matters.[53] Justice Sebutinde critiques the way the General Assembly framed its questions and asserts that they are biased, reflecting a one-sided perspective. She believes that these bias favours one party over the other.[54]

48 Article 2(4), UN Charter.
49 Supra.
50 International Committee of the Red Cross (ICRC), Geneva Convention relative to the protection of civilian persons in time of war (Fourth Geneva Convention), 75 U.N.T.S. 287 (August 12 1949) <http://www.refworld.org/> [Accessed October 9, 2024]
51 Supra, note 50, Article 49.
52 Ibid, Articles 47 and 55-61.
53 Supra, note 6, paragraph 42.
54 Ibid, paragraph 1.

Justice Sebutinde further expresses concern regarding the Advisory Opinion's circumvention of Israel's consent when addressing the primary issues of the Israeli-Palestinian conflict which, in her view, undermines the established legally binding negotiation framework that has garnered international approval.[55] Her position is that this framework is crucial for tackling fundamental matters, including borders, refugees, the status of Jerusalem, security and the possibility of a two-state solution. This position is inspired by the Western Sahara case, where the Court ruled that where an advisory opinion "*would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent*", the Court would decline to give that opinion.[56]

She argues that these issues ought to be settled through negotiation rather than judicial intervention and, the Court should have upheld its judicial neutrality by refraining from interfering with ongoing diplomatic efforts.[57] She argues that the Advisory Opinion lacks sufficient historical background, which she sees as crucial for fully understanding the conflict.[58] This was also observed by Judge Buergenthal in the Wall Opinion who held that the critical question in determining whether to exercise its discretion in acting on an advisory opinion request is;

> *"Whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character".*[59]

In Justice Sebutinde's assessment, the Court's opinion represents a one-sided legal interpretation of Israel's actions under international law, failing to account for the legal and factual complexities involved including the competing territorial claims that arise from the former British Mandate of Palestine. She critiques the Court's proposed timeline for Israel's withdrawal from the occupied territories; considering it impractical, dismissive of Israel's security concerns and previously

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55 Ibid, paragraph 46, 47 and 46.
56 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 25, para. 33.
57 Supra, note 5, paragraph 48.
58 Ibid, paragraph 42.
59 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,

established negotiations.[60]

The dissenting opinion contests the application of the principle of full reparation, contending that it is inappropriate in the context of the Israeli-Palestinian conflict where all parties ranging from the state of Israel, the Arab Palestinians and the international community have a portion of blame to share just as the European Court of Human Rights (EHRC) held in the 2010 Demopoulos case[61] involving Northern Cyprus.[62] That the Court misapplied the law of occupation, and its conclusions on the General Assembly's inquiries without critically examining pivotal issues such as Israel's borders, its territorial claims and the complex relationship between Palestinian self-determination and Israel's own rights and security concerns.[63]

Summarily, Justice Sebutinde points to the necessity of resolving the conflict through negotiation and emphasises the United Nations' role in facilitating peace efforts. Her argument is that the only feasible solution to the Israeli-Palestinian conflict lies within the negotiation framework established through bilateral and UN agreements, a solution cannot be achieved through the Court's intervention.

2.0 APPLICATION OF *UTI POSSIDETIS JURIS* IN THE DISSENTING OPINION

The doctrine of uti possidetis juris, an element of customary international law that acknowledges the administrative boundaries of a territory as the new international borders upon a state's independence is one of the considerations that Justice Sebutinde employs to support her argument her interpretation of Israel's territorial sovereignty. Her argument is that Israel's borders at the time of its independence in 1948 were established based on the administrative boundaries of the British Mandate for Palestine.

The assertion is that when Britain officially terminated its mandate over Palestine in 1947, the administrative lines of the Mandate by operation of *uti possidetis juris* became the international borders of Israel.[64] These borders

60 Supra, note 6, paragraph 54.
61 Demopolous et al. versus Turkey, Decision 1.3.2010 GC.
62 Ibid, paragraph 62.
63 Ibid, paragraph 62-69.

encompassed the Mediterranean Sea to the west, the Jordan River to the east, as well as the boundaries with Lebanon and Syria to the north (which were established in the Paulet-Newcombe Agreement)[65]. The border with Egypt, located in the Negev Desert to the south, was also included. That, under this doctrine, Israel inherited these boundaries as they were at the time of British withdrawal; thus, sovereignty over the entire territory of Mandatory Palestine was conferred to Israel.[66]

Justice Sebutinde references various precedents from the International Court of Justice that exemplify the operation of uti possidetis juris. In *Burkina Faso v Republic of Mali*, the ICJ confirmed that this principle applies retroactively to the administrative boundaries that were in place at the time of independence.[67] The doctrine effectively "*freezes the territorial title*," meaning it does not necessitate that the boundaries had previously been recognised as international borders.[68] In this context, she elucidates that Israel's borders, which were delineated for administrative reasons during the British Mandate, were subsequently transformed into international borders following Israel's declaration of independence in 1948. In *the El Salvador v Honduras case*, the ICJ elucidated that the principle of uti possidetis juris serves to convert internal administrative boundaries into international frontiers regardless of their original purpose.[69] It is from this therefore that, Justice Sebutinde asserts that the administrative borders of Mandatory Palestine existing during British governance ought to be regarded as the international borders of the State of Israel after its independence in 1948.

Reference is also made to Israel's peace treaties with Egypt and Jordan which in the dissenting opinion are said to reinforce the application of the doctrine of uti possidetis juris. These treaties, Justice Sebutinde argues, validate borders that correspond with the confines of the British Mandate for Palestine and strengthen the perspective that Israel's borders were formed based on uti possidetis juris and were later acknowledged through diplomatic Accords with neighbouring

65 Franco-British Agreement on Northern Border (Paulet-Newcombe Agreement, 1923).
66 Ibid, page 28, paragraph 72 and figure 2.
67 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 568, para. 30.
68 Ibid.
69 Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua).

countries in the region. The demarcation of the "*Blue Line*" between Israel and Lebanon by the United Nations in 2000,[70] which depended on the boundaries of the British Mandate, served as a criterion for establishing territorial limits also.

This perspective by Justice Sebutinde that employs the principle of uti possidetis juris encompasses contentious areas such as Jerusalem, the West Bank and Gaza which are the hotspots for the ongoing war between the state of Israel and the Arab Palestinians.[71] She argues that Israel's claim to these territories is fundamentally rooted in the administrative borders established during the British Mandate further reinforced by the principle of uti possidetis juris and this claim is only subject to any voluntary agreements made by Israel to modify those borders.

2.1 CRITIQUE OF JUSTICE SEBUTINDE'S POSITION ON THE APPLICATION OF *UTI POSSIDETIS* IN THE ISRAEL-PALESTINE CONTEXT

The claim usually posited by pro-Israel protagonists that the doctrine of *uti possidetis juris* bestows sovereignty upon Israel over Palestinian land is-upon proper evaluation, flawed and merits re-evaluation. As already stated, this claim implies that, because Israel was the only nation to arise after the British Mandate for Palestine concluded in 1948, it consequently acquired the totality of the contested territory as it was under the British Palestine Mandate. Justice Sebutinde, in her dissenting opinion in this case, reflects this line of argument, asserting that Israel "inherited the whole of the disputed territory" in accordance with uti possidetis juris as opposed to two states as had been envisaged by the international community. However, this legal interpretation has sound limitations both in theory and practice as explored below.

To begin with, the application of uti possidetis juris must be understood within

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70 UN Secretary-General, Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), ¶ 6 n.1, UN doc. S/2000/590 (16 June 2000).

71 Al Jazeera, One year of Israel's war on Gaza: A simple guide (2024, October 7) <https://www.aljazeera.com/news/2024/10/7/one-year-of-israels-war-on-gaza-a-simple- guide> [Accessed October 9, 2024]

the historical context of 1922-1923.[74] This period marks the establishment of the Mandate for Palestine, rather than the pivotal year of 1948, when Israel proclaimed its independence.[75] It is this point that the former Arab territories of the Ottoman Empire were incorporated into the League of Nations' Mandate System which was regulated by Article 22 of the Covenant of the League of Nations.[76] Uti possidetis juris should not be applied to mandate territories in the same way as former colonies, as mandates were not sovereign possessions of the administering powers but international trusteeships with distinct legal status and obligations, fundamentally differing from colonial rule in both purpose and structure.[77] The application of uti possidetis guarantee as a pre-independence guarantee of administrative boundaries within states is a matter of politics and not a pre-existing requirement of international law. Since the mandate was a structure, which some sort of local autonomy, unlike the Ottoman empire, then therefore, the right time for application of the doctrine was 1922-1923 to determine the borders of the territories over which the Ottoman Empire and its successor state, Turkey, relinquished claims. The Principal Allied Powers who were entrusted with this responsibility had the authority to delineate these boundaries.

Proper application of uti possidetis juris in this area, would have necessitated the establishment of borders between Lebanon, Syria, Jordan and Mandatory Palestine, based on the internal administrative divisions of the Ottoman Empire. It is these boundaries that were the proper boundaries at decolonisation that needed to be used in this regard to solve the geopolitical challenges of the region.

Secondly, in her dissenting opinion, Justice Sebutinde tends to buy into the view

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74 Carnegie Endowment for International Peace, The Treaties of eace 1919–1923 (Vol. II) (New York: Carnegie Endowment for International Peace 1924.

75 Opinio Juris, Back to the drawing board of the Partition Plan: Vice President Sebutinde's erroneous account of Palestinian and Israeli claims of title to the territory of Mandatory Palestine – Part Two (September 3 2024) <https://opiniojuris.org/2024/09/03/back-to-the- drawing-board-of-the-partition-plan-vice-president-sebutindes-erroneous-account-of- palestinian-and-israeli-claims-of-title-to-the-territory-of-mandatory-palestine-part-two/> [Accessed October 9, 2024]

76 Opinio Juris, Israel does not have a sovereign claim to the West Bank: A response to IJL's legal opinion (February 22 2024) <https://opiniojuris.org/2024/02/22/israel-does-not-have-a-sovereign-claim-to-the-west-bank-a-response-to-ijls-legal-opinion/> [Accessed October 9, 2024]

77 Anne Peters, The principle of Uti Possidetis Juris: How relevant is it for issues of secession? In C. Walter, A. von Ungern-Sternberg, & K. Abushov (Eds.),

by certain scholars that uti possidetis juris remains relevant even when it conflicts with the principle of self-determination.[78] However, this seems to overstate the extent to which uti possidetis can override the right to self-determination as recognised by international law.

Although uti possidetis suggests that a non-self-governing territory should be viewed as a singular collective entity entitled to statehood[79] leading to the creation of states that include ethnic minorities without claims to independent statehood through external self-determination,[80] this principle has never been utilised to prevent the majority population[81] within a Mandatory administrative unit from realising its national ambitions.[82] Instead, it has only allowed a minority group to exercise such rights. Applying uti possidetis in this way would, in fact, violate the fundamental right of self-determination, which primarily supports the majority within a recognised political unit in asserting their authority and be able to self- actualise.

Thus, it is clear that prioritising the right to self-determination for the majority population in Mandatory Palestine is a more justifiable approach than applying uti possidetis juris, which overshadows the realisation of the fundamental internationally recognised right to self-determine. More broadly still, uti possidetis in relation to Palestine which has distinct circumstances presupposes that the residents of a colonial or Mandatory territory constitute a unified entity deserving of statehood. However, such an assumption does not align with the specifics in the British Mandate, because they mirror a divergent political

78 Supra, note 6, paragraph 81.

79 Supra.

80 Malcom Shaw (Supra, note 42), page 495.

81 As of the end of 1946, the UN estimated the population of Mandate Palestine to consist of 1846000 people including "Arabs, 1,203,000; Jews, 608,000; others, 35,000". See the Special Commission on Palestine Report. Crawford notes that "on 1 May 1948, Jews constituted about 42% of the population of Palestine" (see Crawford (2006), p. 201) (note 92)

82 Zemach, A. (2019). Assessing the scope of the Palestinian territorial entitlement. Fordham International Law Journal, 42(4), 1203–1230. <https://ssrn.com/abstract=3254067> [Accessed October 5, 2024] (Referenced page: 1229) *"The establishment on the entire territory of the Mandate of a state dedicated to the advancement of the right to self-determination of only a minority group would have required divesting the members of the majority group, the Palestinians, of the right to vote for the governing institutions of the state. The tension between the principle of uti possidetis and the right to self-determination does not extend to these extremes."*

landscape.[85] The population in the region basically reflects a spectrum of views and political aspirations right from the time of the end of the British Mandate to date as opposed to somewhat unified aspirations which makes it hard the apply uti possidetis to such a context and this therefore calls into question the legitimacy of its application. A more appropriate approach would be to give the right to self-determination of the people a higher value. In this regard, a two-state solution recognising the territorial claims of both groups having their common aspirations and claims would be a better solution.

Thirdly, it is crucial to acknowledge that the global community through entities such as the League of Nations (LON) and, subsequently, the United Nations had foreseen the potential establishment of an independent Palestinian state.[86] Such a state would have undoubtedly invoked the principle of *uti possidetis juris* regarding the borders of Mandatory Palestine. However, the argument put forth by Justice Sebutinde suggests that, because Israel was the sole state to arise in 1948, it holds the right to assert claims over the entire territory.[87] This reasoning, described as a "*first-come, first-served*" interpretation of *uti possidetis juris* is, flawed. This is because although Israel's emergence did occur, it was not merely a consequence of a one-state solution; rather, it was the outcome of the two-state solution articulated in the UN's Partition Plan of 1947.[88]

Although Arab leaders and states rejected the Partition Plan and later engaged in armed conflict with the newly declared state of Israel, this rejection did not retroactively convert the two-state solution into a one-state solution that would favour Israel alone.[89] Consequently, the principle of uti possidetis juris could be employed to determine Israel's borders with Lebanon, Syria and Jordan; however, it neither grants nor can it grant Israel a valid claim to the entirety of Mandatory Palestine as suggested in the dissenting opinion.

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85 This was reinforced by the UN Partition Plan. see: ICC-01/18, page 30 & 31.

86 United Nations. Department Of Public Information. (2008) The question of Palestine and the United Nations. New York: United Nations Dept., page 3-5.

87 Ibid.

88 Supra.

89 Opinio Juris, Back to the drawing board of the Partition Plan: Vice President Sebutinde's erroneous account of Palestinian and Israeli claims of title to the territory of Mandatory Palestine – Part Two (September 3 2024) <https://opiniojuris.org/2024/09/03/back-to-the- drawing-board-of-the-partition-plan-vice-president-sebutindes-erroneous-account-of- palestinian-and-israeli-claims-of-title-to-the-territory-of-mandatory-palestine-part-two/> [Accessed October 9, 2024].

Moreover, demographic realities at the time of Israel's emergence (1945-1948) further undermine this argument. At this time, Jews constituted only about one- third of the population of Palestine and this population was concentrated in a few districts, such as Jaffa, Haifa and Jerusalem.[92] This demographic composition significantly weakens any assertion that Israel could legitimately claim sovereignty over all of Palestine based on uti possidetis juris as many parts of the territory even barely had any Israeli-Jewish people in their population. The notion that the mandate's provisions for establishing a "Jewish national home" in Palestine confer automatic territorial sovereignty is not supported by international law, because such interpretations fail to consider the broader implications of the demographic landscape.[93]

Fourthly, the claim that Israel just took over the Ottoman Empire's borders is legally incorrect. In this case, it was Mandatory Palestine, not Israel, that succeeded the Ottoman Empire.[94] It is therefore quite reasonable to assert, as some legal scholars contend, that Israel's existence is more accurately viewed as a secession from Mandatory Palestine; thus, uti possidetis juris becomes inapplicable.[95] This is because decolonisation and non-colonial secession differ in crucial aspects which outweigh the similarities.[96] These aspects include legality, effectiveness, implications for territorial integrity, universality, among others.[97]

Additionally, the British Mandate for Palestine, established by the League of Nations, can be seen as a transitional authority rather than a sovereign state. The mandate system was designed to prepare territories for self-governance and eventual independence. The end of the mandate and the subsequent declaration of the State of Israel can be viewed as the final step in a process of cession

91 Ibid.
92 Supra, note 90.
93 Ibid.
94 Abu-Saad and Champagne, Introduction: A historical context of Palestinian Arab education. (American Behavioral Scientist, 2006) 49(8), 1035–1051.
95 James Crawford, The Creation of states in international law 2nd ed (Oxford University Press 2010), pp. 432–433) (for the proposition that Israel was not created either pursuant to an authoritative disposition of the territory, or to a valid and subsisting authorization". Instead, "[s]recession would thus appear to be the appropriate mode).
96 Anne Peters, (2014). Supra.
97 Ibid.

initiated by the Ottoman Empire's renunciation of sovereignty.[98]

In international law, secession and succession are distinct processes with different legal outcomes. Secession is the unilateral withdrawal of a region or group from a parent state to form a new, independent state, often without the parent state's consent, leading to political and legal challenges.[99] In contrast, succession is a recognised, orderly process where one state replaces another in handling the international relations of a territory, usually occurring through processes like decolonization or dissolution, as seen in the Soviet Union's breakup in 1991.[100] While secession is often contested,[101] succession is typically backed by international agreements and frameworks.[102]

Considering this key characterisation, where at the end of the British Mandate for Palestine the Jewish community in Palestine through the Jewish Agency, declared independence without the consent of the British authorities or the Arab population, which aligns with the characteristics of secession,[103] it would therefore be safer to say that Israel seceded from the British Mandate for Palestine. This cemented by the Jewish Agency for Palestine[104] report to the Security Council in 1948, where it stated that the State of Israel "has now been established within Palestine".[105] Israeli authorities consistently denied that the State of Israel emerged by succeeding the Government of Mandate Palestine. This has also been affirmed by Israel courts such as in *Albohar v. Attorney- General* where it was stated:

"The State of Israel which was established on May 14, 1948, is not the successor of the Palestine Government. The new State came into being as a result of the decision and the Declaration of the Provisional Government of Israel, as an independent State which neither received nor took over the

98 Ian Brownlie, Principles of Public International Law. (Oxford University Press 2008) p.234.
99 Take an example of Kosovo's 2008 declaration of independence from Serbia.
100 Supra.
101 Oxford Public International Law, Secession. (Oxford Bibliographies 2019) <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo- 9780199796953-0045.xml> [Accessed October 9, 2024]
102 Oxford Public International Law, Uti possidetis juris in Max Planck Encyclopedia of Public International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1100> [Accessed October 9, 2024]
103 Shaw (2017), supra p. 456.
104 The main representative of Jewish people at the time.
105 Supra, note 86.

authority of the Government of Palestine. The Mandatory Government left the country without transferring its authority to any other body. Furthermore, the State of Israel was established in only part of the territory which was formerly known as the mandated territory. There is no legal nexus having its origin either in a treaty between the two countries or in international law, between the former Mandatory Government and the State of Israel".[107]

Although some may argue that the borders established by the UN Partition Plan[108] signify the exclusive internal boundaries relevant to the creation of Israel, the situation is, in fact, more intricate. UN Resolution 181(II) which outlined the Partition Plan did not genuinely create distinct, clearly defined units for self- determination but also specified boundaries for both the Jewish and Arab states. This ambiguity is important because Israel's Declaration of Independence, which was based on the Partition Plan, did not lead to an automatic legal shift to statehood according to international law.[109] Instead, Israel's legitimacy was established through its effective governance of the territory and the later recognition by the international community.[110]

Therefore, Israel's independence ought to be viewed as a breakaway from Mandatory Palestine rather than merely as a legal successor state under the principle of uti possidetis as contended by Justice Sebutinde in her opinion.

Also, the assertion that Israel could assert any claim to territory beyond the boundaries delineated in the Partition Plan is legally indefensible. Even the post- war armistice lines, often referred to as the Green Line, do not invoke the principle of uti possidetis juris because they were established amid conflict and were never meant to serve as permanent borders.[111] The armistice agreements distinctly indicate that these lines are established without prejudice to prospective territorial negotiations or boundary settlements.[112] If the State of Palestine were to recognise the pre-1967 borders as its boundary with Israel, it

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107 *Albohar v. Attorney-General,* p. 80; *Shimson Palestine Portland Cement Factory Ltd v. Attorney- General,* p. 72; and *Attorney-General v. Levitan* p. 65; and *Khayat v. Attorney-General*, p. 125; Scobbie, Iain & Hibbin, Sarah, The Israel- Palestine Conflict in International Law: Territorial Issues. (SSRN Electronic Journal.10.2139/ssrn.1621382 2010) pp. 51-52.

108 United Nations Resolution 181/1947.

109 Crawford, supra, page 433.

110 Supra, note 88.

111 Supra, note 84.

112 Kohen and Hébié, Peace agreements and territorial change.

would constitute a notable concession.[113] This holds particularly true considering that Israeli dominance over the area between the Green Line and the borders set forth in the Partition Plan was realised using force; thus, this raises concerns about the prohibition against the acquisition of territory through armed conflict.[114]

Uti possidetis juris, dictates that newly formed states should inherit their pre-independence administrative boundaries, and it is primarily applied in the context of decolonisation and is meant to prevent territorial disputes by maintaining existing borders. However, the Green Line does not fit this criterion as it was never intended to be a permanent border but rather a ceasefire line.[115]

Therefore, the territorial changes resulting from the 1967 Six-Day War, where Israel captured the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights, were outcomes of military conquest rather than administrative succession.[116] These acquisitions are therefore not covered by *uti possidetis juris,* which does not legitimise territorial gains achieved through conflict.[117] This prohibition, a fundamental aspect of international law[118], has been consistently endorsed by the ICJ and various UN resolutions.[119] Clearly, this prohibition still maintains full legal force concerning Israel's territorial expansion.[120] The prohibition against the acquisition of territory through force was already articulated in Article 10 of the Covenant of the League of Nations 1919 and subsequently in Article 2(4) of the UN Charter 1945. Had an independent Palestinian state been declared in 1948, it is highly likely that this principle would have prevented Israel from expanding its borders beyond those delineated in the Partition Plan.

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113 Ibid.

114 EJIL: Talk! ICJ delivers advisory opinion on the legality of Israel's occupation of Palestinian territories <https://www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels- occupation-of-palestinian-territories/> [Accessed October 9, 2024]

115 Crawford (2012) supra, p. 512.

116 Bell and Kontorovich, Palestine, uti possidetis juris, and the borders of Israel (Arizona Law Review 2016) 58(4), 633–676.

117 Shaw (2017) supra, p. 456.

118 Article 2(4) of the UN Charter.

119 Gray, C. (2013). The International Court of Justice and the use of force. In C. J. Tams & J. Sloan (Eds.), The development of international law by the International Court of Justice (Chap. 11). (Oxford University Press 2013)

Consequently, Israel's existence, although legally grounded in the two-state solution of the Partition Plan, cannot justify territorial claims beyond what was allocated to it under international law.[122] It is therefore important that if any concession or claim is to be made to justify Israel occupation of the British mandatory Palestine territory in form of a state, such a concession should not go beyond what was delineated in the two-state partition plan as doing so would be legitimising the acquisition of territory using force, something that goes against customary international law.

3.0 IMPLICATIONS OF JUSTICE SEBUTINDE'S APPLICATION OF *UTI POSSIDETIS*

As already demonstrated above, Justice Sebutinde's position in her dissenting opinion legitimising Israel based on the claims over the whole territory of the British Palestine mandate is flawed and goes against some of the core tenets of international law. The application of the principle of uti possidetis has significant implications for the ongoing territorial conflict between Israel and the Arab Palestinians, especially if it is adopted by key stakeholders such the international community and UN organs. It substantially threatens fundamental principles of international law, more particularly the right to self-determination and sets a dangerous precedent that could lead to far-reaching consequences which are explored below.

In the first place, the implementation of uti possidetis juris in this situation would significantly undermine the Palestinian right to self-determination. This principle assumes that Israel could inherit the territorial boundaries of Mandatory Palestine as a legal successor; however, it fails to take into account the fact that Palestinians, who have for long represented the majority population,[123] have the right to determine their political future. The right to self- determination is acknowledged under international law as a peremptory norm[124] that cannot be easily disregarded by alternative legal frameworks, more so when

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121 Supra, note 84.
122 Ibid.
123 Supra.
124 A peremptory norm is defined by Article 53 of the Vienna Convention on the Law of Treaties, (1969) as one that is accepted and recognised by the international community of states as a norm from which no derogation is permitted.

a group's sovereignty and identity are at risk.[125] Thus, the recognition of Israel's claims through uti possidetis essentially amounts to a denial of the Palestinian people's right to form their state, although they have deep historical and demographic ties to the land, a fact that Justice Sebutinde also concedes to.[126]

Secondly, recognising Israeli claims over the whole of the Palestinian territory through the principle of uti possidetis juris which asserts the rights of possession would effectively legitimise Israel's expansionist policies. This expansion encompasses areas acquired post-1948 and 1967.[127] Such a position, however, stands in stark opposition to the ban on territorial acquisition through force, as delineated in the UN Charter.[128]

Notably, UN Resolutions 181 and 242 which advocate for a two-state solution based on pre-1967 borders have been critical in global efforts to resolve the conflict. For example, the Secretary-General of the UN has recently underscored that the two-state solution is the only way to end the Israeli-Palestinian Conflict in a United Nations Security Council debate.[129] By using uti possidetis to justify its territorial ambitions, Israel could potentially bypass Article 2(4) of the UN Charter, thus undermining its authority.[130] This situation would not only threaten the peace process, it could also encourage further territorial claims using similar strategies, which, because of this, would intensify an already fragile geopolitical environment and exacerbate human rights violations.

Thirdly, the improper application of uti possidetis juris in this context presents a considerable threat to well-established international legal precedents. Historically this principle has served to safeguard the territorial integrity of newly independent states, ensuring that administrative borders do not descend into chaos during decolonization.[131] However, it has never been employed to

125 Saul, The normative status of self-determination in international law: A formula for uncertainty in the scope and content of the right? (Human Rights Law Review 2011), 11(4), 609–644.

126 Supra, note 6, paragraph 4.

127 Al Jazeera, Features <https://www.aljazeera.com/features/> [Accessed February 13, 2025]

128 Article 2(4).

129 United Nations, Security Council condemns Israel's actions in occupied Palestinians

legitimise a minority's claim over an entire territory, especially when this occurs at the expense of the majority population's national ambitions.[132]

Although applying uti possidetis to the Israeli-Palestinian conflict might seem justifiable at first glance, it would set a dangerous precedent suggesting that colonial administrative borders can override the rights of indigenous populations to self-determination.[133] Such a potential precedent could embolden various states or groups to assert claims based on historical or colonial borders. Consequently, this could lead to further conflicts, instability and humanitarian suffering around the globe more so in areas with a variety of ethnic classes. The situation in Bosnia and Herzegovina, where the application of uti possidetis was complicated by the significant presence of substantive numbers of Bosnian Serb and Bosnian Croat populations illustrates this catastrophe. Brutal conflict erupted that consequently necessitated international intervention to define territory through the Dayton Accords.[134]

In addition, acknowledging Israel's claims under uti possidetis would indeed have the effect of solidifying the ongoing occupation of Palestinian territories and reinforcing Israel's de facto annexation of the West Bank, East Jerusalem and Gaza.[135] The expansion of Israeli settlements which is illegal under international law, would receive further legitimisation under this framework, thereby exacerbating the displacement and dispossession of Palestinians.[136] This situation perpetuates the human rights abuses[137] that are already prevalent under occupation: including forced displacement, unlawful killings, restrictions on movement and the demolition of Palestinian homes.[138] More critically, it would disincentive any efforts by Israel to withdraw from occupied territories in

132 Supra, notes 90 & 92.
133 Shaw (Supra, note 42).
134 Supra, note 38 & 39.
135 Ibid.
136 Burgis-Kasthala and Masetti Placci, Palestinian self-determination between sovereignty and conquest: Exploring public and private power in the recent ICJ's advisory opinion on the illegality of Israel's occupation. Opinio Juris. Available via <https://opiniojuris.org/2024/08/23/palestinian-self-determination-between-sovereignty- and-conquest-exploring-public-and-private-power-in-the-recent-icjs-advisory-opinion-on- the-illegality-of-israels-occupation/> [Accessed January 13,

addition to eliminating the possibility of a negotiated two-state solution, thus deepening the conflict.

Infringement of the United Nations Partition Plan of 1947[139] will ensue at a point where Israel's claims over the whole territory are recognised under uti possidetis. This framework originally sought to establish distinct and independent Jewish and Arab states within Mandatory Palestine.[140] The UN Partition Plan which aimed to balance the national aspirations of both Jews and Arabs in the region delineated specific borders for each group.[141]

Abandoning this framework in favour of uti possidetis juris would not only ignore the historical and legal consensus regarding Palestinian statehood, but it would also undermine the international community's role in mediating the conflict. This could potentially lead to increased isolation of Israel on the global stage because of an escalation of opposition from the broader international community,[142] which has consistently affirmed the necessity for a Palestinian state grounded in pre-1967 borders.[143] The current situation with many countries revolting Israel addresses at the UN General Assembly and many other countries and organisations putting a stop on pro-Israel commodities due to the ongoing war on Gaza illustrates this situation that can be exacerbated by adoption of uti possidetis juris in the territorial claims.[144]

Therefore, acknowledging Israeli claims to Palestinian land through the lens of uti possidetis juris presents numerous risks. Top on the list is undermining the essential right to self-determination for Palestinians, validating Israeli territorial expansion in breach of international law and establishing a precarious precedent that might destabilise other regions grappling with similar territorial conflicts. The situation could be worse with further entrenchment of the occupation, escalated conflict with gross human rights violations and an undermining of the legal structures that have informed the international community's efforts in

139 Resolution 181.
140 Ibid.
141 Supra, note 125.
142 Supra, 135.
143 Supra, note 129.
144 Wilkins, Mass walkout as 'global pariah' Netanyahu addresses UN General Assembly.

addressing conflict since 1948. Although Justice Sebutinde and some scholars may contend differently, the dangers linked to such recognition cannot be dismissed because they jeopardise the very essence of international norms and institutions.

4.0 CONCLUSION

The invocation of *uti possidetis juris* (to bolster Israel's territorial claims over Mandatory Palestine), as argued by Vice-President Sebutinde, reveals a fundamentally flawed narrative when reassessed considering both legal principles and historical facts.

Uti possidetis juris is designed to maintain the territorial integrity of newly independent states by freezing colonial borders at independence; however, it is ill-suited for the Israeli-Palestinian context because of the distinctive characteristics of the British Mandate and the unique political arrangements that emerged after its dissolution including the UN's Partition Plan of 1947 and the subsequent armistice lines.

Justice Sebutinde's assertion that Israel, being the sole state to arise from the British Mandate, inherited the borders of Mandatory Palestine, oversimplifies the complex historical and legal realities of the region. The Mandate did not foresee establishing a singular Jewish state encompassing the entire territory; rather, it encompassed obligations and consequently independent states for both the Jewish and Arab populations.

Consequently, the claim that Israel inherited these borders fails to acknowledge the right of the Palestinian Arab population to self-determination which is the most critical issue that outweighs claims rooted in colonial administrative boundaries in this regard as these people have formed the majority population in the territory for the relevant timeline.

Ultimately, a comprehensive legal re-evaluation of Israel's territorial assertions necessitates a more sophisticated perspective, one that reconciles the rights of both Israelis and Palestinians. The principle of uti possidetis juris cannot, however, supersede the fundamental legal entitlements of the Palestinian

populace, nor can it rationalise the continuous occupation of Palestinian lands. Rather, an acknowledgement of the suitability of a two-state solution as proposed by the UN[146] and the international community together with a vivid pronouncement of the illegality of Israel's occupation in Palestinian Territory are far better and more fair solutions to the close to a century long conflict and ongoing human rights abuses due to the war between the two factions in the region.

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FRAUD IN LAND TRANSACTIONS IN UGANDA: AN EVOLVING ENIGMA

Julius Ainomugisha*

Abstract

Land is one of the most important factors of production, vital for food security and economic development of any society. As a result, in Uganda, 44% of all the cases in court as at 2023 are land related, even when it takes an average of three years to litigate a case related to land. Because of this, governments are keen on regulating transactions in land by enacting legislation. In Uganda, registered land is regulated under the Registration of Titles Act [RTA] Cap 240 whereunder title is proof of registration except if obtained by fraud. Even ownership of unregistered land can also be impeached by fraud. This article defines and contextualises, traces the origins, evolution of, and litigation against, fraud in land transactions Uganda and makes some recommendations.

1.0 INTRODUCTION

Land is considered an inelastic commodity –its supply cannot be adjusted with increase in demand.[1] Creative ways of optimising use have only increased the productivity per unit. Across time, dating back to pre-medieval times, there has been dependence on land by human nature for development and survival. Even when current development trends emphasise technology and less of actual utilisation of land, the rapid increase in population still pauses challenges. The rate at which population increases has outstripped the growth in innovation and creativity.

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1 Homburg, S, 'Interest and Growth in an Economy with Land' 1991 Canadian Journal of Economics 450-459.

The quest for more land as a factor of production has led to dispossession of households thereby increasing poverty and crime among other ills. In 2015, The United Nations adopted the Sustainable Development Goals[2] for people everywhere to enjoy prosperity with emphasis on sustainable use of land – focus on the use of land and not just ownership.[3] This is also in line with the Uganda National Land Use Policy.[4]

In Uganda, nearly 80 per cent of the Ugandan population relies on land, agriculture and soils for their primary livelihoods.[5] Close to 88% of Ugandans live in rural areas and are pastoralists or practice subsistence agriculture with almost 70% of farm holdings engaged in crop production as a principal activity and about 25% in mixed farming; all of them on land.[6] It is seen as the glue that holds societies together and gives them identity.[7]

With the dependence on land highlighted above, the biggest challenge facing land management in Uganda, most scholars have opined, is fraud.[8] The way fraud is defined, the way it is perceived (in terms of its effect especially on the victims), the way it is committed, the way it is litigated and proved and the punishment for it have all been changing over time.

Even with the extent to, and the frontiers in, which fraud can be committed and its various forms, there has not been found a universal definition for it in

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2 The Sustainable Development Agenda (SDGs) <https://www.un.org/sustainable/> [Accessed 3 December 2024]; Specifically, SDG 15.

3 United Nations, 2024, The Sustainable Development Goals in Uganda. <https://uganda.un.org/en> [Accessed 3 December 2024]

4 Uganda Ministry of Lands, Housing and Urban Development, the Uganda National Land Use Policy <https://mlhud.go.ug/> [Accessed 09 December 2024]

5 Uganda Bureau of Statistics (UBOS), 2006. See also: Land Tenure and Economic Activities in Uganda: a Literature Review <https://pure.diis.dk/ws/files/> [Accessed 3 December 2024]

6 The National Land use policy, Final draft. Retrieved from <https://mlhud.go.ug/> [Accessed 3 December 2024]

7 SaferWorld International (2024). Land governance. <https://www.saferworld-global.org/> [Accessed 3 December 2024]. See also: R. Nakayi, The perceived protection of tenants on registered land against evictions: An Assessment of the legal challenges faced by victims of land evictions in Kampala and Wakiso District, PILAC, 2016.

8 Peter Mukidi Walubiri, 2020, 'Indefeasibility of Title: An Eroded Concept in Uganda' 06 November 2020. See also: Stephen Kafeero, 'Govt issues new rules to address land fraud' (Daily Monitor, 04 May 2024) <https://www.monitor.co.ug/uganda/> [Accessed 4 December 2024]

written law, and that's why the author characterises it as an enigma. The author also calls it evolving because the way fraud is committed keeps changing with time. This paper discusses the origins of land related fraud, showing why it has been on the increase, analyses the current legal framework dealing with fraud and highlights the inadequacies, and proposes some recommendations.

2.0 ORIGIN AND EVOLUTION

The first recorded fraud in history, in general, is believed to have happened around 300 BC relating to insurance policy wherein Hegestratos, a Greek merchant, drowned and died trying to sink an empty boat so as to make a claim for the underwriter to pay.[9] Around the same time, in Ancient Egypt, fraud was a common issue faced by the government of the day, with tax collectors sometimes being punished quite severely for using inaccurate measures to weigh out the quantities of grain to be taxed (thus fooling householders into overpaying their taxes, which could then be skimmed).[10] It is this background that continues to play, both in Africa and globally, out regarding what fraud is, and how it is committed–the deliberate performance of an action with the full knowledge that it is wrong but with the aim of deriving benefit therefrom.

In the pre-medieval times, possession of land territory was seen as a sign of power and dominance as seen from the conquests at the time.[11] From the early medieval times, in England and the biggest part of the West as we know it, there was a shift from communal land use after the establishment of feudal system by William the Conqueror after the 1066 conquest.[12] This generally put more pressure on what can be derived from the land as an individual

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9 Andrew Beattie, 'The Pioneers of Financial Fraud' (Investopedia, 25 November 2024) <https://www.investopedia.com/> [Accessed 4 December 2024]

10 A history of fraud: from ancient Egypt to the modern pandemic (Part 1) (Trulioo, 27 May 2020) <https://www.trulioo.com/> [Accessed on 4 December 2024]

11 Tay, A. E., 'The concept of possession in the common law: Foundations for a new approach' 1963 Melb. UL Rev., 4, 476.

12 Hardin, G. *The Tragedy of the Commons. In Environmental ethics* (Routledge 2013)185-196.

entity. What mattered was no longer the reputation that it guaranteed but what could be obtained from the land.

This shift created the need to have land in big sizes just to optimise what could derive from it thereby causing landlords to start using sometimes illegal means, including dispossessing others from land, to amass as much land as possible. This is generally seen as the beginning of land related fraud in modern times. This morphed into a system that emphasised that as long as one did not have notice of fraud over land they were transacting in, they could buy it and have proprietary right over it in perpetuity. This individualisation of land was legitimised by the law, to the extent that fraud was not only inferred from actions but from notice as well, and it is this law that was received in Uganda in 1902.

2.1 COMMON LAW POSITION ON NOTICE OF FRAUD

Before 1840s, in England, as indeed in all of the British colonies, the deed system of land recordation was being used.[13] Under this system, all the seller and purchaser needed as proof of record to pass ownership of land was a duly executed deed between the parties, which would be registered with the registrar. Before a buyer bought interest in land, they would be required to first examine the record of the deeds that were executed for the same land for as long as possible. This could even mean going as far back as one hundred years in time.[14] This system had many ills inter alia fraud –selling the same interest to more than one buyer.

This is why, in 1840, Robert Torrens, an Irish trained lawyer in Maritime law, invented a similar system (that was named the Torrens system after his name) to strengthen the passage of ownership from one to another –by giving a title that does not require due diligence beyond the register.[15] He was acutely aware that fraud could still exist (in his proposal) and that's why the law that developed from his prescription had four main tenets: title by registration,

13 Ibid.
14 *Dina Management Services v County government of Mombasa* [2023] KESC 30 (KLR).
15 Butt Peter, *Land Law, the Law Book Company of Australia* (Sydney (3rd Ed, 1996) 686.

indefeasibility of title, curtain principle, and assurance of title.[16] The discussion of details of these tenets is beyond the scope of this article. But suffice to say that, owing to the social economic realities of the day in Australia, the law also found significant resistance before it could be passed into law in 1857.[17] He envisaged that some people would suffer loss as a result of residual fraud, and prescribed compensation for the victims, from government.

The registration of the title was considered to be notice in *rem* to ensure that everyone would know that the land about which it is issued belongs to the owner specified, and all the other interests that accrued before the registration did not matter –the principle of indefeasibility. Even if one had notice of other interests on the land, as long as their names were registered on the title without fraud, their title could not be impeached.

2.2 FRAUD IN MARITIME LAW

In many respects, the rationale for the application of a recordation system used in maritime sector for land registration would not be difficult to fathom because the person who introduced it was an Irish lawyer trained in maritime law. Faced with the challenge that he related to maritime practice had been intended to cure, and had in fact cured, it was the closest in his toolkit. Here below I discuss briefly how maritime works especially as regards recordation.

In maritime law, as indeed in all law relating to goods, title for goods or cargo passes from a shipper to a shipping company for the time the cargo is in the hands of the shipping company.[18] The title to the cargo during the time when the cargo is in transit, or after the cargo is handed over to the company but before it is handed over to the consignee, is with the shipping company.[19] The terms under which the cargo is managed are laid out in one document (with copies shared between parties, with the original held by the carrier –the Bill of

16 Nakayi, R., 'Certificate of Title: A discussion of contemporary challenges to the protection of land interests in Uganda' 2023 Journal of African Law, 67(1), 23-43., p33.
17 Walubiri (n 8).
18 *Munywevu and Another v Maersk Agency Uganda Limited* [2022] UGCommC 151.
19 *J I MacWilliam Company Inc v Mediterranean Shipping Company S A* [2005] UKHL 11.

Lading –a legal document issued by a carrier to a shipper) that details the type, quantity, and destination of the goods being carried;[20] *prima facie* evidence for the shipper of the statements incorporated in it.[21]

Departure from the terms of the Bill of Lading by any of the parties attaches liability on the one who has departed. This system is not full proof, it is prone to fraud.[22] That fraud is inherent, given the involvement of humans. The victims of this type of fraud or loss have remedies against the perpetrator or the shipping company.[23] If cargo is stolen by a third party outside the consignor-shipping company-consignee arrangement, the one who steals the cargo cannot be allowed to pass it because, at law, they do not have any title at all.

It is this type of fraud that Torrens, given his background, envisaged. However, whereas he recommended the system for land management, it appears that the aspect of who suffers the effect of, and compensation for, fraud was itself not transplanted *pari materia.* Instead of asking the one who purchased the land that was a result of fraudulent actions to return the interest, or to have their interest impeached, the law was meant to favour the buyer. This was perhaps done to pursue the main goal of land management which was to popularise land market[24] and make it easy even in the context of ousting the traditional system of land ownership, paving way for the land tenure systems in England at the time.

The land ownership in most of the British colonies after the Torrens system was invented was not very different,[25] and it was therefore not difficult to transplant it into Uganda with few or no adjustments or amendments, some

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20 Article III, Rule 3 of The Hague-Visby Rules.

21 *Owners of Cargo Lately Laden Aboard the River Gurara v Nigerian National Shipping Line; The River Gurara"* [1998] 1 Lloyd's Rep. 225.

22 Fraud is listed as one of the [envisaged] exceptions to liability attaching to the carrier in case of damage or loss to the cargo while it is in the hands of the carrier. It is mostly arises from the shipper or his agents or connivance between the shipper and the consignee.

23 *Copy Line Ltd v Rapid Shipping & Freight (U) Ltd & Anor* [2016] UGCommC 61. See also: *Dian GF International Ltd v Damco Logistics Ltd & Trantrack* [2012] UGCommC 10.

24 E Massie, 'Reform of our land laws' (Sept 1905) 11/5 The Virginia Law Register 359, 365.

25 John Mugambwa, *Sourcebook of Uganda's Land law* 159.

eighty years later.[26] The discussion of the suitability of the RTA outside the boundaries of fraud is beyond the scope of this article but suffice to say that indeed, courts have moved to make the necessary modifications to cure the injustice this would cause if applied bluntly.

3.0 DEFINITIONS

Even when it is extensively referred to in the Registration of Titles Act (RTA), fraud is neither defined not described in full.[27] Neither does any other legislation in Uganda including those where it is considered a crime.[28] The RTA provides for some actions which, if committed wilfully, are considered fraudulent *to wit* making false statements, concealing information, deponing false affidavits, giving false evidence, procuring a certificate of title or entry to the register book using illegal means, deception or misleading explanation or information.[29] Courts have taken the view that what are critical to this narrow definition are the knowledge, effect and benefit of the actions.[30]

It has been left for the courts to define without distorting the meaning given in legislation,[31] and this ostensibly leaves the particularity to the doctrine of *stare decesis*, which has its particular dangers. For example, in the sense of equity, it includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[32] This definition is manifestly too broad and, as such, has the effect of widening what can fall within the boundaries of fraud.

Examples of fraudulent land transactions in Uganda include creation of interests in land through falsified/forged/abused powers of attorney,[33] through special certificates of title by false pretense,[34] forged certificates of

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26 Peter Walubiri (n 8)
27 RTA, s.174 (2) provides that remedies for fraud in other legislation other than the RTA.
28 Penal Code Act Cap 128, Laws of Uganda, s.310; Anti-Corruption Act Cap. 116.
29 Section 174.
30 *Frederick. J.K. Zaabwe v Orient Bank Ltd & Others* [2007] UGSC 21.
31 Mugambwa (n 25).
32 Sydney Edward Williams, *Kerr on Fraud and Mistake* (Sweet & Maxwell 1929).
33 *Frederick. J.K. Zaabwe v Orient Bank Ltd & Others* [2007] UGSC 21.
34 *Konde Mathias Zimula v Byarugaba Moses & Anor* [2014] UGHCLD 68.

title,[35] forged wills and or other statutory documents,[36] connivance with authorities to acquire interests in protected areas,[37] collusion and connivance in land registry,[38] under declaration of land values,[39] illegal removal of caveats,[40] among others.

Fraud, as applied to contracts, is defined as the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.[41] Kerr defined it as implying a wilful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to.[42] On to these definitions, Mugamba, J (as he then was) in *Uganda v Semambo*,[43] added that there must be proven an inherent need by the one who causes the fraud to benefit against the one to whom it is caused, for liability arising from fraud to attach.

In *Frederick. J.K. Zaabwe v Orient Bank Ltd & Others,*[44] Katurebe, JSC, quoting BLACK's LAW DICTIONARY, defined fraud as:

> "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury."

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35 Evelyne Anite, '300 acres sold to investors using forged titles' <https://www.ntv.co.ug/> [Accessed 5 December 2024]

36 *Ssetuba v Registrar of Titles* [2011] UGHC 182. See also: *Serufusa v Zirimenya Jimmy & Ors* [2022] UGCA 271; *Lydia Kintu v Ssemakula Ismael & Ors HCCS No. 578 Of 2019.*

37 *Nyakaana V National Environment Management Authority* [2015] UGSC 14.

38 *John Kaggwa v. Joseph Kizito Batume & Ors* HCCS 286 of 2017.

39 *Samuel Kizito Mubiru & Another v G.W. Byensiba & Anor* High Court Civil Suit 513 of 1992.

40 *Kisiribombo v Tumwine & Ors* [2020] UGSC 43.

41 Blacks' Law Dictionary. 2nd Ed. FRAUD Definition & Legal Meaning. <https://thelawdictionary.org/fraud/> [Accessed on 4 December 2024]

42 Sydney (n 31).

43 [2015] UGHCACD 7.

44 [2007] UGSC 21.

Katurebe, JSC went ahead to state that:

> Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others.[45]

The definitions above derive from earlier decisions in *Waimiha Sawmilling Co. Ltd v Waione Timber Co. Ltd*[46] which had followed the reasoning of Lord Lindley in *Assets Co Ltd v Mere Roihi and Anor*,[47] a position that is reiterated in later decisions,[48] to the effect that, broadly, fraud is an act of dishonesty. The phrase 'Act of dishonesty' could literally mean anything, and in any case, it puts the one against whom fraud is meant to be proved on undue burden to prove that their actions did not amount to fraud.

4.0 ANALYSIS OF THE CURRENT LEGAL FRAMEWORK

4.1 THE CONSTITUTION

The Constitution of Uganda (Constitution) provision of ownership of property[49] was elevated in status to a human right[50] whose enjoyment, though not non-derogable,[51] can only be limited under narrow circumstances.[52] In *Philip Karugaba v Attorney General*, Katurebe, JSC, drawing from the general position about land at common law, held that property includes land.

The Constitution provides that land in Uganda belongs to (or is owned by the citizens) and shall vest in them according to the prescribed land tenure systems.[53] There are a number of manifestations of fraud occasioned in the different land tenures for example: because of the multiple interests created on land held under the mailo tenure, there are many transactions majority of them fraudulent;[54] for instance, it is not unusual to find foreigners, with full knowledge, owning freehold interest or other interest than leasehold in

45 *Ibid* 25-26.
46 [1926] A.C. 101.
47 [1905] AC 176.
48 *David Sejjaaka Nalima v Rebecca Musoke* Supreme Court Civil Appeal No. 12 of 1985.
49 Article 26.
50 *Uganda National Roads Authority v Asuman Irumba & Anor* [2015] UGSC 22.
51 *Ibid.*
52 *Ibid.*
53 Art. 237(1), (2)(b) and (c), (3).
54 *Sentongo v Katende & Anor* [2024] UGHCLD 191.

Uganda (even when this is unlawful);[55] intentional or premeditated creation of other interests on a customary land title[56] among others.

Only the Parliament is given power to enact laws generally for peace, order, development and good governance,[57] but impliedly for the operationalisation of the Constitution. Under this mandate, Parliament has enacted laws such as Land Act, Mortgage Act, etc for the management and administration of land in Uganda.

Courts are enjoined to construe existing laws before the coming into force of the constitution with the necessary modifications to bring them into conformity[58] with the Constitution.[59] This means that as long as any provision in any law that existed before 1995 does not contravene and is not inconsistent with the Constitution, it applies with as much binding force as any other law made after 1995.[60] Therefore, even when the RTA was enacted in 1922 (initially as an ordinance), its binding force is derived (or should derive) from Art 274 of the Constitution.

In this same vein, there is a school of thought that by virtue of the Buganda Agreement of 1900, the 1902 Order in Council that created mailo tenure system, and all the other statutes that disenfranchised (or had the effect of disenfranchising) people off their land, there was fraud created by the stroke of the law, and that fraud has persisted through to the Constitution and other laws, and continues to wreak havoc on citizens of Uganda.[61]

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55 *Formula Feeds & 3 Others v KCB Bank Uganda Limited* Supreme Court Civil Appeal No. 76 of 2016.

56 *Sekitoleko Jude & Ors v Commissioner Land Registration & Anor* High Court Misc. Cause No. 18 of 2022.

57 Art 79.

58 Art 274.

59 *Uganda Association of Women Lawyers and Ors v Attorney General* [2004] UGCC 1.

60 *Attorney General v Osotraco Ltd* [2005] UGCA 1.

61 Mukasa James Galabuzi, 'History and Importance of Mailo Land in Buganda' (The New Vision, 01 March 2018) <https://www.newvision.co.ug/> [Accessed 06 December 2024]

4.2 THE LAND ACT Cap. 236, AND REGULATIONS[62]

The Land Act is considered the primary legislation on land matters, was enacted in 1998 to, as stated in the long title, deal with all matters of tenure, ownership and management of land. It lays out the different ways of owning land, the various rights protected, the different offices involved and their roles, and other incidental provisions. The Land Act (Regulations), 2004 provide guidance on how the law should be implemented. The Uganda National Land Policy, 2013 provides guidance on government position and what informs budget allocations to the land sector, and this in many ways, drives land demand and all transactions many of which have been found fraudulent.

4.3 THE REGISTRATION OF TITLES ACT Cap 240

In Uganda, unlike the legislation passed after 1995, which was debated and enacted by the Parliament, the RTA, though passed by the legislative council,[63] was generally an imported piece from common law, amalgamating the provisions from the land law in England, and transplanting what was reigning in Australia at the time.

The RTA governs registration of land, the effect of registration, the different rights and duties of parties, reliefs in cases of grievances, offences and their punishment, and other relevant provisions. S.2, RTA provides that, save for any law enacted to contradict the RTA, the RTA shall reign supreme in adjudicating matters about registered land (freehold or mailo).[64] Even the legislation enacted after the RTA must be construed not to contravene but to supplement the latter unless there is a specific provision in the newer legislation overriding the RTA.[65]

4.4 THE CONDOMINIUM PROPERTY ACT Cap 234

62 Uganda Ministry of Lands, housing and Urban Development, <https://mlhud.go.ug/> [Accessed 06 December 2024]

63 Peter Walubiri (n 8).

64 *Global Capital Save 2004 Ltd v Okiror & Anor* [2020] UGCA 70. The holding by Obura, J specifically on the application of the Mortgage Act and the RTA, in *Alice Okiror & Anor v Global Capital Save 2004 & Anor* [2012] UGCommC 62 and upheld at appeal.

65 *Meera Investment Limited v DFCU Bank Limited and Anor* [2023] UGHCLD 340.

This governs property rights especially ownership in cases where the property is shared, the various offices involved in regulation and other provisions incidental thereto.

The actions of the different parties highlighted thereunder have been found to also be potential sources, or perpetuations, of fraud.

4.5 THE LAND ACQUISITION ACT Cap 235

It provides for the law and process of compulsory acquisition of land for public purposes and the relevant provisions incidental thereto. Compulsory acquisition is an exception to Art. 26, Constitution of the Republic of Uganda, and Parliament made this specific law to regulate it.

The survey, acquisition of land in this regard, the compensation and other related matters have been found by courts to be marred by fraud in some cases.

4.6 THE LAND IN BUGANDA (PROVISIONAL CERTIFICATES) ACT Cap 237

It provides for the management of records relating to the provisional certificates for land in Buganda Kingdom. The rules made thereunder provide for the implementation of the provisions of the Act.

Transactions on mailo land in Uganda, especially those related to bonafide (and/or lawful) occupants have often also marred by fraud.

4.7 THE LANDLORD AND TENANT ACT Cap 238

It governs the relationship between a landlord and a tenant especially the rights and duties of each and how the relationship can be terminated.

The ownership rights and delegation of these rights and duties in cases where they are delegated can sometimes be a source, or a perpetuation, of fraud.

4.5 THE MORTGAGE ACT Cap 239 AND REGULATIONS[66]

[66] Mortgage Regulations, 2012, < https://ulii.org/> [Accessed 06 December 2024]

It governs all transactions relating to land as collateral for credit including the different rights of persons under the Act, the offences and punishment, and other provisions incidental thereto.

The processes to be followed during the recovery of monies from the sale of properties that had been pledged as security have been found in some cases to be laced with fraud.

4.6 THE SURVEY ACT Cap 241

It was enacted in 1964 to provide guidance on how surveyors should conduct themselves while performing their professional duty. Failure to follow procedures in the Act leading to deprivation of land for a claimant has been found in some cases to equal to fraud.

In *Adrabo v Madira,*[67] Mubiru, J held that a valid title deed should, on the face of it, be shown to have been based on a reliable survey. This implies that a survey inconclusively or badly done can cause fraud, and goes to the root of the criticality of the survey process.

4.7 THE LOCAL GOVERNMENTS (RATINGS) ACT Cap 140

It was enacted in 2005, and The Local Governments (Rating) Regulations SI No. 38 of 2006 enacted thereunder, to provide for the regulation of local rates and guidance on implementation of the Act. It provides for inter alia jurisdiction of the court determining disputes arising therefrom, the formula for assessment, and valuation of properties for purposes of charging rates.[68] The valuation of properties has been found by courts in Uganda to be a source (or manifestation) of fraud.[69]

Even when some of the land law doctrines as enunciated in common law are generally applicable in Uganda, they only apply to give remedies where the

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67 [2017] UGHCLD 102

68 This has been subject of interpretation by the courts in *Kampala Capital City Authority v Aya Investments (U) Ltd t/a Pearl of Africa* HCMC No. 10 of 2019; *Kampala Capital City Authority v Ham Enterprises (U) Limited* [2024] UGCommC 151.

69 *Samuel Kizito Mubiru & Another v G.W. Byensiba & Anor* High Court Civil Suit 513 of 1992.

RTA does not.[70] In other words, courts turn to common law provisions when written law is short on reliefs. In *Patrick Mukasa v Andrew Kanyike*,[71] Ekirikubinza, JSC, in reversing the reliance of common law doctrine by the Court of Appeal in *Patrick Mukasa v Andrew Kanyike,*[72] held that *nemo dat quod non habet*[73] did not apply to land transactions where S.2, RTA ousted its applicability and provided for the Torrens system of land recordation that substituted it.

Each of the laws above govern the process of land acquisition at every stage including how a title to land can be cancelled; the responsibilities of the different offices involved, the offences and the punishments for each of them. These laws are applied by different courts together, and in concert, with other relevant and applicable common law doctrines. The ways in which fraud is committed to beat the provisions of these different laws is what the author has termed as having characteristics of the evolving enigma.

5.0 TYPES OF FRAUD

Because of its inherent nature, fraud only mutates in form and manifestation. Courts have so far developed wide classifications only for ease of reference. In *Senkungu & 4 Ors v Mukasa,*[74] court, relying on *Husky International Electronics Inc v Ritz,*[75] held that the fraud referred to in the RTA is not just where the purchaser is actively involved, participated, instigated, procured and facilitated it but also one where it can reasonably be inferred from the set of facts forming the cause of action.

Here below, I discuss some of the different forms of the commonly occurring fraud are canvassed.

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70 Judicature Act Cap 16 Laws of Uganda. s.14 (2) (b) (i).
71 Supreme Court Civil Appeal No. 13 of 2022.
72 [2022] UGCA 35.
73 A common law doctrine to mean that one cannot give better title than they have.
74 [2017] UGSC 14.
75 578 U.S. 356, 136 S. Ct. 1581, 194 L. Ed. 2d 655 (2016).

5.1 ACTUAL FRAUD

Actual fraud is committed when the transferee actively participated in the acts alleged to constitute fraud.[76] In *Katende v Commissioner Land Registration*,[77] Kaweesa, J held that the act of the party from whom the plaintiff bought land to mislead, and in fact misleading, the defendant that the suit land was subject of Statutory Instrument No.79 of 1987, the Diplomatic Property Application (Amendment) Order, 1987, an act he knew to be false was a manifestation of fraud. The learned judge further held that the act of the plaintiff not entering appearance in court to defend himself was further confirmation of the same.

In *Edward Gatsinzi and Anor v Lwanga Stephen*,[78] wherein the defendant had been included on an earlier suit filed by the appellants touching on the suit land, Bashaija, J held that the defendant by his conduct, having knowledge and participating in the process of vacating a caveat legally lodged the plaintiffs, committed fraud that is directly attributable to him.

In *Konde Mathias,* where on account of fraud, court ordered for cancellation of a certificate of title where the second defendant had taken the plaintiff's duplicate certificate of title, used forged powers of attorney purported to have been signed by the plaintiff to transfer the suit property into her names and later on into the names of the first defendant.

In *Betty Kizito v Kizito Kanonya & 7 Ors*,[79] Ekirikubinza, JSC, relying on the reasoning of Mubiru, J in *Gwolo Jackson v Uganda*,[80] held that the acts or omissions preconceived before, and not after, commission are construed to constitute fraud. That if a party forms the intent to breach a contractual obligation after the contract has been signed, that constitutes a mere breach of contract and not fraud.

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76 *Betty Kizito v Kizito Kanonya & 7 Ors* [2019] UGSC 28.
77 [2019] UGHCLD 9.
78 [2014] UGHCLD 29.
79 [2019] UGSC 28.
80 Criminal Appeal No. 14 of 2011.

Whereas actual fraud means acts performed by the purchaser; in some instances, omissions have been imputed by courts to amount to fraud. In *Betty Kizito,* Ekirikubinza, JSC, with whom all the Justices of the Supreme Court agreed, citing *Samuel Kizito Mubiru & Another v G.W. Byensiba & Anor,*[81] held that under declaration of consideration and failure to disclose developments on land during the process of valuation for purposes of transfer amounts to fraud.

5.2 CONSTRUCTIVE FRAUD

Even in cases where one has not been actively involved in the fraudulent actions, fraud can be imputed on them.

In *Assets Co Ltd v Mere Roihi and Anor,*[82] Lord Lindley defined constructive fraud as:-

> An unfortunate expression and one very apt to mislead, but not often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

In *Senkungu*, court reiterated the definition in *Jones v Smith*[83] and held that:

> A purchaser has constructive notice of a fraud if he had actual notice that there was some encumbrance and a proper inquiry would have revealed what it was, has abstained either deliberately or carelessly from making those inquiries which a prudent purchaser would have made.

In *David Sejjaaka Nalima v Rebecca Musoke*,[84] wherein the defendant visited the property owned by the appellant on which some tenants lived, and did not inquire as to who their landlord was, and just went ahead to complete a transaction for it, Odoki, JA, (as he then was), citing *Assets Co v Mere Roihi*, held that:

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81 High Court Civil Suit 513 of 1992. See also: *Janet Diana Cope & 4 Ors v Janet Namuli & Anor* [2008] UGHC 28; *Mudiima & Ors v Kayanja & Ors* [2014] UGHCLD 34; *Deox Tibeingana v Andrew Mirembe Tumwebaze* High Court Civil Suit No. 798 of 2019; *Semwogerere Ibrahim Mbowa v Tumusiime Paul and Others* High Court Civil Appeal 935 of 2019.

82 [1905] AC 176.

83 (1841) 1 Hore.

84 [1986] UGSC 16.

> It is reasonable to infer from the appellant's conduct that his suspicions were aroused but that he feared to learn the truth from the tenant, by inquiring from him who was his landlord. Had he done so he would have definitely found out that Ochiti's landlord had been Prof. Latimer Musoke. Where the purchaser's suspicions are aroused but he abstains from making inquiries for fear of learning the truth, fraud may be properly ascribed to him.

He went ahead, at page 23:

> "….The mere fact that he might have found out the fraud had he been more vigilant and had made further inquiries which he omitted to make does not itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be ascribed to him…"

The emphasis was put on the fact that where there are circumstances that put one on inquiry to look for more information about land, and the further inquiry is not done, and the purchase turns out fraudulent, the one who ignored the circumstances cannot feign ignorance of the fraud. It flows from the fact that while buying land, one is expected to conduct sufficient due diligence not just about the size and nature but also the occupancy and history of ownership.[85] Additionally, in *Omar Salim Mukasa v Haji Mohammed and Anor,*[86] court held that where one has knowledge of the fraud, equity demands that fraud is deemed.

5.3 IMPUTED FRAUD

This type is committed through an agent of the transferee deemed to act for the benefit of the transferee, or any other activities, or information brought to the attention of the purchaser.

In *Mugisha and Anor v Mpiima,*[87] wherein the defendant executed a sale agreement with the plaintiffs, for land that he knew had adverse ownership claims, failed to remove occupants on the land and deliver vacant possession to the plaintiffs, and neglected to attend court hearings after being summoned;

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85 *Fr. Narsensio Begumisa and Ors v Eric Tibebaga* [2004] UGSC 18. See also: *Butamanya v Rwamatsibuza & Ors* [2003] UGHC 82.

86 Civil Appeal No. 114 of 2003.

87 [2020] UGHCLD 33.

Byaruhanga, J, upholding the reasoning in *Zaabwe*, held that such conduct imputed fraud on the part of the defendant.

Fraud can also be imputed on a person where he or she condoned it, it was brought to his knowledge, or they benefited from it, or used it to deprive another person of his rights. In *Katende v Haridas and Co. Ltd,*[88] it was held that whether an imperfect title would pass a good title would depend on the imperfection, whether fatal or going to the root of the transaction or minor – that there is therefore a duty on a buyer personally or through his agents to inquire into the title of his predecessor.

In *Nalima,* court held that*:*

> It seems to me that where a purchaser employs an agent, - such as an advocate to act on his behalf, the notice he receives, actual or constructive, is imputed on the purchaser. And similarly where the advocate acts for both parties any notice he acquires is ordinarily imputed on both parties. There is an exception to the principle where the agent deliberately defrauds the purchaser.[89]

Fraud can also be imputed on a purchaser if they do not take steps a reasonable man would have taken while buying. In *Sinba (K) Ltd and 4 Ors v UBC,*[90] the Supreme Court imputed fraud on the 5th appellant due to her failure to carry out the necessary due diligence. Court resultantly found that she was not a bona fide purchaser for value and the fraud was imputed on her, and her title was therefore void within the provisions of section 176, RTA.

It is now the position of the law that where a purchaser ignored notice of fraud whether constructive or imputed, and went ahead to purchase the land in contention, they cannot plead to be bonafide purchasers of value without notice, or at all, as expressed by Ekirikubinza, JSC in *Mukasa,* where she stated that where a person purchases land from another person other than

88 (2008) 2 EA 73.
89 [1986] UGSC 16.
90 [2015] UGSC 21.

the vendor without ascertaining the interests of the persons in possession, such conduct is termed 'wilful blindness', and amounts to fraud.[91]

6.0 FRAUD, NOTICE AND VALIDITY OF TITLE

A title duly issued pertaining to land by the Registrar, and registered in the names of the proprietor is:[92] a) indefeasible under any circumstances b) conclusive evidence of the particulars therein c) conclusive evidence of proof of ownership.[93] This has been clarified in *Israel Lwanga v Leonard Mubiru and Ors.* Indefeasibility means (i) the state guarantees title; (ii) title holders can only be divested of it in a few exceptional circumstances in the law; (iii) government guarantees indemnity for title holders for losses arising from registrars' mistakes; and (iv) only registered interests affect title.[94]

Though indefeasible under section 59, the title under the RTA can be impeached under s.160 on five main grounds: default in mortgage, lessee in default, fraud, wrong boundaries and double titling.[95] Courts have had occasion to expound on each of these grounds but the most common one, which flowed from the Torrens system (and is considered the biggest mischief the system was intended to cure), is fraud.[96]

The general rule at common law,[97] and codified in the RTA Cap 290, is that save for fraud, a purchaser/transferee shall not be required to search beyond the title, or the terms or consideration under which the transferor obtained the land, or notice (whether actual or constructive) on the land, even in cases

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91 *Uganda Posts & Telecommunications v A.K.P.M Lutaaya* Supreme Court Civil Appeal No. 36 of 1995. See also: *Charles Lwanga v Xaverio Damulira* Supreme Court Civil Appeal No 16 of 1992.

92 S.59, RTA.

93 *Re An Application by GNM Mallo* [1964] EA 31. See also: *Adrabo Stanley v Madira Jimmy* Civil Suit No. 0024 OF 2013.

94 Registration of Titles Cap 240 Laws of Uganda. s.166. See also: Nakayi (n 17).

95 *Nascensio Begumisa v Eric Tibebaga;* See also: *Mariam Nanteza & 3 Ors v Nasari Rwamunono* [2020] UGCA 2131.

96 Peter Walubiri (n 8).

97 *Frazer v Walker* [1967] 1 All ER 649.

when the transferor actually has knowledge of the other unregistered interests in the land.[98]

The provision in the RTA is manifestly problematic, and has in fact been a subject of discussion by the courts[99] and indeed many scholars.[100] Whereas in *Nassanga Margaret & Ors v Leo Kibahiganira & Ors*,[101] although it was held that the sale had been premised on fraudulently acquired letters of administration as a matter of fact, court still held that this per se could not affect the titles of the Defendants who were not shown to be part of the fraud.

In *John Bageire v Ausi Matovu,*[102] Okello J, emphasising the criticality of due diligence, stated that;

> "Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to conduct thorough investigations of the land and the sellers before purchase. Unlike any other asset, landed property is a very valuable asset, the acquisition whereof requires an enhanced level of due diligence by the intending purchaser as opposed to that exercised in respect of other assets or goods; that land is not vegetables."

In *Gatsinzi*, court held that a purchaser must do proper due diligence and exercise reasonable caution before entering into a transaction that would ultimately be binding upon him or her. Nakayi observes that even when the general rule is that certificates of title are conclusive and indefeasible, the socio-political realities have led to exceptions that may render them defective and impeachable.[103] The loopholes in the old system of recordation still exist; Torrens titles have to be searched to ensure their validity and it is good to insure them, just like before.[104]

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98 Expressed in *Imelda Ndiwawangi Nakedde v Rony Busuulwa Nsereko & Anor* (1997) HCB 73.
99 [1986] UGSC 16.
100 TRM "Property: registration of land titles: Inconclusiveness of a Torrens title" (1923) 12/1 California Law Review.
101 [2021] UGHCLD 167.
102 Court of Appeal Civil Appeal No. 07 of 1996.
103 Nakayi (n 17).
104 Ibid.

The resulting position, as held in the courts, is in fact the direct opposite of what the law intended.[105] It, in many ways, informs the main fulcrum of this article. The import of the provision is that even if there is fraud, the transferee is not required to do any due diligence about the land they intend to transact in as long as they confirm that the particulars and ownership are correct, genuine and true. That as long as the title to the land is registered in the names of the transferor, that's all that the purchaser should care about and nothing more. This, by necessary implication, means that if it cannot be proved that the purchaser was involved in having the title in the transferor's names; the purchaser would obtain good title even if in fact, the transfer was itself tainted with fraud.

This is buttressed in *Kampala Bottlers Ltd v Damanico (U) Ltd,*[106] wherein Wambuzi CJ (as he then was) stated that fraud must be attributable to the transferee either directly or by necessary implication. The question that this inherently pauses is: if the transferee does not do due diligence beyond the register book, how will they know that there was in fact fraud (attributable to the transferor) and avoid it, yet fraud has the effect of ousting the very interest intended to be purchased? The answer lies in the origin of this particular provision, and that is traced here below.

7.0 FRAUD, ILLEGALITY AND NEGLIGENCE

7.1 ILLEGALITY

Illegality is not defined in written law but courts have described it as: a) an act that is not authorised by law b) the state of not being legally authorised c) the state or condition of being unlawful.[107] It is also described as acting generally outside the law.[108] A transaction is illegal or at least affected by illegality if the transaction or some aspect of it is prohibited by the law.[109] In *Kateera v Commissioner of Land Registration & 6 Others*,[110] Ssekana, J held that

105 *Robert Luswere v Kasule & Anor* High Court Civil Suit No. 101 of 1983.
106 Supreme Court Civil Appeal No. 22 of 1992.
107 Blacks' Law Dictionary 9th Edition p. 185.
108 *Patel v Commissioner Land Registration & Ors* [2013] UGHCLD 1.
109 Kabazzi Maurice Lwanga, 'The Illegality Defense: A Case for Reform in Uganda's Judicial System' 2021 Makerere Law Journal Volume 20, Issue 1, 154-177.
110 [2024] UGHCCD 64.

illegality arises when one acts outside the powers allocated to him, or does something that is manifestly wrong at law. In that case, though the Commissioner Land Registration (CLR) lodged a caveat at the behest of the applicant under the pretext of a beneficiary under a deceased's estate whereas not, this was not necessarily illegal because he was acting within his powers.

In *Gatsinzi*, Bashaija, J, following *Benedictor Makani Bahati – Chairman & 4 others v Ben Muneria Wesonga & 5 others*,[111] held that whereas illegality is not fraud, in some circumstances fraud can be inferred from an illegality.[112] In *Gatsinzi*, the defendant who, with the knowledge that the title he sought to have transferred was in the names of one who had died, participated in the process that ended in him having the title transferred to his names, was held to be fraudulent.

The need to distinguish illegality from fraud is important because hitherto, the way the two are pleaded, proved, jurisdiction of the courts determining the cases and the remedies available for the affected party are different in both cases.

In *Kanoonya David v Kivumbi & 2 Others,*[113] court held:

> "An illegality vitiates the transfer of title with the result that the sold property remains the property of its owner. In this case the property cannot vest in the owner and at the same time vest in the purchaser the second defendant."

This implies that the net effect of either fraud or illegality obtained therefrom is rendering the title void.

Kabazzi, J observes that the claim of fraud vis-à-vis defence of illegality calls for judicial reform of the approach to illegality rule rather than circumspection of the merits of the case owing to illegality defenses. It is critical to note that reversal of a fraudulent transaction due to illegality has devastating effects

111 [2018] eKLR.
112 *Katarikawe v Katwiremu* (1977) HCB 187.
113 High Court Civil Suit No. 616 of 2003.

where the claimant seeks to avoid their obligations in contract. That is why other public policies should be considered.[114]

The landmark judgement in *Namusoke and 2 Ors v Owalla's Home Investment Trust (EA) Limited and Another*,[115] Ekirikubinza, JSC, in departing from the earlier position in *Rurangaranga v Mbarara Municipal Council*,[116] held that not all illegality is, or is imbued by, fraud. The learned Justice gave an example of S.39, Land Act whereby whereas the transfer of land classified as family land (for which spousal consent is required in order to transact) without obtaining the consent is illegal, not all transfers of this nature are fraudulent, in any refund of the money paid for a transaction of this nature is guaranteed in s.39 (4) thereunder. The learned Justice also gave an example of transfer of freehold interest in land to a non-citizen which is unlawful under s.40, Land Act, for which the Commissioner Land Registration could cancel the title on that account whereas this would not be the case if there were elements of fraud proved, and the proof would have to be before the High Court.

7.2 NEGLIGENCE

Negligence was defined, in *Blyth v Birmingham waterworks*,[117] by Alderson, B defined as:

> "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

This definition was only modified by Lord Atkin in *Donoghue v Stevenson*[118] by introducing the neighbour principle –that when one knows the effects of their actions on another, they must take precaution to prevent harm caused to that other. This position was further modified in *Caparo Industries v Dickman*,[119] where Lord Bridge added the just fair and reasonable test –that the harm

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114 Ibid.
115 Supreme Court Civil Appeal No. 15 of 2017.
116 Another [earlier] decision where Supreme Court had based on the earlier law to hold that under s.88, Land Act, fraud formed part of the grounds upon which the Commissioner could cancel a title.
117 (1856) 11 Ex Ch 781.
118 [1932] AC 562.
119 [1990] UKHL 2.

suffered must be one strictly attributable to the actions of the defendant and must not be trivial.

In *National Social Security Fund & Anor v Alcon International Ltd*,[120] court held that fraud requires a wilful act and is therefore distinguishable from a negligent misrepresentation. A representation is fraudulent not only when the person making it knows it to be false, but also when he ought to have known or must be taken to have known that it was false.

In *Frederick Zaabwe*, court stated:

> "As distinguished from negligence, it is always positive intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo by speech, or by silence by word of mouth or by look or gesture."

The sum total is that a) whether there is intention to cause harm or not, as long as it could reasonably be foreseen that there could result significant harm to the plaintiff from the actions of defendant and b) the defendant did not take any precautions to mitigate the harm, the defendant is liable regardless of whether they benefit from the actions or not.

This essentially means that the key distinguisher between fraud and illegality is the intention and benefit of the actions or omissions by the one who undertakes them. Not all negligent actions are fraudulent and vice versa. This is important because the ingredients to be proved for a cause of action arising from each of the two are different, the burden and standard of proof, the remedies available to the claimant are different.

120 [2013] UGSC 4.

8.0 PROVING FRAUD

Except in the circumstances giving a cause of action under the RTA, fraud has been litigated and imputed focussing on the perpetrator(s).[121]

Where a party pleading relies on fraud, the particulars with dates must be stated in the pleadings.[122] The import of this is that fraud must be strictly pleaded and the particulars set out in the plaint as held in *Hannington Waswa & Anor v Maria Onyango Ochola*,[123] wherein court stated that for matters relating to land fraud, an ordinary plaint must be filed with the details of the fraud. However, in *Mohammed v Roko Construction,*[124] court held that where fraud or illegality was not pleaded, the court should not proceed to decide it unless it has given the parties an opportunity to address it on the perceived acts of illegality or fraud. In *Kampala Bottlers*, court held that it is not a requirement that the word fraud be used, however facts must be stated to show that fraud needs to be charged and it cannot be inferred from facts pleaded.

In *Sinba (K) Ltd & 4 Ors v Uganda Broadcasting Corporation*,[125] court held that departure from the position in *Wasswa* must be under a special procedure relating to execution. But more recently, in *Metropolitan Properties Ltd v Mayimuna*,[126] court held that matters relating to illegality should not be resolved as only points of law but should go through trial, with evidence adduced and evaluated, to establish the veracity of the claims.

The burden of proof in civil proceedings rests upon the person with any fact within his or her knowledge and who desires court to give judgment as to any legal right or liability,[127] as propounded in *Ali Singer v Margaret Nankabirwa.*[128] In matters of fraud, the burden lies first, on the claimant or

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121 *Hotel International Ltd v The Administrator of the Estate of Robert Kavuma* Supreme Court Civil Appeal No 03 of 1995.
122 Order 6 Rule 3 of the Civil Procedure Rules.
123 Supreme Court Civil Appeal No. 22 of 1993.
124 [2017] UGSC 13.
125 [2015] UGSC 21.
126 Supreme Court Civil Appeal No. 04 of 2022.
127 Evidence Act Cap 8, s.106.
128 [2019] UGSC 56.

party who asserts that the transaction was tainted with fraud to adduce evidence to that effect. Specifically on land matters: in *Patrick Mukasa*, Ekirikubinza, JSC, in following the earlier position in *Kampala Bottlers Limited*, reiterated held that the plaintiff had the duty to prove that the respondent had acquired title through extra legal means.

The standard of proof for all civil matters (for which a cause of action is land fraud, seeking remedies other than criminal) is on the preponderance of probabilities.[129] But because of the seriousness that courts accord to fraud, as propounded in *Kampala Bottlers Ltd* and applied in *Senkungu,* this standard has been moved up to one above balance of probabilities but below beyond reasonable doubt.[130] The nature of evidence to sustain or support a course of action in land matters involving fraud can be witnesses[131] but not through affidavits,[132] documentary evidence,[133] and that of locus in quo.[134]

Even when Order 19 Rule 2, Civil Procedure Rules (CPR) provides that where a party may, upon application to court, require that a deponent of an affidavit in an application be summoned for cross – examination on his or her affidavit in court; *in Attorney General v Alibhai Ramji Limited & 2 Ors,*[135] Luswata, J held that such evidence would not measure up to the standard beyond mere probabilities. In *Mbarara Municipal Council v Jetha Brothers Ltd*,[136] Justice Muhanguzi JSC created an exception when he stated thus:

> "…In my view, affidavits can be sworn by anyone to prove a set of facts and an advocate is not an exception. An advocate is therefore not prohibited to swear am affidavit where necessary especially on matters that are well within his knowledge."

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129 *Senkungu & 4 Ors v Mukasa* [2017] UGSC 14. See also *J. W. R. Kazoora v M. L. S Rukuba* Supreme Court Civil Appeal No. 13 of 1992.
130 *Ratlal G Patel v Baiji Mackay* (1957) EA 31.
131 *Kasese District Local Government Council v Baluku & 4 Others* [2020] UGCA 2120
132 Kampala Bottlers; *Hajji Numani Mubi Akulamusa v Friends Estate Ltd*, Court of Appeal Civil Appeal No. 209 of 2013.
133 *Kaggwa v Olal & 6 Ors* [2018] UGHCLD 65.
134 See also: Joseph Kyazze, 'Presentation on law, procedure and practice of locus in quo proceedings <https://www.collegesidekick.com/> [Accessed on 29 June 2024]
135 [2013] UGHCLD 398.
136 Supreme Court Miscellaneous Application No. 10 of 2021.

The process of litigating land fraud in Uganda has been quoted as being inadequate.[137] The effect of technology, time taken effect on evidence collection has not been researched in good detail so far, and is beyond the scope of this article. The steps so far taken by the Ministry of Lands Housing and Urban Development to digitise land transactions have not yet been sufficiently evaluated, as discussed in later in this article. Nonetheless, suffice to note that the law on evidence especially the documents required sets a very high standard, and yet most of the land owners in Uganda are not tech savvy enough to meet it.

9.0 EFFECT OF FRAUD

S.76, RTA provides:

> Any certificate of title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.[138]

From the plain reading of the section: a) any certificate (in whole) or entry or erasure made on the title done by fraud is void; b) the impact of fraud is not just to a certificate but also to an entry, erasure of any entry and affects not only to those who participate in it but also those who are privy to it; c) the provisions are couched in mandatory terms.

In the case of *Fam International Limited and Ahmad Farah v Mohamed El Faith*[139] court held that that fraud is such a grotesque monster that the courts should hound it wherever it rears its head and wherever it seeks to even take cover behind any legislation. Fraud unravels everything and vitiates all transactions. This is in line with the application of the legal maxim, "fraud unravels everything," as applied by Lord Denning, the celebrated jurist, in *Lazarus Estates Ltd v Beasley.*[140]

Where there is fraud proved, the only fate of the transactions arising therefrom is that they are void to the extent of the fraud. In *Kampala Bottlers*, Odoki, CJ,

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137 Land Justice in Uganda. < https://www.hiil.org/wp-content/> Accessed on 06 December 2024.

138 This emphasised in the RTA. s.174 (1). See also *Kampala Bottlers v Damanico (U) Ltd.*

139 [1994] KARL 307.

140 [1956] 1 QB 702 at 712.

held that the title of transferees whom court finds guilty of some fraudulent act, or who came to know of such act by somebody else and took advantage of such act, are void.

10.0 PUNISHMENT FOR FRAUD

The RTA provides for two main punishments: a) that a person who is convicted under the section is liable to a jail term of not more than three years or a fine or both b) that the certificate, entry or erasure is void as against those who participated in, and those who are privy to, the fraud.[141]

In *Ntambi Robert Vincent v Uganda*,[142] wherein the appellant had forged the signature of Matilida Bulya, the deceased mother of the children (who were complainants), Murangira, J ordered for the cancellation of title and instatement of the names of Matilida Bulya and upheld the sentence of the Magistrate's court.

In *Nakawombe Robinah and Anor v Streams of Life Church & Ors*,[143] wherein the 2nd defendant was found to have forged the transfer form leading to the acquisition of the contested land, contrary to S.174, RTA, Namanya, J ordered for cancellation of title in the names of the 1st defendant, and registration of the same in the names of the plaintiffs as administrators of the estate of their late mother.

11.0 DEFENCES AGAINST FRAUD

11.1 FAILURE TO PROVE FRAUD.

Generally, where the perpetrator of fraud is still the registered proprietor, the defences available relate to defeating the evidence adduced by the one seeking to impeach the title. Similarly, where the perpetrator of the fraud has since sold the land to another party, the rules of evidence still apply likewise.

141 S.174(1), RTA.
142 Supreme Court Criminal Application No. 8 of 2019.
143 [2023] UGHCLD 277.

In *Meera Investment Ltd v Sadrdin Gulamhussein & Anor*,[144] where the 1st defendant failed to prove the details of the fraud occasioned by the plaintiff, Bashaija, J held in favour of the plaintiff, and ordered the 2nd defendant to compensate the 1st defendant the market value of the land in contention because the 1st defendant relied on information from the 2nd defendant to his detriment.

In *Ipolito Semwanga v Kwizera Buchana & Ors,*[145] even when the original proprietor of the land had not signed the transfer forms (and the signature that was relied on in the transfer process was forged), when he failed to prove that the fraud and forgery leading to the acquisition of title was not attributable directly to the current proprietor, the cause of action for the original proprietor, the plaintiff, failed and the 1st defendant was found to be a bonafide purchaser of value without notice.

11.2 LIMITATION

Sec. 5 of the Limitation Act[146] provides that no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her.[147] *In FX Miragago v Attorney General,*[148] it was observed that the period of limitation begins to run as against the plaintiff from the time the cause of action accrued until when the suit is actually filed.

That once a cause of action accrued, for as long as there is capacity to sue, time begins to run against the plaintiff. S.25 of the Act also provides that where the defendant obtained title by fraud, the limitation time starts counting when the fraud is discovered, not when it was committed unless it was discovered at the time of commission.[149]

144 [2017] UGHCLD 45.
145 High Court Civil Suit No. 61 of 2005.
146 Cap 290, Laws of Uganda.
147 *David Mukasa Sendaula v Christine Nakalanzi and Anor* [1993] UGHC 2.
148 [1979] HCB 24. See also: *Nyombayabo v Bundibugyo District Local Government* [2023] UGHCCD 108.
149 *Odyeki & Anor v Yokonani & 4 Ors* [2018] UGHCCD 50.

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the grounds upon which exemption from that law is claimed.[150] However, in *Eriyasafu v Wilberforce Kuluse,*[151] court held that for the tort of trespass to land as a continuing tort, the law of limitation does not apply to it in the strict sense.

11.3 Bonafide Purchaser for Value

The most prominent defence available to the registered proprietor who purchased from the perpetrator (or one who participated in, or ignored notice of fraud) is the common law doctrine of bonafide purchaser for value without notice of fraud –common law principle[152] which is codified in S.181, RTA. In *Amratlal Purshottam & Anor v Gian Singh Bhambra*,[153] a bona fide purchaser was defined as one who buys property for value without notice of another's claim over the same property and without actual or constructive notice of any defects in, or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for the property without notice of prior adverse claims.

In *Lwanga v Registrar of Titles,*[154] court held that a person who was registered through fraud could pass a good title to a bona fide purchaser for value if the latter was not privy to the fraud. Similarly, in *Ipolito Semwanga*, the bona fide purchaser acquired title indefeasible under forged transfer and consent forms. The burden of proving this defence, in according with s.101, Evidence Act, lies on the one who seeks to rely on it –the transferee.[155]

Courts have enunciated the main elements to be proved and they include:[156] a) he holds a certificate of title, b) he purchased the property in good faith,[157] c) he had no knowledge of the fraud, d) he purchased for valuable

150 Order 7 Rule 6; Order 15 Rule 5(1), Civil Procedure Rules (CPR).
151 (1994) III KALR 10.
152 *Edward Gatsinzi & Anor v Lwanga Stephen* High Court Civil Suit No. 690 of 2004
153 High Court Civil Suit No. 289 of 2010 (Land Division) (Unreported).
154 [1980] HCB 23.
155 *Ssebiragala Moses v AG & Anor* HCSS No.815 of 2003.
156 *Haji Nasser Katende v Vithalidas Halidas & Co. Ltd* C.A.C.A. No. 84 of 2003.
157 *Uganda Posts & Telecommunications v A.K.P.M Lutaaya* Supreme Court Civil Appeal No. 36 of 1995. See also: *Nabanoba Desiranta & Anor v Kayiwa Joseph & Anor*, High Court Civil Suit No. 496 of 2005.

consideration,[158] e) the vendor had apparent valid title, f) he purchased without notice of any fraud and g) he was not party to the fraud.[159]

12.0 REMEDIES FOR VICTIMS OF FRAUD

It is worth noting that most of the remedies above have challenges, some of them anchored in our laws, others operational.

Most, if not all, of the remedies for victims are viewed as those available to victims of the Torrens system in general because, strictly speaking, fraud has the net impact of vitiating the cornerstone of Torrens system –the certificate of registration.

12.1 TRESPASS

This is a remedy available in tort where one intentionally comes onto the land of another without the consent of the owner.[160] Where the purchaser acquired the title to the land through fraud whether done by him directly, or facilitated by him, or ignored notice of the fraud in the process of the purchase, or can, by any other means, be accountable for it; the claimant can have remedies available for trespass on the land.

In Uganda, as rightly observed by Nakayi, the doctrine of trespass has been heavily weaponised by mostly those who obtain registration and title to land in extra-legal means, and therefore it is important that courts are always alive to this status of affairs.[161] This is mainly because action in trespass is available to a claimant by virtue of possessory rights and not necessarily ownership. And this, in many cases, causes situations where some parties have been driven off their land even when they would otherwise have protection under the current legal regime.

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158 *Hussein Juma v Raphael Bwami* H.C.C.A N. DR. MFP6/1990.

159 *David Sejjaka Nalima v Rebecca Musoke* Court of Appeal Civil Appeal No. 12 of 1985.

160 *Justine E.M.N Lutaya v Stirling Civil Engineering Company Limited* Supreme Court Civil Appeal No. 11 of 2002.

161 Nakayi, R., Weaponisation of trespass to land and its implications for land justice and enjoyment of property rights in neoliberal Uganda' 2023 *Strathmore Law Journal,* 7(1), 179–209.

In *Dr. David Kaggwa v Audrey Musiimenta*,[162] wherein the appellant acquired land from one who falsified his names after buying it from the respondent, Tuhaise, JSC with whom all the four Supreme Court Justices concurred, granted the declaration sought by the respondent, that the appellant was a trespasser on the land since he had acquired it through wilful blindness by not conducting due diligence relating to the use of different names by the one John Ssekimpi who sold to him.

12.2 INJUNCTION

A permanent injunction is a remedy for preventing wrongs and preserving rights so that by single exercise of equitable power an injury is both restrained and repaired, for the purpose of dispensing complete justice between the parties.[163] A Permanent injunction is granted as a remedy against an infringement or violation which has been proven at trial.[164] Where some interests in land were fraudulently acquired for instance easements, court can grant an injunction against the continued enjoyment of those rights.

In *Nakawombe*, Namanya, J, after finding that the 2nd defendant had forged the transfer form used to register the impugned title, issued a permanent injunction restraining the 1st and 2nd defendants, their agents, servants, workmen and all those claiming under them and/or deriving authority from them trespassing, encroaching, interfering and/or in any way dealing with the contested land.

12.3 EJECTMENT

The RTA[165] provides that court can issue an order for ejectment of the purchaser who acquired their interest(s) through fraud after a full trial according each party an opportunity to be heard.[166] This is primarily based on the provisions of S.76, RTA, as discussed here above, that a title proven to

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162 Supreme Court Civil Appeal No. 10 of 2022.
163 *Akena & Ors v Opwonya* [2018] UGHCLD 70.
164 *Ibid.*
165 Sec. 160(c), 161.
166 Constitution of the Republic of Uganda 1995 as amended Article 28. See also *Hannington Wasswa* (Supra).

have been obtained by fraud is void, and the court is mandated, in the interest of justice, to issue orders to return land to the original owners accordingly.

The ejectment or eviction must be compliant with The Constitutional (Land Evictions) (Practice) Directions 2021 issued by the Chief Justice.[167] The directions were only issued following courts instructions in a number of decisions in which it was held that there is no framework for handling evictions even in instances where court had sanctioned the ejectment orders.[168]

12.4 COMPENSATION

In cases where a bonafide purchaser bought the land that was subject of contention without involvement in, or with notice of, fraud, that purchaser is protected;[169] instead, the vendor who was themselves party to the fraud that deprived the claimant of the land can be ordered by court to compensate the claimant accordingly.[170] Compensation is not defined in statute but courts have interpreted it to mean payment of damages or any other act that court orders to be done by a person who caused injury to another.[171]

In *Zaabwe*, court declared that the 1st and 2nd Respondents, who were found to be fraudulent on account of their actions and the notice of fraud they had and yet they proceeded to conclude transfer of the appellant's property into the names of a third party, should compensate the appellant with the current market value of the suit property to be determined by a certified valuation surveyor appointed with approval of a judge of the High Court.

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167 Issued by Katurebe, CJ pursuant to Art. 133(1) of the Constitution of the Republic of Uganda. Court in *Tusingwire v Attorney General* [2017] UGSC 11 held that practice directions are constitutional. See also: Busein Samilu and Peter Sserugo, 'Govt clarifies law on land evictions' (Daily Monitor, 2023) <https://www.monitor.co.ug/uganda/> [Accessed on 9 December 2024]

168 *Muhindo & 3 Ors v Attorney General* [2019] UGHCCD 2.

169 Sections 160, 165, RTA.

170 *Western Highland Creameries Ltd & Anor v Stanbic Bank Uganda Ltd & 2 Ors* High Court Civil Suit No. 462 of 2011.

171 *Goodman International Ltd v Attorney General & Anor* High Court Civil Suit No. 73 of 2014.

The expectations of court in all instances of compensation are that the appointed surveyor would be alive to, and comply with, the provisions of the Local Government (Ratings) Act Cap 140[172]–the guiding framework on how values for different properties are to be determined. Compensation as a remedy is granted owing to the doctrine of restitution–to return the claimant to the status they were in before the deprivation.

12.5 CANCELLATION

In cases where it has been proved that the purchase was tainted with fraud orchestrated by, or directly involving, the current proprietor, court can order for cancellation of the impugned title.[173] In *Nalima*, after finding that the appellant had both constructive and imputed notice of the fraud leading to the acquisition of title that was passed on to him, Odoki, JA (as he was then) ordered the cancellation of the title and reinstatement of names of the deceased Prof. Latimer Musoke for whom the respondent was the administrator (who was represented in the suit by the Respondent).

Similarly, in *Friends Estate v Hajji Mubi Akulamusa*,[174] where the respondent was involved in fraudulent acts leading to the acquisition of title, Chibita, JSC with whom majority judges agreed, ordered for cancellation of the appellant's title and ordered the CLR to instate the names of the respondent as the true owner of the land.

In *Mary Buyondo v Equity Bank (U) Ltd, Nanteza Miriam and Finance Trust Uganda Ltd*,[175] the plaintiff mortgaged property to the first defendant to secure a loan. She repaid it but failed to secure release of the mortgage and return of her clean title. The title was purportedly lost but fraudulently sold to the second defendant, who mortgaged it to the third defendant (Finance Trust Uganda Ltd) and then defaulted. The plaintiff learnt about this when the property was advertised for sale on default. Meanwhile, the first defendant had

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172 In most of the cases, Courts have been inclined to appoint the Chief Government Valuer who also has to follow a scientific process to arrive at the values given as was the cases *Katende* (supra).

173 Sec. 64(1), 76, 120, 160(c), 185, RTA.

174 Supreme Court Civil Appeal No. 21 of 2020.

175 High Court Civil Suit No. 2890 of 2016.

given the plaintiff another forged title instead of her genuine one. The plaintiff, after winning, the High Court awarded damages and costs, and an order reinstating her as the registered proprietor of the land.

12.6 REFUND OF MONEY/INDEMNITY

Where the purchaser of land relied on information provided to them by the Registrar, and because of that, or other action that can legally be attributed to the Registrar, or a representation made on the basis of which the buyer based to purchase the land, and subsequently suffered loss, court can order for indemnity against the representor.

In *Attorney General v Henley Property Developers Limited,*[176] the appellant relied on the search certificate from the registrar's office to enter into a transaction when in fact the records from the registrar were actually false, and the appellant was held to have been involved in fraud, court held that reliance on the register was lawful, and any loss suffered as a result of such reliance would be compensated by the respondent as the legal representative of the CLR.

12.7 CAVEATS

As a temporary relief to curtail enjoyment of land obtained through fraud, the victim can apply to the commissioner Land Registration to give notice to the whole world of their interests.[177] This notice is called a caveat –a Latin word to mean 'let him be aware'. This is meant to notify the world that whoever intends to transact on the land (including the CLR), the caveator must be notify the caveator.[178] It is a [temporary] remedy for the victim to force the registered proprietor to deal with the highlighted by the caveator.

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176 [2024] UGSC 8.

177 *Davakom Collections v CLR* [2021] UGHCLD 215]*; Nakabuye Agnes v Martin Strokes* [2022] UGHCLD 319.

178 As held in *Boynes v Gathure* (1969) EA 385. See also: *Rutungu Properties v Linda Harriet and Anor* [2019] UGCA 2026*; Ahairwe v Mugasha* [2023] UGHC 12*; De Souza v Talbot* [1962] EA 167.

For one to lodge a caveat on land,[179] they must have a current ceveatable interest.[180] In *Ngarukiye v Mubiru*,[181] Nakachwa, J, reiterating S.123, RTA stated that persons with caveatable interests include a purchaser under an agreement of sale of land under certain circumstances; a registered or equitable mortgagor; beneficiaries of an interest in a trust or easement; a builder's contractual right to charge the land with all the moneys owing; and a registered proprietor who fears a false transfer of ownership.

The RTA[182] provides that, except for a caveat lodged by a beneficiary under a testamentary disposition, all caveats lodged lapse within 60 days from the day a notice is given to the registered proprietor about the caveat lodged by the caveator. After receipt of the notice, the registered proprietor is supposed to deal with the caveator to vacate the caveat,[183] and when the caveator fails to reach a settlement with the registered proprietor, the former can petition the CLR for a resolution. If the CLR fails to resolve the matter, the registered proprietor can petition the High Court which, after a full hearing, can cause the vacation of the caveat.

Where the caveator did not have caveatable interest and their motivations were actuated by malice, he can be ordered to pay costs.[184] In *Ainomugisha Doreen v Saava Michael David Kyazze*,[185] after the defendant failing to show cause why the caveat he lodged should not be vacated, Kawesa, J ordered the caveat to be vacated and awarded general damages to the plaintiff for the inconvenience suffered.

The RTA provides that once a caveat is vacated from the land, the land becomes available for transaction as if there was not caveat in the first

179 Sec. 123, RTA.
180 *Hunter Investment v Lwanyaga & Anor* [2015] UGHCLD 23 reiterating the old common law position in *Concord v Coles* [1906] 3 CPR 96 and restated in *Kazoora v Rukuba* [1993] UGSC 2.
181 [2023] UGHCLD 28.
182 Sec. 124.
183 *Nakabuye v Martin Strokes and Another* [2022] UGHCLD 13.
184 Sec. 126, RTA.
185 [2019] UGHCLD 20.

place.[186] Case law has also shown that, even then, the registered proprietor cannot deny the knowledge of other interests.[187]

12.8 DAMAGES

In cases where the deprivation of one's land has occasioned some injury that can be atoned by monetary restitution, courts can order payment of general damages by the perpetrator of the fraud.

In *Zaabwe*, where the property had already been fraudulently transferred to the names of a third party who was not neither party to the fraud nor had notice of the fraud, court ordered that the appellant is paid damages of Ushs. 200,000,000 for inconvenience caused.

13.0 OTHER EMERGING ISSUES

In the evolution of fraud, there have been key issues that are worth taking note of, including those that inhibit the effectiveness of the policy and regulatory interventions to stop it. Here below I capture the key issues in this respect.

13.1 DIGITISATION

Digitisation refers to the conversion of an item – printed text, a manuscript, an image, or sound, film and video recording – from one format[188] (usually print or analogue) to a digital one that can be stored electronically, through use of digital camera or a scanner,[189] for purposes of easy access.[190] In the case of Uganda, before 2012, the system of land recordation was one developed in the early 1900s only changed in the mid-1950s –which was manual and

186 Sec. 129.

187 *Kabiito and Another v Yan Jian Uganda Company Limited* [2020] UGCommC 164.

188 Pakesh, H., 'Digitisation: An overview of issues' (2002) <http://ir.inflibnet.ac.in/dxml/> [Accessed 9 December 2024]

189 Lee, S. 2001. Digital imaging: A practical handbook. New York: Neal-Schuman.

190 Hirtle, PB. 2002. The impact of digitisation on special collections in libraries. Libraries and Culture: A Journal of Library History 37(1): 42-52.

consisted many systems for one to transfer interest in land, was poorly managed and prone to fraudsters, agents and speculators.[191]

Even after the advent of the digitised National Land Information System (NLIS) in 2010, many challenges have dogged the development and implementation of the system including limited funding, understaffing, among others. These have greatly impaired the achievement of the objectives as planned, and instead increased the fraud in some instances.[192]

Even with envisaged huge benefits from a digitised register,[193] in 2013, Luyombya and Obbo carried out a study to assess the effectiveness of the land information system, and concluded that in fact, there were major challenges including planning, tactical and operational challenges with personnel readiness, electricity supply and internet connectivity, inadequate infrastructure and in fact cast doubt on the metadata that would be captured in the system.[194] These challenges were mainly infrastructural and did not go the root of the propriety of the system itself.

From a study conducted by Oput in 2023, even if there had been a remarkable approximately US$ 193 million generated from services through the system in the period between 2013 and 2019, and decentralisation of the system to 22 zonal offices, the challenges highlighted by Obbo earlier on, still persisted including electricity supply and connectivity. Oput goes ahead to highlight the issues of the general poor quality of records, man power training and number, the inconsistency of the legal and regulatory framework with the flexible development of land administration services globally.[195]

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191 MISR/Winsconsin, 1990, Land Tenure and Agricultural Development. Madison: University of Wisconsin, Land Tenure Center. See also: Bazaara, N., 'Land reforms and agrarian structure in Uganda: retrospect and prospect' 1994 Nomadic peoples, 37-53.

192 Mushoborozi Tony, 'Status of Uganda's digital land registry system ten years later' (Daily Monitor, 14 June 2023) Retrieved from <https://www.monitor.co.ug/uganda/> [Accessed 9 December 2024]

193 Aparajita Goyal, 'Benefits of Land Registry Digitization' (2012) <https://blogs.worldbank.org/> [Accessed 10 December 2024]

194 Luyombya, D., & Obbo, D. F., 'The state of digitisation of the land registry operations in Uganda' 2013 Journal of the South African Society of Archivists, 46, 25- 25.

195 Richard Oput, 'Modernization of land administration services in Uganda' (Oct, 2021) <https://mycoordinates.org/> [Accessed 10 December 2024]

13.2 VIOLENCE, HIGHHANDEDNESS AND IMPUNITY OF THE STAFF OF REGISTRAR OF TITLES AND SOME LAW ENFORCEMENT AGENCIES.

Even with the policy and legal framework, the administration of land, and the fraud occasioned therefrom, has been severally reported to be marred by abuse of office by staff of the Registrar of Titles facilitating or participating or abetting the commission of fraud.[196] Recently, the Commissioner Land Registration issued a memo to his staff to warn them off internal misconduct and gave a raft of orders.[197] The prosecution of staff of the agencies involved in the land recordation system is Uganda, as it is for most of the other agencies, slow for various reasons.[198] And this, in the long run, leads to more fraud.

Rugadya noted that the possibility of increasing conflict is largely driven by competition for influence and power which comes with demonstrated control over land matters such as ownership, allocation and access.[199] Conflict is largely arising out of people desiring to take up interests in land beyond what the law entitles them to.

13.3 EFFECTIVENESS OF THE COURT SYSTEM

A study conducted by the Hague Institute for Innovation of Law revealed that 25% of Ugandans have had a land dispute in their lifetime (or suffered its effects), most disputes arise out of boundaries (most times out of fraud), take so long to resolve through the court system, and most people have opted to use other means to resolve those disputes.[200] And yet even with this, about

196 Charity Akullo, 'Two Lira officials remanded over alleged land fraud' (Daily Monitor, 21 June 2024) <https://www.monitor.co.ug/uganda/news> [Accessed 10 December 2024]

197 Stephen Kafeero (n 8).

198 Milton Olupot, 'Uganda: Land Titles Scam Exposed' (19 March 2007) <https://allafrica.com/stories/200703200092.html> [Accessed 10 December 2024]

199 Rugadya, M. A. (2009). Escalating land conflicts in Uganda. A Review of Evidence from Recent Studies and Surveys. The International Republican Institute, The Uganda Round Table Foundation.

200 Land Justice in Uganda. <https://www.hiil.org/wp-content/> [Accessed 10 December 2024]

44% of all the cases in the Ugandan court system are land related.[201] The most recent case of *Yovana Katosa v Fiona Mbabazi*[202] took the Court of Appeal to more than 10 years deliver a judgement therein. The *Akena* case took sixteen years to resolve.

This challenge has been attributed to insufficient resources (both human, infrastructural and others) but it still persists even with the many steps taken to deal with it.[203] This, in some ways, gives some latitude to the fraudsters to think that after all, by the time a case is decided they would have gained benefits from the land acquired wrongly, and in some cases the people from whom they acquire the land might pass on or even just abandon the cases altogether. The summation of the challenges the judiciary faces, which limit its effectiveness in expeditious resolution of disputes, and the magnitude of the challenges, is reflected in the brief submitted by the Acting Principal Judge to the Bamugemereire Commission[204] but have not been acted on decisively.

13.4 CIVIC COMPETENCE AND AWARENESS OF THE LAW

The land recordation system in Uganda is structured mainly for people with a certain level of literacy above what an average Uganda land owner has. The general awareness of Ugandans about the laws is disturbingly low.[205] And this leads to a lot of ignorance among the biggest part of the population about rights accruing from land laws.[206] Government has also acknowledged the big knowledge gap existing among most land owners[207] but not a lot has been

201 Legal Aid Service Providers Network (LASPNET), State of Access to Justice Report; 2017 Annual trends analysis <https://laspnet.org/joomla-pages/reports/> [Accessed 02 December 2024]

202 Court of Appeal Civil Appeal No. 125 of 2014.

203 Judiciary, 2021, 'Special Court Sessions to Clear 220 Land Cases Start Monday' <http://www.judiciary.go.ug/data/> [Accessed 10 December 2024]

204 Judiciary, 2017, 'Judiciary Blames Land Disputes on Inadequate Law, Structures' <https://www.judiciary.go.ug/data/news/408/142/ [Accessed 11 December 2024]

205 Mubangizi, John, 'The Protection of Human Rights in Uganda: Public Awareness and Perceptions' 2005 African Journal of Legal Studies. 1. 166.

206 Rugadya, M., Nsamba–Gayiiya, E., Kamusiime H. (2008), Northern Uganda Land Study; Analysis of Post Conflict Land Policy and Land Administration: A Survey of IDP Return and Resettlement, Issues and Lessons: Acholi and Lango regions, for the World Bank to input into the PRDP and the Draft National Land Policy.

207 LAND watch, 'The British Colonial Masters set the Land Problem in Uganda' (2018) <https://landnet.ug/landwatch/> [Accessed 10 December 2024]

done to stem it. This in turn shrinks their appreciation of which rights they have over land.

Mwebaza traces the origins of the challenges most Uganda land owners face, and amplifies the quagmire that most Ugandans face in enforcing their rights mostly bonafide occupants.[208] In some ways, ignorance of the law has also been attributed to the law enforcers themselves which further complicates the chances and trust of landowners in the formal justice systems.

13.5 FRAGILE LAND ADMINISTRATION ECOSYSTEM

The system in which the land market operates creates more opportunities for fraud. The Wakiso District Human Rights Situation Report highlights fraud perpetuated by land brokers in selling the same piece of land more than twice to different unsuspecting buyers who later realise that they have been duped from their land without compensation whatsoever.[209] The role property brokers play in land conveyance had been amplified in the Real Estates Bill[210] which has not yet seen the light of day. The efforts to regulate them have been futile until only recently.

The role played by surveyors in Uganda cannot be sidestepped in the perpetuation of fraud in Uganda.[211] Various studies have indeed shown that [apt] legislation plays a very important role in the implementation of the land policy and is a key driving force for the surveying profession and industry.[212] The regulatory framework for the surveying profession has been viewed as

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208 Mwebaza Edward, 'A HISTORICAL PERSPECTIVE OF THE LAND PROBLEM IN UGANDA' (2024) <https://hrapf.org/?mdocs-file=1602/> accessed 10 December 2024

209 Promoting human rights, advancing freedoms for communities in Wakiso' <https://wakiso.go.ug/> accessed 11 December 2024

210 Bill to enact the Real Estate Agents Act 2013. <https://mlhud.go.ug/wp-content/> accessed 11 December 2024]. Recent efforts to regulate these land brokers' actions have also not yet yielded any fruit.

211 Even when the report by the Commission of Inquiry into Land Matters, 2016, also called the Bamugemereire Commission, has not been made public, media reports indicate that surveying is one of the processes that perpetuate fraud especially the gaps in disciplining unregistered surveyors who hold out and are stopped in time. See: <https://www.newvision.co.ug/category/> accessed 11 December 2024; Bamugemereire report on land to be turned into law–Museveni (The Independent, 2021) <https://www.independent.co.ug/> accessed on 11 December 2024

212 Williamson I. P. and John. A. Ristevski, 2001: The reform of statutory regulations relating to the surveying profession.

feeble, with the governing law was enacted in 1964[213] with little or no amendment to date. The technology regarding how land is surveyed has itself changed, together with the documents used in the registration process are filled.[214] In 2022, the Surveyors Registration Board (the surveyors' regulation body) issued some circulars regarding how the profession would conduct itself and curb on the malfeasance cases they had encountered, but these have not yet registered any tangible benefits.[215]

The corruption and use of the cash system cannot be understated. Transparency International indicated that land corruption has been driven by poor oversight, weak institutions, a lack of capacity, and by not including civil society and other key stakeholders in the land administration. The report further recommends some mitigation measures to deal with the rampant corruption in various land management institutions but these have not been implemented.[216]

Even when land management, including management of fraud thereunder, has been considered key and critical to the growth and progress of Uganda as a country, the endemic corruption facilitated by weak and mostly unaccountable institutions aided by gaps in the law as it is provide a recipe for continuation of the vice.[217]

There have been indications that land management is critical to the achievement of the SDGs globally,[218] but the structural challenges at individual states' level are still a big impediment, and Uganda is not an

213 Surveyors Registration Act Cap 275. <https://mlhud.go.ug/wp-content/> accessed 10 December 2024].

214 Musinguzi, M., & Kisakye, M. (2011). Discrepancy between survey practice and legislation in Uganda. In The First Conference on Advances in Geomatics Research; Makerere University: Kampala Uganda.

215 Surveyors' body draws the line for professionals. <https://www.monitor.co.ug/uganda/> accessed 11 December 2024

216 Transparency International, 2016. Corruption risks and mitigation measures in land administration. Retrieved from <https://www.u4.no/publications/> accessed 10 December 2024

217 Tackling corruption in land sector is critical for Uganda <https://www.monitor.co.ug/uganda/> accessed 11 December 2024

218 Transparency, 2023, 'Tackling Land Corruption is Vital to Achieving Land Rights and The 2030 SDG Agenda' <https://images.transparencycdn.org/> accessed on 26 June 2024

exception. The manifestation of this can be traced from the delay in the processes of actual registration, laws with skewed provisions to deal with land rights, longer turnaround times for cases in the court system, among others.

14.0 RECOMMENDATIONS

There has been talk of adopting new technologies to mitigate or deal with fraud especially blockchain. By design, blockchains are inherently resistant to modification of data. Once recorded, the data is in any given record/block, it cannot be altered retroactively without the alteration of other blocks, which requires collusion of network majority. The versatility of blockchains creates the need to consider it as a way to manage regulatory obligations. In particular, blockchain is now seen by many as the future of land registration.

Away from the changes in the law and legal framework, there is urgent need for sensitization for the citizenry on land rights and ownership. There is also need for accurate valuation and timely compensation. The approach to eliminating fraud should be specific to, and across, the different cases. There should be a deliberate framework especially under the line ministry to sensitise the population about these initiatives, their rights and duties among others.

15.0 CONCLUSION

From the foregoing discussion, fraud has mutated in many ways not so much its effects but the way it is masterminded, carried out, the factors necessary for its continuation. The legal, policy, investigative framework to tackle it has, however not changed that much in the context of Uganda.

Even with the different safeguards courts have adopted in the effort to curtail fraud, it is evident that these efforts are still a drop in the ocean outside the statutory provisions. Fraud continues to be committed most of it undetected, and in many cases with the victims not being able to litigate against it. This continues to give latitude to those that perpetuate it.

The changing times and socio-economic environment have left behind the law on fraud as it is known. Whereas the legal regime might not be changing at the speed of technology, there is need to give a broad definition of fraud

especially on how it can be committed. The refuge for this has thus far been in the interpretation of the courts.

This is not favourable in the case of Uganda where common (or case law) is expected to be applied where or when written law provides no remedy. As discussed above, Courts have since taken the position to safeguard the land markets by raising the standard against which fraud should be proved. The law should therefore, as a way of providing clarity, be amended, especially s.136, RTA which, in the case of Uganda, has been subject of huge contention.

It is clear that majority of the cases would still be handled under the current legal regime (the RTA, other relevant laws and the necessary implication augmented by the courts) if it was still implemented flawlessly but there seems to be o*v*erarching intention on the part of law enforcement to either selectively apply the law towards certain parts of the population or not apply the law at all.

Technological advancement has led to the change in how land recordation is done by minimising human involvement and influence peddling. Some scholars have recommended blockchain as a practical solution to deal away with the human interaction in the recordation processes as has been adopted in Ukraine, Georgia, Sweden, Ghana and India (in the offing).[219] First created by Satoshi Nakamoto in 2008,[220] a blockchain is a distributed ledger with growing lists of records (blocks) that are securely linked together via cryptographic hashes.[221]

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219 Kenneth Muhangi, 2018 Transform Uganda's Land registries using blockchain technology. <https://www.newvision.co.ug/new_vision/> accessed 11 December 2024

220 Oberhaus, Daniel (27 August 2018). "The World's Oldest Blockchain Has Been Hiding in the New York Times Since 1995" Retrieved at <https://www.vice.com/en/article/> accessed 10 December 2024

221 Narayanan, Arvind; Bonneau, Joseph; Felten, Edward; Miller, Andrew; Goldfeder, Steven (2016). Bitcoin and cryptocurrency technologies: a comprehensive introduction. Princeton, New Jersey: Princeton University Press.

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A LEGAL THEORY OF MORTGAGE AND LAND TRANSACTIONS UNDER THE LAND USE ACT 1978 IN NIGERIA: ISSUES AND CHALLENGES

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A LEGAL THEORY OF MORTGAGE AND LAND TRANSACTIONS UNDER THE LAND USE ACT 1978 IN NIGERIA: ISSUES AND CHALLENGES

Busari Morufu Salawu*

Abstract

The use of land as securities for mortgages appears more desirable for lenders because its value increases over a period and it cannot be shipped out of jurisdiction. This paper undertakes an overview of mortgage theories, examines their applications to mortgage transactions under the Nigeria's Land Use Act 1978 and identifies and appraises challenges to their use. Although the Nigerian mortgage industry is still developing, due to a legal complexity in the sector, intermediate theory provides a strong base for its operation because of its adoption of principles of title and lien theories. Contentious provisions in the Land Use Act, such as the consent clause deemed grantee, and the half hectare clause are recommended for amendment for easy mortgage transactions.

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1.0 INTRODUCTION

Regulating mortgage transactions in an economy characterised by high inflationary trends and low rates of mortgage repayments is a difficult task engaging the Nigerian economy.[1] The uncertainties that pervade the mortgage sector because of the lack of clear directions and policies have had negative impacts on the access to capital flows and sustainability of the banking sector. Many banks have gone into bankruptcy because of the inability to recover mortgage loans due to problems emanating from the implementation of the Land Use Act 1978 Cap L5.[2]

Lending institutions in Nigeria are frequently confronted with loan defaulters who, for several reasons, are not able to fulfil their obligations as contained in the loan agreements.[3] Oyedokun, *et al* identified factors which may dispose the mortgagors to default from payment of the mortgage to include payment-to-income ratio, type and sex of the borrowers among others.[4] Due to that, lenders are left with no option than to set in motion actions to recover the capital and the interest in the loan. Actions which a lender could take in the recovery of the sum outstanding depend on loan securities. The loan which is secured by land has the advantage of attaching the security to the loan and thereby seeking a suitable method of recovering the pecuniary interest in any of the following ways: recovery of the mortgage loan through litigation; actual possession; appointment of a receiver; foreclosure; a specific performance and selling security.[5]

In a developing economy like that of Nigeria, recovering a loan may be a challenge for the mortgagees even when their interests are secured. This may be due to

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1 Central Bank of Nigeria (CBN), Credit Condition Survey Report for Q4 2020, (December, 2020), 14-16 <https://cbn.gov.ng> [Accessed October 12, 2024]; T.B. Oyedokun, A,O. Adewusi and M.O. Be;;o, "Impacts of Borrower's Attributes on Mortgade Default" Evidence from Nigerian Lending Market, (2015)2(3), Pacific Rim Property Research Journal, 259-274, <http://dx.doi.org/10.1080/1445921.2016.1140713> [Accessed October 12, 2024].

2 Law of the Federation of Nigeria (LFN), 2004.

3 Oyedokun, Adewusi & Bello, Impact of Borrower's Attributes on Mortgage Default: Evidence from Nigerian Lending Market.

4 Ibid.

5 F.J. Oniekoro, *Mortgages in Nigeria* (Chenglo Ltd, Enugu 2007) 142.

complex economic situations and the hyper-inflationary trend which has seen Nigeria enter into economic recession for twice; in 2015-2016 and in 2020-2021,[6] the effect of which persists to the present day.[7] Another reason is the macroeconomic effect of COVID-19. These present great dangers for the financial sector where the government itself has found it difficult to repay its loans.[8]

It was further alleged that in 2020, the nation used 97% of its revenue to service debts.[9] Banks and other lending firms may therefore, find it difficult to recover even secured loans and may have to use various enforcing strategies, chief among which is the mortgagee's power of sale (MPoS). In recent times, various reports and publications on the mortgage performance in Nigeria have shown an increasing rate of default, with grave implications for the lending industry.[10] The Central Bank of Nigeria (CBN) report showed that the rate of default worsened for small scale businesses in the last quarter of 2020 due to Coronavirus disease (COVID-19) Pandemic.

This study is conducted due to a dearth of legal theoretical frameworks for mortgage transactions in Nigeria. Though many works have been done on mortgage transactions in Nigeria, few of such have concentrated on formulating a legal theoretical framework and, theory building. Findings from these studies revealed the complexity of the legal regime of mortgage and a lack of developed legal theory in Nigeria.[11] Conducting this study would contribute to knowledge in

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6 The World Bank,' Nigeria's Economy Faces Worst Recession in Four Decades, says World Bank Report'. *Press Release*, (June 26, 2020) <www.worldbank.org> [Accessed 2 May, 2021].

7 Stephen Onyeiwu, Inflation in Nigeria is still Climbing while it has Slowed Globally: Here's Why The Conversation, (Lagos, March 14, 2024), <https://theconversation.com/inlation-in-nigeria-is-still-climbing-while-it-has-slowed-globally-heres-why-222226> [Accessed 13 October, 2024].

8 Oladeinde Olawoyin, 'Nigeria spent 97% of its revenue on debt servicing in 2020 – Report' *Premium Times* (Lagos, July 11, 2021).

9 BudgetIT, '2020 Budget Implementation Analysis' (Lagos, July, 2020) cited in *Premium Times* (Lagos July, 2021).

10 See Okafor Endurance, 'Nigerian lenders tighten credit criteria as default rates worsened in Q4 20 *Businessday*; Central Bank of Nigeria (CBN), Credit Condition Survey Report for Q4 2020 Abuja', Statistic Department (December, 2020), 14-16.

11 UG Ihekwoaba, 'A Holistic Analysis of Mortgage Transactions in Nigeria' (2024) (1) (2) *NAU Journal of Private Property Law*, 102 <https://journals.unizik.edu.ng/naujppl/article/view/4374> [Accessed 28 May 2025];

the mortgage sector and would contribute to repositioning the fledgling mortgage industry for sustainable development.

The study appraises the relevance of lien theory to mortgage transactions under Land Use Act in Nigeria. The objectives of the study were to;

1. Examine global best practices on mortgage theories regulating land transactions in Nigeria;

2. Apply the legal theory to mortgage transactions under the Nigeria's Land Use Act 1978; and

3. Identify and appraise challenges to the applicability of the theories to land mortgage in Nigeria.

The study adopted the doctrinal research method relying on primary and secondary sources. While the primary source includes statutory analysis and the case law, the secondary sources used are textbooks, journal articles, conference proceedings and the internet to achieve the aim and objectives of the study.

2.0. CONCEPTUAL CLARIFICATIONS

A mortgage is the legal or equitable transfer of title as security for the loan repayment or fulfilment of an obligation, with the promise that the title alienated would be redeemed when the debt is refunded or the obligation is settled.[12] In law, the mortgage relationship is usually between two parties (the mortgagor and the mortgagee). A third party may, however, come into the arrangement as a trustee, head lessor or a guarantor who may give or confirm the transfer of the title as debt security.[13] In this paper, the words 'mortgagor' is used synonymously with

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Kehinde Ogundimi, ' Legal and Regulatory Framework for the Mortgage Industry in Nigeria' (2019) (54) (4) *Economic and Financial Review*, 85 <https://www.cbn.gov.ng/out/2020/rsd/efr%20vol%2057%20no%204%20december%202019%20legal%20and%20regulatory%20framework%20forthe%20mortgage%20industry%20in%20nigeria.pdf> [Accessed 28 May 2025]; Oluwaseyi Sanni, ' An Appraisal of the Legal Framework Regulating Mortgage of Landed Property as Security for Loans from Banks in Nigeria' (19 September 2017) Available as SSRN <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3039309_code2720962.pdf?abstractid=3039309&mirid=1 > [Accessed 28 May 2025].

12 *Santley v Wilde* (1899) ChD 474 (Lord Lindley).

13 F.J. Oniekoro, *Mortgages in Nigeria: Law and Practice,* (Chenglo Ltd., Enugu, 2007) 1.

'borrower' and 'debtor', while 'mortgagee' bears the same meaning as 'lender' and 'creditor'.

The historical development of the mortgage could be traced to French jurisprudence where two types of 'gage existed, namely 'mort gage' which means dead pledge and 'vif gage', live pledge respectively.[14] In "vif gage", the secured lender (pledgee), would be in possession, utilise the rents, profits and products from the security to reduce the payment sum.[15] Under the *mort gage* however, the secured lender was not under such obligation.[16] Rather, the rents, products and profits collected would not be used to defray the debt.[17]

The evolution of mortgage law over the centuries has repositioned it for the promotion of commercial and industrial developments and housing facilities to take care of the continued need for funds in the globally competitive world. The institution of mortgage is, perhaps, one of the most important contributions of the English common law and the doctrines of equity to property management. It clearly enunciates roles of borrowers and lenders when security is involved.

3.0 OVERVIEW OF THE MORTGAGE THEORIES

Mortgage is a legal devise of a complex origin. It is a devise in which a legal or equitable title is conveyed by a party, known as mortgagor to another party, known as mortgagee, as security for the payment of a debt or to satisfy some other legal duties, with the understanding that the security would be re-conveyed when the debt is paid.[18] The author identifies and discussed three main theories in this section, namely: the title theory; the lien theory and intermediate theory.

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14 *Online Ethymology Dictionary* etymonline.com/word. Mortgage, Retrieved on 8 April 2020.
15 George Edward Osborne, *Handbook of the Law of Mortgages, (*2nd ed. West Publishing Co. Ltd, Texas 1970) 1.
16 *Ibid,* 3.
17 *Ibid.*
18 *Santley v Wilde* (1899) Ch. P. 474 (Lord Lindley).

3.1 TITLE THEORY

The title theory of mortgage is otherwise known as the common law doctrine of mortgage. By this theory, a mortgage is conveying the title of the property from the mortgagor to the mortgagee.[19] The title theory holds that the lender has certain rights which include entry and possession of the security immediately and as an incidence of his title, even before foreclosure. Failure to pay on the due date as agreed on the part of the mortgagor would determine his interest and make the interest of the mortgagee absolute.[20]

The common law position views mortgage as a conditional conveyancing because it does not set any special rules which could be regarded as law of mortgages. The conditional sale transferred the legal title to the lender, which could be made absolute upon the fulfilment of conditions precedent.[21] It operates more like an escrow contract where the lender is vested with the estate before default and upon the occurrence of a condition precedent, the right to non-judicial foreclosure is exercised.[22] The mortgagee, however, has the post-foreclosure right of re-entry when the condition stipulated in the mortgage deed has been performed, before the final decree of foreclosure.[23] The implication of the common law rule of conditional conveyancing is that the legal right in the property is transferred to the mortgagee upon the perfection of the mortgage deed.

Apart from its common law origin in English law, the title theory has regulated mortgage transactions with considerable success in many states in the United States of America, where 24 states follow the title theory.[24] Lessons on its

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19 William. H. Lloyd, "The Mortgage Theory of Pennsylvania," *(1924) 23 (233) Yale Law Journal*, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=penn_law_review> [Accessed 13 October, 2024].

20 Ibid.

21 Edgar N. Durfee, 'The Lien or Equitable Theory of the Mortgage - Some Generalizations' (1912) (X)(8) *Michigan Law Review*, 587, 592.

22 Ibid.

23 Wesley A. Sturges and Samuel O. Clark,' Legal Theory and Real Property Mortgages '(1928) (XXXVI) (6) *Yale Law Journal*, 691- 715.

24 Amanda Bell," Understanding the Difference: Lien Theory v Title Theory" *Home Buying and Home selling Tips*, <https://www.proplogix.com/videos/lien-theory-vs-title-theory/>

operation in the United States are therefore relevant, and are tapped, for this analysis. When in operation, lenders have both possession and legal rights in the security, a situation which confers adequate protection and safeguards their interest.

Furthermore, access to loans is swift under this theory as the lender takes over security, manages and protects it to ensure that the loan is repaid. While this theory safeguards and protects the rights of the mortgagee, it has been accused of short-changing the interest of the borrowers whose title in the security could be conscripted and foreclosed without any judicial proceeding, subject to the exercise of post-foreclosure right within a certain period specified after the foreclosure sale.[25]

Through title theory, a trust mortgage deed which allows three parties- the borrower, the lender and the trustee- in a mortgage agreement.[26] The deed of trust transfers the title in the property to the lender or third party and sets out duties and conditions of the lender and when and how the property can be foreclosed. For example, a borrower in a title theory state transfers the property title to a trustee to hold for the lender. In case of default, a trustee has powers of non-judicial sale.[27]

Perhaps a major shortcoming of the title theory which has necessitated several reforms by the court of equity is the absolute transfer of title in the mortgaged security to the mortgagee the moment the mortgagor fails to pay the debt as scheduled.[28] The common law relies on contractual terms and obligations to grant

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[Accessed 13 October, 2024]; World Population Review, 'Lien Theory States 2021' <www.worldpopulationreview.com> [Accessed on 13 October, 2024].

25 George E. Osborne, *Handbook of the Law of Mortgage* 2nd Edition, (Minnesota, West Publishing, 1970).

26 Faster Capital," Title Theory Explained, the Impact on the Trust Deeds and Mortgages," 4 June, 2024, <https://www.fastercapital.com/content/Title-Theory-State-Title-Theory-Explained-The-Impact-on-Trust-Deeds-and-Mortgages.html> [Accessed on June 01 2025].

27 Ibid.

28 Willliam H. Lloyd, "The Mortgage Theory of Pennsylvania," *University of Pennsylvania Law Review* (1927) 76,73.

the lender, or its trustee, the non-judicial foreclosure and sale.[29] The strict adherence to these principles dictates that when the borrower (mortgagor) fails to pay the lender (mortgagee) as promised, the security should be foreclosed.[30] The Pennsylvania Supreme Court in *Tyson v Munson,*[31] affirmed this as follows:

> The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made. He may, therefore, enter at pleasure, and take actual possession-use of the land and reap its fruits. Now this title or lawful right to possess, and actual *pedis possession,* are not ideal or contemplative merely, but are real and tangible.

Under the title theory, the borrower who ordinarily is in a weak position, appears to be more weakened by the enormous powers it heaps on the lender, who has the title from inception, though subject to the right of redemption upon payment of the loan, but who can lose such right by defaulting to pay the loan as promised, through a non- judicial foreclosure?[32]

In its modern form, title theory contends that a mortgagor conveys the title to the mortgagee to hold and utilise until the mortgage is discharged or foreclosed.[33] In such context, the mortgagee has a legal title while the mortgagor possesses an equitable title for the duration of the mortgage. The right of possession by the mortgagee at common law is a feature of the title theory.[34] While it entitles the mortgagee to possession of the security, with the right to utilise it for his own benefit, the right is not absolute as the mortgagor has the right of reversion upon the payment of the loan and interest.[35] As soon as the debt is paid, the ownership, which earlier resides in the mortgagee reverts to the mortgagor. The reason for

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29 Morris G. Shanker, 'Will Mortgage Law Survive? A Commentary and Critique on Mortgage's Birth. Long Life, and Current Proposals for its Demise' (2003) (54) (1). *Case Western Reserve Law Review*, 69- 102.

30 William H. Lloyd, 'The Mortgage Theory of Pennsylvania' 1923-1925 (73) (1) *University of Pennsylvania Law Review* 43-58.

31 Per Chief Justice Agnew in *Tyson v Munson,* (77 Pa. 250 (1875).

32 Administrator, Mortgage >Title Theory, Lien Theory, Intermediate Theory," *econo*, 10 May,2022, <https://ecnoagency.org/Mortgage/2893 > [Accessed 13 October, 2024].

33 Ibid (n30).

34 Faster Capital, Title Theory States Explained, the Impact on the Trust Deeds.

35 Morris G. Shanker, "Will mortgage Law Survive? A Commentary and Critique on Mortgage's Birth., Long Life, and Current Proposals for its Demise," (2003) 54(1), *Case Western Reserve Law Review*,69-102.

this procedure is to ensure that the lender acquires immediate possession should the borrower default in the obligations to defray the debt.[36]

Nigeria inherits, as part of its common law heritage, the title theory of mortgage as contained in its primary conveyancing statute, the Conveyancing Act 1881 which was received from English law on 1st January 1900. The English legal heritage was formally introduced to Nigeria in 1862, as a result of the British occupation of Lagos.[37] The first court to apply the English law was the Supreme Court, which had both civil and criminal jurisdiction.[38] The West African Court of Appeal (WACA) was established in 1866, following the amalgamation of British settlements of Lagos, Gold Coast, Sierra Leone and the Gambia.[39] Appeals from the court lay to the Judicial Committee of the Privy Council. In 1874, a separate Supreme Court was established for the settlements of Lagos and Gold Coast, known as Gold Coast Colony.[40] It was the first colonial court to apply the full compliments of the received law, namely the English common law, doctrine of equity and the statutes of general application in force in England on July 24, 1874.[41]

The promulgation of the Foreign Jurisdiction Acts, 1890–1913, the British Government was empowered to legislate in Nigeria. The amalgamation of the Colony and Protectorate of Southern Nigeria in 1914 led to the establishment of the Supreme Court.[42] The court received the English law heritage of common law, doctrine of equity and statutes of general application in force in England on January 1, 1900. with necessary modifications to "suit Nigerian needs."[43] This operates in Nigerian courts till present. The Interpretation Act incorporated the

36 U. Kama, J. Yakubu, P. Bewaji, M.A. Adigun, O. Adeigbe, and J.O. Elisha, Mortgage Financing in Nigeria (Abuja, Central Bank of Nigeria, Occasional Papers 50 2013), p.7.
37 Treaty of Cession 1861.
38 Supreme Court Ordinance 1863. No 11 of 1863.
39 AO Obilade, The Nigerian Legal System (*Spectrum Books Limited*, Ibadan, 2001) 18.
40 The Supreme Court Ordinance 1874.
41 Ibid.
42 No 6 of 1914.
43 IO Agbede, Themes on Conflicts of Laws (Revised Edition, Princeton & Associates,2018) 23.

extent of the reception of the English law.[44] These received laws became operational on any matter within the Exclusive Legislature List of the Government of the Federation,[45] subject to local legislation and local circumstances,[46] and with necessary modifications to "suit Nigerian needs."[47] The purpose of this is to ensure that local peculiarities and circumstances are taken into consideration in the interpretation of the received laws.

Based on this, the English law of real property came to be applied in Nigeria subject to the exceptions earlier identified. Thus, the rules of English Common Law affecting the tenure, disposition of real property estate and inheritance procedure were applicable in Nigeria. In addition, the doctrines of equity and statutes of general application were operative in Nigeria.[48] Applicable SOGA subject to the availability of local laws includes Statute of Frauds Act 1677,[49] Conveyancing Act 1881,[50] Land Transfer Act,[51] etc.

However, the enactment of the Land Use Act 1978[52] for land management and control has posed some challenges like the certainty of title, requirement of Governor's consent for alienation of interests and the principle of unexhausted improvement in the determination of compensation to the continued operation of this common law jurisprudence.

3.2 LIEN THEORY OF MORTGAGE

The lien theory means that a mortgage is like a lien on the property. A lien is legal claim or legal right on debtor's property or other assets, especially assets used as

44 Cap. 89 LFN, 2010.
45 S. 45(1).
46 S. 45 (3); S. 15 of the High Court Law Cap. 161, Law of Eastern Nigeria, 1963.
47 Ibid (n43), 23.
48 Property and Conveyancing Law 2006, Cap 120, Law of Ondo State 2006.
49 Law of England.
50 Law of England.
51 Law of England.
52 Cap L5, Law of the Federation (LFN) 2004.

collateral to secure a loan.[53] Its purpose is to serve as the security of a loan repayment, failing which "the creditor can seize and sell the asset".[54] It is created through the operation of the law and not by the parties' agreement. It is, unlike the mortgage, which can only be created through the consensus of the parties. A lienee retains custody of a property belonging to another person until certain demands are satisfied, failing which the property can be sold to satisfy the condition.[55] It may be categorized as possessory, maritime or equitable. It is possessory when a person who has possession of goods retains them until certain financial demands are met.[56] A real estate lien affords the creditor the opportunity to sell a particular item of property if a contract is not fulfilled.[57] A lien emanates from the doctrines of equity. As an equitable remedy, it is "the most convenient and flexible device for enforcing equitable obligations".[58]

Hence, under the lien theory, a mortgagee merely obtains a lien on the security, while both the legal and equitable titles reside in the mortgagor.[59] Thus, if a mortgagor defaults by not meeting the contractual terms, an order of foreclosure may be sought to enable the mortgagee to dispose of the property for the repayment of the loan. This theory is premised on the argument in equity that although a mortgage was like "a conveyance on condition precedent," its purpose is to serve as a security for the debt.[60] The lien theory arose following the development in equity which watered down the harshness of the common law.

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53 W Kenton, N Yashina & HD Jasperson, 'Lien: Definition, Major Types and Examples' (Investopedia, 8 August 2024) <https://www.investopedia.com/terms/l/lien.asp> [Accessed 24 April 2025].

54 Ibid.

55 *Hammonds v Barclay* (1802) 2 East 227 (Grose J.).

56 F. Oniekoro, *Mortgages in Nigeria: Law and Practice* (Chenglo Limited, Enugu, 2007) 7.

57 Ibid (n52).

58 'The Equitable Lien as a Remedy for Breach of Contract" 32 Mich. L.Rev.685 (1934) <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=11756&context=mlr> [Accessed 24 April 2025].

59 U. Kama, J. Yakubu, P. Bewaji, M.A. Adigun, O. Adeigbe, and J.O. Elisha, *Mortgage Financing in Nigeria,* 7.

60 Edgar. Durfee, 'The Lien or Equitable Theory of Mortgage' X (8) (1912) *Michigan Law Review.* 587- 607.

The doctrines of equity influenced the law of mortgages considerably in the seventeenth century because of the rigidity of the rules of the common law mortgage. This demanded that any mortgagee in possession should account for the proceeds from the property. The proceeds should be used to cover the necessary costs of maintenance and preservation of the property while the remainder should be set aside to defray the principal debt and interests.[61]

Equity recognised that the content of the mortgage deed notwithstanding, the transaction was a debtor-creditor relationship in which the mortgagee's entitlement was the loan and interest to be repaid. Hence, the moment this was done, the relationship between the parties had come to an end. Any contention with this position was declared illegal and unenforceable by equity because it hindered the rights of the mortgagor.[62] Thus, rules were developed to ensure the achievement of mortgagor's rights. First, a mortgage deed is a contract which regulates the relationship between the creditor and the debtor with various duties and obligations.[63] Second, it is illegal for the mortgagee to hold on to the security beyond the period of full payment.[64] It also declares the mortgagor's redemptive right upon full repayment, even beyond the debt due date.[65] It further limits the strict foreclosure right of the mortgagee to foreclosure by sale.[66]

Equity introduces the creditor relationship,[67] to beat various attempts of lenders to clog the rights of the mortgagors under various spurious names given to such transactions.[68] Although it promotes the rights of debtors, it may be

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61 Ibid *(n15)* 19.

62 Garrard Glenn, *Mortgages, Deed of Trust, and Other Security Devices as to Land,* Volume 2 (Michie Co, 1943) cited in Bukhart, p. 266.

63 Ibid 35.

64 William Blackstone, *Commentaries on the Laws of England* 160 n. 38 (W. Lewis ed. 1902) cited in Bukhart, p. 266.

65 Ibid 62.

66 Strict foreclosure is a right granted the mortgagee by equity to be able to recover his payment on time and after the default date. The mortgagee would institute the foreclosure proceeding For the setting of a date the mortgagor would exercise his right of redemption before payment. This right was limited by foreclosure by sale to make mortgagee accountable for the proceeds of sale.

67 "Once a mortgage is always a mortgage"

68 Ibid *29.*

disadvantageous to the lenders who may have to embark on tortuous legal battles to secure judicial foreclosure and sale. In a developing economy like Nigeria where the CBN has reported increasing mortgage delinquency, lenders may be reluctant to grant loans, for fears of poor loan recovery.[69] The lien theory upholds that the right of redemption of the debtor should not be sacrificed on the altar of non-judicial foreclosure.[70] Hence, it provides for the equitable right to redeem.

As in the case of title theory, a lesson on the implementation of title theory can be drawn from America where not less than 19 states follow it.[71] Mortgagors in a title theory state like Virginia has opportunities to defend their legal rights before the courts and avert the injustice of a non-judicial foreclosure.[72]

Equity of redemption may have been introduced to mortgage transactions to remove forfeiture of land title under the title theory because the value of land often rises beyond the debt to be paid in consideration. Also, equity viewed debt repayment as being central to the mortgage. Hence, the lender could not impose the penalty of forfeiture on the borrower when the debt was paid at a reasonable time after the payment is done.[73] The introduction of the equity of redemption gives the borrower the opportunity of repayment after its agreed date and further vested in him an equitable estate to deal with the land beyond that date. This innovation has made it possible for the borrower to transfer, mortgage and divide his estate during the pendency of the loan thus increasing the economic value of land.[74]

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69 CBN, Credit Condition Survey Q4, 2020.

70 Ibid 592.

71 Administrator, "Mortgage > Title Theory, Lien Theory, Intermediate Theory."

72 D. Rendleman. 'Foreclosure of a Deed of Trust in Virginia' (2016) (51) *University Richmond Law Review* 147 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1543&context=wlufac> [Accessed 27 April 2025].

73 G. Osborne, *Handbook of the Law of Mortgage,* (2nd Edition West Publisher Co., 1970). The increasing innovations of equity courts in 16th and 17th centuries gave more powers to the mortgagors who were free from onerous terms of the mortgagees.

74 Ib*id, 16-17.*

The position of equity has been viewed to be hard on the lender, as it could possibly lead to the reduction of the value of a security. However, this argument could be countered by the principle of equitable method of eliminating the mortgagor's interests in the land. Through the decree of foreclosure, an end is effectively put to the mortgagors' interest.[75] This decree is referred to as "strict foreclosure"[76] and its purpose was to restore some hope to the lenders that they could hold on to the security upon borrowers' defaults. However, because the operation of strict foreclosure was unfavourable to the borrowers whose equity had perceived to be in a weak position, it developed a redemptive right from a strict foreclosure. Just like the earlier right to redeem, the redemption of security was extended to situations where the land had been sold.[77]

Realising the equitable trend in mortgages, practitioners focus more on the debt rather than security. Therefore, mortgage documents include a right of sale when there is a breach of agreement to pay and the retention of the income realised from sale to settle the debt, while the borrower would receive the surplus.[78] This approach has been widely accepted, and it consolidates the position of the lien theory. In other words, the lien theory position is that mortgages do not transfer title and possession. What is transferred is the right of sale of property upon default which can only be done through court orders because foreclosure is judicial.[79] To allow for non-judicial foreclosure, the mortgage contract(s) must contain power of sale clause which gives the lender the power of non-judicial foreclosure.[80]

The implication of this theory is that the mortgagee does not have a title to the mortgaged land before any default. In lien theory, mortgagees are entitled only to

75 Ibid 64.
76 Ibid (n62).
77 Ibid.
78 Richard W. Turner, *The Equity of Redemption* II (Wm. W. Gaunt & Suns, 1986), p.121.
79 Ibid (n24).
80 Oniekoro, Mortgages in Nigeria: Law and Practice, op cit.178.

the lien for the payment of the debt and not the security. Hence, when a debtor has paid the creditor, an end has been put to further creditor right.[81]

This theory prolongs enforcement of mortgages through court litigations. However, the judicial foreclosure and sale have been identified in Ghana which uses the lien theory to contribute to inefficiencies and undue delays in foreclosure proceedings which affect the mortgage industry negatively.[82] In order to curb the defects, two Acts were passed in 2008 and 2020 respectively; namely the Borrowers and Lenders Act 2020[83] and the Home Mortgage Finance Act 1978[84] which allow lenders to make use of non-judicial foreclosure and sale.[85]

3.3 INTERMEDIATE THEORY OF MORTGAGE

This theory retains the features of both title and lien theories in the conduct of mortgages. The title of the security remains in the borrower, with the provision that such can be recovered by the lender without judicial proceedings upon default.[86] Borrowers have possession of security and the right of redemption upon full repayment through a deed of reconveyance. Like the previous theories, the intermediate theory is applied by some states in the United States of America[87] and Ghana.[88] It is instructive to note that the intermediate theory applies principles of lien theory for the creation and operation of the mortgage until the borrower defaults in loan repayment. After the default, the title theory shall apply. It is a middle of the way approach which accommodates both the theories earlier discussed.

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81 M.G. Shanker, *supra,* p.74

82 Frank Gyamfi- Yeboah," Mortgage Foreclosures in Ghana: The law, Practice and Implications." AFRES, 21st Annual Conference, <https://architexturez.net/system/files/afres-2022-12pdf> [Accessed 14 October,2024].

83 S. 67.

84 Act 770, S. 12 (b).

85 Borrowers and Lenders Act, S. 67.

86 Administrator, "Mortgage >Title Theory, Lien Theory and Intermediate Theory."

87 These states include Montana, Minnesota, Michigan, Oklahoma, Alabama, Maryland, Vermont, New Hampshire, Massachusetts and Rhode Island.

88 Frank Gyamfi- Yeboah, Mortgage Foreclosures in Ghana: The law, Practice and Implications.

It recognises that mortgage conveys legal or equitable title to the creditor as a promise to repay. It however grants the lender the power of sale which is free from judicial encumbrance when the mortgagor defaults. However, the central theme of the lien theory, adopted by the intermediate theory of mortgage, is the cardinal principle enunciated in *Samuel v Jarrah Timber & Wood Paving Co,*[89] where the court reiterated that it would never permit any mortgage deed to clog the mortgagor's reversion of the security when contractual obligations have been fulfilled.[90]

In the United States of America, 14 states use the intermediate theory of mortgages.[91]

4.0 APPLICATION OF THE LEGAL THEORY OF MORTGAGE ON LAND IN NIGERIA

In Nigerian legal regime, the title theory inherited through the common law is in use. The lender is entitled to both the transfer of the legal title and the physical possession of the security, while the borrower has only an equitable title.[92]

Mortgages under the Nigerian law adopt principles of title theory because of its English law heritage.[93] The common law right of entry into possession by the mortgagee is therefore part of the Nigerian law of mortgage, although many lenders do not take possession because of the attendant legal responsibilities provided for in the statutes.[94] Features of mortgages in Nigeria include transfer of title right to the mortgagee, mortgagee's right of possession of the security, leasing powers of both the mortgagor and the mortgagee and non-judicial foreclosure and

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89 (1904) A.C. 323, 326 (H.L.1904).

90 Per Lord Lindley Ibid, 329.

91 World Population Review, 'Lien Theory States 2021' <www.worldpopulationreview.com> [Accessed on 13 November 2021]. These include Montana, Minnesota, Michigan, Oklahoma, Alabama, Maryland, Vermont, New Hampshire, Massachusetts and Rhode Island.

92 A. O. Okoye, "Creation of Legal Mortgages: A Critique" (2018)73 *Journal of Law, Policy and Globalization*, 56.

93 English law, comprising statutes of general application, common law and doctrines of equity in force in England as at 1st January1900 were received into Nigeria legal system due to its colonial heritage.

94 Mortgages and Property Law 2012 (MPL), Law of Lagos, Section 67.

sale of securities of legal mortgage.[95] Provisions for the right of redemption and equitable right to redeem operate as equitable principles in Nigerian mortgage law.[96]

However, possession of security is rarely exercised by the mortgagee under Nigeran law to avoid liabilities and loss that may arise by the payment of the occupational rents and the rendition of accounts for the extra period spent on the land. In *Aderoku v UAC*,[97] the mortgagee in possession in 1921 at the commencement of mortgage was there till 1937, even when the mortgage was discharged in 1935. The court ordered him to render accounts that ought to have accrued for the whole of the period he was in possession. Additionally, while in possession, the lender is responsible for repairs, though this will be set off from profits and rents collected.[98] All these requirements of the law often deter lenders from exercising the right of possession.

The feasibility of successfully applying a theory of mortgages in Nigerian property law depends on its compliance with the land control and management rules under the Land Use Act, 1978.[99] It is apt to have a closer look at the status of the Governor of a state under the Act.

4.1 STATUS OF THE GOVERNOR

The word 'trust', just like any other legal term, does not lend itself to an easy definition.[100] Generally, embarking on a definition in law has always been a hazardous and perilous venture as the result has always been unsatisfactory. Despite that, to have an operational roadmap for academic purposes, attempts in defining 'trust' would be examined.

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95 Ca, S.19 (1); PCL, S. 123 (1); MPL. S. 35 (1).
96 *Bank of the North v Akintoye* (1990)12 NWLR (631) 302.
97 (1941) 7 WACA 39.
98 *Nigerian Loan & Mortgage Co Ltd v Ajetunmobi* (1944) 17 NLR, 140.
99 Cap.L5, LFN 2004.
100 Underhill and Hayton, *Law of Trusts and Trustees* (11th ed); 1959, 3.

Trust is as a relationship where a party (trustee) holds the property for the enjoyment of others, the *cestuis que trust* of which the trustee may be inclusive in a manner that the ultimate benefit of the property accrued to the beneficiaries or other objective of the trust.[101] This definition is akin to that of Underhill[102] which sees trust as an equitable obligation, which binds a person, (a trustee) to manage the property (trust property), for the benefit of other persons (beneficiaries or *cestuis que trust*), of which he may be part of.

These definitions show that a trust is an equitable devise, the purpose of which is to make a person, the trustee to hold property for the benefit of other person, the *cestuis que trust,* of which he can be a part in a manner that the actual benefit does not go to the trustee but to the beneficiaries of the trust.[103] It creates a double system of ownership which is peculiar to English jurisprudence, and unknown to many legal systems including Nigerian customary law concept of trusteeship.[104] Under English Law, the trustee law holds the nominal but at the same time dominant ownership recognised at law, but in equity, the beneficial interest is vested in the beneficiary.

There have been considerable arguments over the "concept of trust" debate which is juxtaposed in the powers granted to the Governor.[105]. The "concept of trust" has generated some issues on the status of the Governor under the Act regarding a trust created in his favor on all lands "in the territory of his State".[106]

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101 George W. Keeton, *The Law of Trusts* (8th ed) (Pitman & Sons, London, 1963).

102 Underhill A. & Hayton, *Law of Trust and Trustee* (18th. ed) (Butterworth Law, London, 2010),3.

103 *Ibid.*

104 Jegede M. I, Law *of Trusts, Bankrupt and Administration of Estate* (Lagos: MIJ Professional Publishers Ltd. 1999) 14.

105 Land Use Act (LUA) S.1.

106 See generally section 1 of the LUA.

Ogundare J.[107] states that "the use of the word "vested"[108] has the effect of transferring to the Governor of a state the ownership of all land in that state…" He observes that the LUA does not envisage the "nature of the trusteeship status" vested in the Governor. Differences exist between a trust under English law and the "trust" given to the Governor. A beneficiary under a trust in English law enjoys equitable right while the right of the Governor under the LUA is legal.[109] A trustee who breaches a trust property by transferring the object of trust to a person without a prior notice of the beneficiary's interest but with due consideration for the conveyance, the beneficiary's interest is extinguished as it is merely an equitable interest.[110] Alternatively, the grantee's interest of a right of occupancy under the LUA is always legal. The maxim "first in time, first in law" rule is not applicable. Hence, a second grant, a right of occupancy while a first one subsists in another person, will not confer any right superior to the former holder even if he gave consideration for the grant.[111]

Another factor which opposes the status of the Governor as a trustee in English law is that the LUA does not state any responsibilities obligatory on the Governor because of this trusteeship status and the Governor is not saddled with any of the onerous duties imposed by the English law of equity upon a trustee. In practice, some Governors have denied granting rights of occupancy without giving any reasons or justification for the refusal.[112] These are deviations from the characteristics of a trust under English law.

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107 *Akinloye v Chief Oyejide* (Unreported) High Court of Ondo State, Suit No HC/GA/83. See also Irikefe JSC's statement in *Nkwocha v Governor of Anambra State* ibid, where Irikefe states in reference to the LUA that "by this piece of legislation a legal trust affecting every inch of Nigerian land is created constituting every Governor trustee in respect of the land within the limits of his state."

108 Section 1 of the LUA.

109 L.B. Curzon, *Equity and Trusts Lecture Notes* (Second Edition, Cavendish Publishing Limited, 2001).

110 *Pitcher v Rawlings* (1872) 7 Ch. App. 259.

111 *Dzungwe v Gbishe* (1985) 2 N.W.L.R. (Pt. 8) 528; *Ogunleye v Oni* (1990) 2 N.W.L.R. (Pt. 135) 745.

112 *Eperokun and Ors v University of Lagos* (1986) 4 NWLR Part 34, 162; *Garba and Ors v Unimaid* (1986) 1 NWLR Part 18, 550.

Based on the foregoing analysis, the position of the Governor under the Act is neither the trustee nor the owner of the property which is the subject of mortgage. The position of the Governor is also different from the communal head/ family head as the head lessor in customary tenure. A family head has been labelled as the manager, representative agent and caretaker of the family to whom he owes a fiduciary duty.[113] It is a *sui generis* creation of the statute that gives the charge of all lands to him to appropriate and expropriate.[114] This has grave implications for the adoption of any legal theory of mortgage, based on the transfer of legal rights. Rights to land under the LUA is a right of use and occupation only for a definite term.[115] The title of the mortgagor which may be legal or equitable cannot be alienated until the consent of the Governor is obtained.[116] Thus the conveyance to the mortgagee could not be higher than an equitable right until the consent is obtained pending final perfection of mortgage consent.[117]

4.2 MORTGAGE THEORY AND THE LAND USE ACT 1978

In the Nigerian legal system, title theory of mortgage is applicable because the mortgage contract vests the title of the property in the mortgagor, who, as the holder under the LUA, is saddled with the responsibility of seeking consent for the transaction.[118] Until the approval for the transfer is sought and obtained, the lender has no better title than an equitable one. However, with the consent obtained for the transaction, the legal title to the security is vested in the lender.

Despite the transfer of legal title to the mortgagee, the LUA still recognises the mortgagor as the 'holder'[119] to whom the right of occupation has been conveyed and who has the right to be compensated on the 'unexhausted improvements.[120] LUA states this of the holder:

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113 Adefi M.D. Olong, *Land Law in Nigeria* (Second Edition, Malthouse Press Limited,2011) 55.
114 LUA, Section 1.
115 LUA, Section 8.
116 Ibid, Section 22.
117 *Awojugbagbe Light Industries v Chinukwe* (1993) 1 NWLR (Pt 270) 485.
118 See 22 Land Use Act 1978.
119 Ibid, s. 51. 'Holder' is defined to include a mortgagor but clearly excludes a mortgagee.
120 Ibid, s, 51 (1).

> "Holder" in relation to a right of occupancy means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of the holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-under lessee.[121]

In addition, the Conveyancing Act (CA)[122] which clearly states that a conveyancing shall pass all estates and interests of the vendor to the purchaser, does not avail the lender of the right of the holder of legal title under the LUA.[123] This may be attributed to some factors. First, the section does not appear to contemplate mortgage transactions. Second, the LUA has lucidly stated that the application of any statute after its passage is subjected to necessary modifications to make it conform to its provision.[124] Third, the LUA's provision on who is to be compensated upon acquisition is also very clear. Hence, S. 63 of CA has lost its force in the face of the superior legislation which has a constitutional flavour.

LUA has very wide implications for mortgage practice under the Nigerian law.[125] First, until the consent has been secured, the mortgagor has a legal estate, while the mortgagee's equitable interest is in the property as contained in the mortgage agreement. Upon the consent of the transaction, the mortgagee has the title which he is free to make absolute without recourse to the court in case of default. While before the consent is obtained for the transaction, the only remedy the lender has is judicial foreclosure, but upon the Governor's consent, the mortgagee has the power to embark on non-judicial foreclosure and may exercise his power of sale as provided for under Conveyancing Act 1882.[126]

Then LUA excludes the mortgagee from the holder appears to introduce confusion into the whole mortgage transaction.[127] The mortgage agreements confer only the equitable title on the mortgagee until the approval of the Governor. The mortgagor

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121 Section 51 (1) of the LUA.
122 See also S. 5(1) PCL Cap 100 and S. 19(1)(a) MPL, 2012
123 Section 63(1).
124 Section 48 of the LUA.
125 Section 22 LUA.
126 See S. 19(1). See also PCL 123 and MPL 35(1) MPL.
127 S. 51 LUA.

is in control as a 'holder,' until the document has been perfected by the Governor's approval.[128] The exclusion of a lender from the definition of a 'holder' is an indication that LUA does not recognize the interest of the lender as a right holder.[129] The Act specifically exempts mortgagee from having a right to the statutory right of occupancy or somebody it can be validly assigned. Therefore, a mortgagee's interest as a legal title holder appears to have been constrained by the Act.

The implication of this for the mortgage practice is that the mortgagor still has the legal title. The conveyance to the mortgagee can only operate as a conferment of the statutory right of occupancy (SRO) even when the assignment of the land to the mortgagee is processed by the holder by obtaining a Governor's consent for the mortgagee (the lender).

Another major implication is that it is only the holder who can access compensation on the mortgaged land.[130] The mortgagee is not included in the definition of the holder under Section 51 LUA. Hence, when the security (land) is revoked, only the mortgagor can access compensation. Perhaps the rationale for this is that despite the encumbrances(s) on the land, the holder (mortgagor), rather than the (lender) mortgagee, is still regarded as the grantee, until he has defaulted on the payment of the debt and actions are taken for the enforcement of mortgagee's right. It may, therefore, be argued that until the period of default, the lien theory of mortgage could be said to be operating on mortgage transactions in Nigeria. However, upon default, the legal title transferred and acceded to by the Governor becomes fully operative to allow the mortgagee to embark on non-judicial foreclosure and exercise the power of sale (PoS) as stipulated CA[131] and PCL.[132]

128 Ibid.
129 Ibid.
130 S. 29 LUA.
131 1882, s. 19(1).
132 Cap 100, Law of Western Region, 19 s. 9, s.123, (1) – (4).

5.0 CHALLENGES TO THE APPLICATION OF A LEGAL THEORY OF MORTGAGES

This section highlights practical difficulties that practitioners face in applying legal theories in the Nigerian mortgage industry.

5.1 UNCERTAINTY OF TITLE

Under the Act, ownership title formerly held under the pre-LUA tenures is no longer possible. Hence, a new type of title, namely a right of occupancy, previously limited to the Land Tenure Law 1962 (LTL)[133] of Northern Nigeria, was extended to cover all parts of the Nigerian federation. Although the right of occupancy is not defined under the LUA, the LTL gives its definition as "a title to the use and occupation of land."[134] This right, which is for a definite term replaces pre-existing allodial titles in land.[135] As such, freehold estates known to common law and pre-LUA legislations, especially in southern Nigeria were replaced with the right of occupancy system.

Furthermore, a statutory right of occupancy is different from a freehold because it has a definite duration, and a rent is paid by the grantee. This is unlike a freehold which has exclusive possession and has indefinite duration. Hence, the decision in *Prenchard Nathu & Co Ltd v The Land Officer*[136] that the right of occupancy under the Tanzania Law is *sui generis* and that the legislative intention was to introduce a totally new interest is revealing and captures the essence of the concept. This position is the same under the LUA, where a right of occupancy is neither a personal nor a proprietary right.[137] Rather, it is a right to the use and occupation of land.[138]

The right of occupancy under the LUA converts all titles to land to temporary rights which allow the grantee to use and enjoy the land for a finite term of years.

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133 Cap 59 Laws of Northern Nigeria 1962.
134 Ibid S.1.
135 This refers to an outright ownership of property.
136 (1960) EA 731 at 941.
137 J.A. Omotola, *Essays on Land Use Act* (1980), 14.
138 LUA, S. 51.

At the commencement of the LUA, the Governors were vested with the power to allocate lands[139] as trustees for the people of state.

The uncertain title of the holder or occupier of the right of occupancy contributes in no small way to problems of the LUA in mortgage transactions. For example, the SRO used as security has uncertain nature. Is it to be treated as a lease, or a license or a freehold? What are the interests that can be transferred to the mortgagee? Also, the holder/mortgagor does not hold free of the encumbrance of the Governor; he enjoys no quiet possession, and his right is subject to the pre-LUA superior rights of deemed grantee which may arise during alienation. The problem is further compounded by the Act itself: it does not define what a right of occupancy is. All these constitute hindrances to the mortgagee who may find it difficult to realize the mortgage by sale because of the uncertainty which surrounds the nature of the right. Additionally, the uncertain title makes it difficult to clearly pigeonhole Nigerian mortgage law either as title or lien theory since the theories deal with certainty of title conveys or charges by the mortgage.

5.2 CONTROVERSIAL NATURE OF DEEMED RIGHTS

Deemed grants raise questions which are pertinent to the enforcement of power of sale. These are: by the language and tenor of the Act, is deemed grant a freehold, with rights absolute and tenure indeterminable? Has the LUA automatically converted all deemed rights, customary and statutory, to a right of year determinable? In alienating the deemed grants, has the Act set the same condition for transfer or conveyance of interest of deemed grants and express grants? Answers to these questions are provided in *Savannah Bank v Ajilo.*[140] In the matter, the 1st defendant sought to sell the mortgaged property upon the default of the plaintiffs. The plaintiffs approached the court to declare Deed of Mortgage

139 R.N. Nwabueze, "Alienations under the Land Use Act and Express Declarations of Trust in Nigeria", *Journal of African Law,* 53(1) 59-89.

140 (1989) 1 NWLR (Pt. 97).

and other transactions on it illegal. Grounds upon which the request was based among others were:

(1) the urban location of the property;

(2) the property had been conveyed to the 2nd plaintiff prior to the LUA;

(3) the approval for the transfer and public auction ought to be first sought;

(4) since there was no approval, both the Mortgage Deed and the Auction Notice were illegal.

The apex court decided that both deemed grants and express grants under the LUA have determinable years. But this appears controversial and creates further confusion when viewed against the clear provision of section 8, which limits governor's appropriating power only to grants under section 5(1)(a). It was also held that although deemed and actual grants were markedly different, a deemed right is by the operation of law while an actual grant is by the activities of the governor, but both are subject to his legal controls. Equally, held was that the words "as if" in section 34(2), LUA, unambiguously equated deemed grant with actual grant. A deemed grant is thus treated by the court as a grant which has all attendant consequences and subject to the control of the Governor. Despite this judgment, the conflict created using deemed grant as subject of mortgage did not abate.

In realising the mortgage by sale, to what extent has the mortgagor compiled with the LUA? First, the nature of the interest the mortgagor holds determines what can be transferred. If the mortgagor is an occupier at the commencement of the Act, he/she is entitled to a deemed grant, but such could only be conveyed by transfer, mortgage or sale by the holder.[141] Second is the right to the statutory grant upon the approval of the Certificate of Occupancy (C of O).[142] The holder, or the occupier, is entitled to the certificate in respect of rural land. While for the

[141] See *Abioye v Yakubu* supra.

[142] A C of O does not confer ant title or interest in land, it is mere evidence of a statutory right of occupancy.

deemed statutory grant, only the holder is entitled to the C of O. However, ownership of the land could not be proved only by the possession of the certificate. In exercising the power of sale, the mortgagee must be sure of the nature of right it possesses, otherwise, the power cannot be exercised.

Based on the above analysis and the dual tenure conception, an equitable distribution and administration of land may not be achieved under the Act if deemed grant persists. Interests which are held under the deemed grants appear superior to express grants. Deemed grant lands are not vested in the Governor until the holder or occupier intends to alienate the land or apply for a certificate of occupancy. Hence, a deemed grant (customary and statutory) may not be suitable as security of a mortgage until it is converted to express grant given under Governor's hand. Its use appears limited to devises such as equitable charge which does not require Governor's consent. However, the gravest hindrance that sustenance of deemed grant under the Act poses to economic value of land and its use to access capital for development is that the right is indeterminable and absolute at least until the holder/occupier applies for a C of O.

6.0 CONCLUSION

6.1 SUMMARY

This paper considers the applicability of a legal theory of mortgage to mortgages of land in Nigeria. The theories explored are the title theory, the lien theory and the intermediate theory.

6.2 FINDINGS

Due to the legal complexity in Nigeria's property sector, neither the title theory nor the lien theory could completely explain land mortgage in Nigeria.

Section 5(1) of the Act empowers the Governor to grant statutory right of occupancy to any person in respect of land in both urban and rural areas. Section 5(2) provides further that "upon grant of a statutory right of occupancy. All existing rights to the use and occupation of the land which is the subject of the

statutory right of occupancy shall be extinguished". On the other hand, all existing land titles and ownerships are preserved and recognised by sections 34 and 36 of the Act. This is a contradiction so fundamental as to deprive the Act of any force. Hence, the contradiction needs to be resolved through statutory reform. It is noteworthy to observe that pre-existing rights on land are converted to deemed rights of occupancy which cannot be defeated simply by a grant of statutory right of occupancy over the same land to another person.

The Supreme Court confirmed this in *Adole v Gwar*,[143] when it was decided that a statutory right of occupancy cannot defeat a deemed right which exists and has not yet been revoked as at the time it is issued. A deemed right of occupancy can only be revoked under section 28 of the Act. Hence, section 5(2) appears to be an empty provision which is contrary to the deemed rights vested in sections 34 and 36 of the Act.

6.3 RECOMMENDATION

Based on the above, the following recommendations are hereby made.

The intermediate theory combining the theories of title and lien is recommended.

Furthermore, controversial provisions of the LUA which make it difficult and confusing to regulate Nigeria's vast land resources should be amended. Hence the following recommendations are made.

Rights and obligations under the actual statutory grants and deemed grants be merged to make them transferable for commercial transactions such as mortgages.

The confusion the Act introduces in the meanings of the "holder" and "occupier" in section 51 (1) should be streamlined to legally affirm that a mortgagee is a "holder" with all rights appurtenant to.

143 (2008) 5 NWLR (pt. 1099) 563.

The incidents of the half-hectare rule and other limitations to conveyancing in the Act are recommended for amendment to make for easy transactions.

Since a deemed grant cannot be defeated by an express grant until it is revoked for public purposes, its continued existence under the LUA has become a threat to mortgagees who may not be aware of the pre-LUA encumbrances on the land. It is recommended for excision.

The procedure for obtaining approval for the transfer of a right of occupancy should be streamlined and unified throughout the federation in the interest of development. This will reduce waste of time and resources critical to investment decisions. It will also reduce corruption of land officers who may gloat on the cumbersome and non- transparent process.

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RADICAL FEMINISM AS A TRANSFORMATIVE APPROACH TO ADDRESSING WOMEN'S OPPRESSION: A CASE FOR SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS IN UGANDA

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RADICAL FEMINISM AS A TRANSFORMATIVE APPROACH TO ADDRESSING WOMEN'S OPPRESSION: A CASE FOR SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS IN UGANDA

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"*We should embrace radical strategies in our struggles. We must reject the arguments that Africa is not ready for radical feminism. What such arguments are saying in essence is that we are not ready for transformation.* "[1]

- Sylvia Tamale

Abstract

Radical feminism, as opposed to other strands of feminism, offers a more revolutionary approach to fighting for women's equality. This article uses a doctrinal legal research approach to analyse how radical feminism offers a transformative approach to fighting for SRHRs of women. We trace the evolution of the feminist movement in Uganda from the 1980s to date, then provide the legal framework governing SRHR, and finally offer radical feminist thought as a solution to the gap in SRHR in Uganda with the end goal of attaining sexual and reproductive health for all women. By the end of this article, we shall demonstrate how the patriarchy in trying to control

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The authors appreciate Afoyomungu Lornah for her mentorship, guidance and unwavering support in writing this paper. We dedicate this paper to all the women and young girls in Uganda who continue to resist, survive and speak out. This work is for you!

[1] Sylvia Tamale, 'African Feminism: How should we change?' (Development, 2006) pp. 39.

women's sexualities and bodies has been enabled by the three evils, 'Law, Religion and Culture.'

1.0 INTRODUCTION

At its core, feminism is the belief in the full social, economic, and political equity of women. It recognises that there is a problem with gender as it is today and that it our duty to fix this problem, feminism requires us to do better.[2] Feminism largely arose in response to Western traditions, but feminist thought has global manifestations and variations.[3]

African forms of feminism are of different definitions because the oppression African women face is not homogenous. In Africa, western feminism has been perceived as incompatible with many of the concerns of African women today.[4] However, the need to Africanise these Western feminism has driven Afro-feminists to pick out specific aspects within these strands of thought that speak to the African woman and girl. This article will therefore take an Afro-centric perspective in appreciating how radical feminist thought can provide more solutions to for women, particularly Sexual and Reproductive Health and Rights (SRHR).

The term 'radical' is used to mean going to the root cause of the particular problem at hand.[5] When many people think of the word 'radical', they tend to think of extreme or outrageous and yet, it simply means a process of going to the root of something.[6] Radical feminism targets a wider range of oppressions and desires to engage in more aggressive public actions that challenge power structures and demand far-reaching change.[7] Just like how Afro-feminism takes a decolonial

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2 Chimamanda Ngozi Adichie, 'We Should All Be Feminists' (Harper Collins Publishers, 2014) p.11.

3 Encyclopaedia Britannica <https://www.britannica.com/topic/feminism> [Accessed 17July 2023].

4 Sylvia Tamale, Decolonization and Afro-Feminism (Daraja Press 2020) pp. xiii.

5 Robyn Rowland and Renate D. Klein, 'Radical Feminism: Critique and Construct' pp. 272.

6 Breanne Fahs, 'The Urgent Need for Radical Feminism Today' <https://signsjournal.org/the-urgent-need-for-radical-feminism-today/> [Accessed 1 August 2023].

7 Ibid.

approach, radical feminism works towards dismantling the patriarchy, as it is the root cause of women's oppression, in trying to achieve gender equality.

Radical Feminism emerged during the second wave of feminism in the 1960s and 1970s. It was influenced by left-wing social movements such as the civil rights movement.[8] It is believed to have been created as a way of opposing the other feminist movements at that time such as, Liberal and Marxist feminism.[9] Radical feminists criticised liberal feminism for not going far enough in the fight to attain gender equality. On the other hand, Marxist feminism confined itself to an economic analysis of women's oppression and believed that women's liberation came from abolishing capitalism.[10]

Radical feminists have had a paramount goal of achieving equal rights for women and the fundamental tenets of liberal political philosophy were a comfortable fit for these reformers.[11] They seek to address the root causes of gender inequality and challenge societal structures that perpetuate the oppression of women. Radical feminists advocate for significant social and political change to dismantle patriarchal systems and advocate for women's liberation. Later on, radical feminists split into two basic camps that is: radical-libertarian feminists and radical-cultural feminists. Depending on their camp, these feminists voiced very different views about how to fight sexism.[12]

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8 Dipannita Bhattacharjee and Dr. Swati Banerjee, 'Feminist Theories' 2: Radical Feminism pp 2.

9 Olivia Guy-Evans, 'Radical Feminism: Definition, Theory and Examples' <https://simplysociology.com/radical-feminism.html#The-History-Of-Radical-Feminism> [Accessed 18 July 2023].

10 Ibid.

11 Rosemarie Tong, Feminist Thought; A More Comprehensive Introduction (3rd ed, Westview Press 2009).

12 Ibid.

1.1 RADICAL FEMINISM AND SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (SRHR)

According to Maria Nassali, "SRHR as a concept is like an amoeba constantly changing form, nature and scope."[13] Its meaning is fast evolving with different perspectives among the different stakeholders such as, health care providers, lawyers, policy makers and academia to mention but a few.[14] The feminist conceptualisation of SRHR encompasses mainly three critical areas: Health (the complete, mental, physical and spiritual well-being); Sexuality (sexual orientation and sexual pleasure and the extent to which one can enjoy both without fear, guilt or shame); and Rights (the extent to which one can exercise choice on all matters of sexual and reproductive life and well-being).[15]

SRHR is among the key aspects of the broader right to health.[16] Reproductive Health is defined as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes".[17] Reproductive health places women at the centre of the process, and recognises, respects, and responds to the needs of women and not only to those of mothers.[18]

On the other hand, 'Sexual Health' is a "state of physical, emotional, mental and social well-being related to sexuality; it is not merely the absence of disease, dysfunction or infirmity."[19] The World Health Organisation (WHO) further observes that 'sexuality is influenced by the interaction of biological,

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13 Maria Nassali, 'A Sexual and Reproductive Health and Rights Movement Story: By Whom?' in Maria Nassali et al (eds.): *A* Walk Through the CEHURD Garden: Situating Ourselves in the SRHR Movement in Uganda (Fountain Publishers, 2022) pp 1.

14 Ibid.

15 Ibid, pp 2.

16 Ben Kiromba Twinomugisha, 'Fundamentals of Health Law in Uganda,' (Pretoria University Law Press, 2015) pp 43.

17 United Nations (1994) 'Report of the International Conference on Population and Development' Cairo, 5-13 September 1994. A/CONF.171/13. On the importance of the ICPD, see JC Caldwell 'The international conference on population and development, Cairo 1994: Is it important, desirable and feasible?' (1996) 6 Forum: Health Transition Review 71.

18 Ibid (n14), pp 1.

19 WHO Defining Sexual Health (2006) pp. 5.

psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors'.[20] These rights include the right of access to sexual health including, reproductive health care services, sexuality education and information, respect for bodily integrity, choice of partner and the decision to be sexually active or not.[21]

Radical feminist thought focuses on a number of themes like sexuality, achieving reproductive freedom, violence against women and, sex work.[22] These are key aspects of feminist thought that are intertwined with the concept of SRHR. These elements are very relevant to our discussion on pushing for a radical feminist approach to achieving SRHR for all women in Uganda. In fact, American feminist philosopher and author of the Feminist Thought, Rosemarie Tong has also agreed that men's control of both women's sexual and reproductive lives as well as, women's self-identity, self-respect, and self-esteem is the most fundamental of all the oppressions human beings visit on each other.[23]

1.2 THE EVOLUTION OF THE FEMINIST MOVEMENT IN UGANDA

While we move towards a radical feminist approach, it is worth noting that the women's movement in Uganda, in trying to attain gender equality before the law, experienced a lot of difficulty. It took time for women to get where they are, and the following discussion will detail its evolution through appreciation of legislative and judicial efforts. This paper will primarily concentrate on the feminist movement from the 1980s to date. It will not only discuss the evolution of SRHR but also commend other key milestones for women in Uganda.

After Uganda attained independence, it became imperative to consolidate a written law that reflected the needs, values, and culture of the Ugandan populace. This was to include women who had previously been overlooked in the law and

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20 Ibid.
21 Ibid.
22 Camille Cottais, 'Radical Feminism' <https://igg-geo.org/wp-content/uploads/2021/04/Technical-Sheet-Radical-feminism.pdf> [Accessed 28 July 2023].
23 Ibid (n12).

lacked any legally binding protections that recognised their status as a vulnerable and marginalised group in society. In terms of land ownership, women's access to land was limited to their patrilineal ties. They only had user rights to land through male relatives or spouses, and they could not own or inherit land under customary law.[24] Women were also subjected to harmful cultural practices that undermined their autonomy, dignity and welfare, such as forced early marriages,[25] female genital mutilation,[26] and widow inheritance.[27] Therefore, there was a great need to harmonise the law to address women's unique plights in society.

The realisation of women's rights started in the late 1980s. President Yoweri Museveni set several women-centered policies in motion, including a 1989 rule that at least 39 seats in the Ugandan parliament be reserved for women, due to his conviction that Uganda's successful development depended on increased gender equity.[28]

Eventually, during the construction of the 1995 Uganda Constitution, other key players like Miriam Matembe were pivotal in advocating for the inclusion of specific provisions that protected women's interests within this law.[29] As a member of the Uganda Constitutional Commission, she brought the gender question to the forefront of national politics. Her role in the Constitutional Assembly was indispensable to the constitution making process, as no single

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24 UN Women, 'Assessment of Uganda Women's Movement (1980-2018)' <https://africa.unwomen.org/sites/default/files/202310/state_of_the_womens_movement_in_uganda.pdf > [Accessed 6 June 2025].

25 Joy For Children Uganda, 'Child Marriage in Uganda: A Call for Urgent Action' <https://joyforchildren.org/wp-content/uploads/simple-file-list/CHILD-MARRIAGE-in-Uganda-A-Call-For-Urgent-Action.pdf> [Accessed 6 June 2025].

26 'The persistence of Female Genital Mutilation in Uganda's communities: A case for the Pokot and Tepeth communities in Karamoja,' (The Cross Cultural Foundation of Uganda) <https://crossculturalfoundation.or.ug/wp-content/uploads/2023/09/The-persistence-of-Female-Genital-Mutilation-among-the-Tepeth-and-Pokot-in-Karamoja-CCFU-2023-min.pdf> [Accessed 6 June 2025].

27 'Widow Inheritence,' <http://lawschoolnerds.blogspot.com/2012/03/widow-inheritance.html > [Accessed 5 June, 2025]

28 Sylvia Tamale, 'When Hens Begin to Crow: Gender and Parliamentary Politics in Uganda' (Westview Press 1999).

29 Ali Tripp, A. 'Women in Ugandan Politics and History: Collective Biography' (2020, November 19) *Oxford Research Encyclopedia of African History.* < https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-644 [Accessed 18 January, 2025].

clause in the 1995 constitution concerning women escaped her attention and contribution.[30]

Furthermore, 18% of the elected representatives to the constitutional assembly were women, many of whom were active in a non-partisan Women's Caucus that pressed for women's rights. They were able to get significant concessions in the constitution, including legal equality and protection in political, economic, social, and cultural spheres along with the prohibition of laws, cultures, customs, or traditions that violate the dignity, welfare, or interests of women.[31]

In addition to other provisions of the Constitution, which applied to both women and men, Article 33 was devoted solely to the protection of women's rights. During the constituent assembly, there was overwhelming support from the delegates for the recognition of the status of women in society, and thus the inclusion of a specific article on women's rights.[32] Notably, Hon. Mr Basaliza, representing Fort Portal Municipality, stated:

> *"The status of women should be recognised and acknowledged in the constitution. It is the first time the constitution addresses itself to gender issues. It is important that women find their right status in the constitution. If you want to build a healthy, balanced and educated group of people, we must see to it that women are catered for properly in terms of education, health and social well-being."*[33]

The constitution thus guarantees women full and equal dignity of the person with men,[34] and also enjoins the state to provide the facilities and opportunities necessary to enhance the welfare of women to enable them realise their full potential and advancement.[35]

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30 Miria Rukoza Matembe and Nancy R. Dorsey, 'Matembe: Gender, Politics, and Constitution Making in Uganda' (Fountain Publishers 2002).

31 Ali Tripp, 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda' (Oxford University Press 2004).

32 Ben Twinomugisha, 'Juridical Evolution of Sexual and Reproductive Health Rights' in Maria Nassali et al (eds.), A Walk Through the CEHURD Garden: Situating Ourselves in the SRHR Movement in Uganda (Fountain Publishers, 2022), pp 107.

33 Ibid.

34 Article 33(1).

35 Article 33(2).

Another major point of contention was marriage and divorce equality between men and women. The then section 154 of the Penal Code Act was successfully argued to be unconstitutional in the case of *Law Advocacy for Women in Uganda vs. Attorney General of Uganda*[36] as it criminalised adultery for married women and not married men. The case of *Uganda Association of Women Lawyers & 5 Others v. Attorney General*[37] challenged the provisions of the Divorce Act, which displayed sexist favoritism for a man over a woman during divorce. They were declared unconstitutional as they violated Articles 21 and 31 of the Constitution, which emphasized the equality of women during the dissolution of marriage.

Article 33(6) of the Constitution further, prohibits all laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status. Some of these customs have been challenged in the courts. In *Law and Advocacy for Women in Uganda v. Attorney General*,[38] the Constitutional Court held that the custom and practice of female genital mutilation as practised by several tribes in Uganda was unconstitutional as it contravened various articles of the constitution, including Article 33. This was further outlawed by the Prohibition of Female Genital Mutilation Act Cap.133.

In *Mifumi (U) Ltd and others v. Attorney General*[39] the Petitioners challenged the constitutionality of the customary practice of the demand for and payment of bride price. They argued that bride price as a condition precedent to a marriage, and a demand for a refund of bride price as a precondition for dissolution of marriage should be declared unconstitutional as it violates various provisions of the constitution. The Supreme Court ruling sought to protect the sanctity of customary practices whilst applying nuance in order to ensure the protection of women's rights. It upheld the constitutionality of bride price, citing it as a voluntary cultural practice which does not contravene the right to free consent to marry under Article 31(3). However, court abolished the practice of mandatory

36 Ibid pp 27.
37 Constitutional Petition No. 2 of 2003 [2004] UGCC 1ILDC 1137 (UG 2004).
38 Constitutional Petition No. 08 of 2007.
39 (Constitutional Appeal 2 of 2014) [2015] UGSC 13 (6 August 2015).

refund of bride price at divorce, declaring it unconstitutional for violating Article 31(1(b)) of the Constitution, which guarantees equality during marriage and at its dissolution. Court also held that this practice devalued the worth, respect and dignity of the woman.

The Centre for Health, Human Rights and Development (CEHURD), an organisation engaged in the struggle for health, human rights, and social justice in Uganda, has played a critical role in the women's movement by taking a lead in litigating maternal health-related rights in the country. In *CEHURD v. Attorney General***,**[40] the Petitioners sought declarations to the effect that the non-provision of essential maternal health commodities in public health facilities and the unethical conduct of health workers towards expectant mothers were inconsistent with the constitution and a violation of the right to health and other related rights namely, women's rights, the right to life, and freedom from torture, cruel, inhuman and degrading treatment. The court held that the government's omission to adequately provide basic maternal health care services in public health facilities violated the right to health, right to life, and women's rights. The government's omission to adequately provide emergency obstetric care in public health facilities, which resulted in obstetric injury, subjected women to inhuman and degrading treatment.

In *CEHURD & Others v. Nakaseke Local Government.*[41] the Plaintiffs brought an action on behalf of the deceased, Irene Nanteza, who was admitted to the Defendant's hospital with obstructed labour, and later died due to negligence from the hospital staff. The court held that her right to basic medical care had been violated due to the absence of the doctor on duty.

Additionally, in *CEHURD & Others v. Executive Director*, *Mulago Hospital & Another,*[42] the third plaintiff, a wife to the second plaintiff, delivered two babies at Mulago National Referral Hospital but was discharged with only one baby. The

40 Constitutional Petition No. 16 of 2011.
41 Civil Suit No. 111 of 2012.
42 Civil Suit No. 212 of 2013.

plaintiffs contended that the third plaintiff gave birth to two live babies, while the defendants argued that one of the babies was born dead. The second and third plaintiffs rejected the dead baby, and a DNA examination confirmed that they had no biological connection with the body handed over to them by the mortuary attendant. The court relied on Article 12 of the International Convention on Economic, Social and Cultural Rights (ICESCR) which guarantees the right to health and Article 7 on the International Covenant on Civil and Political Rights (ICCPR) which guarantees the freedom from cruel, inhumane or degrading treatment to emphasise state obligations that accrue in the realisation of the right to health. This case was also cited in *CEHURD v. Attorney General* above. The three decisions above show that the right to health of women is justiciable as it can be enforced by the courts.

These constitutional provisions and case law have laid a foundation for further feminist advancements in the law, for they can be leveraged as authorities when confronting systemic patriarchal norms that still pervade several institutions in the country. These concerted efforts demonstrate Uganda's earnest zeal to integrate feminist principles into the fabric of its legal framework. However, large gaps between policy and practice still exist because the subjugation of women is embedded in the country's socio-cultural atmosphere, in ways that are to be dissected and explored subsequently.

2.0 THE CURRENT LEGAL FRAMEWORK GOVERNING SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS IN UGANDA

The legal framework governing SRHR in Uganda comprises both International and Domestic Laws. Uganda is party to a number of international instruments that provide a framework governing SRHR.

The Parliament of Uganda has also passed a number of laws that have a direct impact on SRHR. These legal frameworks have presented both challenges and opportunities for women in Uganda in terms of the penal laws and humanitarian frameworks respectively.

In regard to the progressive protection of SRHR, the 1995 Constitution of Uganda presents a number of protections to these women domestically. Uganda, being a signatory to international human rights instruments also places key obligations on the state to protect the SRHRs of women.

On the other hand, a number of legislations like the Penal Code Act Cap. 128 hinder the full realisation of these rights. This section of the paper therefore delves into a discussion of frameworks both at the domestic and international scene.

2.1 INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Uganda has ratified a number of International and Regional instruments that create key obligations on the state that relate to SRHR. Uganda has ratified the core United Nations instruments which include the International Covenant on Civil and Political Rights (ICCPR)[43], International Covenant on Economic, Social and Cultural Rights (ICESCR)[44], the Convention on Elimination of All forms of Discrimination Against Women (CEDAW),[45] and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment (UNCAT).[46]

Under the African Regional System, Uganda is party to the African Charter on Human and Peoples' Rights (ACHPR)[47], the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[48], the African Youth Charter[49], the African Charter on the Rights and Welfare of the

43 UN General Assembly International Covenant on Civil and Political Rights (16 December 1966) UN Treaty Series 999 p. 171. Ratified by Uganda on 21 June 1995, and it came into force on 21 September 1995

44 UN General Assembly International Covenant on Economic, Social and Cultural Rights (16 December 1966) UN Treaty Series 993 p.3. Ratified by Uganda on 21 January 1987

45 UN General Assembly Convention on Elimination of All forms of Discrimination Against Women (18 December 1979) UN Treaty Series 1249 p.3. Ratified by Uganda in 1985.

46 UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UN Treaty Series 1465 p.85. Uganda acceded to it on 3 November 1986.

47 African Union (AU) African Charter on Human and Peoples' Rights (27 June 1981) CAB/LEG/67/3. Uganda ratified it on 10 May 1986 and it came into force on 27 May 1986.

48 African Union (AU) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003). Uganda ratified it on 22 July 2010.

49 African Union (AU) African Youth Charter (2 July 2006). Uganda ratified it on 6 August 2008 and it came into force on 22 October 2008.

Child[50] and the Treaty for the Establishment of the East African Community[51]. The African Commission on Human and People's Rights has also welcomed the adoption of the African Union Convention on Ending Violence Against Women and Girls.[52]

The relationship between domestic and international law is mainly portrayed within the monism-dualism dichotomy.[53] Uganda, being a dualist country implies that international law and domestic laws are separate legal systems. This in turn means that many of the principles of international human rights law have to be domesticated in order for them to apply directly to the state.[54] Ugandan courts have therefore played a key role in application of international law within Uganda's legal system. Despite the fact that the state is dualist, many of these international human rights principles have been manifested in Uganda's supreme law.

2.1.1 THE UNITED NATIONS SYSTEM

a. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR) 1966 AND ITS TREATY BODY

The right to health is enshrined in Article 12 of the ICESR which provides for the right to the highest attainable standard of physical and mental health and places

50 African Union (AU) African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990 and came into force on 29 November 1999.

51 East African Community the Treaty for the Establishment of the East African Community (30 November 1999) Publication 1. It came into force on 7 July 2000.

52 ACHPR, 'Statement on the Adoption of the African Union Convention on Ending Violence Against Women and Girls,' (February 17, 2025) available at <https://achpr.au.int/en/news/statements/2025-02-17/convention-ending-violence-girls-and-women> [Accessed 23 February, 2025].

53 Magnus Killander and Horace Adjolohoun, 'International law and Domestic Human Rights Litigation in Uganda: An Introduction' in Magnus Killander (ed.) International Law and Domestic Human Rights Litigation in Africa (Pretoria University Law Press, 2010).

54 Human Rights Awareness and Promotion Forum (HRAPF), 'Legal Regulation of Sex Work in Uganda: Exploring the Current Trends and their Impact on the Human Rights of Sex Workers' (HRAPF, 2016) <https://hrapf.org/?mdocs-file=9310#:~:text=The%20Penal%20Code%20Act%20criminalises,the%20rights%20of%20sex%20workers> [Accessed 4 June 2025].

an obligation on state parties to ensure full realisation of this right.[55] In 2000, the Committee on Economic, Social and Cultural Rights (CESCR), gave a wider interpretation to the right to the highest attainable standard of physical and mental health, through General Comment No. 14.[56]

The Committee emphasised that the right to health has four critical components: availability, accessibility, acceptability and quality.[57] One of the steps to be taken by states towards the realisation of the right to health is "provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (Article 12(2)(a)). The CESCR has interpreted this to entail "measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information" (paragraph 14).[58]

The committee has made its stance on women and the right to health, and called for the elimination of discrimination against women, development and implementation of a comprehensive national strategy for promoting women's right to health through their life span. Such strategies should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services.[59] According to the CESCR, states have a number of positive and negative obligations towards realisation of the right that is, to respect, protect and fulfil.

In 2016, the CESCR issued General Comment No. 22 on the right to sexual and reproductive health to assist state parties' implementation of the ICESCR and

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55 UN General Assembly International Covenant on Economic, Social and Cultural Rights (16 December 1966) UN Treaty Series 993 p.3. Ratified by Uganda on 21 January 1987.

56 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12).

57 Ibid, paragraph 12(a)-(d).

58 Ibid, paragraph 14.

59 Ibid, paragraph 21.

their reporting obligations.[60] According to the committee, the right to sexual and reproductive health entails a set of freedoms and entitlements. These freedoms include, the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, over matters concerning one's body and sexual and reproductive health.[61] The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensures all people enjoy the right to sexual and reproductive health under article 12 of the Covenant.[62]

The committee emphasises that the right to sexual and reproductive health is indivisible and interdependent with other human rights, such as the right to life; physical and mental integrity; liberty and security of the person; freedom from torture and other cruel, inhuman and degrading treatment; privacy and respect of family life; and equality and non-discrimination.[63] An example of violation of these rights is a lack of emergency obstetric care services or denial of access to safe abortion, which often lead to maternal mortality and morbidity.[64]

On the normative content of the right to sexual and reproductive health, the CESCR stated that the right is an integral part of the right to health and it contains four interrelated and essential elements: availability, accessibility, acceptability and quality. The CESCR calls upon state parties to ensure non-discrimination and equality in the provision of sexual and reproductive health services. States should respect the right of all persons, including LGBTI persons, who are to be respected for their sexual orientation, gender identity and intersex status.[65]

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60 General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights).
61 Ibid, (paragraph II (2)).
62 Ibid.
63 Ibid paragraph II (10).
64 Ibid.
65 Ibid, paragraph III (23).

b. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979 AND ITS TREATY BODY

Article 12 of the CEDAW calls upon states to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services including those related to family planning. The covenant also emphasises that states ought to ensure that women have appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. The Committee on the Elimination of Discrimination against Women (CEDAW) had earlier noted in 1999 that, "it is discriminatory for a state party to refuse to legally provide for the performance of certain reproductive health services for women."[66]

CEDAW has also emphasised that criminalisation of abortion, delay of safe abortion and or post-abortion care, and forced continuation of pregnancy are forms of gender-based violence and, are violations of women's sexual and reproductive health rights and; freedom from torture or cruel, inhuman or degrading treatment.[67] CEDAW has also stated,

> *Criminal regulation of abortion serves no known deterrent value. When faced with restricted access, women often engage in clandestine abortions including self-administering abortifacients, at risk of their life and health. Additionally, criminalisation has a stigmatising impact on women and deprives women of their privacy, self-determination and autonomy of decision [making], offending women's equal status, constituting discrimination.*[68]

2.2 THE AFRICAN REGIONAL SYSTEM

The African human rights system provides for realisation of the right to health, including aspects of SRHR. It is fundamentally governed by the African Charter

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66 CEDAW (1999). General Recommendation on Women and Health, 1999, para 11. CEDAW (2017) paragraph 11.

67 General Recommendation No. 35 (2017) on Gender-Based Violence against Women, Updating General Recommendation No. 19, para 18.

68 Ibid, paragraph 59.

on Human and Peoples' Rights. The Charter also has a Protocol regarding the rights of women in Africa which Uganda has ratified (Maputo Protocol) and which has particular effect on SRHR of women. Many of the rights protected under the regional system are simply a repetition and enforcement of rights existing under the international system.[69]

2.2.1 AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS 1981

Under Article 16, the charter guarantees every person the right to the best attainable state of physical and mental health,[70] and obliges states to take necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick.[71]

2.2.2 THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (MAPUTO PROTOCOL) 2003

In June 1995, the Heads of State and Government of the Organisation of African Unity endorsed the recommendation of the African Commission on Human and Peoples' Rights (African Commission) to elaborate a Protocol on the Rights of Women in Africa.[72] In 2003, the Maputo Protocol was adopted, and later came into force in 2005. The Protocol became the first treaty in the history of SRHR to address these rights in detail.[73] Article 14(1) provides that state parties "shall ensure the right to health of women, including sexual and reproductive health is respected and promoted". The right includes: the right to control women's fertility; the right to decide whether to have children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS.[74]

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69 Ibid (n51).
70 Article 16(1).
71 Article 16(2).
72 OAU Resolution AHG/Res. 240 (XXXI).
73 Ibid (n33) pp 77.
74 Article 14 (1)(a)-(d).

Under Article 14(2)(c) State parties are called upon to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus".

The African Commission in its General Comment No. 2 on Article 14 emphasised the indivisibility of rights and stated that although the General Comment focuses on provisions of Article 14 guaranteeing women's sexual and reproductive rights, they must be read and interpreted in the light of other provisions of the Protocol on cross-cutting issues of women's human rights, including the right not to be discriminated against, the right to dignity, the right to integrity and security, access to justice and the right to education.[75] Paragraph 23 is critical to bodily autonomy and emphasises that the rights to exercise control over one's fertility, to decide one's maternity, the number of children and the spacing of births, and to choose a contraceptive method are inextricably linked, interdependent and indivisible. The right to safe abortion covers various rights, including freedom from discrimination; the right to benefit from scientific progress and its applications; privacy and confidentiality; and freedom from cruel, inhuman and degrading treatment.[76]

2.3 SUB-REGIONAL LEVEL

The East African Treaty established the East African Community (EAC) and this sub-regional system exists mainly for reasons of economic cooperation and support for sustainable development.[77] Though the Treaty does not contain rights provisions, it requires states to abide by their existing human rights obligations in respect of the African Charter on Human and Peoples' Rights in particular.[78] The East African Court of Justice also plays a critical role as an avenue for

75 Paragraph 11.
76 Paragraphs 31-36.
77 Ibid (n55).
78 See article 6(d) and article 7(2) of the East African Treaty.

ensuring that people's rights are enforced following the protections under international and regional instruments.

Article 118(f) of the treaty provides for co-operation by partner states in specialised training, health research, reproductive health, the pharmaceutical products and preventive medicine". The East African Sexual and Reproductive Health Rights Bill seeks to provide a legal framework for matters relating to sexual and reproductive health; to protect children, adolescents and young persons from sexual abuse and other forms of exploitation; and to provide for assisted reproductive technology.

2.4 NATIONAL LEVEL

Uganda, being a dualist state, is a governed by a number of principal and subsidiary legislations. The following discussion will detail how the framework seeks to protect and threaten the rights of female sex workers in Uganda.

2.4.1 PRINCIPLE LEGISLATION

a. THE CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995

This is the supreme law of Uganda and all power and authority of Government and its organs derive from this instrument, which in turn derives its efficacy from the people of Uganda. Laws or customs inconsistent with this constitution are void to the extent of the inconsistency. Thus, the Constitution forms the standard upon which all other laws are enacted. Objective IV(b) read together with Objective XX of the National Objectives and Directive Principles of State Policy provides for the right to access health or medical services. This can be read together with Article 8A which operationalises the National Objectives. Article 45 also provides for the non-exhaustiveness of the Bill of Rights to which one may infer SRHR. In *Centre for Health, Human Rights and Development & Others v. Attorney General*[79] Justice Barishaki Cheborion emphasises that the right to healrth is embedded in the Constitution under Objectives IV(b) and XX read together with Article 8A of the Constitution.

[79] (Constitutional Petition No. 16 of 2011).

The constitution provides for the right to equality and freedom from discrimination.[80] Article 21(1) 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." The Constitution is therefore emphatic that persons shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.[81] The term "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.[82]

The right to human dignity, freedom from torture, inhuman and degrading treatment is embedded in Article 24. It states that, "No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment."

Under Article 33, women are guaranteed full and equal dignity of the person with men and the state is called upon to provide the facilities and opportunities necessary to enhance the welfare of women to enable them realise their full potential and advancement.[83] The state also has an obligation to protect women and their rights, taking into account their unique status and maternal functions in society.[84]

Affirmative action is provided for under Article 33(5) which aims at redressing the imbalance created by history, tradition or custom. The constitution also prohibits all laws, cultures or traditions, "which are against the dignity, welfare or interest of women or which undermine their status."[85] In *Law and Advocacy for Women in Uganda v. Attorney General*[86] the Constitutional Court held that the custom and practice of female genital mutilation as practised by several tribes in Uganda was

80 Article 21.
81 Article 21(2).
82 Article 21(3).
83 Article 33(2).
84 Article 33(3).
85 Article 33(6).
86 Constitutional Petition No. 08 of 2007.

unconstitutional and contravened various articles of the constitution, including Article 33. This laid ground for the Prohibition of Female Genital Mutilation Act in Uganda.

Article 43 is quite critical as it provides for a limitation to the enjoyment of rights within Chapter Four. The article provides that in the enjoyment of rights guaranteed under the Bill of rights, a person shall not prejudice the rights and freedoms of others or the public interest. This clause in effect means that the rights enshrined under the Constitution are not absolute and in the event that there is need to protect the rights of others or the interest of the public, their enjoyment can be limited.[87] It is because of this article that it can be said that although the Constitution does not in itself prohibit sex work expressly, there could be justification for the restriction of the rights of sex workers due to the presence of laws that criminalise sex work and related activities.[88]

Article 43(2) creates a limitation within a limitation noting that in curtailing the enjoyment of a right, the limitation should not permit political persecution, detention without trial or anything beyond what is acceptable and demonstrably justifiable in a free and democratic society.[89] *Mulenga JSC in Charles Onyango Obbo and Another v. Attorney General* formulated the limitation analysis emphasising that under Article 43(2), democratic values and principles were a criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution had to be justified.[90] That in the determination of validity of a limitation, the court had to be guided by values and principles essential to a free and democratic society.

b. THE PENAL CODE ACT CAP 128

The Penal Code Act is the primary criminal law, outlining offences and their corresponding penalties. Since its introduction in 1950, it has undergone several

87 HRAPF above n55, 23.
88 Ibid.
89 See Supreme Court in *Andrew Mwenda & Onyango Obbo v Attorney General* Constitutional Petition No 15 of 1997.
90 Ibid.

amendments yet much of its original content remains unchanged.[91] Chapter 13 of the Penal Code Act which is titled 'Offences against Morality' deals with a number of offences that directly and indirectly affect SRHR of women in Uganda.

On procuring an abortion and related offences, Section 130 criminalises attempts by any person with the intent to procure a miscarriage of a woman while Section 131 criminalises any pregnant woman who procures an abortion with intention. Section 132 also criminalises supplying of drugs to procure an abortion. The continued criminalisation of abortion has limited access to safe abortion services for women in Uganda which has increased the marternal mortality rates due to unsafe abortions. According to the International Federation of Gynecology and Obstetrics (FIGO), unsafe abortions are a leading cause of deaths of women in Uganda with an estimated 4-6 deaths attributed to unsafe abortion daily.[92] This illustrates the dire situation of SRHRs in Uganda.

The Penal Code Act also criminalises sex work in Uganda. Section 127 defines a 'prostitute' as a person who, in public or elsewhere regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary gain. Under Section 128, any person who practises or engages in prostitution commits an offence and is liable on conviction, to imprisonment for a term of seven years. Persons living on earnings of prostitution commit an offence under Section 125 are also criminalised. The continued criminalisation of sex work has pushed the profession underground which is further limits access to health care especially sexual and reproductive health care.[93]

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91 Adrian Jjuuko 'The incremental approach: Uganda's struggle for the decriminalization of homosexuality' in C Lennox & M Waites (eds) Human Rights, Sexual Orientation and Gender identity in the Commonwealth: Struggles for Decriminalisation and Change (2013) 381-408.

92 International Federation of Gynecology and Obstetrics (FIGO), 'End Preventable Deaths and Disability from Unsafe Abortion' (10 December, 2020).

93 Ben Twinomugisha, 'Beyond 'Malaya' or Prostitute: Interrogating Sexual and Reproductive Health Rights of Young Female Sex Workers in Context of HIV/AIDS in Uganda', Human Rights and Peace Centre, Working Paper No. 37 (March 2012) pp 21.

The Penal Code Act also provides for unnatural offences and indecent practices. Sections 134 and 135 provide for offences regarding 'unnatural acts' which in turn can affect female sex workers in Uganda. Particularly, Section 134 (a) provides that any person who has carnal knowledge of any person against the order of nature commits an offence and is liable on conviction to imprisonment for life. Section 135 on the other hand criminalises attempts to commit unnatural offences. This provision directly affects sexual minorities in Uganda since it limits their access to basic health care. It also creates a stigma which is antithetical to prevention of HIV/AIDS, but also other sexually transmitted diseases since these sexual minorities cannot access basic sexual and reproductive items like condoms and lubricants.

c. THE HIV AND AIDS CONTROL ACT CAP 126

The Act promotes access to HIV/AIDS services by regulating access to facilities, goods and facilities related to HIV prevention, counselling, testing and care, and provides for a number of state obligations. Under Part VII of the Act, discrimination on the grounds of HIV is prohibited. The Act embodies the principle of non-discrimination in the workplace, educational institutions, public service, financial institutions, health institutions, among others.[94]

Under the State obligations in Section 24(1)(k), the Act calls explicitly for prioritising the most at-risk populations in all interventions. The Act defines these communities as fishing communities, persons in prisons, migrants and other populations.[95] While the law calls for greater access to these groups, it leaves out key and vulnerable groups highlighted by UNAIDS, including transgender persons, persons who use and inject drugs, sex workers and homosexuals.[96] The

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94 Sections 32-40 of the HIV and AIDS Prevention and Control Act, Cap 126.

94 Section 24(2)

95 AHAKI, 'Appraising Legal Instruments supporting Sexual and Reproductive Health Rights in Uganda,' (July 16, 2024). Available at < https://www.afyanahaki.org/appraising-legal-instruments-supporting-sexual-and-reproductive-health-rights-in-uganda/ > [Accessed 15 January, 2025].
AHAKI, 'Appraising Legal Instruments supporting Sexual and Reproductive Health Rights in Uganda,' (July 16, 2024). Available at <

omission of these groups from the Act has the effect of rendering them invisible regarding access to services, information and commodities. The Act also criminalises the intentional transmission of HIV with or without intent, a provision which discourages people from testing and disclosing their HIV status.[97]

d. THE PROHIBITION OF FEMALE GENITAL MUTILATION ACT CAP 133

The Act prohibits female genital mutilation (FGM) as being an inhuman cultural practice which violates women's rights and is inconsistent with the provisions of the Constitution. This Act aims at protecting the SRHR of women in Uganda who are at risk of suffering from this cruel cultural practice that would have adverse effects on them. It also provides for the offence of aggravated FGM where a victim is infected with HIV.

e. THE PUBLIC HEALTH ACT CAP 310

This Act places an obligation on the Ministry of Health to ensure the effective provision of good health care to the people of Uganda, including women. It also encourages the provision of better reproductive health services to women. However, the Act is silent on key and vulnerable populations, including sexual minorities.

f. ANTI HOMOSEXUALITY ACT CAP 117

This Act provides for several penalties in regards to same-sex relations in Uganda. 'Homosexuality' is defined in Section 1 of the Act to mean the performance of a sexual act by a person with another person of the same sex. Section 2 provides for the offence of homosexuality and if liable, the person receives a sentence of life imprisonment. The offence of aggravated homosexuality carries a sentence of death under Section 3[98] of the Act. Section 6 of the Act rejects the defence of

https://www.afyanahaki.org/appraising-legal-instruments-supporting-sexual-and-reproductive-health-rights-in-uganda/ > [Accessed 15 January, 2025].

97 Section 43.

98 It should be noted that Section 3(2) (c) was also nullified in Hon. Fox Odoi v. AG. Consolidated Petitions No. 14, 15, 16, and 85 of 2023.

consent to a sexual act, which means that persons remain liable under the law although they agree to same sex relations.

The law also criminalises the offence of promotion of homosexuality, which carries a conviction of not more than twenty years. In *Hon. Fox Odoi-Oywelowo and 21 Others v. Attorney General*[99], the Constitutional Court found in part for the petitioners, noting that the reporting requirement under Section 14 of the Act would have a chilling deterrent effect on access to health care by homosexual patients. The court also struck out provisions relating to unknowing transmission of HIV through same-sex intercourse, noting that it compounded the susceptibility of persons living with HIV to mental health issues.[100] The court also nullified Section 9 on the use of premises for purposes of homosexuality would have the effect of not only restricting but also denying the right to housing. The law has still continued to limit access to health care and is quite detrimental to prevention of HIV/AIDS and other STIs.

g. THE HEALTH SERVICE COMMISSION ACT, CAP 86

Section 30(1) of the Act mandates health workers to prioritise and consider the health, safety, and interest of the patient and due respect to each patient at all times and in all circumstances. The Act also obligates medical practitioners to provide patients with relevant, clear and accurate information to patients.[101] There is also a requirement that the patient gives informed consent prior to testing and treatment unless it is an emergency. However, the Act allows a breach of confidentiality where disclosure is in the patient's best interest. This provision undermines patient autonomy and agency while encouraging health workers' paternalism to decide what is in the patient's best interest.[102] Such

99 Consolidated Petitions No. 14, 15, 16, and 85 of 2023.

100 Chapter Four, 'A legal Analysis of the Constitutional Court Judgement in the Consolidated Petition Challenging the Anti-Homosexuality Act, 2023' (May, 2024), available at <https://chapterfouruganda.org/resources/reports-analysis/legal-analysis-hon-fox-odoi-oywelowo-21-others-case> [Accessed March 2, 2025].

101 Section 30(3) of Health Service Act.

102 Ibid (n94).

provisions promote avoidance of health behaviour, including testing and treatments.

h. THE EMPLOYMENT ACT CAP 226

The Act emphasises employees' right to maternity leave and equal treatment at work, as stipulated under Section 55 of the Act. This brings to the forefront the need for post-natal health care for women.

i. THE DOMESTIC VIOLENCE ACT, CAP 123

Section 1 of the Act defines 'domestic violence' to include physical and sexual violence. Freedom from Sexual and Gender-Based Violence (SGBV) is a critical element of SRHR and the Act offers protection to women in Uganda from such violence. Although this law seemed like a great win for feminists across Uganda, it has not been properly implemented by the state. In fact, some critics have described it as "merely a scarecrow with no ability to fight its cause since relatively a low proportion of the cases are seen through investigation or conviction."[103]

2.4.2 SUBSIDIARY LEGISLATION

a. THE NATIONAL POLICY GUIDELINES AND SERVICE STANDARDS FOR SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (2012)

These policy guidelines provide for the general rules and regulations governing reproductive health services, components of reproductive health services, target groups for services and appropriate primary information education and communication. They delve into the standardisation of the delivery of reproductive health services and the promotion of SRHR, the policy looks at the roles of Ministries, Development Partners, communities and stakeholders engaged in the "planning, implementation, monitoring, and evaluation of quality, integrated, gender-sensitive and rights-based reproductive health services."[104] The policy should be appreciated for introduction of the safe motherhood program, which

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103 Uganda Network on Law Ethics and HIV/AIDS (UGANET), 'Enforce Laws and Policies That Fight Against Domestic Violence' (26 November, 2020).

104 The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights (2012).

aims at addressing the persisting sexual and reproductive health issues. The motherhood program was developed to ensure that no woman or new born dies or incurs injuries during pregnancy or childbirth.[105]

b. NATIONAL HEALTH POLICY 2010

The policy prioritises reproductive health, maternal and child health, and HIV/AIDS control. It further emphasizes access to essential health services, including SRHR, such as safe motherhood, family planning, and adolescent health services. However, it remains silent on critical aspects of SRHR like access to safe abortion.

c. THE MARPS PRIORITY ACTION PLAN 2020

The Key Population Priority Action Plan guides access to services for key populations. The plan of action guides which services are available and how they should be provided. Like many others formulated post-2015, this action is inclusive and protects key populations and other vulnerable populations, including those explicitly criminalized.

The foregoing discussion has detailed most of the critical legal framework on SRHRs of women in Uganda today. Uganda's legal framework presents quite the complex intersection of constitutional guarantees, statutory provision and international human rights obligations. While the Constitution affirms fundamental rights to health, dignity and freedom from discrimination, the realisation of SRHR remains hindered by restrictive laws, policy gaps and deeply socio-cultural norms. Legislations such as the Penal Code Act which continue to criminalise aspects of reproductive autonomy, including abortion, while access to comprehensive sexual education remains limited for many women and girls in Uganda.

A key take away from the domestic framework is that it reflects a deep entrenchment of patriarchal control over women's bodies. A truly transformative approach demands dismantling these legal and cultural structures that

105 Ibid (n94).

subordinate women's sexual and reproductive choices. Only through radical reform can the SRHRs of women and girls in Uganda be fully realised.

3.0 RADICAL FEMINISM AT THE FOREFRONT OF SEXUAL AND REPRODUCTIVE HEALTH FOR ALL WOMEN

Under this section, the paper delves into the key arguments propounded by radical feminists. It presents four critical aspects at the heart of SRHRs and radical feminism, that is, Sexual and Gender Based Violence (SGBV), Reproductive Freedom through Assisted Reproductive Technologies (ART) and the Right to Abortion, Sexuality, and lastly Intersectionality. The golden thread running through this section will open the reader's mind to appreciating arguments made by radical feminists, and why the situation in Uganda regarding sexual and reproductive health ought to adopt the radical feminist approach. We shall also demonstrate how the law, culture, and religion as critical institutions in Uganda, have made it a point to police women's sexualities by controlling their bodies.

3.1 HER BODY, HER CHOICE: EMPOWERING REPRODUCTIVE RIGHTS

One of the key slogans of second-wave radical feminism included "My body belongs to me" which reflected women's desire to reclaim their bodies in a patriarchal society that desires to control them.[106] Other slogans included: '*Mein Bauch gehört mir, l'utero è mio e me lo gestisco io*' which meant '*My belly is mine; the uterus is mine and I manage it myself*' which demanded the right to abortion and women's control over their own bodies and reproduction.[107]

In this section, we delve into a critical aspect at the heart of the radical feminist movement which is pertinent to the realisation of women's SRHRs in Uganda. The section shall analyse the underlying issues surrounding abortion rights and

106 Ibid (n23).

107 Gerda Neyer and Laura Bernardi, 'Feminist Perspectives on Motherhood and Reproduction' (Leibniz Institute for the Social Sciences, 2011) < https://www.jstor.org/stable/41151279 > [Accessed 3 August 2023].

assisted reproductive health, which critically demonstrate how the patriarchy continues to control women's bodies by controlling their reproduction.

3.1.1 REFORMING REPRODUCTION HEALTH AND MOTHERHOOD THROUGH ASSISTED REPRODUCTIVE TECHNOLOGIES (ART)

There is a need for a realisation that ART has come to do more good than harm. It is here to liberate Ugandan women from the patriarchal institution of the family that is oppressive and exerts control over their bodies and, tries to deny them access to such reproductive health services. If one of the root causes of women's oppression in Uganda has been men trying to control women's bodies, then ART is here to nip it at the bud.

What then is Assisted Reproductive Technology (ART)? According to the Centres for Disease Control and Prevention (CDC), ART includes all fertility treatments in which eggs are surgically removed from a woman's ovaries, combined with sperm in the laboratory, and returned to the woman's body or donated to another woman.[108] In Vitro Fertilisation (IVF) is the most commonly utilised assisted reproductive technology. ART has opened up the possibility of having children to groups of women and men who did not have this opportunity like sub-fecund and infertile women, to women and men with other health problems, to gays, lesbians, and transsexuals, and to women beyond menopause.[109]

Leading feminist thinkers have directly attacked the institution of motherhood and its patriarchal conceptualisation with women's sexuality and maternal work. They have attempted to separate 'birthing' from 'mothering' in order to establish genderless mothering that paves the way to understand inherent questions and contradictions regarding women's bodily choices and motherhood

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108 Centers for Disease Control and Prevention, 'What is ART' < https://www.cdc.gov/art/whatis.html#:~:text=According%20to%20this%20definition%2C > [Accessed 4 August 2023].

109 Gerda Neyer and Laura Bernardi, n. 109.

in the context of ART and Surrogacy.[110] Radical-Libertarian feminists tend to argue that women's reproductive capabilities and sexual roles and responsibilities serve to oppress them in a patriarchal society, and limit their ability to be full human persons.[111]

Simone De Beauvoir contends that motherhood should be seen as a decision that a woman comes to freely rather than a societal obligation. She argued that a woman's biological disposition should not be used as a marker for her destiny and place an undue reproductive responsibility on her, emphasising that motherhood needed to be a conscious and autonomous choice that a woman made. At its core, her argument advocates for ARTs due to their ability to present women with avenues for 'voluntary motherhood' as opposed to the patriarchal idea of 'enforced motherhood.'[112]

Another pertinent theorist in this area is Shulamith Firestone who insisted that, "nothing will change for women so long as natural reproduction remains the rule and artificial or assisted reproduction the exception." She went on to analyse women's oppression through an intersectional lens of class, race and sex together with the dialectical materialism of Marx and the psychoanalytic insights of Sigmund Freud.[113] She proposed that "family structure is the source of psychological, economic and political oppression," Shulamith Firestone's, 'The Dialectic of Sex' paralleled the Marxist conviction that the economic underclass needed to seize the means of production in order to weave their way out from under the thumb of capitalistic oppression by advocating for women, who are a sexual underclass under patriarchy, to seize the means of reproduction and child-rearing. She championed the use of technology as a tool to liberate women from

110 Nisha Z, 'Negotiating Surrogate Mothering and Women's Freedom' *Asian Bioeth Rev.* 2022 Apr 22;14(3):271-285. <doi: 10.1007/s41649-022-00205-6> PMID: 35791331; PMCID: PMC9250556.

111 Rosemarie Tong, above n 12.

112 Simone de Beauvoir, 'The second sex, Trans. by Constance Borde and Sheila Malovany-Chevallier,' (2009, London: Jonathan Cape).

113 Shulamith Firestone, 'The Dialectic of Sex: The Case for Feminist Revolution', (William Morrow and Company 1970).

their biological reproductive obligations under patriarchy, which played a large factor in their oppression.[114]

Some jurisdictions in Africa have demonstrated their commitment to giving women agency over their reproductive choices through implementation of laws that uphold reproductive freedom through ART. Countries like South Africa have made conscious efforts to recognise that the right to procreative freedom is not limited to natural procreation but also includes the use of ARTs, through several statutory and judicial considerations.

A significant development towards ART in regards to the law on surrogacy was reached in the landmark case of *AB v. Minister of Social Development,*[115] which posed the question of whether a person could legally have parenthood rights over a child born through surrogacy who was genetically related to the surrogate mother. At that time South Africa's surrogacy law posited that a surrogacy arrangement must involve a child not genetically related to the surrogate mother, and any not in compliance with this scheme was unenforceable and unlawful.[116] The law also required that commissioning parents use their own gametes for the conception of the child. The Applicant sought to challenge the constitutionality of these provisions because, she was seeking surrogacy but could not provide her own eggs as they had long been declared as not viable. Her legal argument was that the impugned provision was arbitrary and that it discriminated against her based on her status of being infertile. She further argued that the impugned provision infringed her procreative freedom (expressed in the rights to dignity, privacy, and bodily and psychological integrity) and her right to access reproductive health care services.

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114 Nisha Z. Technicisation of "Birth" and "Mothering": Bioethical Debates from Feminist Perspectives. Asian Bioeth Rev. 2021 Mar 8;13(2):133-148. <https://pmc.ncbi.nlm.nih.gov/articles/PMC8079552/> [Accessed 06 June 2025].

115 AB v. Minister of Social Development 2017 (3) SA 570 CC.

116 South Africa, Children's Act (2005) Sections 292, 297, and 303.

However, the minority judgment interpreted the ambit of the right to procreative freedom as including the use of ARTs.[117] In this judgement, it was maintained that since we live in an era where the effects of infertility can be ameliorated to a large extent through assistive reproductive technologies, these persons should not be denied the right to benefit from these technological advances. Rather these reproductive avenues should be celebrated as they allow our society to flourish in ways previously impossible.

Other considerations regarding reproductive freedom were explored in the case of *Ex Parte KF2*[118], whereby courts considered the objective criteria for assessing the suitability of an intended surrogate-mother.[119] The case also examined the notion that an in vitro embryo could have interests, and provides a clear theoretical basis for understanding the legal relevance of acts directed toward the in vitro embryo.[120]

Another judicial decision is, *Surrogacy Advisory Group v. Minister of Health* [121] which answered the ethical considerations about non-medical sex selection strategies during the ART process, and whether this prohibition was a limitation on the procreative freedom of intended parents? And, if so, could it be justified? The Surrogacy Advisory Group relied on the Choice on Termination of Pregnancy Act (Choice Act) which aims to strike a balance between the procreative freedom of the pregnant woman and the interest of the state in protecting prenatal life,[122] and made an argument for sex-selective abortion using the provision that states that a woman can have an abortion without having to provide a reason during the

117 Shozi B, Something Old, Something New: Applying Reproductive Rights to New Reproductive Technologies in South Africa. South African Journal on Human Rights. 2020

118 Ex Parte KAF 2017 ZAGPJHC 227 ("KF 1").

119 Thaldar D,'The Need to Develop Objective Criteria for Suitability as a Surrogate Mother: Reflections on Ex Parte KAF,' South African Journal of Bioethics and Law. 2018;11(1).

120 Jordan D. W. "Legal Status of the Human Pre-embryo in the Context of the Genetic Revolution," South African Law Journal. 2005;122(1).

121 Surrogacy Advisory Group v Minister of Health 2022 (4) SA 187 (GP).

122 Christian Lawyers Association v Minister of Health 2005 (1) SA 509 (T).

first trimester. The judgement held that sex selection falls within the ambit of procreative freedom and can be understood as part of reproductive autonomy, whose scope was significantly increased by the now-available reproductive technology, thereby increasing reproductive liberty.

The above case study of South African jurisprudence regarding ART demonstrates a concerted effort by African societies to expand the terrain of women's reproductive liberty, by not only embracing these new technologies and letting women actively partake of them as they please; but also, ensuring to refine these laws with due regulatory policies. These regulations include; incorporating further ethical considerations pertaining to access to these services, the emotional and psychological wellbeing of the parties involved and the non-medical selective abortion question into the operational fabric of assisted reproductive technology. These courses of action are a measure of good faith from African governments, that the reproductive health and autonomy of women in their populace is of imperative value, which reinforces the radical feminist thought on reproductive freedom of women.

This proactive stance that unequivocally recognizes women's right to procreative liberty is one that Uganda would do well in adopting, as it would solidify women's constitutional protections that guarantee the right to privacy, equality and nondiscrimination.

Women in Uganda are amenable to the use of ART as a reproductive option available to them, and many couples are prepared to resort to ART use to have children if getting them normally fails. Producing children is as cultural as it is a biological necessity.[123] However, the lived realities of ART use in Uganda are shaped by a complex interplay of socio-cultural, ethical, economic, and legal factors.

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123 Wilson Muyinda Mande and Eunice Akullo, 'Ethics and Assisted Reproductive Technology in Uganda: An Analysis of the Perceived Mediating Role of Culture,' <https://ojs.umi.ac.ug/index.php/ujmpps/article/download/100/72> [Accessed 5 June 2025].

Firstly, the centres that provide ART services are few and far between, and are primarily located in urban areas. For assisted reproductive services, we have 9 IVF clinics; 8 are situated in the central region specifically in Kampala district and one in the western region (Mbarara).[124] Moreover, the exorbitant cost of ART makes it an economic impossibility for the average Ugandan woman, and therefore creates a class divide regarding which type of Ugandan woman is able to gain access to this service.

Due to several costs like surrogate mother compensation, medical procedures (IVF, embryo transfer), legal and administrative expenses, surrogate screening and testing, fertility center fees, prenatal care and delivery expenses and miscellaneous expenses (travel, accommodation, etc.), the total estimated surrogacy cost could accrue to about $26,000 – $43,000,[125] which is an exorbitant cost that the average Ugandan woman might not be able to meet. These socio-economic constraints therefore close access to ART services to the rich and privileged elite, which strays from the constitutional guarantee of equality and nondiscrimination of all women in Uganda.

It also denies women the full enjoyment of the SRHR guaranteed by international law instruments like the ICESCR, of which General Comment No.22 that the right to sexual and reproductive health in the ICESCR also guarantees availability and accessibility of reproductive healthcare services, which includes economic affordability.

Furthermore, Uganda's unique cultural landscape also shapes the acceptance of these seemingly modern reproductive practices, that subvert the traditional ideal and structure of the family. In traditional Ugandan culture, having a paternal

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124 Zaake D et al, 'Prevalence, Regional Distribution, and Determinants of Infertility in Uganda Between 2006 and 2016: Analysis Of Three Demographic And Health Surveys,' Journal of Global Health Reports', pp.10 <https://www.joghr.org/api/v1/articles/94212-prevalence-regional-distribution-and-determinants-of-infertility-in-uganda-between-2006-and-2016-analysis-of-three-demographic-and-health-surveys.pdf> [Accessed 5 June 2025].

125 Fertility Centre Kenya, 'Surrogacy Cost in Kampala' <https://fertilitycentrekenya.com/surrogacy-cost-in-kampala/> [Accessed 5 June 2025].

claim (belonging) is still taken seriously, hence it is socially difficult for people to accept children who do not share blood relationships with them.[126] This makes it difficult for parties who might benefit from use of ART to explore this option, for fear of social ostracisation.

Additionally, there is no a comprehensive legal and regulatory policy framework on ART use in Uganda. However, the proposed Human Assisted Reproductive Technology Bill of Uganda stands as a landmark effort to balance the ethical, regulatory, and access considerations in the realm of reproductive technology and healthcare.[127] Even so, there are several provisions of the bill that have come under fire for their exclusionary and discriminatory connotations. The Bill is stated as purposely applicable to a man and woman who jointly seek to use ART to obtain a child, and a man and woman who suffer a type of reproductive health challenge or infertility.[128] This conspicuously excludes single women and men who may seek ART with a view to exploring single parenthood. It also simply denies single individuals who are divorced, widowed and other categories of single people a chance at becoming parents.[129]

This compulsion in the Bill to offer access to ART on the basis of being in a partnered heterosexual relationship reflects the broader and much more sinister underbelly of Ugandan jurisprudence, which callously enforces heteronormative ideals of family and procreation onto the masses. The concept of 'heteronormativity' refers to the ideology that views heterosexuality as the normal and only legitimate socio-sexual arrangement of society.[130]

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126 Ibid (n125).

127 Resty Nalwanga and Angualia Daniel, 'The Human Assisted Reproductive Technology Bill 2023: Balancing Ethics, Regulation And Access To Reproductive Healthcare In Uganda,' Angualia Busiku & Co. Advocates <https://lawfirmsinuganda.ug/the-human-assisted-reproductive-technology-bill-2023-balancing-ethics-regulation-and-access-to-reproductive-healthcare-in-uganda/> [Accessed 18 February, 2025].

128 Human Assisted Reproductive Technology Bill 2023, Clause 1.

129 'Regulation or Discrimination? Uganda's proposed IVF Law could be both. The Independent,' (December 1, 2024) <https://www.independent.co.ug/regulation-or-discrimination-ugandas-proposed-ivf-law-could-be-both/> [Accessed 7 June 2025].

130 Rosemary Hennessy and Chrys Ingraham, 'Materialist Feminism: A Reader in Class, Difference, and Women's Lives' (New York: Psychology Press, 1997).

A similar train of thought was reflected in the provisions of the Anti-Homosexuality Act, of which Section 14(2) had actively encouraged professionals to breach confidentiality and report parties suspected of being homosexuals. This provision would severely affect these individual's access to medical care, as parties would stay away from medical centres for fear of being reported. The provision was challenged in *Hon. Fox Odoi & 21 Others v Attorney General & 3 Others*,[131] and consequently struck out, but its presence in the Act in the first place reflects the law's efforts to dictate heteronormativity on the populace, outrightly implying that only heterosexual individuals have a right to access to healthcare services, including ART services.

Gayle Rubin[132] critiqued such practices that favor 'the charmed circle of sex', whereby societal hierarchies' privilege certain socio-sexual practices over others, such as heterosexual monogamous relationships, which are placed on a pedestal, and systematically enforced through a merging of culture, religion and law. Under this concept, the patriarchal and capitalistic family structure is favoured, within which the nuclear family model is idealised and pedestalised. Barbara K. Rothman points out that in a patriarchal society, women are seen as mothers of men's children rather than men being seen as the children of women and that it is women's motherhood that men must control to maintain patriarchy.[133] Adrienne Rich described motherhood under partriarchy as an institution which prescribes social norms and regulations employed to control women and ensure the dominance of men within patriarchal power structures.[134]

This is why even during the advancement of novel and modern ideals like ART, men's interests are placed at the forefront; they are viewed as the breadwinners of the family while women are the designated caregivers, and because of this men's

131 Consolidated Constitutional Petitions Nos. 14, 15, 16 & 85 of 2023.
132 Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' (1984).
133 Rothman Barbara Katz, 'Recreating Motherhood' (New York: W.W. Norton & Company, 1989).
134 Rich Adrienne, 'Of woman born: Motherhood as experience and institution', New York, (New York University Press, 1976).

role in family formation is reinforced by ensuring only partnered women can access ART.

The aforementioned Bill tabled in Uganda represents the implication that women must be partnered with men in order to exercise their right to procreative freedom, and succinctly rejects non-traditional family structures, highlighting the role of the state in the construction of family and the influence of assumptions about gender, sexualities, marriage, class, and dependency.[135] This provision in the bill also contravenes Article 21 of the Uganda Constitution, which guarantees equality before the law and prohibits discrimination based on sex, race, or other grounds. There is a need to harmonise this bill with the radical feminist considerations espoused above so as to satisfactorily fulfill all Ugandan women's right to reproductive freedom.

On the other hand, whilst reproductive freedom is recognised as a fundamental facet of Ugandan women's right to choose, many radical feminists criticize the authenticity of this 'choice', given the broader socio-cultural implications of marriage and motherhood being viewed as core expectations and markers of womanhood in many Ugandan cultures. Women are expected to marry and bear children, which is culturally accepted and enforced.[136] These societal pressures may influence women's choice to turn to ARTs as a last saving grace in situations of infertility, as the extreme value placed on children in Uganda means that women are only recognized, valued, and accorded prestigious status through bearing children.[137]

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135 Appleton, Susan Frelich and Weisberg, D. Kelly, 'Families Under Construction: Parentage, Adoption, and Assisted Reproduction', Paper No. 20-12-01 December 2020.

136 The Impact of Social and Cultural Norms on Uganda's Child Marriage and Teenage Pregnancy Crisis-Joy for Children Uganda <https://joyforchildren.org/the-role-of-social-and-cultural-norms-in-ugandas-child-marriage-and-teenage-pregnancy-crisis/> [Accessed 07 April 2025].

137 Kudesia R, et al, 'Infertility in Uganda: a missed opportunity to improve reproductive knowledge and health', Global Reproductive Health. 2018;3(4): e24. DOI:10.1097/GRH.0000000000000024 <https://journals.lww.com/grh/fulltext/2018/12000/infertility_in_uganda__a_missed_opportunity_to.1.aspx> [Accessed 05 April 2025].

Thus, failure to bear children translates to a lack of support and recognition in social settings, loss of property rights, stigma and ostracisation from society.[138] Infertility is also known to cause significant psychological and social effects on the affected party, such as fear, guilt, depression, self-blame, marital stress, emotional abuse, intimate partner violence, divorce and abandonment of the partner, and economic deprivation.[139]

This begs the question, can this choice be called her real choice when she is socially coerced to choose technology to save herself from the social stigma of infertility?[140] Feminists who reject assisted reproductive technology (ARTs) argue that in patriarchy, a woman is defined through the lens of a man in which his desire and interpretation of the desire is more valuable than her own, which has such a strong impact on her choices, actions and decision-making that it cannot be ignored.[141]

Choices are socially structured and coerced but appear as a free act of an individual. They are based on the social and material situations that allow women to freely exercise them without any constraints.[142]

Ruth Hubbard aptly points out that as 'choices' become available, they all too rapidly become compulsions to 'choose' the socially endorsed alternative.[143] It can be said that, in patriarchy, individual choices are structured in accordance with

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138 Asiimwe S, Osingada CP, et al, 'Women's experiences of living with involuntary childlessness in Uganda: a qualitative phenomenological study', BMC Women's Health. 2022 Dec 19;22(1):532. DOI: 10.1186/s12905-022-02087-0. PMID: 36536395; PMCID: PMC9761954. <https://pubmed.ncbi.nlm.nih.gov/36536395> [Accessed 05 April 2025].

139 Chiware TM, Vermeulen N, Blondeel K, Farquharson R, Kiarie J, Lundin K, Matsaseng TC, Ombelet W, Toskin I. IVF and other ART in low- and middle-income countries: a systematic landscape analysis. Hum Reprod Update. 2021 Feb 19;27(2):213-228. <https://pmc.ncbi.nlm.nih.gov/articles/PMC7903111/> [Accessed 6 January 2025].

140 Nisha Z, 'Negotiating 'Surrogate Mothering and Women's Freedom', Asian Bioeth Rev. 2022 Apr 22;14(3):271-285. DOI: 10.1007/s41649-022-00205-6. PMID: 35791331; PMCID: PMC9250556. <https://pmc.ncbi.nlm.nih.gov/articles/PMC9250556/> [Accessed 05 June 2025].

141 Ibid (n116).

142 Spallone P and Steinberg DL, (editors), 'Made to Order: The Myth of Reproductive and Genetic Progress', (London: Pergamon Press; 1987)

143 Arditti Rita Renate, Klein Duelli, Minden Shelley., editors, 'Test-tube women what future for motherhood?', (London: Pandora Press; 1984

the social needs of men and, can be used as a tool against women. De Beauvoir asserts that in a male dominated world, men's manipulative and coercive tendencies towards women are only to be expected. Men will use ARTs as an additional means of applying pressure on women to further conform to their role of motherhood under partriarchy.[144]

However, Katz Rothman disagrees with other feminists' rejection of ARTs, asserting that all state-backed political and social controls seek to regulate and diminish women's choices. Thus, it is not this reproductive technology that is a problem but the real problem lies underneath the very structure of society that manipulates it into an oppressive tool.[145]

> *"[Women] must not get caught into discussions of which reproductive technologies are 'politically correct,' which empower and which enslave women. They ALL empower and they ALL enslave, they all can be used, by for or against us. We will have to lift our eyes from the choices of the individual woman, and focus on the control of the social system which structures her choices."*

3.1.2 LIVE AND LET DIE: ABORTION RIGHTS IN UGANDA

Global efforts to criminalise and ban abortion reflect the tremendous extent to which the patriarchal and capitalistic machine will go in its desire to control women's sexuality and reproductive freedom. Patriarchal societies propagate the ideology of institutional motherhood, which restricts women's mobility and, burdens them with the responsibilities to nurture and rear children. The biological factor to bear children is linked to the social position of women, with responsibilities involving nurturing, educating and raising children by devoting themselves to family.[146] Therefore, as it stands, restrictions on abortion are systemic efforts to control women's fertility.

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144 Alice Schwarzer, 'After the second sex: conversations with Simone de Beauvoir', (New York: Pantheon Books, 1984).

145 Katz-Rothman B, 'The Meaning of Choice in Reproductive Technology', In: Arditti RR, Klein D, Minden S, (editors), 'Test-Tube Women What Future for Motherhood?' (London: Pandora Press; 1984).

146 Suranjita Ray, 'Understanding Patriarchy', Feminism: Theory and Practice (DSE7), Department of Political Science, *Daulat Ram College, University of Delhi* (2008).

Sylvia Tamale in 'Controlling Women's Fertility in Uganda'[147] posits that indeed, when women abort, they are in essence exercising their sexual autonomy by controlling their fertility. She goes on to argue that,

> *"When a woman can control her fertility; when she can choose whether or not to have children; when she can determine how often she can have children; when she can have sex and not fear that the outcome will be an unwanted pregnancy, she breaks the chains that permanently condemn her to the domestic arena."*

Banning abortion severely limits if, when and how women and others who can become pregnant choose to have children, especially for those who have the fewest resources. That means that, theoretically, these women are more likely to end up as mothers, caregivers and homemakers,[148] which is exactly what society envisions and forces upon them under patriarchy.

It is in the best interests of the capitalistic machine that women remain 'stuck' in the home, fulfilling their motherhood duty under the gendered roles posited by the public-private divide, whereby women's labour is exploited during their confinement to the home, doing tedious and thankless care work that is undervalued and unpaid.[149] Meanwhile the men go out and offer paid labour in the public arena, and are able to gain a more substantial hold of the means of production, further exacerbating the already unfair advantage they hold over women in terms of economic and social and even political power.[150]

This is why according to Simone De Beauvoir, safe and legal abortions would rid women of reproductive servitude so that they can take on the economic roles open to the; roles that would ensure their control of their own person."[151] Beauvoir was

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147 Sylvia Tamale, 'Controlling Women's Fertility in Uganda', *Sur – International Journal on Human Rights,* vol. 24, 2016, pp. 117-128.

148 'How the Right Uses Abortion Restrictions to Reinforce Racist and Gendered Hierarchies,' June 13, 2024 <https://www.splcenter.org/resources/reports/goals/> [Accessed 4 April 2025].

149 Sylvia Tamale, 'Gender Trauma in Africa: Enhancing Women's Links to Resources', Journal of African Law 48, no. 1 (2004), pp. 50-61.

150 Friedrich Engels, 'The Origin of the Family, Private Property and the State' (new ed.) (New York: Pathfinder Press, 1972).

151 Beauvoir, The Second Sex, pp.139.

not only not opposed to abortion, but also campaigned for a widening of access to abortion clinics for those who did not belong to a social elite.[152]

The trifecta of religion, culture and law reinforces itself when it comes to upholding restrictive policies and attitudes towards abortion. Religion plays a crucial part in constructing the patriarchal logic that women were created to bear and rear children. Natural Law, which is based on the Divine and the belief that all written laws must follow universal principles of morality and religion, is extremely influential in shaping our thinking on issues of contraception and abortion.[153] Therefore, written law, culture and religion are all instrumental in constructing Ugandan women's sexuality and desire through the inscriptions they engrave on our bodies.[154]

Many of these cultural and religious norms, as well as the laws that criminalise abortion were enforced during colonialism, whereby the British imposed their Eurocentric ideals about morality, gender roles and family structures onto indigenous African societies through religion and the Western legal system. These ideas did not reflect the unique cultural and historical context of these communities, which had more nuanced practices regarding their sexual and reproductive health, and the role women played in society.[155]

Abortion in Uganda has been criminalised by virtue of Article 22 of the Constitution of the Republic of Uganda. This is emphatically discussed in our Chapter 2 that demonstrates how the penal code criminalises abortion in Uganda. The Penal Code Act also criminalises attempts to procure abortion.[156] Additionally, when Uganda ratified the Protocol on the Rights of Women in Africa

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152 Joseph Mahon, 'Simone de Beauvoir and her Catholicism: An Essay on her Ethical and Religious Meditations', (Galway: Arden House, 2002), pp.118.
153 Ibid. 32.
154 Sylvia Tamale, "'Keep Your Eyes Off My Thighs': A Feminist Analysis of Uganda's 'Miniskirt Law,'" Feminist Africa 21 (2016): 83-90.
155 Ibid (n5).
156 Section 130.

(Maputo Protocol) in 2010, it did so with a reservation to Article 14(2)(c), which allows for abortion in cases of sexual assault, rape and incest.[157]

There is need for Uganda's jurisprudence to reflect the radical and decolonial feminist perspectives espoused above, as well as, the international and regional approaches, which emphasize a human rights approach to reproductive health in the context of abortion. Several jurisdictions in Africa have already leaned heavily towards decriminalisation and legalisation of abortion. Tunisia opened the way to safe legal abortions in Africa,[158] Cape Verde followed a decade later,[159] and South Africa in 1996. Other African countries have allowed for safe and legal abortion in progressive legislation.

In South Africa, the Choice on Termination of Pregnancy Act of 1996 (CTOPA) was enacted with a view to achieving a paradigm shift in the regulation of abortion, from a historically embedded crime and punishment model to a reproductive health rights model. It underscores a commitment to a transformed universe of reproductive health and abortion in which reproductive autonomy, including abortion, is a fundamental right which must be fulfilled by the state.[160] This law has substantially increased access to safe, legal abortion in South Africa and, consequently, impacted positively on unsafe abortion-related morbidity and mortality.[161]

In Kenya, judicial precedent has had the effect of implicitly conveying the right to abortion onto women. In *FIDA Kenya & 3 Others v. Attorney General & 2 Oth*ers[162] a 14-year-old girl from rural Kisii became pregnant after being raped. Lacking access to safe, legal abortion services and post-rape care, she sought help from

157 Ibid (n17).

158 Among other grounds, the Tunisian Law No 65-25 of 1965, as amended, permits abortion on request in the first trimester.

159 Law of 31st December, 1986 of Cape Verde permits abortion on request in the first trimester among other grounds.

160 Preamble of the Choice on Termination of Pregnancy Act of South Africa, 1996.

161 R Jewkes et al 'The Impact of Age on the Epidemiology of Incomplete Abortion in South Africa after Legislative Change' (2005) 112 *British Journal of Obstetrics and Gynaecology* pp. 355.

162 Constitutional Petition No. 266 of 2015.

an unqualified provider, suffered severe complications, and ultimately died from lack of appropriate medical care. The Petitioners, acting on behalf of the deceased's mother, challenged actions by the Ministry of Health (MOH) that created the unsafe conditions in which this incident took place, specifically the 2014 withdrawal of the "Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya" and a ban on abortion training for health professionals. The High Court ruled that the MOH's withdrawal of the guidelines and training curriculum was arbitrary, unlawful, and unconstitutional.

The Court affirmed that women and girls in Kenya have a constitutional right to access lawful abortion, especially in cases of rape, defilement, or where the life or health (including mental health) of the mother is at risk, as provided by Article 26(4) of the Constitution, The Court ordered the reinstatement of the withdrawn guidelines and training tools to provide clear standards for health professionals on safe abortion in constitutionally permitted circumstances. The Court also clarified that a "trained health professional" is empowered to determine whether an abortion is necessary under the law.

The same was held in the case of *PAK & another v Attorney General & 3 others*[163] whereby the 1st petitioner was pregnant and when she started experiencing complications with her pregnancy including severe pain and bleeding, she went to Chamalo Medical Clinic for treatment. At the Clinic PAK received emergency care from the 2nd petitioner who upon examining her concluded that she had suffered a spontaneous abortion. The 2nd petitioner performed a successful manual vacuum evacuation, after which the petitioner was in a fair general condition. Plain-clothed police officers stormed the clinic without notice or permission and demanded to be given the 1st petitioner's treatment records and subsequently confiscated the same from the 2nd petitioner. They were both arrested and the 1st petitioner alleged that she was forced to undergo a medical examination and was later charged with the offence of procuring an abortion contrary to section 159 of the Kenyan Penal Code. The 2nd petitioner was charged

163 Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR).

with procuring an abortion contrary to section 158 of the Penal Code, and with supplying drugs to procure an abortion contrary to section 160 of the Penal Code.

The court held that inaccessibility of quality abortion care risked violating a range of human rights of women and girls, including the right to life; the right to the highest attainable standard of physical and mental health; the right to benefit from scientific progress and its realization; the right to decide freely and responsibly on the number, spacing and timing of children; and the right to be free from torture, cruel, inhuman and degrading treatment and punishment. The court emphasized that a blanket ban on abortion and or prosecution of medical personnel exposed both the mother and foetus to mortality and therefore flew against state obligations in preventing/reducing maternal and infant mortality rates and *ipso facto* violated the right to life.

Court observed that the country's law did not prevent women from having abortions but instead, severely undermined the quality-of-care women received or forced them to resort to unsafe and clandestine means to terminate unwanted pregnancies. It called out to Parliament, as the legislative body, to fast-track legislation to provide for access to safe abortion for women in Kenya and to actualize the provisions of article 26(4) of the Constitution.

The above assertion rings true in Uganda as well, where a ban on abortion has done little to curtail the number of abortions still carried out within the county. In Uganda, an estimated 314,300 abortions took place in 2013. This translates to 14% of all pregnancies—or a rate of 39 per 1,000 women aged 15–49, down from 51 per 1,000 in 2003. The abortion rate for Uganda is slightly higher than the estimated rate for the East Africa region as a whole, which was 34 per 1,000 women during 2010–2014,[164]

It is unfortunate that no effort has been made to take advantage of the opportunity that is presented by Article 22 (2) of the Constitution to create a law that provides

[164] Guttmacher, 'Fact Sheet: Abortion and Post Abortion Care in Uganda' <https://www.guttmacher.org/fact-sheet/abortion-and-postabortion-care-uganda> [Accessed 5 June 2025].

specific instances in which an abortion is permitted. The law has barely moved an inch since the Constitution of Uganda came into force.[165] Ambiguity of the law and fear of imprisonment mean doctors turn away women looking for care. The women, influenced by misinformation, then resort to extreme and dangerous measures to rid themselves of unplanned pregnancies.[166]

The Ugandan Ministry of Health reported that in 2018, 5.3% of all maternal deaths were due to complications from unsafe abortions.[167] The high rate of unintended pregnancies, driven by limited access to contraception, exacerbates the situation.[168] Unsafe abortion practices remain the major contributor to maternal death in Uganda, impeding the achievement of universal health coverage and quality of maternal health care. In 2015, the Ministry of Health and other stakeholders developed and launched *The National Standards and Guidelines for reducing Maternal Morbidity and Mortality from Unsafe Abortion in Uganda*, but following resistance, these were withdrawn 6 months later.[169] The Ministry of Health withdrew the guidelines in December 2015 before their official launch due to political and religious opposition, particularly from conservative and religious groups who argued that the guidelines did not reflect Uganda's cultural and moral values.[170]

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165 CEHURD, 'Facing Uganda's Law on Abortion: Experiences From Women and Service Providers,' (July 2016) <https://www.reproductiverights.org/sites/default/files/documents/Uganda-Abortion-Law-Experiences.pdf> [Accessed 5 June 2025].

166 Sophie Neiman, 'It's Needless Death': Ugandan Activists Decry Restrictive Abortion Laws. Aljazeera News, (28 September, 2024) <https://www.aljazeera.com/features/2024/9/28/its-needless-death-ugandan-activists-decry-restrictive-abortion-laws > [Accessed 6 June 2025].

167 Ministry of Health, 'Annual Health Sector Performance Report (AHSPR)' (Financial Year 2017/18) <https://library.health.go.ug/sites/default/files/resources/AHSPR%202017_18%20FY.pdf> [Accessed 6 June 2025].

168 'Uganda Abortion Laws (2025): Legal Status, Costs & Safe Options' <https://safe2choose.org/blog/abortion-in-uganda> [Accessed 6 June 2025].

169 Kagaha A, and Manderson L, 'Power, policy and abortion care in Uganda. Health Policy Plan,' (2021) <https://pmc.ncbi.nlm.nih.gov/articles/PMC7996642/> [Accessed 05 June 2025].

170 Women;s Probono Initiative, 'Access to Safe and Legal Abortion Services in Uganda, Case Brief' <https://womenprobono.org/wp-content/uploads/2023/06/standards-and-guidelines-case-brief-1.pdf> [Accessed 5 June 2025].

This continued reluctance from the government to create a solid abortion policy framework has proven to be a death sentence for women and girls in Uganda.

The 2015 CEHURD Policy Guidelines proposed that the government of Uganda amend the Penal Code to streamline it with the Constitution by clearly stating the conditions under which safe, legal abortions can be accessed by women.[171]Control over the choice and timing of motherhood is crucial to women's agency, welfare and, ultimately, their equality as individuals and a class.[172]

The struggle for reproductive autonomy is in fact a struggle for equal citizenship in a social environment in which there is structural inequality and gender discrimination.[173] Therefore, it is in the best interests of the government of Uganda to follow the lead of countries like Tunisia, South Africa and Kenya in legalising abortion, so as to facilitate the liberation of women from all ongoing forms of oppression, as well as upholding their constitutionally guaranteed right to equality under the law and non-discrimination.

3.2 SEXUAL AND GENDER BASED VIOLENCE (SGBV): THE ENFORCEMENT MECHANISM OF PATRIARCHY

This part contains a discussion on SGBV through the lens of the radical feminist train of thought by highlighting the state of affairs in Uganda, thereafter making an analysis of case law to buttress the arguments on the role of culture in SGBV and finally, providing radical feminist solutions to this challenge through a case study of Senegal.

Sexual rights include the right of all persons to be free from coercion, discrimination, and violence to the highest attainable standard of health

171 CEHURD, 'The Case for Clarifying the Law on Termination of Pregnancy in the Revision of the Penal Code', CEHURD, July 2015, <http://www.cehurd.org/wp-content/uploads/downloads/2016/02/Clarifying-the-Law-on-Termination-of-Pregnancy-in-the-Revision-of-the- Penal-Code.pdf> [Accessed 4, February, 2025).

172 RB Siegel 'Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression' (2007) 56 Emory LJ pp. 815–42, pp. 818

173 N Fraser, 'Justice Interruptus Critical Reflections on the Postsocialist' Condition (1997) 11.

concerning sexuality.[174] Among the underlying determinants of sexual and reproductive health are effective protection from all forms of violence and torture, other human rights violations that harm the right to sexual and reproductive health.[175] Professor Ben Twinomugisha agrees with this and has summarised SRHR to include the, 'right to freedom from sexual and gender based violence in all its forms and the right of access to appropriate medical, counselling and legal services'.[176] The 1993 United Nations Declaration of Violence against Women defines 'gender based violence' as any act causing physical, sexual, or psychological harm including threats, coercion, or deprivation of liberty in public or private life.[177]

States including Uganda therefore, have an obligation to shield women from the harmful practices and norms and gender-based violence that deny them their full sexual and reproductive health, such as female genital mutilation, child and forced marriage, domestic and sexual violence, including marital rape.[178] International Humanitarian law takes cognisance of the fact that there is violence and coercion targeting lesbian, gay, bisexual, transgender and intersex persons or women seeking abortion or post-abortion care, forced abortion and forced pregnancy; and medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children.[179]

As per 2024, gender-based violence ranks as the most important women's rights problem that Ugandans say their government and society must address.[180] SGBV in Uganda encompasses a range of violations, including rape, domestic violence, female genital mutilation (FGM), early and forced marriages, and emotional or psychological abuse.[181] A 2021 report by the Uganda Bureau of Statistics (UBOS)

174 Ibid (n17), pp. 44.
175 Paragraph 7 of General Comment No. 22.
176 Ibid (n17), pp. 20.
177 United Nations Declaration of Violence against Women, 1993.
178 Paragraph 22 of General Comment No. 22.
179 Paragraph 59 of General Comment No. 22.
180 Caroline Nakayiza, 'Gender-Based Violence Ranks as Top Women's-Rights Issue That Ugandans Want Government and Society to Address', (Afrobarometer) April 2024.
181 Bridget Nsimenta, 'The growing Impact of sexual and gender-based violence in Uganda.' Nile post September 3, 2024.

revealed that one in three women aged 15 to 49 has experienced physical or sexual violence.[182] In 2023, Uganda's Police Force Annual Crime Report showed that out of the 15,184 survivors of domestic violence, 10,792 were female, and 113 were killed from aggravated violence.[183] These alarming statistics are just the tip of the iceberg since many cases remain unreported due to fear and distrust in Uganda's justice system.

Let's look at these statistics from an intersectional lens because, queer or female sex workers and poor women will have it worse when it comes to SGBV compared to other women or girls. A month after the Anti-Homosexuality Act was passed, the Human Rights Awareness and Promotion Forum (HRAPF) recorded a total of 10 cases involving threats of violence against 12 persons based on their sexualities.[184] Violence remains a norm because it is deeply rooted in cultural structures that view women and girls as inferior, and cultural practices, like payment of bride price, exacerbate this violence, often leading to the perception that women are 'owned' by their husbands. This is very common in rural areas where women are poor and uneducated. In poor and vulnerable communities like refugee camps, it has also been noted that SGBV is quite prevalent with increased acts of forced marriages, wife battering, incest, and force prostitution.[185] It should be noted that all these practices are fuelled by culture through their families who use their daughters as source of money or resources to survive.[186]

Ugandan communities have also fuelled these evil acts of SGBV by blaming women and young girls and cruising their dressing as a reason for their abuse.[187] For instance, if a girl or woman is raped when she was wearing a trouser, the community members often blame her and call her dress code indecent and hence

182 UBOS, et al, 'National Survey on Violence in Uganda' 2020.
183 Police Force Annual Crime Report, 2023.
184 HRAPF, 'Two Months After: Report on Violence and Violations on The Basis of Real or Presumed Sexual Orientation And/ Or Gender Identity Two Months After the Anti-Homosexuality Act Came into Force,' Kampala 9th August 2023.
185 Sarah Ademun, 'Sexual and Gender Based Violence and Mental Health', Femme Forte (12 October, 2022).
186 Ibid.
187 Ibid.

the perpetrator (man) goes free.[188] In fact, in some communities, women believe that being beaten by their husbands is a 'sign of love'.[189]

These are a few illustrations of how culture has been the biggest root cause of SGBV in Uganda. On can then link the state's failure to properly implement the Domestic Violence Act as yet another reason that has exacerbated SGBV against women and girls in Uganda. This is why there is a need for a radical approach to dismantle such notions that have become the norm in Uganda.

Several cases have come before the courts, but this paper will rely on two popular cases that shocked many Ugandans, that is the *Hamidu case* and the *Nakoupuet case*. These two cases illustrate the interplay of culture and SGBV.

In *Uganda v. Yiga Hamidu*,[190] the victim who had been culturally married to the accused was subjected to the one of the worst kinds of inhumane treatment. When the victim refused to have intercourse with the accused, he then called two men to hold her hands and legs as he had his way with her. After he satisfied his beastly lust, the three left her lying on the floor covered with dirt and blood. The trial court convicted him and emphasized that, 'the existence of a valid marriage between the accused and complainant no longer constitutes a good defence against the charge of rape after the promulgation of the 1995 Constitution.'[191]

Similarly, in *Uganda v. Lamoe Nakoupuet***,**[192] the survivor knew the accused since her childhood as her village mate, and had been present at home when her father sold her off to the accused while they drunk *'waragi'*[193]. The accused thereafter abducted her. She fortunately escaped from him but, was forcefully handed back to him the next day by her father. She was then held down by her own brothers who spread her legs and the accused raped her. The accused raised his defence

188 Ibid.
189 Ibid.
190 Criminal Session Case 005 of 2002.
191 Ibid.
192 Criminal Case No. 109 of 2016.
193 '*waragi*' also known as '*kasese*' is a generic term in Uganda for locally distilled beverages or gin.

by stating that he had only made her his wife.[194] The court condemned the cultures of chasing, abducting and raping girls as it is backward, brutal and barbaric. These two cases portray the state of affairs in Uganda, particularly in the rural areas.

The consequences of SGBV are devastating for victims. Physically, survivors face injuries, sexually transmitted infections (STIs), and unintended pregnancies. Psychologically, many victims suffer from depression, anxiety, and post-traumatic stress disorder (PTSD).[195] A 2022 study by Makerere University's School of Public Health found that SGBV survivors were three times more likely to experience mental health issues compared to non-survivors.[196]

During the second wave of feminism which aimed to achieve women's liberation, radical feminists while focusing on patriarchy as the root cause of women's inequality also focused on violence against women by men, and started to talk about violence in the family as well as, rape.[197] According to Camille Cottaise:

> *"Violence (or the threat of violence) is a way for men to control, dominate, and perpetuate women's subordination. By appropriating women's bodies through violence, women are reminded of their subordinate status. Radical feminists fight against such sexual and gender-based violence, including domestic violence, which they have helped to render more visible."*[198]

Matters traditionally seen as part of the private sphere such as violence should instead be recognized as public and systemic issues. Due to the efforts and activism of radical feminists, sexual violence, including rape and domestic abuse, is now recognized as a criminal offence in most countries.[199]

Senegal presents a great example for Ugandan feminists and allies to embrace regarding radical feminism. Because of the various strands of feminism that

194 Ibid.
195 Ibid (n183).
196 Ibid.
197 Anca-Ruxandra, et al, 'Gender Matters: A Manual on Addressing Gender-Based Violence Affecting Young People', (Council of Europe, 2019).
198 Ibid (n23).
199 Ibid, page 10.

seemed very western-oriented, the feminists in Senegal decided to embark on their own radical feminist movement. The president of the Senegalese Women's Rights network, Siggil Jigeen, founded in 1998, noted that their feminism was based on Senegalese values, not individualist Western values.[200]

In Senegal, feminists advocating against gender-based and state violence have played a crucial role in challenging the status quo and reshaping discourse, activism, and protest methods in Senegal.[201] Nearly 40 years after the rise of *Yewwu Yewwi*, a significant feminist movement, Senegalese feminists are once again embracing radical feminist organising, even amid growing anti-gender opposition.[202] The movement established an award to honour political efforts supporting women's emancipation, condemned gender-based violence, launched the magazine *Fippu* as an advocacy platform, and built international alliances with other feminist organizations.[203] The idea of Senegalese embracing this radical feminist stance through an Afrocentric lens is indeed a great lesson for many Africans to adopt a more radical approach to fight against SGBV.

Similarly in the global north, radical protests by African-Americans, women and sexual minorities in the 1960s played a critical role in the fight against violence.[204] These groups challenged the continued hostility and punishment that were being meted out by society.[205] The idea that these various groups fought to dismantle these notions of violence that had become the order of the day does lay ground work for Ugandans to also take the streets and fight to end such violence.

In this fight against SGBV, women and men cannot just sit by and wait. There is a need to stand up and take to streets and fight for what every woman and young girl deserves. Ugandans need to stop settling for less. Laws like the Domestic

200 Ibid.
201 Dieng, RS 2023, 'From Yewwu Yewwi to #FreeSenegal: Class, gender and generational dynamics of radical feminist activism in Senegal', Politics & Gender. Available at <https://doi.org/10.1017/S1743923X2200071X> [Accessed 21 January, 2025].
202 Ibid, page 2.
203 Ibid, page 2.
204 Anca-Ruxandra, et al, above n 199, pp. 211.
205 Ibid.

Violence Act have been enacted and yet the same laws give a maximum punishment of two years imprisonment or a fine not exceeding 48 currency points,[206] to perpetrators of violence who are often men. Ugandan feminists and women's rights movements have fought hard, but this is not enough. A more radical approach is required to dismantle the root causes of this oppression.

3.3 RADICALISING SEXUALITIES: A CASE FOR HOMOSEXUALITY

The golden thread running throughout this paper has been how radical feminism seeks to dismantle patriarchal notions than men can control women's bodies. This theme continues to this section in which the intersection of culture, law and religion is discussed as a means of enabling the abuse of sexual minorities like LBTQI women. There is a brief discussion of the sex/gender system that creates a foundation for the discussion on the control of women's sexualities.

Radical Feminist, Gayle Rubin makes an argument that the sex/gender system is a "set of arrangements by which society transforms biological sexuality into products of human activity."[207] This implies that society takes certain biological characteristics of being male and female and converts them into a system of masculine and feminine identities that create a hierarchical power relation between men and women.[208]

Essentially, radical feminists claim that gender is separable from sex, and naturalised gender roles are attempts on the part of patriarchal society to control women through rigid sanctions.[209] In many African countries, feminism and homosexuality are accused of being foreign and exported from the "West". Uganda is truly no different, and is plagued with sexual stereotypes, and individuals who

206 Section 3 of the Domestic Violence Act Cap 123.
207 Gayle Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex' in Rayna R. Reiter (ed) 'Toward an Anthropology of Women' (Monthly Review Press, 1975) 157.
208 Dipannita and Swati, 'Gender and Social Work'. Available at; <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000032SW/P001714/M021043/ET/15004642966-RadicalFeminism-Text.pdf> [Accessed 10 July 2023].
209 Ibid.

so clearly task themselves with making ignorant assumptions about people's sexualities.

How does gender shape sexualities? How does society try to control women's sexuality? These are some of the key questions one needs to have in mind while trying to understand African sexualities. In the past, few women had the opportunity to openly speak about aspects involving their sex lives with anyone.[210] In Uganda, many women still find it taboo when it comes to putting their sexual desires before those of their male partners. The control of women's sexualities has been a pivotal tool through which patriarchy has asserted its dominance. Since the 1960s, radical feminists have been at the forefront of fighting for women's sexualities by supporting key aspects like sex work, pornography, and sexual orientations.

The law is the biggest challenge to women's sexualities. The Penal Code Act Cap. 128 criminalises same sex persons from engaging in sexual pleasure. Marriage between persons of the same sex in Uganda is also prohibited by the Article 31(2A) of the Constitution. The Anti-Homosexuality Act Cap.117, prohibits any form of sexual relations between persons of the same sex, and prohibits the promotion or recognition of sexual relations between persons of the same sex.

The patriarchal and capitalistic hegemony strongly opposes the existence and practise of homosexuality, and utilizes religion, culture and the law to solidify its position. As sources of power, the institutions of culture, religion and law structure sexual morality in such a way that it congeals into states of domination.[211] This disdain is demonstrated through a categorical enforcement of hetero-normative practices in the socialization of men and women at every stage in their socio-economic, political and religious interactions.

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210 Alix Kates Shulman, 'Sex and Power: Sexual Bases of Radical Feminism' (University of Chicago Press Journal, 1980) <https://www.jstor.org/stable/3173832> [Accessed 12 August 2023].

211 Sylvia Tamale, 'Exploring the Contours of African Sexualities: Statutory, Customary and Religious Laws', (lecture, Cambridge University, 4 June 2013).

Adrienne Rich examined this system's downright militaristic insistence on heteronormativity and coined the term 'Compulsory Heterosexuality'[212], suggesting that heterosexuality, like motherhood, is a political institution whereby violent structures are found necessary to enforce women's total emotional, erotic loyalty and subservience to men. Compulsory heterosexuality, through which the lesbian and queer experience is perceived on a scale ranging from deviant to abhorrent or simply rendered invisible, insists that species survival, the means of impregnation, and emotional/erotic relationships between men and women should be so rigidly identified with each other; and under this system male power manifests itself through the use of cruelty and forceful submission to enforce heterosexuality on women.[213]

It seeks to trap women within the confines of heterosexuality so that they may be convinced that marriage and sexual orientation toward men are inevitable (even if unsatisfying or oppressive) components of their lives.

In her essay titled, "The Origin of the Family,"[214] Kathleen Gough lists eight characteristics of male power in archaic and contemporary societies as,

> *men's ability to deny women sexuality or to force it upon them; to command or exploit their labor; to control their produce; to control or rob them of their children; to confine them physically and prevent their movement; to use them as objects in male transactions; to cramp their creativeness; or to withhold from them large areas of the society's knowledge and cultural attainments.*

Heteronormativity involves the idealizing and societal privileging of a strict gender binary, "opposite sex" romantic and sexual desires, heterosexual marriages, and the raising of children in nuclear families. It results in cisgender-heterosexual existence occupying default representational and socio-politico-economic

212 Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence (1980) reprinted in Blood, Bread, and Poetry: Selected Prose', 1979-1985 (Norton 1986).

213 Ibid, 2.

214 Kathleen Gough, 'The Origin of the Family', in Toward an Anthropology of Women, ed. Rayna [Rapp] Reiter (New York: Monthly Review Press, 1975), pp. 69–70.

spaces.[215] This disposition is reinforced through religious beliefs and practices, which teach and uphold the sanctity of marriage, the concept of sex being for procreation and pleasure within marriage. Religion also outrightly rejects any sexual or erotic practices that are outside the 'charmed circle of sex' of heterosexual monogamy, viewing others like homosexual relationships as sins and forms of deviance that should be quashed.[216]

Patriarchal culture views women as a means to serve men in the private divide of the home through motherhood, nurturing, care work and unpaid labour, and any deviation from these extremely regressive and repressive gender roles as an existential threat to society as it is set up.[217] Gay women who reject these traditional roles by partnering with other women are viewed with disdain, fetishized, or dismissed because they upset the status quo, challenge male supremacy and threaten male control over female sexuality.[218]

This is why many African countries have taken an unequivocal stance against homosexuality through the implementations of Anti Homosexuality laws. However, the constitutionality of these laws has been challenged by several human rights and feminist groups who assert that these laws are oppressive and discriminatory in nature, serving to rob homosexual women of their constitutionally embedded rights and freedoms.

In Uganda, there has been a dramatic legal back and forth between human rights activists and the criminalisation of homosexuality. Parliament passed the Anti Homosexuality Act, 2014, which criminalised same sex relations and the promotion of homosexuality. However, in *Oloka-Onyango and others v. Attorney*

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215 The Politics Of The Gender, Sexuality, And Religion Nexus: Perspectives From The Margins Victoria Basug Slabinski And Nicolas 'Nicola' Chehade (April 1, 2024) <https://contendingmodernities.nd.edu/education-module/politics-gender-sexuality-religion/> [Accessed 16 April 2025].

216 Michelle Mueller, 'Polyamory as Religious Sexual Counter-Culture: An Analysis through Gayle Rubin's "Charmed Circle', *Proceedings of the 3rd International Conference on Gender Studies,* Vol. 2, Issue 1, 2020, pp. 15-21 ISSN 2602-8611 online DOI: <https://doi.org/10.17501/26028611.2020.2102> [Accessed 16 April 2025].

217 Sylvia Tamale (ed), African Sexualities: A Reader (Pambazuka Press 2011).

218 Pharr, Suzanne. 'Homophobia: A Weapon of Sexism', SIECUS Report, vol. 21, no. 3, Feb./Mar. 1993, pp. 1-6.

General,[219] the Constitutional Court declared the Act unconstitutional on the ground that it had been passed by parliament without the requisite quorum.

Later on, Parliament passed the Anti Homosexuality Act, 2023 which was also challenged in the constitutional Court by the *Consolidated Petitions No. 14, 15, 16 & 85 of 2023*, contesting virtually all the seventeen sections of the Act for their alleged contravention of human rights and freedoms that are guaranteed under the Uganda Constitution, and international human rights instruments to which Uganda is a party.[220]

Sections of the Act that called for mandatory reporting of homosexual individuals by health professionals demonstrated the law's undermining of the sexual and reproductive health rights (SRHR) of queer women, who might be scared to seek medical care for fear of being reported to the authorities. The Act also further criminalized queer women living with HIV/AIDS, changing their offense to aggravated homosexuality and increasing the punishment from life imprisonment to death. This blatant dismissal of the humanity of these individuals was a direct violation of the constitutional guarantee of the right to life, privacy, nondiscrimination and freedom from cruel and inhumane treatment.[221]

Criminalisation of HIV/AIDS in any capacity undermines public health efforts to treat and prevent HIV/AIDS,[222] as the stigmatization deincentivises people to disclose their status, and discourages health-seeking behaviours for effective management of the epidemic when there is lack of community support. Moreover, this criminalization does not prevent new infections or reduce women's vulnerability, rather it furthers the harm these women might encounter by closing up channels for access to healthcare services.[223] These provisions were struck

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219 (Constitutional Petition 2014/8).

220 Constitutional Court pronounces itself on the Anti-Homosexuality Act, 2023 of Uganda, April 3, 2024.

221 Ibid (n102).

222 Mujugira A et al, 'Uganda's Anti-Homosexuality Act undermines public health,' (J Int AIDS Soc.) <https://pmc.ncbi.nlm.nih.gov/articles/PMC11075067/> [Accessed 5 June 2025].

223 Ibid (n94).

down by the courts in the *Fox Odoi case*[224] and aptly so as they violated the right to health of homosexual women, and their sexual and reproductive health rights guaranteed under several international provisions like the CEDAW and ICESCR.

Nonetheless, in upholding the constitutionality of the Act, save for four provisions, the Court justified itself using a number of reasons, among them being the recent developments in human rights jurisprudence including the decision of the US Supreme Court in *Dobbs v Jackson Women's Health Organisation*,[225] where the Court considered the nation's history and traditions, as well as the dictates of democracy and rule of law, to over-rule the broader right to individual autonomy

This decision demonstrates how regressive laws and attitudes that are rooted in misogyny and deny women their sexual and bodily liberties reinforce each other, shown by the emboldening of Uganda's court to pass its own law restricting women's autonomy after the US did the same in the *Dobbs* decision.

Radical feminist perspectives demand that the laws regulating women's bodily and sexual autonomy reflect their inherent right to privacy, right to marry, and right to non-discrimination under the constitution.

Since many men identify themselves as heterosexual, they expect all women to conform to these similar heterosexual norms yet these heterosexual norms that many fight so hard for, are simply a colonial export.

In a world where women's bodies are a battleground for control, a radical feminist approach is much required. By adopting such a radical stance, feminists desire to break these generational chains of oppression against women that have been normalised by institutions like the state and church. The fight for an inclusive Ugandan society rests in the hands of each of us and, the fight starts with all of us, to pave the way for a future where every woman and girl can exercise agency over her own body without any discrimination.

224 Ibid (n133).
225 No. 19-1392, 597 U.S. 215 (2022).

3.4 RADICALISING INTERSECTIONALITY

This has been intentionally discussed as the last part of the paper because it recognises that, multiple systems of oppression interact and mutually reinforce one another. During the subsequent discussions, the golden thread of how the law, religion and culture have reinforced patriarchy has been demonstrated. But yet another key aspect that the article has portrayed are these multiple oppressions that are interact which has been quite disadvantageous towards the realisation of SRHRs of women and girls in Uganda. Borrowing from the examples of intersectional feminism, radical feminists also recognise these multiple oppressions.

During protests in South Africa, the female students articulated their identities as 'radical, intersectional African feminists'.[226] This re-introduced discussions of the concept of intersectionality into the private and public domain.[227]

American Law Professor and Civil Rights Activist, Kimberle Crenshaw, describes intersectionality as a prism for seeing the way in which various forms of inequity often operate together and exacerbate each other. For example, a woman with a disability may face discrimination not only because of her gender or her disability, but because of the combination of these two factors which operate simultaneously and interact in an inseparable way.[228]

Everyone has an identity made up of other complex and intertwined identity factors, which may not be reduced to gender.[229] Females and persons belonging to gender minorities are exposed to oppression because of their gender; nevertheless, their other identity factors (age, disability, sexual orientation, origin, skin colour, marital status, etc.) also play a key role.[230] By including this idea of

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226 Amanda Gouws, 'Feminist Intersectionality and the Matrix of Domination in South Africa' (Agenda, 2017) < https://doi.org/10.1080/10130950.2017.1338871 > [Accessed 17 August 2023].

227 Ibid.

228 Handicap International, 'Intersectionality in Gender-Based Violence (GBV) Programming' < https://www.hi.org/sn_uploads/Briefing-Paper-Intersectionality-in-GBV-programming.pdf. > [Accessed 17 August 2023].

229 Ibid.

230 Ibid.

intersectionality in feminism, the movement becomes truly inclusive and allows women of all races, economic standings, religions, and orientations to have their voices heard.[231]

Early radical feminist theory prioritised the experience of women and theorised women as a homogeneous category or unit of analysis.[232] Thus, intersectionality became a corrective mechanism against this type of essentialism.[233] Using this intersectional approach meant recognition of the historical context around the issue.[234] Women in Uganda and Africa have had a long history of violence and systemic discrimination, which created deep inequalities that disadvantaged them from the outset. Such inequalities intersect with each other, for example, poverty, caste systems, tribalism, and sexism, denying people their rights and equal opportunities, which impacts, extend across generations.[235]

The intersectionality lens remains a great tool for advocating for solutions and policy changes that address the needs of the most marginalized.[236] For instance, in Uganda, that is still grappling with high rates of HIV, high maternal mortality rates, high teenage pregnancies, high rates of sexual violence perpetrated against women, girls, and so much more, intersectionality provides an escape beyond the one-size-fits-all approach to SRHR. According to Mubeezi Tenda:

> *"The intersectionality framework acknowledges that an African teenage girl who is visually impaired and living in a rural area may face more challenges than an older, financially stable married woman in accessing information about reproductive health services. By understanding these diverse experiences, the intersectional lens turns our eyes onto the*

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231 Ginny Sharkey and Taylor Hawk, 'What is "Intersectional Feminism"?' (Denison, 26 July 2016) <https://denison.edu/academics/womens-gender-studies/feature/67969#:~:texte> [Accessed 28 July 2023].

232 Ibid (n185) pp. 20.

233 Ibid.

234 UN Women, 'Intersectional Feminism: What It Means and Why it Matters Right Now' (1 July 2020) <https://firstwitness.org/wp-content/uploads/2021/07/Intersectional-Feminsim-What-it-Means-and-Why-it-Matters-Right-Now.pdf> [Accessed 28 July 2023].

235 Ibid.

236 Mubeezi Tenda, 'How Intersectionality can help everyone realise their Sexual and Reproductive Health and Rights', MakeWay, (07 December 2023) <https://www.make-way.org/learn-about-intersectionality-from-this-short-video/> [Accessed 20 January, 2024].

> *oppressive systems that prop up these barriers and enables us to treat the root cause as opposed to the symptoms of the problems. Recognizing these oppressive contexts or systems means that we focus on dismantling discriminatory policies, challenging cultural norms that perpetuate inequalities, and advocating for social and economic justice*".[237]

Studies carried out in Uganda have shown that persons with disabilities (PWDs) are not a homogeneous group and that different types of disabilities intersect with social factors in complex ways that affect access to SRHR.[238] In fact, structural ableism, stigma, and systemic barriers such as inaccessible health infrastructure and provider discrimination are continue to undermine SRHR for with disabilities.[239]

A survey carried out by BMC Public Health on disability and SRHR revealed that although SRH service utilisation has increased over the decade (e.g., HIV testing rose from 30.8% to 92.4%), including among pwds, disparities persisted based on disability type, especially in antenatal care and contraceptive use.[240] Women with hearing or communication difficulties, even when wealthy or educated, were less likely to access antenatal care showing that disability-related barriers persist despite economic privilege.[241] This demonstrates the how identities like disability could exploited as a means of enabling oppression i regard to realisation of SRHRs.

Radical feminism therefore recognises the intersections of gender with other identities like race, ethnicity, class, and sexuality and therefore advocates for an inclusive approach to address challenges faced by women. Radicalising intersectionality goes beyond acknowledging these intersections and seeks to challenge and dismantle the underlying power structures that perpetuate these oppressions. Radical intersectionality will therefore, delve into the root causes of

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237 Ibid.

238 Muriel Mac-Seing et al, 'Disability and Sexual and Reproductive Health Service Utilisation in Uganda: An Intersectional Analysis of Demographic and Health Surveys between 2006 and 2016' BMC Public Health (2022) <https://doi.org/10.1186/s12889-022-12708-w> [Accessed 4 June 2025].

239 Ibid.

240 Ibid.

241 Ibid.

these intersecting oppressions and seeks to understand how these systems of power and privilege interlock to create and perpetuate inequity. Thus, activists will be able to uncover how these political, economic, and social structures such as patriarchy and capitalism generate inequity in all spaces of society.[242] This can show how the institutions of the state produce and replicate the systems of oppression based on gender, sexuality, class, race, gender, religion, etc., all of which affect many marginalised groups.

Also, radicalising intersectionality would champion collective liberation by recognising that true liberation requires solidarity among all marginalised groups. This involves building alliances and advocating for change that benefits everyone. Radicalised intersectionality also questions societal norms and constructs that perpetuate inequity e.g., addressing human rights violations against LBTQI+ persons through the intersectional lens may help to move towards meaningful and comprehensive advances.[243] Having passed the Anti Homosexuality Act, the women in the LBTQIA community continue to suffer a different kind of oppression compared to heterosexual women. They are highly discriminated against which has limited their access to basic sexual and reproductive health care.

Yet another example could be how intersectional approaches to violence against women and girls recognise that all oppressions exist simultaneously and that such oppressions mutually construct each other.[244] Lastly, the 'Intersectional Praxis'; radicalised intersectionality encourages a praxis, which means applying theory to action. This entails promoting strategies that embody the principles of intersectionality and create tangible change in people's lives.

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242 Fernando D' Elio, 'Intersectionality in LGBTI Advocacy' (Sexual Rights Initiative, 14 May 2015) < https://www.sexualrightsinitiative.org/news/2015-may/intersectionality-lgbti-advocacy > [Accessed 21 August 2023].

243 Ibid.

244 Imkaan, 'The Value of Intersectionality in Understanding Violence Against Women and Girls (VAWG)' <https://eca.unwomen.org/sites/default/files/field%20ECA/Attachments/Publications/2019/10/The%20value%20of%20intersectionality%20in%20understand> [Accessed 21 August 2023].

The SRHRs of women in Uganda are not being realised because intersectionality is not being taken seriously. While gender inequality is most certainly a critical factor in issues of SRHR, so too are other forms of discrimination.[245] The current legal framework does not enable a broad enough understanding of what reproductive freedom and health entails for lack of intersectional analysis for women in Uganda. The reason for an intersectional approach is to ensure an in-depth analysis of differing markers of identity and discrimination in order to obtain a clear and accurate contextual understanding. The framework itself not only encourages a deeper analysis and understanding, but requires it.[246] The intersectional lens brings to light compounding discrimination and points of intersection which would otherwise be missed.[247] Furthermore, it ensures a letting-go of the gender-hold, resulting in, for example, the recognition of privileges which lie outside of simply being a man.

Without this intersectional analysis, other forms of discrimination and violations of women can sip through the cracks, even, and especially, within mainstream SRHR efforts. The result being that,

> *"particular reproductive health issues are not addressed. Intersectionality also ensures that inward looking analysis, which as the growth within the global women's movement has shown, can lead to incredibly valuable and important insight. When analysing intersections of class and gender, the power hierarchies that are operating both on individual as well as systemic levels become clearer."*[248]

This is valuable for individual advocates of SRHR, such as members of the donor communities and organisations and systems in themselves. The recognition of

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245 Amie Ritchie, 'Intersectionality and The Struggle for Sexual and Reproductive Health and Rights: An Analysis of Un Discursive Patterns' A Thesis Submitted to the Victoria University of Wellington in Partial Fulfilment of the Requirements for the Degree of Master of International Relations (MIR) School of History, Philosophy, Political Science and International Relations, (2012) page 60 < https://openaccess.wgtn.ac.nz/articles/thesis/Intersectionality_and_the_Struggle_for_Sexual_and_Reproductive_Health_and_Rights_An_Analysis_of_UN_Discursive_Patterns/16999225?file=31447624 > [Accessed 18 January, 2025].

246 Ibid.

247 Ibid.

248 Ibid.

privilege leads into another way an intersectional paradigm can benefit the SRHR agenda. The paradigm exposes structural and systemic inequalities which are otherwise reduced to individual level or country-level problems based on bias, discrimination and stereotyping.[249] These stereotypes and forms of discrimination are often institutionalized yet unspoken.

In essence, radicalising intersectionality means moving beyond individual experiences and towards collective systemic change. It is all about recognising that the struggle against multiple oppressions is interconnected and requires a transformative approach. There is need to use the intersectional lens in fighting to reform the law which enables these oppressions while working hand in hand with the institutions of religion and culture.

4.0 CRITICISMS OF RADICAL FEMINISM

This section navigates the critical evaluations directed towards radical feminism. Despite the fact that radical feminism aims at abolishing patriarchy in order to liberate women and girls from oppression, this feminist thought has also been criticised for some of its arguments and beliefs, that have been described as un-feminist. Concentration will be made on the radical feminist objection of sex work and the transwoman face off. While navigating these criticisms, counter arguments will also be provided to further get a wider appreciation of this train of thought.

4.1 RADICAL FEMINIST OBJECTION TOWARDS SEX WORK

In a society plagued with prejudices and marginalisation, sex work stands as an example of a sector burdened by oppression and stigmatisation. For many years, sex work has been a site for contesting sexuality, race, and patriarchy.[250] Radical feminist objection to sex work has been described as profoundly un-feminist. According to Lauren Rose Warne, for the radical feminists, sex work is a substitute

249 Ibid. page 61.

250 India Thusi, 'Radical Feminist Harms on Sex Workers' (California Western School of Law, 2018) < https://core.ac.uk/download/pdf/232622972.pdf > [Accessed 16 August 2023].

for the sins of patriarchy and something that can lead women away from equity.[251] Radical feminist campaigns in the 1970s and 1980s were focused on the abolition of sex work.[252]

These campaigns characterised sex work as an abuse of human rights, whether it was forced or voluntary.[253] This is mainly because radical feminism was built on understanding female sexuality resultantly, radical feminists viewed sex work as a form of male dominance.[254] Despite the fact that feminists generally agree that sex work should never be criminalised, radical feminists argue that abolition is the ultimate goal because sex should never be an employment option.[255]

However, this rejection of sex work does not meet the reality that criminalisation is actually a serious gender issue which manifests the patriarchy's continued control of women's sexualities. The Penal Code Act of Uganda also criminalises other activities surrounding women's sexualities like sex work, living on the earnings of sex work, aiding and abetting sex work, and operating brothels.[256]

The Sexual Offences Bill, 2024 also proposes to introduce the criminalisation of the buying of sex, thereby, leading to the adoption of the 'Total Criminalisation' model which aims are curbing demand and supply of sex. The way sex work and other related offenses are defined is based on the idea that sex work is an identity as opposed to it being a commercial activity like any other business. This framing

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251 Lauren Rosewarne, 'Radical Feminists' Objection to Sex Work is Profoundly Un-Feminist' (The Conversation, 8 August 2017) < https://theconversation.com/radical-feminsts-objection-to-sex-work-is-profoudly-un-feminist-81333 > [Accessed 21 August 2023].

252 International Committee on the Rights of Sex Workers in Europe, 'Feminism Needs Sex Workers, Sex Workers Need Feminism: Towards A Sex Worker Inclusive Women's Rights Movement' (ICRSE, March 2016).

253 Ibid.

254 Ibid.

255 Ibid (n205), pp. 195.

256 Section 128. Prohibition of prostitution: Any person who practises or engages in prostitution commits an offence and is liable to imprisonment for seven years. Section 126. Brothels- Any person who keeps a house, room, set of rooms or place of any kind for purposes of prostitution commits an offence and is liable to imprisonment for seven years. Section 127. Definition of prostitute and prostitution: In this Code, "prostitute" means a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain, and "prostitution" shall be construed accordingly.

violates constitutional human rights, guarantees of equality, dignity, liberty, privacy, the right to a fair trial, and the right to work and earn a living.[257]

Professor Ben Twinomugisha poses the question, "Is there any compelling justification for criminalising sexual activity between consenting adults because they have chosen to turn it into a commercial transaction?"[258] The criminalisation of sex work is a serious gender issue because it affects women more than men. By taking up multiple partners, female sex workers (FSWs), challenge the entrenched 'patriarchal and bourgeois morality'.[259]

The actions of these women show that they have autonomy over their bodies and do not conform to the societal notions that women are expected to be docile, married, submissive, and non-promiscuous. The continued criminalisation has driven sex work underground, where sex workers have been exposed to violence, harassment, and exploitation.[260] Criminalisation also increases stigmatisation, which is antithetical to improving the health of FSWs since it is particularly detrimental to the HIV/STI prevention and care programmes based on principles of human rights.[261]

The need to dismantle these patriarchal notions that are embedded in the law and enabled by culture and religion remains one of the reasons why there is a need for a radical approach. The continued desire to control women's bodies is not as obvious as it used to be. It manifests itself through such ideas of 'morality' or 'culture' as a means of fighting women's autonomy over their sexualities.

Lauren Rosewarne also makes quite the arguments in defence of sex work, by stating that it is a matter of consent and bodily autonomy. She makes the following arguments against this un-feminist objection:

> *"If the sisterhood can support my decision to swallow contraceptive pills or terminate an unwanted pregnancy, then there is a duty for*

257 Ibid (n55).
258 Ibid (n 94) pp 21.
259 Ibid pp 24.
260 Ibid pp 25.
261 Ibid. pp 27.

> *radical feminists to support my choice to have as much or as little sex as I like and, if I so choose, put a price tag on that sex. If feminists aren't fighting for my right to use my body how I choose, then they have dramatically detoured from their mission".*[262]

The radical feminists make quite a number of assertions about sex work. They make arguments that since sex work involves women's sexuality, it promotes subordination.[263]

According to Catherine Mackinnon, radical feminist theory treats sexuality as a construct of male power.[264] Other radical feminists argue that sex work re-iterates that women have been reduced from whole person to simply vagina and womb.[265] Radical feminists also love to present the "re-victimisation narrative."[266] Under this narrative, radical feminists present testimonies of survivors who have been abused as children, have issues with substance abuse, or mental illnesses, or have had bad industry treatment and are now abolitionists.[267] It is not right that the "broken woman" who is preyed upon by a pimp and, who is reliving her pain as a sex worker is a narrative that this what the sex industry is all about, rather than the reality is that many women enter the sex industry for an abundance of reasons.[268]

Yet another assertion made by radical feminists is that sex work shouldn't exist because certain labour should not be sold. Radical feminists often argue concepts like coerced participation, trafficking, and poor working conditions which are used to make claims that no sex worker truly chose this toil.[269] It is also a fact that in any industry, even in Uganda, there will be examples of poor working conditions, abused employees, and other bad practices. This doesn't make trafficking or coercion unimportant issues, but equally, it doesn't make the presence of these

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262 Ibid (n206).
263 Ibid (n207).
264 Ibid.
265 Ibid.
266 Ibid (n206).
267 Ibid.
268 Ibid.
269 Ibid.

issues in the sex industry as a special case.[270] It should not be right to criminalise an entire industry because of these isolated bad examples.

4.2 THE RADICAL FEMINIST AND TRANSWOMAN FACE-OFF

The dispute between radical feminism and transgenderism began more than forty years ago at the height of the second-wave feminist movement.[271] Trans women assert their womanhood by expressing a profound feeling of being female, often describing it as having a feminine identity within the male physical form. To some radical feminists, the notion of the "female brain" does not exist.[272] According to their perspective, the difference in thought and behaviour between men and women is a result of societal pressures that demand women to conform to notions of sexual allure, nurturing behaviour and submissive attitudes.

Radical feminists who exclude trans women are often referred to as "trans-exclusionary radical feminists" or "TERFs".[273] Some of these trans-exclusionary feminist campaigners themselves generally object to this acronym "TERFs".[274] In recent years, many have preferred to call themselves 'gender critical' – a term that denotes, less a critical approach to gender, and more an emphasis on claiming 'biologically defined' notions of femaleness and womanhood over gender identity and social concepts of gender.[275] In addition to attacking trans people's right to access public toilets in line with their sex/gender presentation, 'gender critical' feminists have criticised social developments such as LGBTIQ-inclusive school education and positive media representations of trans people.[276]

According to lesbian radical feminist, Janice Raymond in her book *The Transsexual Empire: The Making of the She-Male*, "All transsexuals rape women's

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270 Ibid.

271 Michelle Goldberg, 'What is a Woman? The Dispute Between Radical Feminism and Transgenderism' (The New Yorker, July 28, 2014) <https://www.newyorker.com/magazine/2014/08/04/woman-2> [Accessed 21 August 2023].

272 Ibid.

273 Ibid.

274 Ruth Pearce et al, 'TERF wars: An introduction' The Sociological Review Monographs 2020, Vol. 68(4) pp. 681.

275 Ibid.

276 Ibid.

bodies by reducing the real female form to an artefact, appropriating this body for themselves."[277] Other radical feminist scholars like Sheila Jeffreys, have also made arguments that transsexuals are constructing a conservative fantasy of what women should be, which is insulting to such feminists.[278] Although such views are no longer embraced within feminism, a minority of self-identified radical feminists still adhere to them, sparling contentious conflict with trans women and their supporters.

However, not all radical feminists can be described as trans exclusionary. Scholars like Susan Stryker have pointed to the rise of feminist circles that are both radical in their critique of patriarchy and affirming of gender diversity.[279] The Trans inclusive radical feminists "TRAs" have also been at the forefront towards the fight for inclusivity of trans women. Cristan Williams in her paper reviews some of the ways in which the inclusion and support of trans people by radical feminists has been hidden from trans and feminist discourse, thereby creating the perception that radical feminism isn't supportive of trans people.[280] John Stoltenberg, a radical feminist author and long-term partner of the pioneering radical feminist opinion leader Andrea Dworkin, wrote that:

> *"The notion that truly revolutionary radical feminism is trans-inclusive is a no brainer. I honestly do not understand how or why a strain of radical feminism has emerged that favours a biology-based/sex-essentialist theory of 'sex caste' over the theory of 'sex class' as set forth in the work of [Monique] Wittig, Andrea [Dworkin], and [Catharine] MacKinnon. Can radical feminism be 'reclaimed' so that its trans-inclusivity—which is inherent—is made apparent? I hope so."*[281]

It is has become quite common for social media platforms and other popular media outlets to assert that "radical feminists" take issue with trans women.

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277 Janice G. Raymond, 'The Transsexual Empire: The Making of the She-Male' (Beacon Press, 1979).

278 Sheila Jeffreys, 'Transgender Activism: A Lesbian Feminist Perspective' (Journal of Lesbian Studies, 2008) <https://doi.org/10.1300/J155v01n03_03> [Accessed 21 August 2023].

279 Susan Stryker, 'Transgender History,' (Seal Press, 2008).

280 Cristan Williams, '*Recounting the Trans Inclusive History of Radical Feminism' TSQ: Transgender Studies Quarterly Volume 3, Numbers 1–2 (May 2016) Duke University Press pp. 254< DOI 10.1215/23289252-3334463* > [Accessed 6 June 2025].

281 Ibid.

However, lost in these popular representations of radical feminism is its long and courageous trans inclusive history.[282] Through these popular radical feminism versus trans narratives, we also lose the reality that the sound of the 1970s-era women's music movement was actually engineered by an out trans woman because Olivia Records, the radical feminist lesbian separatist music collective, was itself trans inclusive.[283] The trans inclusive nature of radical feminism was also apparent when TERF activist Sheila Jeffreys spoke at the Andrea Dworkin Commemorative Conference where she credited Dworkin as being her inspiration and spoke at length about Dworkin's pioneering book, *Woman Hating*.[284] One should note that this same Dworkin advocated that trans people be given free access to trans medical care or that Dworkin viewed gender identity research as being subversive to patriarchy.

It is true that some radical feminists could be trans exclusionary, but it would be wrong to create a storyline that radical feminism is completely trans exclusionary. These narratives that radical feminism is trans exclusionary can be countered by simply tracing the history of this strand of thought. One can also block out the blogs and media outlets that have been at the forefront of creating these narratives as means of putting women down.

5.0 CONCLUSION

From the genesis of this article, attempts have been made to demonstrate how patriarchy has been infused into the law, culture and religion in Uganda. The major aim of this article has been to bring to the forefront a new kind of feminism to Uganda, which will not take no for an answer. A kind of feminism that will fight for autonomy of women's sexualities. A feminism that makes SRHRs a concept that can be enjoyed by all women regardless of class, age, sexuality, or tribe.

Radical feminism emerges as a potent and thought-provoking paradigm that not only identifies the oppression faced by women but also offers potential solutions

282 Ibid 255.
283 Ibid.
284 Ibid.

to dismantle these deeply rooted inequities. It unearths the underlying power dynamics and patriarchal structures that perpetuate women's oppression in Uganda. Its emphasis on recognition of the interconnections between various forms of oppression such as sexism and classism, offers a key understanding of women's experiences. This comprehensive perspective prompts society to address the root causes rather than merely treating the symptoms of women's marginalisation.

This article discussed patriarchal norms rooted in the three evils (law, culture and religion) as some of the root causes of women's oppression in SRHR and delved into the main issues surrounding sexualities, abortion rights, motherhood, and sexual and gender-based violence. The article had an in-depth analysis of the legal frame work governing SRHRs in Uganda, and a conclusion was made, that it was lacking in so many ways. This framework presented more challenges than opportunities for women which demonstrated this article's arguments that the law is one of the greatest tools of patriarchy.

Central to the prospective solutions offered by this article in championing for a radical feminist approach was the concept of 'bodily autonomy'. By championing women's right to make choices about their bodies, including issues surrounding assisted reproductive technologies and abortion rights, radical feminism not only hopes to empower Ugandan women but also challenges societal perceptions that have historically objectified and controlled them. The discussion of sexual and gender-based violence tried to reveal how culture as tool of oppression has enabled this kind of violence to women. It also demonstrated that that public/private divide that exists in which some matters are looked at as domestic issues in which the state should not get involved.

The article's discussion on sexualities and intersectionality also illustrated the multiple oppressions that women with different identities face. It delved into a radical feminist point of view that calls for action and dismantling of some of these oppressions that have become norms.

Uganda is ready for radical feminism, and it has been ready for a while. It will not only need women to champion this fight but will also need men to join in this fight to finally attain gender equity in Uganda. It truly starts at the grassroots, with families and how the parents raise their children, either in an environment that promotes equity or one that does the opposite. This fight will require collaboration between various stakeholders from both the state and the citizens themselves. This article is a call for Ugandans to have a change in their mindsets, to refuse to settle for less and to adopt more radical approaches to achieve the objective of gender equality. It is a call for women and men to take to the streets and fight for the SRHR rights of all women and girls in Uganda.

To all the feminists in Uganda, your work has been quite impeccable, but it is far from over!

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THE INSURANCE SECTOR OF UGANDA: BEYOND THE LAW

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Abstract

Insurance Penetration in Uganda remains significantly low despite its potential to provide financial security and economic stability. Notwithstanding Uganda's well-regulated insurance sector, it remains faced with unique challenges, that have informed its low insurance penetration rate. Key challenges include inadequate public awareness, mistrust in insurance providers, weak enforcement of mandatory insurance policies, and the financial constraints faced by many Ugandans. This paper analyses the underlying reasons for the low insurance uptake within Uganda, critically examining some of the regulatory gaps and the impact of informal insurance. The paper further proposes policy recommendations aimed at enhancing insurance accessibility and regaining public trust for the Insurance Sector.

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"If you can meet with Triumph and Disaster

And treat those two impostors just the same;

If you can bear to hear the truth you have spoken

Twisted by knaves to make a trap for fools,

Or watch the things you gave your life to, broken,

And stoop and build them up with worn- out tools"[1]

-Rudyard Kipling-

The significance of Insurance in navigating life's uncertainties brings Rudyard Kipling's Poem titled *"IF"* to mind, with its themes of resilience and preparedness in the face of adversity;

This poem forms a great foundation for this paper, Rudyard Kipling emphasizes the need for one to remain calm, focused, and resolute in the face of adversity. Given this current contemporary society, adversity is a given, and generally life will often meet its "Highs and Lows." Therefore, insurance as a form of preparation against adversity becomes of great necessity in preparing for the most difficult and least expected misfortunes. I explore some these aspects in their full context in the following sections.

1.0 INTRODUCTION

Insurance can simply be understood as a means of protection against financial loss.[2] This protection arises from an insurance contract that is defined under Section 2 of the Insurance Act Cap. 191 to mean:

> *"A contract under which one party (insurer) in exchange for a premium, agrees with another party (policyholder) to make a payment for providing*

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1 If, by Rudyard Kipling ('Brother Square- Toes'– Rewards and Fairies)

2 <https://ira.go.ug/cp/uploads/English%20Handbook%20final.pdf> [Accessed on 19th October 2024].

> *a benefit to the policyholder or another person on the occurrence of a specified uncertain event which if it occurs, will be adverse to the interests of the policyholder or to the interests of the person who will receive the payment or benefit."*[3]

This definition has further been stressed through case law, forexample, in *Prudential Insurance Co v Inland Revenue Commissioners,*[4] court defined an insurance contract as one where an insurer promises to pay a sum upon the occurrence of a specified event, potentially adverse to the insured's intrest, for consideration.

On the other hand, insurance penetration is the measure of the relative contribution of the insurance sector to the GDP of a country. It is used as an indicator of the insurance sector development within a country and is calculated as the ratio of total insurance premiums to gross domestic product in a given year.[5] Whereas, it does not specifically indicate how many people actually have insurance coverage, nor does it signify the quality of coverage, insurance penetration together with insurance density collectively analysed provide a key measure used to assess the level of development of a country's insurance sector.

Currently, a total of 139 Insurance players are authorised to carry on Insurance business within Uganda.[6] The players include two (2) Re-insurers, 20 Non-life Insurers, eight (8) Life Insurers, five (5) Micro insures, two (2) Health Membership Organisations (HMOs), four (4) Reinsurance brokers and 50 Insurance Brokers.[7] Despite this, Uganda's Insurance penetration remains too low, currently standing at 0.876%[8] as compared to its neighbours i.e. Rwanda, which stands at 1.6%, Kenya at 2.6%, Ghana at 1.1%, Senegal at 1.7%, Botswana at 2.6%, Namibia at 9.3%.[9]

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3 Section 2.
4 Prudential Insurance Co v Inland Revenue Commissioners (1904) 2 KB 658
5 Life and non-life insurance penetration in selected regions globally 2020-2024, published by Jennifer Rudden, June 21st, 2024.
6 As of 3rd January 2024, accessible on the Insurance Regulatory Authority Website, <https://ira.go.ug/> [Accessed on 23rd November 2024].
7 Ibid.
8 The Annual Insurance Industry Market Report, 2022.
9 Atlas Insurance Reports 2024, Africa: Insurance Penetration rate in 2022.

Uganda's Insurance sector is faced with several challenges perhaps contributing to its low Insurance penetration as compared to some of Uganda's regional peers as highlighted above. Ignorance and glaring insurance knowledge gaps, among other factors, existing within Uganda's populace are of key consideration while analysing Uganda's low Insurance penetrability. Other social and economic concerns are of further consideration.

Therefore, this paper looks at the purpose of insurance Law, the legal framework governing the insurance business in Uganda and further interrogates both the social and economic aspects that have profusely contributed to Uganda's low Insurance penetration. It proposes some reforms that can be undertaken by regulators and legislators to ensure a much more effective and adequate insurance business in Uganda.

1.1 BACKGROUND TO INSURANCE LAW IN UGANDA

The Insurance Industry in Uganda dates back in the colonial era with branches of foreign insurance companies established in Uganda especially from Britain, America and India.[10] This prevailed until the establishment of the East Africa General as the first local insurance company in 1946.[11]

The Insurance sector remained unregulated until 1964 with the commencement of the National Insurance Corporation Act[12] that established the National Insurance Corporation. This was the off set of subsequent legislation, for example, in 1978 when the Insurance decree came into force. However, this was replaced with the 1996 Insurance statute that established the Uganda Insurance Commission.[13] The Commission had a regulatory mandate, with a specific objective to ensure effective administration, supervision, regulation and control of the business of insurance in Uganda.[14]

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10 <https://ira.go.ug/cp/uploads/IRA%20FACTS%20Final.pdf> [Accessed on the 19th October 2024].
11 Ibid.
12 Chapter 314, commenced on 30 July 1964.
13 Section 14 of the Insurance Statute.
14 Short title of the Insurance Statute.

In 2011, the Insurance (Amendment) Act was passed which incidentally oversaw the renaming of the Uganda Insurance Commission to the current Insurance Regulatory Authority with the mission of creating an enabling Regulatory Environment for a sustainable, Inclusive and Reliable Insurance Industry.[15]

Regardless of this law reform in the insurance sector, the Finscope Report of 2018.[16] seven (7) years later, indicated only a 1% of Ugandan adults to have taken up insurance cover. It is an undeniable fact that Uganda's insurance penetration rate remains significantly low due to various factors that I discuss in detail later in this paper.

1.2 PURPOSE OF INSURANCE

Insurance is a crucial aspect of any modern society that provides financial protection and adequate preparation for disaster. A more pragmatic illustration would be to imagine a billion's worth warehouse burning to ashes, unexpectedly, with all the merchandise, or a life's savings mansion destroyed to pieces by an earthquake. One historic example, in recent history, is the 2008 Hurricane Katrina incident. Insurance companies in the U.S settled claims totalling to $40.6 billion in disbursing rebuilding funds, among other compensation costs, to their policy holders after the hurricane.[17]

Since no one plans sickness or foresees accidents, health insurance, as an example, could be a financial shield to these unexpected medical costs that are often high. Another example could be with property, an expensive car for instance, that may be just an accident away from perishing.

Therefore, insurance becomes more than necessary in meeting Triumph and Disaster, and treating those two imposters just the same, as Rudyard Kipling

15 <https://ira.go.ug> [Accessed on the 19th October 2024].
16 Fsduganda; Report on Uptake of Insurance Services in Uganda 2018.
17 <https://www.iii.org/press-release/insurers-paid-more-than-40-billion-in-hurricane-katrina-related-claims-majority-settled-without-dispute-022807> [Accessed on 12th October 2024].

illustrates above. Given these uncertainties, Insurance thus becomes vital in managing risk, providing financial security and promoting economic stability.

2.0 REGULATORY AND LEGAL FRAMEWORK GOVERNING THE INSURANCE SECTOR IN UGANDA

2.1 LEGAL FRAMEWORK

The insurance sector in Uganda is governed by the Insurance Act of Uganda Cap.191 that expressly provides for the regulatory framework as seen below and, a detailed Insurance complaint handling procedure as shall be discussed at a later stage in this paper. The main objective of the Act is to ensure effective administration, supervision, regulation and control of the insurance business in Uganda.[18]

The necessity for the enactment of the Insurance Act has been buttressed in the decision of the Tax Appeals Tribunal in *Gold Star Insurance Company ltd v Uganda Revenue Authority* were the tribunal made the following observation;

> *"There is need to streamline how the premium is rationed, in order to balance the payment of the insured claims, costs and profitability so that the insured are not left at the mercy of the insurers. In order to protect the customers of the insurance company the Insurance Act was passed to govern the insurance sector."*[19]

In a bid to operationalise the substantive law, different regulations have been enacted such as the Insurance (Licensing and Governance) Regulations, 2020; the Insurance (Reinsurance) regulations, 2020; the Insurance (Index Contracts) Regulations, 2020; the Insurance (Mobile insurance) regulations, 2020, the (insurance Training college) Regulations, 2020; the Insurance (fees) Regulations, 2020; the insurance Appeals Tribunal Regulations, 2019 among others. However, there is the need to enact regulations governing the handling of claims stemming from Motor third-party liabilities as I expound much later in this paper.

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18 Insurance Act Cap 191, Long title.

19 *Gold Star Insurance Company Ltd v Uganda Revenue Authority* Application No.9 of 2013.

2.2 REGULATORY FRAMEWORK

The insurance sector in Uganda is regulated by the Insurance Regulatory Authority (IRA)[20] that was first established under section 14 of the now repealed insurance statute 1996 and has its continued functionality established under section 9 of the Insurance Act Cap 191. The Insurance Act Cap 191 spells out objectives that guide the Authority in the execution of its mandate as follows;

a) to promote and facilitate the maintenance of a sound, efficient, fair, transparent and stable insurance sector;
b) to promote and uphold public confidence in the insurance sector;
c) to protect the interests of persons who are, or who may become, policy holders of insurers or customers of other licensees;
d) to regulate and supervise licensees on a risk-sensitive basis;
e) to promote effective competition in the insurance sector in the interests of consumers, the growth and development of the insurance sector and the development of an inclusive insurance sector.[21]

The Act further expressly provides for the general functions of the Authority and of greater relevance to this paper include the following;

a) To regulate, supervise, monitor and control the insurance sector.
b) To receive and resolve insurance related complaints
c) To promote awareness of, and undertake public education concerning, the insurance sector.[22]

It follows that the Authority has the mandate to safeguard the rights of insurance policy holders and insurance beneficiaries to any insurance contract. That notwithstanding, Uganda's insurance sector is met with constant challenges lying mainly with its market base ranging from legal and to social challenges. These

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20 The Background to its establishment was a consequence of the government's adoption of the liberalization and privatization policies which ended its role of directly engaging in the provision of goods and services and taking on the role of supervisor or regulator. (Insurance Regulatory Authority of Uganda, Strategic Plan 2022/23 – 2024/25)

21 Section 10.

22 Section 11.

challenges, while they are still prevalent, have informed in various ways Uganda's low insurance penetration rate.

3.0 CHALLENGES TO UGANDA'S INSURANCE SECTOR

3.1 HIGH TAXATION ON INSURANCE PREMIUMS

It is imperative to bear in mind from the onset that insurance is a business like any other, that attracts profits and therefore is subject to tax. In order to understand this, it is important to comprehend how the Insurance business operates as summarised below:

> *"In order for a person to get insured, he or she has to pay a premium to the insurance company. A premium is defined by the Black's Law Dictionary 8th Edition p. 1219 as the periodic payment required to keep an insurance policy in effect. It is from the premiums collected that an insurance company indemnifies an insured against any loss or damage including the liability to pay damages or compensation upon the happening of a specified event. An insurance company also receives income from the said premiums to meet its operation costs. In the event the income exceeds expenditure it makes profits. There is need to streamline how the premium is rationed, in order to balance the payment of the insured claims, costs and profitability so that the insured are not left at the mercy of the insurers."*[23]

Insurance Premium Tax (IPT) is a tax that insurers often have to pay on the premiums that they receive from their policy holders. Insurance Premium tax can be related to insurance main in two ways:

> "Firstly, a tax that could be directly imposed on insurance premiums paid whether it is an insurance-specific tax or a general consumption tax, i.e. value-added tax; secondly, part of insurance premiums could be reimbursed through income tax deduction. Insurance premium income tax deductions can vary by product, policy duration, type of beneficiaries, and so on, sometimes with maximum deductible amounts in countries where such deduction is permitted."[24]

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23 Ibid 19.

24 Tetsutaro Shindo and Craig Thorburn, Developing Insurance Markets: Do fiscal incentives help long term life insurance development? (June 2020).

This tax is premised on section 4 of the Income Tax which provides that, a tax to be known as income tax shall be charged for each year of income and is imposed on every person who has chargeable income for the year of income.

For context, section 16 is more relevant to this paper, it provides for chargeable income arising from the carrying on of short-term insurance business. Section 16 (3) defines what amounts to insurance business as taxable under the Income Act to mean;

> *Insurance business" means the business of, or in relation to the issue of, or the undertaking of liability under, life policies, or to make good or indemnify the insured against any loss or damage, including liability to pay damages or compensation contingent upon the happening of a specified event.*

Section 16(3) (c) is of necessity to note since it exempts life insurance business from the ambit of short-term insurance business. Whereas taxation may not be a problem, it has an indirect effect on the premiums set by insurance companies. IPT will quite often determine whether to make premium on a certain policy high or low.

It follows that Insurance companies will most likely charge additional costs on premiums issued to cover for taxes levied. Ambrose Tuhairwe, the Head of Tax and Treasury at Old Mutual stresses the impact of tax on insurance premiums issued:

> *"They were forced to increase the cost of insurance services because of taxes citing the recent increase in withholding tax from 6-10 percent at the start of this financial year. Tuhairwe adds that the increase in the cost of insurance policies affected the demand for insurance policies."*[25]

Despite numerous efforts to petition government to reduce the taxation on insurance policies, there has not been fruit yielded as noted by Mr. Ibrahim

[25] Insurance Companies restless over increasing taxation, accessible on <https://www.independent.co.ug/insurance-companies-restless-over-increasing-taxation/> [Accessed on 12th October 2024].

Lubega Kaddunabbi, the Chief Executive Officer (CEO) Insurance Regulatory Authority (IRA).[26]

It is thus crucial to revisit some of these taxation rates in order to make insurance more affordable and thus available to the people. Disregarding the aspect of high Insurance Premium taxes may do so little to improve, if not to continue affecting the insurance penetration negatively.

4.0 THE QUESTION OF PUBLIC TRUST IN THE INSURANCE SECTOR

It shall be the objective of the IRA to promote and uphold public confidence in the insurance sector.[27] In the pursuit of achieving this statutory objective, the Authority is mandated with the obligation under section 11, among several other functions thereunder to regulate, supervise, monitor and control the insurance sector. On numerous occasions, the public trust in the insurance sector of Uganda has faded away due to the failure of insurers to honour their obligations as seen across a number of decided cases for example *Scorpion Holdings Ltd v Lion Assurance Co. Ltd* where Justice Henry Peter Adonyo observes:

> *"From the above, I must point out that that while this case is simply between two parties who are before this court , it actually points to the fact that there is something fundamentally wrong with the insurance industry in Uganda and arising from this decision , it is clear to me that the crucial thing for the insurance industry in Uganda to do is to always honour their obligations under insurance policies issued to avoid the public losing trust in the industry for where an insured discharges his or her burden under an insurance policy contract an insurance company must by necessity meet its obligation without letting matters spiral out of control by the courts coming in to act as referees. The insurance industry must practice the honesty they require from their clients to prove their worth."*[28]

The case as one of the many examples of the failure of honouring obligations concerned the plaintiff Company losing valuable equipment through acts of incendiarism or arson and therefore consequently sought indemnification from

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26 Supra.

27 Section 10(b) of the Insurance Act Cap. 191.

28 *Scorpion Holdings Ltd v Lion Assurance Co. Ltd* Civil Suit No.221 of 2013, Ruling by Justice Henry Peter Adonyo delivered on the 3rd day of March 2015.

the defendant Insurance Company under the Contractors Plant Machinery Policy. Court found that the Insurance company had failed to heed to its contractual obligations.

Such acts and omissions gradually rapture the public trust within the Insurance industry and ultimately negatively affects the number of people that take out insurance policies based on insurance companies failing to honour their contractual obligations. Rethinking the role of trust in insurance will with no doubt have significant effects on the growth and development of our insurance sector, which as a result could have encountered a significant rise in the number of people taking out insurance policies as noted below:

> *"Trust has always been at the foundation of the industry, of course; customers buy insurance based on the belief that insurers will honour their commitment to pay out claims promptly and sustain promises over time horizons that can extend across decades. Certainly, high degrees of trust remain a hallmark of the world's top insurance brands. But, today, declining levels of trust in the industry have become a competitive liability."*[29]

In addition to the above, while emphasising the role of trust as the cornerstone to our insurance sector, the Insurance Appeals Tribunal in the case of *Rosette Asiimwe v UAP Old Mutual Life Assurance* further, stated:

> *"At the centre of this dispute is poor customer service from the insurer in the form of lack of issuance of timely premium policy statements and none responsiveness to email correspondence. The tribunal further observed that the insurance sector in Uganda is still fragile and suffers generally from lack of public trust and confidence. The public treats insurance with great suspicion and poor customer service by insurers only erodes the trust in the sector."*[30]

More pragmatic steps have to be taken, especially by the regulatory Authority, to ensure the restoration of public trust within the insurance sector of Uganda. One step in this direction can be deduced from the Insurance Regulatory Report which states as follows under its Strategic Objective 2:

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29 EY 2024 Global Insurance Outlook Report, Volume 2.

30 *Rosette Asiimwe v UAP Old Mutual Life Assurance*, Insurance Appeals Tribunal Application No.001 of 2023 (Arising from Complaint No. IRAB/COMP.141/08/22).

"In light of the functions of the authority to promote and uphold public confidence in the insurance sector as well as protect the interest of persons who are, or who may become policy holders of insurers or customers of other licensees, this objective shall be operationalised through five strategies. These are promoting Good Governance in Insurance Business; Enhancing IRA's board capacity; Undertaking constant engagements with relevant stakeholders; advising the government on insurance-related matters; and protecting the interests of policy and beneficiaries."[31]

4.1 INSURANCE FRAUD AND PUBLIC TRUST

On the flip side, persistent insurance fraud continues to undermine public trust and deter wider insurance uptake in Uganda. While the sector grapples with issues of awareness and regulation, the internal integrity of insurance operations presents an equally significant challenge. Insurance fraud manifests in various forms: staged motor accidents, ghost health claims, inflated hospital bills, insider collusion, and fake documentation. In Uganda, IRA noted a 15% spike in suspicious claim activity between 2021 and 2023.[32]

The implications are wide-reaching: genuine claimants experience delays, premium costs are inflated to cover fraud-induced losses, and the credibility of insurers is questioned. Combating this will require not only strict enforcement under the Insurance Act but also technological innovation such as blockchain technology and AI-powered fraud detection systems, which have shown promising results in India and the UK.

Unless insurance fraud is tackled decisively, efforts to expand coverage and public confidence will remain limited, regardless of regulatory or educational interventions.

5.0 GLARING INSURANCE KNOWLEDGE GAPS

This can be argued two-fold, the first limb of the argument covering the numerous cases that end up in courts of law arising from technicalities involved in the

31 Insurance Regulatory Authority Strategic Plan.
32 IRA Annual Report (2023).

insurance policies taken. The second arm of this argument centres on the focal point to this paper – the low Insurance penetration. It can be argued, as I will discuss later, that the perception biases surrounding the Insurance sector is a limiting factor to very many people getting insurance policies.

5.1 TECHNICALITIES INVOLVED IN HANDLING INSURANCE CONTRACTS

Firstly, it is trite law that Insurance Contracts are governed by a higher standard of utmost good faith (uberrimae fidei) which is not the case with other contracts. This position has been buttressed in a number of cases, however for this context, the decision of Lord Mansfield is of great relevance as here below noted:

> *"If the true facts are concealed in any way, whether fraudulent or not, then the risk taken by the insurers may be different from the risk they intended to take in which case the policy would be void. This was seen as a natural consequence of an imbalance of knowledge under which the Insured (usually) has sole knowledge of most of the key information which should form the basis for a risk assessment by the Insurer."*[33]

It should however be noted that this duty is reciprocal as observed in the instant case. Lord Mansfield went on to hold that if an insurer withheld material facts, then the policy holder could declare the policy void and recover the premium.[34] The qualification to the duty of disclosure was observed as follows:

> *"either party may be innocently silent, as to grounds open to both, to exercise their judgment upon.... An under-writer cannot insist that the policy is void, because the insured did not tell him what he actually knew.... The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation."*[35]

This duty was further emphasised in the case of *Orient Insurance Brokers Ltd v Transocean (U) Ltd,*[36] were court stressed the applicability of section 16 of the

33 *Carter v Boehm* (1966) 97 ER 1162.
34 Ibid.
35 Ibid.
36 *Orient Insurance Brokers Ltd v Transocean (U) Ltd* ACCA 55/1995.

Marine insurance Act 2002, which provides for the principle of good faith, to be applicable to the ordinary insurance business in Uganda. This being the case presents rather a challenge while handling insurance claims. This is because, the general duty of good faith manifests itself in at least two important Aspects; the first being a positive duty to disclose material information and the second being the duty not to make any material misrepresentation.

However, it appears that the good faith duties are significantly more onerous for the insured than the insurer which may require a review of our Insurance Law to do away with the many unfair aspects of the current law.[37] The Hon. Justice Stephen Musota (as then was) in *National Insurance Corporation Ltd v Kakugu Sylvan,*[38] further gives reasons for this position as seen below:

> *The Insured can be unaware of their duty to volunteer information not specifically asked for by the Insurer on the proposal form.*
>
> *The law requires the Insured to assess whether information would be relevant to the assessment of risk by a "prudent underwriter." This test of materiality, which underlies the rules on disclosure and misrepresentation, assesses the Insured by reference to the professional knowledge of the Insurer which is unfair.*
>
> *The Insured can still be in breach even if their error was reasonable in the circumstances; for example, if a question was unclear or required specific technical knowledge which they did not have.*
>
> *The only remedy for breach of good faith duties is retrospective avoidance of the entire contract which is unfair too.*
>
> *The Insurer is not required to show that the non-disclosure or misrepresentation had any causal link to the claim in order to avoid the contract, for example, if the claim was submitted relating to flood damage the Insurer could avoid the whole contract if Insured had failed to disclose that their alarm system was not functioning.*
>
> *Intermediaries, including brokers, are generally treated as being agents of the Insured. As such the Insured is held responsible for any failings on their part. That is so even where in practice, the intermediary is most closely connected to the Insurer.*

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37 *National Insurance Corporation Ltd v Kakugu* (Civil Appeal No. 040 of 20150 (2016) UGHCCD 136 (8 November 2016).

38 Ibid.

It is thus arguable that such legal requirements put an onerous duty of disclosure on the part of the policy holder. This turns out to be problematic to policy holders especially in cases where they might lack technical knowledge. An attempt to such a situation was evident in the case of *Nakisenyi & Anor v Insurance Company of East Africa (U) Ltd,*[39] wherein the defendants (insurance company) argued that cause of death of the assured in the instant case appeared to be related to HIV/AIDS, which was inconsistent with the medical examination results that formed the basis of the insurance policy and the only logical explanation is that it was fraud and misrepresentation. Court held the defendant insurance company had failed to prove fraud and misrepresentation on part of the Assured and the plaintiffs who were the beneficiaries of the insurance policy. The reason was simply because there was no clear and convincing medical evidence to prove the facts that the assured died as a result of ISS and PCP that the defendants claimed.

It is further important to note that the current law makes payment of premium a condition of the existence of a valid Insurance contract under section 62(1) of the insurance Act Cap 191 which specifically provides:

> Subject to subsection (2), the insured shall pay in full the premiums payable under the insurance contract on or before the date of inception of the policy or renewal of the policy.

The intention behind this position of the law is to protect the solvency of the Insurance industry and curtail the exposure of insurers to liability for premiums which have not been received.[40]

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39 *Nakisenyi & Anor v Insurance Company of East Africa (U) Ltd* (Civil Suit No.652 of 2013) (2016) UGCommC38 (16 March 2016), Judgment by Hon. Lady Justice Elizabeth Jane Alvidza delivered on the 16th day of March 2016.

40 *Tropical Bank Limited v Goldstar Insurance Company Ltd,* in the Insurance Appeals Tribunal of Uganda at Kampala Appeal No. 4 of 2023. The case further emphasised that Payment of premiums by an insured is generally governed by the terms and conditions of the insurance policy and relevant statutory regulations. The specifics may vary based on the type of insurance and the terms outlined in the policy. In this case, the policy document premium payment was a condition precedent to the validity of the contract. The consequences of the failure to pay premiums by the insured within the stipulated time would render the policy null and void.

However, the IRA is mandated by law to regulate payment of premiums.[41] Additionally, provides that, an insurer or Health Membership Organisation (HMO) shall not issue any policy of insurance if the premium rates and commission rates contravene any regulations made by the Authority under subsection (2).[42] Further, the Act stipulates that the Authority may prescribe minimum premium or maximum commission rates for any class or type of insurance business.[43]

This statutory duty becomes of great importance in as far as regulating the insurance sector is concerned to ensure that insurers comply with such statutory requirements. This ultimately prevents the over exploitation of insurers in the bid of maximising profits that many times will instead hold back people from getting insurance policies and thus keeping the penetration levels low.

5.2 PERCEPTION BIASES AND KNOWLEDGE GAPS SURROUNDING THE INSURANCE SECTOR

It has been widely observed that most people in Uganda think insurance companies do not pay claims and avoid it altogether.[44] Which is a common negative attitude among the very many stereotypes surrounding Uganda's insurance sector. This is primarily as a result of loss of public trust of the sector as discussed in depth above, but also low awareness levels of the insurance sector as highlighted by the Insurance Regulatory Authority Strategic Plan of 2022/23-2024/25.

Uganda's informal sector is widely untapped into, yet people face insurable risks daily. Policy holders should have an adequate understanding of the risks associated with the technicalities involved in insurance transactions. Such knowledge gaps met with the wide perception biases surrounding this sector end

41 Section 62 (2).
42 Section 63 of the Act.
43 Subsection (2) of the Act.
44 Daily Monitor article, Perceptions about insurance industry, on January 02, 2021, accessible online via <https://www.monitor.co.ug/uganda/business/insurance/perceptions-about-insurance-industry-1722366> [Accessed on 12th October 2024].

up having significant effects on the general insurance uptake and penetration rates.

This notwithstanding, there is a great projection into the growth of Uganda's Life insurance market to about US $ 1.01 bn in 2025.[45] This stride has been attributed to the growing middle class and the increasing awareness of the importance of financial protection.[46]

6.0 THE QUESTION ON MOTOR THIRD PARTY INSURANCE IN UGANDA

Motor third party insurance is by far a classical example of perception biases if not the ignorance in general about insurance law and its benefits in Uganda. Motor third party insurance is a type of insurance policy which pays the legal liabilities of a motorists to the third-party bodily injuries including death while the vehicle is being driven on public roads.[47]

This type of insurance is governed by the Motor Vehicle (Third Party Risks) Act, and makes it compulsory for any vehicle, van or motorcycle for private or commercial use to undertake this third-party insurance cover. Insurance of such a person, or persons or classes of persons as may be specified in the policy in respect of liability which may be incurred by him or her or them in respect of death or bodily injury to another person (third party) caused by or arising out of the use of a vehicle on the road.[48] This same position has been emphasized in case law for example in *Agua Plumbing (U) Ltd v United Assurance Co. Ltd*, where court noted:

> *"On the other hand, 'a Third-Party motor vehicle insurance policy" (here in Uganda) covers the insured only in respect of death or personal injury occasioned to a third party as a result of an accident which the motor*

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45 Statista, Life insurance – Uganda, accessible via <https://www.statista.com/outlook/fmo/insurances/life-insurance/uganda> [Accessed on 12th March 2025].

46 Ibid.

47 Definition as provided by the Uganda Insurers Association website accessible on <https://uia.co.ug/faq/what-motor-third-party-insurance> [Accessed on 12th March 2025].

48 Section 3 of the Act.

> *vehicle of the insured causes. It does not cover the insured in respect of damage to his/her motor vehicle sustained on the road or, damage his/her motor vehicle may cause to any other motor vehicle or property."*[49]

This insurance is paid every year and renewed by law however most people look at it as a coercive measure as opposed to its intended purposes. Speaking of coercion brings to mind the painful story of Elvis Basudde;[50] a victim of the 9th of March 2019 road traffic accident, that involved a collision of an Isuzu truck and a commuter taxi, leaving him fractured and admitted to international hospital Kampala. His story speaks to the so many Ugandans that find trouble in seeking compensation from insurance companies arising from accident claims made under the third-party policy. His story further speaks to the many Ugandan road users who don't know the use and aim of paying for Motor third party insurance, especially where he notes:

> *"I decided to look for the owner of the vehicle that caused the accident. When I eventually found him and shared my frustrations, he agreed to report to NIC. However, he didn't even know that he had an insurance cover with NIC. He did not even know where NIC was located. He said further that he had just bought the third-party insurance from a certain petrol station. We just buy it because the police will arrest you if you don't have one, he added. But do people ever get this money from insurance? It seems to be their deal to eat free money, he told me."*[51]

This is a perfect example of the very many road users that pay for this insurance but do not know exactly understand how it operates. In the 2023 Traffic Accident report, a total of 432 accidents were recorded, with 97 being fatal accidents, 202 being serious accidents, 133 being minor accidents. In all these a total of 100 victims lost lives while 324 sustained injuries.

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49 *Agua Plumbing (U) Ltd v United Assurance Co. Ltd* Civil Suit No. 431 of 2002, Judgment by Hon. Justice F.S Lugayizi (as then was) delivered in the commercial court on the 15th day of March 2004.

50 Getting 3rd party insurance compensation, a camel & needle affair, New Vision Sep 22, 2020, accessible on <https://www.newvision.co.ug/category/business/getting-3rd-party-insurance-compensation-a-ca-NV_5676> [Accessed on 12th March 2025].
The Article further explains how very many insurance companies make money off frustrating settling claims and generally making payments, especially where it mentions that in general the insurance business is believed to be a multi-million business, thriving on dodging payments.

51 Ibid.

Despite this being the unfortunate truth, it is argued that the Motor Third Party insurance remains under-utilised ranging from lack of awareness to the deliberate efforts by Insurance companies to frustrate the payment of Victims/settlement of claims.[52] It is remains evident, as argued before, that the level of awareness among motorists concerning motor third party insurance is low which significantly affects their ability to file claims to their insurers following an accident.[53] A Survey conducted by the Uganda Insurance Regulatory Authority[54] indicated a general concern by Players, Vehicle Owners and transport associations that the increment of stamp duty on all the non – life premiums is a major deterrent to the development of the sector as this led to non- compliance. The survey findings indicated a number of 'boda boda' cyclists were reluctant to purchase the Motor Third Party Policy due to these increments.

7.0 ENFORCEMENT MEASURES IN PLACE

It remains a general observation that the current enforcement measures of the Motor Third Party Liability Insurance (MTPL) are made less effective especially due to the bureaucratic procedures involved in making this nature of claims, on the one hand.

On the other, however, the general enforcement by the traffic police is seen as a coercive measure to ensure compliance of road users in as far as having Motor Third Party Insurance policies is concerned. It has been argued however, that an establishment of a clear framework governing the Motor Third Party Liability through introduction of clear compensation guidelines and implementation of claims of settlement practices on the part of the insurers would be key in fulfilling the objectives of Motor Third Party Insurance.[55]

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52 Influence of awareness on the usage of motor third party insurance: case study of Kampala district.

53 Ibid.

54 Baseline Survey on the Insurance Industry in Uganda by the Uganda Insurance Regulatory Authority (June 2014).

55 Ibid.

8.0 THE POSITION ON MICROINSURANCE AND INFORMAL INSURANCE IN UGANDA

Microinsurance can be simply understood as a financial arrangement to protect low-income people against specific perils in exchange for regular premium payments proportionate to the likelihood and cost of the risk involved.[56] This definition has further been broken down as:

> *"Firstly, micro can be understood as a characteristic of the financial situation of the clientele, i.e., an insurance targeted at low-income (and financially marginalised) people in developing countries. Secondly, micro can be understood as characteristic of the product, i.e., an insurance offering limited benefits for small premiums. Thirdly, micro can be understood as characteristic of the process by which the schemes are created and administered."*[57]

Thus, a broad conclusion from these definitions can be made that Microinsurance is a type of insurance mode specifically designed for low-income groups. Uganda's Insurance Act gives providence for microinsurance under section 1 to mean insurance for the protection of low-income people against specific perils in exchange for regular premium payments proportionate to the likelihood and cost of risk involved. The Act further defines a microinsurance organization to mean a person holding a microinsurance organization license. Section 34(d) stipulates further that a microinsurance license authorizes the holder to carry on microinsurance business only.

The crux of microinsurance is to mitigate the risks of low-income earners. This is often made possible through offering affordable and low priced microinsurance products in order to encourage low-income earners to take up such policies. It is important to note that Uganda's microinsurance, even when it has been referred to as the "Industry's Silver bullet" is not as developed as the regional counterparts regardless of its enormous potentials.[58] In addition, the FINSCOPE Survey indicates an acute possibility of development of Uganda's microinsurance sector,

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56 Churchill C., ed. (2006). Protecting the Poor: A Microinsurance Compendium. Geneva: ILO.

57 Dror, David & Piesse, David, What is Microinsurance? SSRN Electronic Journal. 10.2139/ssrn.2434501.

58 Uganda Insurer's Association Report, Insurance Today (May 2024).

however this has to be met with deliberate consumer sensitisation into the products, identification of the different distribution channels and regulating Uganda's informal sector.[59]

While speaking at a stakeholder meeting organised by the Bank of Uganda and the United Nations Capital Development Fund (UNCDF), Principal and managing director at the Microinsurance Centre in Miliman, Micheal McCord expounded on Uganda's microinsurance industry by making the following remarks;

> *"We must make microinsurance that works for both insurers and the insured. Our regulations have not facilitated microinsurance, yet it has the potential to grow up take in the country. For instance, many taxi drivers and boda bodas in Kampala have informal insurance but who regulates them?"*[60]

He further observed the need for insurers to generate products that speak to the needs of the ordinary customer and also ensure that pricing and distribution of the product do not add extra costs.[61] It is necessary to focus on the growth of the microinsurance sector of Uganda especially were 41.93% people in Uganda still live in poverty.[62] What this essentially means is that nearly half of Uganda's population is still in poverty and thus the need to prioritise microinsurance which might be more affordable as compared to traditional insurance covers.

9.0 THE GROWING AND SEEMINGLY OPERATIVE INFORMAL INSURANCE

Informal Insurance can be understood to mean alternative actions taken by people with the intention of protecting themselves against any form of financial risk. This

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59 FINSCOPE Uganda 2023 Findings published on 11th April 2024 in Kampala.

60 New vision, Insurers eye Digital innovations to grow Micro-Insurance (May 07, 2024), accessible online; <https://www.newvision.co.ug/category/business/insurers-eye-digital-innovations-to-grow-micr-NV_187443> [Accessed on 12th March 2025].

61 Ibid.

62 Statista, Statistics report, Uganda 2024. The Report indicates the total population in Uganda is forecast to amount to 49.92m inhabitants in 2024 and of these the share of the population in Uganda who earn less than $ 2.15 per day is forecast to amount to 41.93% in 2024, the share of the population in Uganda who earn less than $3.65 per day is forecast to amount to 72.15% in 2024, and the share of the population who earn less than $6.85 per day is forecast to amount to 91.78% in 2024.

usually takes many forms among which commonly include opening memberships with Savings and Credit Cooperative Organisations (SACCOs), Community Self-help groups, and friendship investment clubs among others. According to the FSDU thematic Report on Insurance, findings revealed that the informal insurance sector was largely dominated by adults who are likely to be females living in rural areas.

It has been widely observed that some causes to the continued preference of informal insurance to formal insurance is based on a number of factors as revealed by the FINSCOPE III Survey (2013)[63] to include:

> *"Preference for informal insurance products and services over formal ones was because: informal insurance schemes are easier to join (48%), cannot afford formal insurance (15%), never heard about formal insurance (11%), never thought about formal insurance (10%), and don't know where to buy formal insurance (17%)."*[64]

The Report further indicated that despite the figures, Uganda's informal insurance is quite faced with challenges ranging from dishonesty by members thereby causing financial loss, poor administration, and death occurring to members, non-payment of contributions, members pulling out and loss of money through theft or fraud arising from committee members among other challenges.

This was further confirmed by the findings of a report published by the project of Financial Inclusion in Rural Areas – PROFIRA[65] which indicated that about 312 of the savings and credit cooperative Organisations in Uganda are victims of fraud. It was also noted that 64 out of the 453 registered SACCOS in the year 2023, had collapsed while 312 were struggling due to fraud and poor governance among other challenges.

Arising from the above, greater formalisation which implies a rules-based business trading environment which offers greater protection for consumers and

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64 Uganda 2013 FINSCOPE III Survey Key Findings, Unlocking Barriers to Financial Inclusion, (November 2013).

65 Project for Financial Inclusion in rural Areas, Project Completion Report Validation, as validated by IOE (March 2023).

businesses, is desirable. This is so, especially where it has been observed that informal insurance mechanisms are typically weak and do not provide sufficient protection to households.[66] Informal insurance evidently has the potential to be harnessed to further develop the insurance sector in Uganda.[67]

10.0 RECOMMENDATIONS

A robust framework governing the settlement of claims arising from Motor Third Party Insurance will be instrumental in addressing some of the existent biases among policy holders. Secondly, the current law governing Third Party Motor Insurance needs to be amended especially section 3(b) of the Motor Vehicle Insurance (Third Party Risks) Act Cap 214 to include insurance of a person in respect of liability which may be incurred in respect of damage to a motor vehicle of another. In addition, as the law stands, it doesn't permit institution of claims against insurers by third parties, which is detrimental to third parties especially when the policy holders do not follow up in seeking indemnity by the insurance companies.

Additionally, Part III of the Act which includes Section 34 that previously provided for compensation under the Act has been suspended under Section 42, effectively rendering the statutory compensation mechanism inoperative.

In response, the IRA stepped in to issue administrative guidelines and directives[68] that suggest more realistic payouts. Based on current regulatory practice, compensation for death now typically ranges between UGX 5 million and UGX 10 million, while varying levels apply for partial or permanent disability.[69] However, these guidelines are not legally binding and may differ in application across insurers, leaving a dangerous gap in protection and predictability for victims.

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66 Jonathan Morduch; Between the state and the Market; Can informal insurance Patch the Safety Net? The world Bank Research Observer, Vol. 14, no.2 (August 1999).

67 Uganda Insurance Regulatory Authority, Leveraging on Informal insurance platforms and Group dynamics to upscale Formal Insurance in Uganda, "The voices of the informal sector" (December 2015).

68 The Motor Vehicle Insurance (Third Party Risks) Regulations.

69 Ibid.

While the IRA's interventions are a commendable stopgap, they lack the force of law. This underscores a critical legal-policy gap between regulatory practice and legislative authority. Uganda should move to codify these regulations, especially through amending the current Act to ensure that compensation scales are legally enforceable and uniform.

More stringent measures ought to be employed by the Uganda Insurance Regulatory Authority to ensure the restoration of public trust within the insurance sector and enable compliance of with the laws in place. This could be done through ensuring swift and adequate settlement of insurance claims by insurance companies.

More attention needs to be placed on the Microinsurance sector through provision of affordable services and products to ensure adequate growth and development of Uganda's Microinsurance sector.

Continued advocacy and sensitisation will be instrumental in addressing the existing knowledge gaps among the general populace regarding insurance.

Lastly, a revision on the tax levied on Insurance premiums would be of great benefit to the insurance sector. Tax reductions on insurance products and premiums will lower the cost of insurance premiums. This in turn will make insurance for affordable to all people including low-income earners. It should however be noted that tax reductions should be wholesomely addressed with other factors affecting the insurance sector to ensure positive consumer attitudes towards the insurance sector as indicated below:

> *"Even if the tax deduction of insurance premiums has some positive effect, it appears that it is not a panacea but just one of a number of factors motivating consumers. If a country is considering introducing a policy which allows the tax deduction of insurance premiums, it is recommended to combine it with other interventions."*[70]

[70] Developing Insurance Markets: Do fiscal incentives help long term life insurance development? Tetsutaro Shindo and Craig Thorburn, June 2020

It is thus noteworthy that a reduction in the taxes levied on premiums could be a positive incentive to attract customers and ultimately increase the insurance uptake in the country.

10.1 HARNESSING ARTIFICIAL INTELLIGENCE IN INSURANCE

To modernise operations, build consumer trust, and close Uganda's insurance penetration gap, the sector should urgently adopt Artificial Intelligence (AI) as a strategic enabler. AI is transforming the global insurance industry by introducing automation, precision, and real-time decision-making in areas such as underwriting, claims processing, and fraud detection.

In the United States, Lemonade Inc. has pioneered the use of AI in peer-to-peer insurance, using bots to settle claims within seconds while allocating unclaimed premiums to social causes.[71] In China, Ping An Insurance employs AI to analyze over 30,000 health and financial data points to optimize policy recommendations and improve customer targeting. In the United Kingdom, Aviva uses machine learning to flag potentially fraudulent motor insurance claims with over 75% accuracy before human review. These companies demonstrate the far-reaching potential of AI in increasing operational efficiency and improving consumer experience.

Ugandan insurers should consider deploying AI-powered tools to automate customer onboarding, perform intelligent risk assessment, and provide predictive analytics for portfolio management. Regional firms such as Jubilee Insurance Kenya and Britam have already introduced AI-driven chatbots and claims assistants, offering a blueprint for domestic adoption.[72] The IRA should also incentivise innovation sandboxes to allow experimentation with such technologies under regulatory oversight.

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71 Generative AI in Insurance: Lemonade Case Study | Devoteam. (n.d.). Retrieved June 15, 2025, from <https://www.devoteam.com/expert-view/innovation-in-insurance/> [Accessed on 12th March 2025].

72 Artificial Intelligence: Matters Arising for the African Insurance Industry. (n.d.). Retrieved June 15, 2025, from <https://actuview.com/news/9579> [Accessed on 12th March 2025].

By leveraging AI, the Ugandan insurance sector stands to improve efficiency, reduce fraud-related losses, and regain public confidence, an essential foundation for long-term industry growth.

10.2 INTEGRATING CYBER INSURANCE IN A DATA-DRIVEN ECONOMY

As Uganda's digital economy expands with fintech, mobility apps, and e-commerce platforms becoming central to service delivery, the need for cyber insurance has never been more urgent. Cyber insurance covers the losses relating to damage to, or loss of information from, IT systems and networks. It covers a direct financial loss to you or your business arising from a cyber event. A cyber event is simply any actual or suspected unauthorised IT system access, electronic attack, or privacy breach[73]. The vast majority of financial losses are first party loss and include theft of funds, theft of data and or damage to digital assets. Cyber insurance covers the liability actions that might be brought against you, arising out of a cyber event (third party loss), such as investigation and defence costs, civil damages, compensation payments to affected parties[74].

The SafeBoda data breach in August 2020[75] exposed the personal data of thousands of users, including names, contact details, and trip histories, demonstrating how vulnerable even the most trusted platforms can be to cyber threats. On a global scale, the Cambridge Analytica scandal revealed how data harvested through digital platforms was misused to influence democratic elections, leading to massive legal and reputational consequences.[76]

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73 What does Cyber Insurance cover? | Cyber insurance | Choosing the right insurance | ABI. (n.d.). Retrieved June 15, 2025, from <https://www.abi.org.uk/products-and-<issues/choosing-the-right-insurance/cyber-insurance/what-does-cyber-insurance-cover/> [Accessed on 12th March 2025].

74 Ibid.

75 Safeboda Found In Breach Of Data Privacy Laws. (n.d.). Retrieved June 15, 2025, from <https://afmpanga.com/safeboda-found-in-breach-of-data-privacy-laws/> [Accessed on 12th March 2025].

76 Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach | Cambridge Analytica | The Guardian. (n.d.). Retrieved June 15, 2025, from <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> [Accessed on 12th March 2025].

Despite these risks, Uganda's uptake of cyber insurance remains negligible. Most digital start-ups and various online lending platforms operate with little to no coverage for data-related liabilities. This is partly due to a lack of awareness and partly due to the underdevelopment of such products in the local market.

Drawing lessons from markets like Germany, where cyber insurance is standard among SMEs, or South Africa, where insurers like Hollard offer dedicated policies for small businesses, Uganda's insurance industry should urgently develop tailored cyber insurance products. These should align with obligations under Uganda's Data Protection and Privacy Act Cap. 97 and offer coverage for legal defence, regulatory fines, customer notification costs, and public relations remediation.

The IRA should collaborate with the Ministry of ICT and National guidance to enforce cybersecurity standards and promote cyber risk insurance as a key pillar of national data resilience. In a world increasingly governed by data, protecting that data through insurance must no longer be optional.

11.0 CONCLUSION

Given the contemporary society we live in, where risk is an inherent part of life often surrounded by forces that threaten our financial well-being through different factors such as health, business, death, education, and travel among other things, Insurance Law becomes of core value to human existence in contemporary society as it is today. Its importance is most significant in dealing with management of risk and uncertainty.

The insurance sector of Uganda presents positive ambitions and hope for the people of Uganda especially those with lower income levels. It should however be noted, as seen above, that the sector is still met with a number of challenges lying from the general lack of public trust to an under-developed microinsurance sector among so many others as discussed in detail.

Significant efforts have to be taken especially by the Uganda Insurance Regulatory Authority as the main regulator so as to ensure the restoration of public trust within the insurance sector, take progressive steps to ensure regulatory compliances by the different insurance stakeholders within in the industry. On the other hand, continued advocacy for a favourable insurance environment such tax reductions especially on the premiums charged would make insurance services far more affordable to the Ugandan Market.

Addressing the existing knowledge and Regulatory gaps, especially with handling claims and the efficient settlement of claims by insurance companies will play a key role in the growth and restoration of public trust within the insurance sector of Uganda. This, without a doubt, will increase the general insurance up take and penetration rates within the country.

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NO DUTY TO DOUBT: AN ANALYSIS OF PHILIPP V BARCLAYS BANK AND ITS IMPLICATIONS ON THE BANKER-CUSTOMER RELATIONSHIP

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NO DUTY TO DOUBT: AN ANALYSIS OF PHILIPP V BARCLAYS BANK AND ITS IMPLICATIONS ON THE BANKER-CUSTOMER RELATIONSHIP

Cynthia Amiri L. E.*

Abstract

The paper explores a pivotal United Kingdom Supreme Court decision, Philipp v Barclays Bank that redefined the legal obligations of banks towards customers in the context of fraud. The Court held that banks do not owe a duty of care to challenge payment instructions made by customers, even when those instructions arise from fraudulent inducement. This ruling narrows the scope of the Quincecare duty, traditionally requiring banks to verify the authenticity of transactions under suspicion of fraud. The implications of this judgment are far-reaching, particularly for vulnerable populations such as the elderly, as it shifts the onus of fraud prevention onto customers. The paper critically analyzes the judgment's impact on the banker-customer relationship and the broader financial landscape.

1.0 INTRODUCTION

The Banker- Customer relationship creates a number of duties upon both the Bank and its customers, the most notable of which is the Bankers' duty to carry out the Customer's mandate.[1] But what happens when the Customer's mandate is to their own detriment? The United Kingdom Supreme Court in *Philipp v*

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1 E. P Ellinger and Richard Hooley, "Ellinger's Modern Banking Law", *Oxford University Press,* 4th Edition (2006), pp. 117 to 130.

Barclays Bank UK PLC, has resolved this lacuna by holding that a bank does not have a duty of care to halt the carrying out of a customer's instruction even if it is as a result of a fraud perpetuated against them.[2] There has always existed contention regarding the scope of the Quincecare duty in Banking Law, especially given the innovations and technological advancements within this branch of the law. The Court's decision in the aforementioned case has resolved some of these lingering issues.

This paper discusses the peculiar facts of the case, its journey from the High Courts of England and Wales, through the England and Wales Court of Appeal, and finally to the Supreme Court of the United Kingdom. It goes on to address the central issue in this case as being the banks liability for fraud in carrying out of the customer's mandate and the extent to which the banks liability extends.

Additionally, an examination will be made of Authorised Push Payment Fraud, as well as, the implications of this case to the banking sector. Most importantly an analysis will be made regarding the failure of the banking system to take into the account the elderly, both in this case, as well as, in Ugandan jurisprudence. Finally, recommendations will be made to reduce and consequently bring an end to the rampant fraud carried out on the elderly, as well as, an examination of this decision's compatibility with Uganda's existing consumer protection laws.

2.0 THE NATURE OF THE BANKER-CUSTOMER RELATIONSHIP

A Bank is defined under the Financial Institutions Act Cap. 57 as being any company licensed to carry on financial institution business as its principal business, as specified in Schedule 2 to the Act and, includes all branches and offices of that company in Uganda.[3] The Act further provides that financial services include: acceptance of call, demand, savings and time deposits withdrawable by cheque or otherwise, provision of financial and investment

2 *Philipp v Barclays Bank UK PLC*, [2023] UKSC 25.
3 Section 2.

advice, acceptance of savings and fixed deposits, engagement in any other Shari'ah compliant banking business, among others.[4]

The first requirement for the establishment of the Banker-Customer relationship is the presence of a bank account held by the individual. In *Great Western Railway v London and County Banking Co. Ltd*, the issue before the Court was whether Mr. Higgins, who had regularly cashed cheques with the Defendant Bank was a customer of the bank. It was held that, as he had no account with the bank, he was not a customer.[5] Furthermore, in *Ladbroke v Todd*, it was established that a person becomes a customer of a bank when they present money or a cheque to the bank and, request the opening of an account in their name. Once the bank agrees to accept the funds and opens the account, the individual is entitled to be regarded as a customer.[6]

The banker-customer relationship is of a contractual nature, as was discussed in *Foley v Hill*,[7] and upheld by the Supreme Court of Uganda in *Esso Petroleum v Uganda Commercial Bank*.[8] Therefore, once the contractual relationship is established, several duties accrue to both the bank and the customer.

The first duty of the customer is to exercise reasonable care in executing orders so as not to mislead the bank or occasion a forgery.[9] In *Mobil (U) Ltd v Uganda Commercial Bank*, the High Court held that due to the contractual nature of the banker-customer relationship, a customer when drawing a cheque is bound to take precautions to prevent forgery.[10]

Additionally, the customer must inform the bank of any forgeries that they are aware of. In *London Joint Stock Bank Ltd v Mac-Millian & Arthur*, the House of Lords held that the bank was entitled to debit the account because the firm had

4 Schedule 2.
5 *Great Western Railway v London and County Banking Co. Ltd,* [1901] AC 414.
6 *Ladbroke v Todd*, (1914) 30 TLR 433.
7 *Foley v Hill,* (1848) 2 HLC 28.
8 *Esso Petroleum v Uganda Commercial Bank***,** Civil Appeal No.14 of 1992.
9 *Joachimson v Swiss Bank Corporation,* (1921) 3 K.B 11O.
10 *Mobil (U) Ltd v Uganda Commercial Bank,* 1982 HCB 64.

a duty to exercise care when drawing cheques. Since the firm failed to do so, the clerk's ability to alter the cheque was a direct consequence of its negligence.[11] In *Greenwood V Martins Bank,* it was stated that mere silence could not amount to a representation; however, as there was a duty on the customer to disclose, his deliberate silence as to the forgery of the cheques amounted to a representation.[12]

The bank also owes several duties to its customers, primarily involving the execution of the customer's payment instructions, the safekeeping and proper management of any securities, as well as, the customer deposits, and maintaining confidentiality regarding the customer's financial affairs.[13] These obligations are central to the trust-based relationship between a bank and its customer. For instance, the bank must process payments accurately and promptly; ensure that any documents or assets left in its custody are secure; and must not disclose sensitive customer information without proper authorisation or legal obligation. Additionally, there arises a legal duty not to disclose the customer's information without their consent, however, this is duty qualified.[14]

The discussion on the banker-customer relationship lays the foundation for examining the facts in *Philipp v Barclays Bank,* as it highlights the mutual duties that arise once this contractual relationship is established. In particular, the case raises critical questions about the extent of a bank's duty to protect its customers, even when they authorise transactions in instances where a fraud has been perpetrated upon them.

3.0 THE FACTS OF THE CASE

Mrs. Fiona Philipp (the Respondent) was a long term customer of Barclays Bank (the Appellant), having held an account since she was a student until her retirement. Dr. Philipp, her husband acting on the encouragement of a fraudster under the pseudonym "John Watts" (hereinafter referred to as 'JW'), from whom

11 *London Joint Stock Bank Ltd v Mac-Millian & Arthur,* [1918] AC 777.
12 *Greenwood V Martins Bank,* [1932] 1 KB 371.
13 G.P. Tumwine-Mukubwa, "Essays in African Banking Law and Practice", (2nd Edition, 2009), *Makerere University Printery* pp. 72- 73.
14 *Tournier v National Provincial and Union Bank of England*, (1924) 1 KB 461.

he received a phone call transferred his funds from Hong Kong and Shanghai Banking Corporation Ltd (HSBC) and Tilney Financial Services (Tinley) to safe accounts. John Watts stated to Dr. Philipp that there was internal fraud by employees of HSBC Bank to which, he might fall victim.

The couple had been convinced to do carryout these transfers by JW in a series of calls starting in late February 2018 the pretext that they were cooperating with the Financial Conduct Authority (hereinafter referred to as 'FCA') and the National Crime Agency (hereinafter referred to as 'NCA') to bring fraudsters to justice. Part of the deception involved Dr Philipp telephoning what he thought was the Fraud Department within HSBC Bank Plc and being re-directed to JW.[15]

On another occasion JW arranged for another fraudster to telephone Dr and Mrs Philipp from what was depicted as being the NCA's telephone number as shown on their website. This was done by encouraging Dr Philipp to look up the NCA's telephone number on the internet. The caller claimed to have worked with JW for 9 years and further stated that he was a senior person in the FCA who could be trusted. As the elderly couple were desperately seeking to secure their retirement savings, they were more vulnerable to falling victim to this well executed fraud.[16]

Resultantly, Dr. Philipp transferred £950,000 from his account with Tilney having stated to his financial advisor that he needed to speedily purchase a house. This money was transferred to Mrs. Philipp's account in Barclays bank, of which she was the sole account holder, resultantly making her the only Claimant in the case.

Before the couple carried out their first transfer to the supposed "safe accounts", they were visited by a police officer who advised them that she believed they were victims of fraud. However, upon the deceit of the fraudster, they declined to offer any information to the police. The first transfer, a sum of £400,000, was consequently made on the 10th of March, 2022. The authorisation was made physically by Mrs. Philipps at a branch of the Defendant bank and confirmation

15 *Philipp v Barclays Bank* [2022] EWCA Civ 318.
16 Ibid.

of this payment made through a phone call later in the day. This payment was made to the "Lambi" account on an assurance that Mr. Philipp had carried out previous transactions with the account holder, which was false.

On the 13th of March, Mrs. Philipp authorised the transfer of £300,000 to an account held by Bonito Systems Ltd, in Dubai. The Bank still telephoned her to confirm whether she had authorised the transfer. Thereafter, the Police reached out to the couple, once more, who refused the assistance offered. On 19th March, Mrs. Philips further sought to transfer £250,000, but her account had been blocked pending review. She then called the Bank to request the transaction go through. During this phone call, she answered security questions the most vital being the last four digits of her long card number. The answers were overheard by the fraudsters as they too were on the line. The fraud perpetuated on the couple was finally discovered by the report of two close friends who visited HSBC and Tilney to express their concern that a fraud had been perpetuated on the Respondent and her husband.[17]

3.1 THE NATURE OF FRAUD

The nature of the fraud carried out on the Claimant was Authorised Push Payment (APP) fraud. A push payment refers to a transaction in which a bank transfers funds from a customer's account to a recipient, typically upon the customer's instruction.[18] Such a transaction is considered 'authorised' when the customer consents to the transfer. However, in cases of APP fraud, customers are deceived into consenting to the transfer, unknowingly directing funds to an account controlled by a fraudster.[19]

In cases of APP fraud, the perpetrator initiates contact with the victim and manipulates them into voluntarily transferring funds to a bank account under

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17 *Philipp v Barclays Bank*, [2021] EWHC 10 Comm.

18 Robyn Maher, "A Critical Analysis of Recent Efforts in the United Kingdom to Tackle Authorised Push Payment Scams and the Impact on the Bank-Customer Relationship" (2021) 24 *Trinity College Law Review* pp. 135 <https://heinonline.org/HOL/P?h=hein.journals/trinclr24&i=142> [Accessed on 22nd May, 2025].

19 Ibid.

the fraudster's control.[20] This deception often involves sophisticated impersonation tactics, such as falsely claiming that a legitimate payee has altered their banking details. Alternatively, the victim may be misled into believing that their funds are under imminent threat, typically through assertions that law enforcement, a financial institution, or a regulatory body has recommended transferring the money to a so-called "safe account." Such schemes exploit the victim's trust and sense of urgency, rendering the fraudulent transaction "authorised" but deeply insidious.[21]

At the England and Wales Court of Appeal, Birss LJ referred to APP fraud as "authorised" because according to the bank, the payment is approved by the customer.[22] From the bank's perspective, it is treated as a routine payment instruction initiated by the account holder. The term 'authorised' reflects the bank's view that the transaction was properly instructed by the customer, even though it was made under false pretences resulting from deception.[23]

Building on this foundation, the implications of this decision are examined in light of the Quincecare duty established in *Barclays Bank PLC v Quincecare Ltd.*[24] In that case, the fraudulent payment instructions were issued by an agent acting on behalf of the customer, and the court held that the bank had a duty to refrain from executing such instructions if there were reasonable grounds to suspect dishonesty. The essence of the Quincecare duty, therefore, lies in the bank's obligation to verify that the instructions genuinely reflect the customer's intent, rather than being the product of the agent's deception. This raises complex questions when applied to APP fraud, where the instructions originate directly

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20 David McIlroy and Ruhi Sethi-Smith, "Prospects for bankers' liability for authorised push payment fraud", (March, 2021) *Butterworths Journal of International Banking and Financial Law* pp. 172, <Article-2-Smith.1-1.pdf> [accessed on 22 May, 2025].

21 Ibid.

22 *Philipp v Barclays Bank,* [2022] EWCA Civ 318.

23 Tim Brentall and Mohammed Hussein, "Authorised push payment (APP) fraud", (May, 2023) *Solicitor's Journal* pp. 63 <https://heinonline.org/HOL/P?h=hein.journals/solicjo199&i=370> [Accessed on 22nd May, 2025].

24 *Barclays Bank PLC v Quincecare Ltd*, [1992] 4 All ER 363.

from the customer, albeit under fraudulent inducement, challenging the traditional application of the Quincecare principle.

3.2 THE QUINCECARE DUTY

The Quincecare duty refers to financial institutions' duties to safeguard their customers against fraudulent activity on their accounts. The core purpose of this is to achieve an appropriate balance between ensuring adequate protection for customers and avoiding the imposition of unduly onerous obligations on banks. This duty developed from the case *of Barclays Bank PLC V Quincecare Ltd*, the facts of which are discussed hereunder.

In the aforementioned case, Mr. Harry Stiller approached Barclays Bank for a loan of £400,000 to finance the purchase of four chemist shops. The bank agreed to give him the loan provided that it was made to the new company formed by Mr. Stiller (Quincecare Ltd) and that the loan was guaranteed by Unichem (the second defendant and a major supplier of pharmaceutical products throughout the United Kingdom). Without the adequate security provided by Unichem, the loan application would never have been considered. Nevertheless, the bank agreed to provide a medium-term loan of £400,000 to Quincecare for a period of ten years, on condition that a £50,000 cash injection would be made by the Directors of the company.

Mr. Stiller thereafter formed Quincecare Ltd. While he had no direct shareholding in Quincecare, 40% of the issued shares were held by his two children. Additionally, his wife held 20% of the shares in her own names and the remaining 40% of the shares were held by Mr. Plater and Mr. Elliot who each held 20%. Mr. Stiller was however, the chairman and had effective control of Quincecare Ltd while Mr. Plater and Mr. Elliot were Directors of the company.

On receipt of an acceptable guarantee by the Bank, Mr. Stiller was informed. Thereafter, he gave an oral notice of drawdown of the loan. Nevertheless, the requirement of the £50,000 cash injection by the Directors was re-echoed. Pursuant to this, Mr. Elliot (one of the two Directors of Quincecare) sent a letter

to the Bank that was to the effect that capitalization of the company had taken place. Therefore, in the view of the Bank, the last obstacle to the drawdown had been removed.

Mr. Stiller then gave instructions to a law firm, to which he had a substantial connection, to act on his behalf in the purchase of the four chemist shops. The firm was instructed to receive the large sums in a client account, to place it on deposit and transfer the funds to the United States. Mr. Stiller thereafter phoned the Bank to give instructions for the transfer of the sums of money. The Bank insisted that written confirmation of the order be made, to which Mr. Stiller rebutted stating that the order was required to be made immediately. Due to the bank's insistence, a letter confirming the order was delivered to its branch. A discrepancy however arose as to whether the confirmation was received before or after the order was executed. However, it was later resolved that the money was only transferred after written confirmation was received.

The bank effected the transfer and the sums were received by the firm acting on the instructions of Mr. Stiller. The firm thereafter made the transfer to the account which they were instructed to. This account was under the names Thomas Doran. The bank later discovered the fraud following Mr. Stiller's disappearance and, upon contacting Mr. Elliot (one of the Director's) it became clear that Mr. Stiller had indeed misappropriated the money and absconded.

Barclays bank was able to recover £9,000 from the United States and sued Mr. Stiller for the £344,848 but the judgement was unsatisfied. Due to the insolvency of Quincecare, the bank relying on the guarantee sought payment from Unichem. Due to Unichem's refusal to pay, the bank instituted proceedings against Quincecare and Unichem.

The case established that if a transaction raises doubts to a reasonable banker about its authenticity or benefit to the customer, the bank has a duty to investigate. Failure to do so would amount to negligence. A bank is liable if it

knowingly processes a dishonest order, ignores clear signs of dishonesty, or recklessly fails to make reasonable inquiries. The court stated:

> *"If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties."*

In this case, the Bank had made inquiries both by telephone and confirmatory letter. Resultantly, since the Bank had made an inquiry, it was held to be entitled to judgement against Quincecare and Unichem. The Court further stated:

> *"Mr. Tomlinson had no reason to suspect that Mr. Stiller was about to embark on an audacious fraud. He was entitled to regard the letter of 6 January as an order from Quincecare, and to assume that the £344,840 was being transferred to Quincecare's solicitors. It was argued that the size of the transaction should have put him on his guard. The answer to that in the context of the purchase of the shops this was not an unusual feature and Mr. Tomlinson was entitled to think that a transfer to a Quincecare account, controlled by solicitors, was perfectly normal. It was also contended that Mr. Stiller's insistence on the urgency of the transaction should have alerted Mr. Tomlinson. But funds are frequently required urgently, and there was nothing abnormal about a request for a telegraphic transfer of the money as company funds to the company's solicitors."*

The test for the Quincecare duty is simply this: Were the circumstances such as to put the bank on inquiry? This imposes a duty of care on banks to refrain from executing a customer's payment instructions where there are reasonable grounds to suspect fraud. It seeks to strike a careful balance between ensuring that banks remain efficient facilitators of commercial transactions and, guarding against the misuse of customer accounts by fraudulent agents or insiders. It compels banks

to remain alert to anomalies that might signal fraud while maintaining the practicality and speed necessary in modern banking operations.

This traditional application of the Quincecare duty required Banks to ensure that the payment instructions made by the customer were a true representation of their intention. When applied in contemporary banking, the Quincecare duty is applied by the requirement of proper customer authorisations of payment instructions. The belief being that once a customer adheres to the available security measures put in place, their payment instruction will be an accurate representation of the transaction that they intend to carry out. Nevertheless, this raises questions in regard to new technologies such as mobile and digital banking as well as contactless payment systems.

4.0 PHILIPP V BARCLAYS BANK: FROM THE ENGLAND AND WALES HIGH COURT TO THE SUPREME COURT OF THE UNITED KINGDOM

4.1 ON FIRST INSTANCE AT THE ENGLAND AND WALES HIGH COURT

4.1.1 THE CLAIMANT'S SUBMISSIONS

In the particulars of the claim, it was pleaded that the Quincecare duty required the Bank to refrain from executing Mrs. Philipp's payment instructions if, and for so long as, it had reasonable grounds to suspect that the instructions were an attempt to misappropriate her funds, thereby placing the Bank on inquiry. Furthermore, it was contended that, in the context of APP fraud, banks ought to adopt measures aimed at identifying customers who may be particularly vulnerable to such fraud. To facilitate detection, it was proposed that institutions consider customer behaviour patterns and employ data analytics.

4.1.2 THE DEFENDANT'S SUBMISSIONS

The Bank contended that the Quincecare duty did not extend to protecting customers from the consequences of their own decisions, particularly where the customer personally authorised the transaction. The bank's duty to exercise reasonable care and skill in executing payment instructions and fulfilling the customer's mandate was acknowledged. However, it argued that this duty is

limited to circumstances where the Bank has reasonable grounds to suspect that the instruction is an attempt to misappropriate the customer's funds, such as through fraud by an agent.

The Bank further argued that the Quincecare duty did not extend to protect Mrs. Philipp's from her own actions. Rather, it recognised its duty to act in accordance with reasonable care and skill while carrying out her instructions and carrying out her mandate unless there was reason to believe the transactions were to misappropriate her funds.

4.1.3 ANALYSIS AND CONCLUSIONS OF THE COURT

The Claimant submitted that the Quincecare duty should be extended to require banks to implement measures aimed at preventing APP fraud. Consequently, the central issue before the Court was whether such an obligation fell within the established scope of the Quincecare duty.

The Court rejected this argument, holding that the Bank is not expected to act as a guardian of the commercial wisdom of its customer's decisions. It reaffirmed that the Quincecare duty arises only where a bank is on inquiry, typically in cases involving dishonest agents. The Court further held that the duty did not extend to situations where the customer personally authorises a payment, even if they are under the influence of fraud. Accordingly, judgment was entered in favour of the Bank, with the court finding it would be unjust to impose liability on the Bank for a fraud directly perpetrated on Mrs. Philipp.[25] Following this judgement, Mrs. Philipp appealed the decision at the England and Wales Court of Appeal.

4.2 THE POSITION OF THE ENGLAND AND WALES COURT OF APPEAL

The question on appeal was whether the bank owed Mrs. Philipp a duty of care in these unique circumstances. The Court allowed the appeal and a unanimous judgement entered to the effect that the bank did in fact owe the Appellant a duty of care to halt the carrying out of the suspicious transaction. Lord Justice Birss, LJ Coulson and, The Chancellor agreed that halting the making of a payment

25 *Philipp v Barclays Bank Plc*, [2021] EWHC 10 Comm.

instruction to ask questions about it, did not only apply where the instructions were made by an Agent but rather extended to instructions made by the customer on their own. Therefore, the Quincecare duty was extended to encompass scenarios where the customer issued instructions under a fraudulent belief.[26] Barclays Bank then appealed this decision at the United Kingdom Supreme Court.

4.3 ARRIVAL AT THE UNITED KINGDOM SUPREME COURT

4.3.1 THE RESPONDENT'S SUBMISSIONS

The Respondent submitted that the reasoning in the Quincecare line of cases can be applied where the instruction is given by the customer and not simply by an agent. The Quincecare duty would therefore apply in any circumstance where the bank is put on inquiry as to the fraud.

The second averment was that the payment instruction was not Mrs. Philipp true intention as she assumed her money was going to safe accounts, yet it was moved to accounts controlled by criminals. Additionally, the Claimant's alternative case was that the bank breached its duty after the fraud was discovered in not taking adequate steps to recover the money that had been transferred to the United Arab Emirates.

4.3.2 WHY THE QUINCECARE DUTY DOES NOT APPLY TO INSTANCES OF APP FRAUD

At the Court of Appeal of England and Wales, the Claimant advanced the argument that the reasoning underpinning the Quincecare duty was not confined to situations where the payment instruction emanated from an agent acting on behalf of the customer. Instead, it was contended that the duty could apply with equal vigour to cases in which a customer directly instructs the bank, particularly where the bank has reasonable grounds to suspect that the customer is the victim of fraud.

However, the United Kingdom Supreme Court rejected this submission, characterising the reasoning of the Court of Appeal as fundamentally flawed. The

[26] *Philipp v Barclays Bank Plc*, [2022] EWCA Civ 318.

Supreme Court observed that the error lay in attempting to derive a coherent legal duty from a false premise, namely, that a bank owes a duty of care to question or decline to execute an instruction given by a customer who has full capacity and has properly authorised the transaction.

In reflecting the foundational rule governing the banker-customer relationship, the court relied on *Bodenhan v Hoskins* in which it was held that the banker must act on the customer's instructions without inquiry into their underlying motives or transactions. Once account is opened in the customer's name, the banker is bound to honour the cheques the customer issues without probing further. The banker is neither obligated nor entitled to question the reasons behind the account's opening, the source of funds deposited, nor the purpose for which the withdrawals are made.[27]

The first flaw, identified by the Supreme Court in *Philipp v Barclays Bank UK PLC,* was that this line of reasoning created a conflict between two core duties owed by the bank:

> (1) the duty to execute a customer's payment instructions promptly and accurately, and
>
> (2) the purported duty of care to refrain from executing a transaction if there are suspicions of fraud.

The Court held that these duties are not co-equal. The duty to exercise reasonable skill and care is subordinate to the bank's primary duty to execute the customer's mandate. A bank is not at liberty to second-guess the wisdom of the customer's decisions unless it is presented with evidence that the instruction is not genuinely authorised.

In support of this reasoning, the Court cited the decision in *Asurani Tugu Pratama Indonesia TBK v Citibank,* in which it was stated that the law cannot coherently treat compliance with an authorized instruction as breach of a duty.[28] To hold otherwise would render the legal framework governing banker-customer

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27 (1852) 21 LJ Ch 864, 869.

28 *Asurani Tugu Pratama Indonesia TBK v Citibank,* [2023] HKCFA 3.

relationships incoherent, as it would imply that fulfilling a lawful mandate could simultaneously constitute a tortious breach of duty.

Furthermore, reliance was had on *Lipkin Gorman v Karpnale Ltd,* in which May LJ stated that nothing in the contractual relationship between a bank and its customer imposes a duty on the banker to assess the commercial soundness or prudence of a given transaction.[29]

The second flaw addressed was the reliance on policy considerations. In the High Court, Steyn J had invoked the policy rationale found in *Barclays Bank plc v Quincecare Ltd* to suggest that banks ought to play a greater role in preventing fraud and protecting customers. However, the Supreme Court rejected this normative extension. It held that the duty to prevent or detect fraud is not ordinarily implied into the contractual relationship between a bank and its customer, absent specific terms or exceptional circumstances. The Quincecare principle, therefore, is confined to its original context, that is, cases where an agent purports to act on behalf of a customer, and the bank has reason to doubt the genuineness of the authority.

Accordingly, the Supreme Court concluded that it would be inappropriate and doctrinally unsound to expand the Quincecare duty to encompass direct instructions from customers who are victims of APP fraud. Simply put, the law cannot impose on banks the burden of acting as a guardian of the commercial wisdom or susceptibility of their customers, particularly when the instructions are clear, unambiguous, and given with full authority.

4.3.3 ACTUAL AND APPARENT AUTHORITY

The issue of authority was addressed even though it was not a matter of contention in these particular set of facts. Nevertheless, it was reiterated that the duty of an Agent is to act for the Principal. If an Agent acts fraudulently, any loss

[29] [1989] 1 WLR 1340.

that results thereunder is liable to the Principal. The Agent's actual authority, however, does not include the authority to act fraudulently.

An Agent who is given authority but acts dishonestly will lack actual authority. Nevertheless, by virtue of the customer's representation they will still have apparent authority to give instructions on the Principal's behalf. In such a circumstance, the bank has a duty to verify the Agent's authority and ensure that the instructions given are authorised by the customer. The duty of care in this circumstance, requires the bank if put on inquiry, not to act without ensuring that the order is indeed a valid order of the customer to transfer the money. A bank that relies unreasonably on an agent's authority despite notice of matters that would have caused a reasonable banker to make inquiries cannot legitimately expect to be immune from liability.

The Quincecare principle was held to be inapplicable in Mrs. Philipp's case because her instructions to the bank were clear and unequivocal. There was no basis upon which the bank could be said to have been "put on inquiry." Accordingly, no duty arose to investigate the legitimacy of the transaction. In such circumstances, the bank's primary duty was to execute the customer's mandate. Refusing to do so would itself constitute a breach of duty.

4.3.4 THE CUSTOMER'S INTENTION

The Supreme Court offered a nuanced perspective on the second averment. It held that fraud does not negate a person's intention, as intention is fundamentally a state of mind. Rather than nullifying the transaction, fraud gives the defrauded individual a right to rescind it and to seek restitution from the fraudster. However, the existence of fraud does not render the payment instruction invalid, nor does it give rise to a claim against the bank for merely executing an instruction that was properly authorised by the customer.

4.3.5 THE LIMIT OF A BANK'S DUTY TO EXECUTE VALID PAYMENT INSTRUCTIONS AND THE PECULIAR FACTS OF THE CASE

The bank has a duty to carry out a customer's payment instructions except where it would be carrying out an illegal act. Where a bank receives reliable information such as from the police suggesting that a customer's payment instruction has (unknown to the customer) been procured by fraud, the bank must first inquire from the customer whether they wish to continue with the payment before executing it.

Mrs. Philipp argued that the bank ought to have been put on inquiry due to several red flags: the unusually large and unprecedented deposits into her current account, the significant sums she instructed to be transferred, the fact that the payments were directed to foreign bank accounts, and the absence of any prior dealings with the recipient companies. However, the bank took precautionary steps on both occasions. This was through contacting Mrs. Philipp to confirm that the instructions had indeed been authorized by her.

Moreover, once suspicions of fraud arose, the bank took proactive measures by blocking the account, despite her repeated requests to have it unblocked. These actions demonstrated that the bank exercised reasonable care and diligence within the scope of its duty, and ultimately supported the court's finding that it had not breached its fiduciary duty.

4.3.6 RECALL OF THE PAYMENTS

The Claimant's fall-back argument was that the bank had breached its duty by failing to take timely steps to recall the payments after the fraud had been discovered. Notably, the bank only attempted to initiate recall procedures on 31st May 2018, by which point it was already too late to recover the funds. The bank, in its defence, contended that it had no authority to reverse the earlier transactions, as doing so would have contravened the original, authorised payment instructions. While the bank's eventual efforts to recall the funds suggest that such remedial steps were, in principle, available, the practical likelihood of recovering any of the funds, even if action had been taken earlier, was extremely low.

Nevertheless, the Supreme Court held that this line of argument should not have been summarily dismissed. The Court acknowledged that although the prospects of successful recovery were minimal, the issue raised important questions about the scope of a bank's obligations upon discovering fraud, particularly where those obligations might arise after the execution of a mandate. The Judges of the Supreme Court however, stated that this aspect of the claim warranted closer examination at trial rather than being excluded at a preliminary stage.

5.0 IMPLICATIONS OF THE JUDGEMENT

The onus of vigilance has now shifted more heavily onto customers, who must exercise heightened diligence in safeguarding themselves against fraudulent schemes. This judicial repositioning carries significant implications for vulnerable populations, most notably the elderly, such as the claimant in the present case. The Supreme Court's decision signals a broader doctrinal retreat from protective paternalism in banking law,[30] effectively narrowing the scope of financial institution liability in instances of APP fraud.

The result being that customers are now required to be all the more vigilant in how their bank accounts are handled especially in regard to the transactions being initiated. It reduces the once common place laxity that existed among customers that could be attributed to the confidence that the customers had in regard to the bank's liability for their financial loss. However, the major impact of this judgement is that it places the liability for a customer's instruction on them, effectively requiring customers to be hyper vigilant when carrying out financial transactions.

The group most impacted by this decision are the elderly, who often face cognitive decline, diminished digital literacy, and social isolation. This makes them

30 Paternalism is a system under which an authority undertakes to supply needs or regulate conduct of those under its control in matters affecting them as individuals as well as in their relations to authority and to each other <PATERNALISM Definition & Meaning - Merriam-Webster> [Accessed on 22nd May, 2025]. In the context of this commentary, it simply means that the Courts will not require banks to protect customers from the consequences of their own authorised instructions.

particularly susceptible to APP fraud, as they may be more easily deceived by fraudsters posing as legitimate actors. The decision in *Philipp v Barclays Bank* effectively limits the bank's obligation to intervene in such transactions, even when they appear suspicious, as long as the customer has authorised the payment. For elderly customers, this creates a significant gap in protection, as the legal duty to prevent fraud does not extend to cases where the customer has been manipulated into acting against their own interests. Consequently, the ruling places a heavier burden on elderly individuals to detect and prevent fraud themselves, despite their heightened vulnerability.

However, contemporary jurisprudence, both within Uganda and across common law jurisdictions, reveals a troubling lacuna in the banking sector's institutional response to such vulnerabilities. Despite policy rhetoric around financial inclusion and consumer protection, banks frequently fail to operationalise age-sensitive safeguards for older customers who are acutely exposed to manipulation.

The case of *Aida Atiku v Centenary Rural Development Bank,* further underscores this. In that case, an elderly woman with visual impairment was defrauded of her pension totalling 56 million Uganda Shillings through unauthorised withdrawals made via the "Centemobile" banking service, a banking service which unbeknownst to her, she had signed up for. The Court held that the Bank was not liable for the fraud because, despite the Plaintiff's lack of awareness, she had validly consented to the service. Consequently, the Bank's obligation to act on her authorised instructions remained intact, highlighting the limits of the bank's duty to protect customers from fraud in the absence of suspicious or unauthorized mandates.[31]

It is indisputable that elderly individuals are particularly vulnerable to financial fraud, especially in the context of modern banking systems. This vulnerability stems not only from age-related cognitive decline which can impair memory,

[31] *Aida Atiku v Centenary Rural Development Bank,* Civil Suit No. 0754 of 2020.

decision-making, and the ability to detect red flags. But also, the elderly have a greater likelihood of reliance on third parties for managing financial affairs. In many cases, elderly individuals, unable to recall passwords or navigate increasingly complex digital interfaces, delegate access to caregivers or family members. While this delegation may be done in good faith, it significantly increases the risk of financial exploitation, particularly when safeguards are insufficient or when undue influence or coercion is exerted.

However, the implementation of additional protections must be carefully reconciled with the elderly's right to privacy and autonomy. Measures that are too intrusive may feel patronising or even disempowering, potentially eroding the trust elderly persons have in financial institutions. Furthermore, cognitive decline can also manifest as resistance to change, making older adults less likely to adopt new, supposedly "elder-sensitive" banking solutions, particularly if these solutions are not designed with dignity and intuitive simplicity in mind.

Thus, while the need for tailored protections is urgent, it is equally critical that these interventions be developed with a nuanced understanding of the lived experiences of the elderly. Striking the right balance involves designing banking systems that are both secure and respectful while preserving privacy and independence. This requires a shift from a one-size-fits-all model to one that is anticipatory, inclusive, and human-centred.

In light of these risks, many financial institutions have introduced technological safeguards aimed at preventing fraud, ranging from multi-factor authentication to biometric verification and AI-driven transaction monitoring. While these innovations enhance overall security, they often unintentionally create new barriers for older adults.[32] Complex security protocols, frequent password changes, and unfamiliar digital interfaces can overwhelm individuals experiencing cognitive decline or reduced digital literacy. Ironically, in attempting to shield

[32] Katherine Grace and Sierra Smucker: "Protecting the Elderly from Financial Exploitation" (2021), RAND Blog <https://www.rand.org/pubs/commentary/2021/10/protecting-the-elderly-from-financial-exploitation.html> [Accessed 20th May 2025].

elderly clients from external threats, these systems may compel them to rely more heavily on others, whether family members, caregivers, or acquaintances, for basic banking functions.[33]

In line with efforts to promote financial inclusion for the elderly in digital banking, a study conducted in Japan revealed that older adults value social interaction and a sense of reassurance as key factors influencing their preference for traditional banking. They noted that online banking and digital platforms fail to offer the same level of comfort and personal connection.[34]

Building on these insights, it becomes clear that any initiative aimed at integrating elderly individuals into the digital financial ecosystem must go beyond mere access and convenience. It must also address the emotional and psychological dimensions of banking such as, trust, familiarity, and interpersonal assurance. The Japanese study highlights a critical gap: digital banking platforms often neglect the human element that traditional banking offers, which many older adults rely on not just for transactions, but for confidence and peace of mind. Therefore, financial inclusion for the elderly cannot be achieved through technology alone; it requires a holistic approach that humanizes the digital experience. With this in mind, the following recommendations seek to strike a balance between these interests, therefore, ensuring that efforts to modernize banking systems do not leave behind those who need them most.

6.0 RECOMMENDATIONS

Banks must take deliberate steps to develop financial services tailored specifically to the elderly, just as they have historically created banking products for infants and young savers. To date, however, the financial sector has largely overlooked

33 Ibid.

34 Ineke Schuurman, Leen Sevens, Victoria Yaneva & John O'Flaherty, "Improving Social Inclusion using NLP: Tools, Methods and Resources" (2018) *LREC Workshop* pp. 11 <book_of_proceedings.pdf> [Accessed on 22nd May, 2025].

the elderly, whose inclusion in broader society remains an ongoing challenge, particularly in the regard to financial access and autonomy.[35]

This neglect is not merely an oversight; it is a systemic failure that carries serious consequences. In Uganda, the socio-cultural perception that sickness, disability, and cognitive decline are natural and inevitable aspects of old age has fostered a dangerous complacency. This view normalises the marginalisation of elderly individuals, subtly justifying their exclusion from fully participating in economic life.

It obscures the urgent need for adaptive financial systems and protections, and worse, allows structural vulnerabilities, such as fraud, coercion, and economic dependence to thrive unchecked. As people age and accumulate wealth, this reality must be met with equal foresight and institutional responsibility. Anything less not only fails the elderly but, weakens the social fabric as a whole.

According to the 2016 Uganda Demographic and Health Survey (UDHS), approximately one out of five older persons have severe disability.[36] Additionally, the world's population is steadily aging with increase in life-expectancy accompanied with falling fertility rates. By 2050, the number of people aged 60 years and above is projected to be over 2 billion and make up over 21% of the global population.[37] Therefore, a solution to this impending reality needs to be found expediently through the passing and implementing of legislation.

Banks should put in place systems to allow the elderly choose a trusted person with whom to run their accounts. This however needs to be reconciled with the data protection and privacy laws. Often, elderly people choose a relative or person close to them to assist in the running of their accounts. By including this third

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35 Msweli, N.T & Mawela, T: "Financial Inclusion of the Elderly: Exploring the Role of Mobile Banking Adoption" (2021) <https://repository.up.ac.za/handle/2263/81347> [Accessed on 21st May, 2025].

36 Ministry of Gender, Labour and Social Development: The State of Older Persons in Uganda, Situational Analysis Report. (2020) < http://tinyurl.com/29x2edt6> [Accessed 20th May, 2025].

37 UNFPA and HelpAge International (2012).

party into the banking contract and, permitting them to act together with the elderly persons in their transactions, it will be known who exactly is responsible in case a financial crime is committed in regard to the elderly person's bank account.

Accounts of the elderly should be monitored more closely than any other types of accounts. In *Philipps v Barclays Bank PLC*, allusions were made to the fact that Mrs. Phillips account had a history of relatively humble transactions since her student and professional life. Therefore, for large deposits of that nature to be made into her account, the Bank ought to have reasonably be put on notice. This notice need not have necessarily been of fraud but to the very, least signalled money laundering or any another financial crime. If the transactions by elderly account holders are managed in such a laissez-faire manner, the immediate outcome is that the elderly will indeed be victims of fraud and other financial crimes. Therefore, banks ought to be keener in their management of accounts and the execution of instructions in relation to the elderly.

The Bank should inquire into any disabilities of the elderly prior to the formation of accounts as this may affect the running of these accounts. The UDHS study found that one out of five elderly persons has a disability resulting from age.[38] In the Aida Atiku case, the Plaintiff had been afflicted by a cataract which resulted into a significant sight impairment and, as a result, had her daughter help her fill the savings account opening form.

Arguably, this would be a high duty to impose on the Banks, but nevertheless it should be viewed more as a preventive measure that will lead to an overall improvement in the banking sector. More so, it would be simple to carry out by including a medical examination in certain circumstances as a pre-requisite to the formation of an account (just as a National Identification Card is required before one can open an account). This could be decentralised and easily carried out at a branch level.

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38 Supra.

Positively shaping the elderly's perceptions of digital banking is a critical step toward enhancing both their financial inclusion and protection. An Internet Survey carried out by Oxford Identified that 46% of the elderly participants strongly agreed they do not use the technology as they are scared they might 'break something' and 68% suggested it was easier to cope without using technology.[39] This shows that the elderly are negatively biased against digital banking, however, by educating them and affirming them of their abilities to carryout transactions using digital platforms, fraud can be prevented. This is because these platforms offer higher security measures against financial crimes.

The application of Article 32 of the Constitution of the Republic of Uganda, would drive financial inclusion for the elderly. This article is to the effect that the state shall take affirmative action in favour of groups marginalized on the basis of age, for the purposes of redressing imbalances which exist against them.[40] Furthermore, this article mandates the Parliament to make relevant laws to ensure that it is given full effect.[41] The elderly who are often excluded from the design and implementation of modern financial systems, clearly fall within this category. The marginalization they face is not only economic but also structural, as current digital banking frameworks fail to accommodate their unique cognitive and physical needs.

By invoking this constitutional provision, the call for financial inclusion of the elderly is elevated from a policy preference to a constitutional imperative. It empowers stakeholders (both governmental and private) to move towards tangible,

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39 L. Georgiva, "Sustainable Operability: Digital Inclusion and The Elderly: The Case of Online Banking" (2018) <http://lrec-conf.org/workshops/lrec2018/W14/pdf/book_of_proceedings.pdf#page=15> [Accessed on 20th May, 2025].

40 Article 32 (1): Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.

41 Article 32(2): Parliament shall make relevant laws, including laws for the establishment of an equal opportunities commission, for the purpose of giving full effect to clause (1) of this article.

human rights-based interventions that protect and empower the elderly in Uganda's evolving financial landscape.

Most banking contracts are of a standard form. This means that once the customer appends their signature, even without particularly knowing its contents, they are bound to the contents of the contract.[42] Therefore, before customers sign the contract, they should be given guidance as to its terms and the particular services to be provided as a result of it. This will prevent fraud of the nature in the Aida Atiku case that was through a digital banking service that the Plaintiff was not aware she had signed up for.

Furthermore, guidance on the available banking services should be given to the customer at the point of opening an account. In line with this, the Bank of Uganda Consumer Protection Guidelines provide for fairness in the relationship between a financial service provider and a consumer.[43] They also state that before a consumer chooses a product, the financial service provider ought to clearly explain to them the range of services offered and the key features of the services.[44] Additionally, financial service providers have to ensure that any service recommended to the consumer must be suitable for them.[45]

7.0 CONCLUSION

Philipp v Barclays Bank has provided much-needed clarity on the scope of the Quincecare duty by firmly establishing that a bank's duty of care does not extend to preventing payment instructions made directly by customers, even where such instructions are influenced by fraud. As a persuasive authority from a common law jurisdiction, this decision is applicable in Uganda.[46]

It also signals a need for Uganda's legal system to re-evaluate its protective mechanisms in light of emerging financial risks. In the context of the growing

42 *L' Estrange v Gracoub Ltd* [1934] 3 KB 394.
43 Guideline 6(1).
44 Guideline 6(2).
45 Guideline 6(3).
46 Section 14 of the Judicature Act Cap. 16.

pattern of financial exploitation targeting the elderly, mere reliance on judicial precedent is insufficient. The most effective and forward-looking approach lies in rigorously enforcing existing financial regulations while simultaneously enacting specific legislation that recognises and responds to the vulnerabilities of elderly persons.

The implementation of elderly-friendly financial services can promote financial inclusion of the elderly. This can be done through simplified user interfaces such as voice-assisted navigation and large text icons. Further, banks can provide specific banking products to the elderly, for example, GTBank Uganda has designed the GTBank Seniors Account for senior citizens who are 60 years and above to enable them easily carryout their banking transactions. Equity Bank similarly provides a Pensioner's account.

In the United States of America (U.S.A), the American Association of Retired Persons (AARP) was formed to empower people to choose how they live as they age. In line with this, once an individual attains AARP membership status, they are given a wide variety of banking services catered specifically to the elderly. So far, partnerships have been formed with Barclays Bank in order to provide elderly friendly banking technology, among others. Using this as a success story, financial inclusion of the elderly can be advocated for by civil society groups in Uganda as has been done by the AARP in the U.S.A.

Lastly, the launching of awareness campaigns can reduce the number of fraud incidents occurring among the elderly. This can be done through radio, newspaper, television and billboards to ensure that they are aware of the high rates of fraud and the common methods through which they are carried out. This is because, protecting the elderly in financial spaces is not just a matter of policy, rather, it is a constitutional imperative. The time to act is now, before silence becomes complicity.

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ÉRÀMÀ, NÀIGBIÀ: THE DAWN OF PATERNITY FRAUD VIS-À-VIS THE NIGERIAN LEGAL SYSTEM

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Abstract

Paternity fraud in Nigeria constitutes a profound societal and legal crisis, posing as a setback for society. This phenomenon, marked by the wilful misidentification of a child's biological father, has surged within marital contexts, as seen in several cases, destabilising Nigerian families. This article analyses its prevalence under the current legal framework and proposes solutions. Employing the doctrinal approach, the article conducts an in-depth review of legal literature, statutory provisions and judicial interpretations. Findings indicate that paternity fraud lacks legal recognition as a crime in Nigeria, with existing laws failing to address it. This article recommends enacting a Paternity Fraud Prevention Bill, amending laws to prioritise truth over outdated norms. Additionally, it advocates for awareness campaigns, school initiatives and group therapy to restore trust.

1.0 INTRODUCTION

As a seasoned writer, I tend to unhappily resonate with the sort of grief surrounding the narration of the 'Book of Lamentations'.[1] The reason for this is

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The phrase "Éràmà, Nàigbià" translates as "Good morning, father" in English. Essentially, the title of this article echoes a deep concern towards the trend of paternity fraud (consequently in Nigeria), effectively drawing attention to the dawn of a societal ill in view of fading legal frameworks.

1 The Holy Bible, King James Version (Oxford University Press, 1769) Lamentations.

vaguely ingrained in my thought process, or perhaps the burden of surviving everyday life in the Nigerian society does, in fact, reinforce such proximity. Just yesterday, I accompanied some of my neighbours in climbing an electricity pole to '*shake the wire'* in order for electricity to be supplied to our 'dearly residential' hostel. Objecting to this, an ordinary citizen residing in a functional country would have appreciated the option of calling the electricity company, but instigating such an idea in Nigeria is almost equivalent to sighting a polar bear on 'Elegant Stiletto heels' dancing to the unending album release of SEYIVIBEZ[2] (whatever this illustration means). In a more meaningful depiction, it is simply a waste of time.

Documenting the chaotic yieldings of the Nigerian society would have been, to a certain extent, interesting, but the essence of this work tows toward a more conscious conversation. One touching on the fundamentals of the crashing societal values with an appendage of ethical and legal vantage point. Consequently, the scornful sprout of paternity fraud is upon the Nigerian society, and for some reason, the Nigerian legal system offers a fertile soil for such seeding. Therefore, the exploration of this theme aims to investigate paternity fraud in marital households within the context of the Nigerian legal system and propose appropriate solutions.

1.1 NATURE OF PATERNITY FRAUD

Paternity fraud, in short, is the act of intentionally misattributing the biological father of a child.[3] The underlying assumption of paternity fraud is that the mother deliberately misidentifies the biological father, this fraudulent misrepresentation thus leads the man to erroneously believe that he has a biological connection with the child of another man which, in fact, does not exist.

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2 Nigerian Singer and Songwriter, Balogun A. Oluwaloseyi, popularly known as Seyi Vibez.

3 Skillern Firm, 'What is Paternity Fraud' SkillernFirm.com <https://skillernfirm.com/what-is-paternity-fraud/> [Accessed January 4 2025].

The above explanation undoubtedly streamlines the definition of paternity fraud. In due course, subsequent paragraphs will fully delve into the landscape of paternity fraud and depict its shadowed bod through the culmination of real-life stories. In furthering this piece, do well to take a seat.

2.0 TREND OF CRASHING SOCIETAL VALUES

In the past few years, it is often not uncommon to surf the internet and be bombarded with notifications of more than one occurrence of the paternity fraud crisis, invading the home of a somewhat popular or even not-so-popular person. To illustrate, the following features a story reported by Punch Newspaper:

> In 2023, it felt like a jaw-dropping scene from a Nollywood blockbuster when Olanrewaju Kolawole received the paternity test results for his four children, who are products of his 16-year marriage to Toyin. The 44-year-old collapsed, slipping into seven-day coma after DNA test revealed the unimaginable truth: he was not the biological father of any of his children.[4]

Another real-life event in mind is that of the tribulations of Tunde Thomas. His story was unfortunately divulged as:

> In July 2021, there was a case of US based man [who] died from cardiac arrest after coming to Nigeria to conduct a DNA test on his kid, only to discover that he is not the biological father.[5]

Trailing this sequence, not even a High Court judge was spared; not that his position mattered anyway. A publication by Premium Times confirms this story, revealing comments attributed to Delta State High Court judge, Hon. Justice Anthony Okorodas, who opined that, *'he is not the biological father of three children from his marriage with his former wife.'*[6]

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4 Victor Ayeni, 'Heartbreaking Stories of Men Damaged by Paternity Fraud' *Punch Newspaper* (8 September 2024) <www.punchng.com/heartbreaking-stories-of-men-damaged-by-paternity-fraud/#google_vignette> [Accessed 5 January 2025].

5 F. Godson, 'The Rise Of Paternity Fraud In Nigeria, Why We Should Be Worried' Global Report (5 September 2021) <https://www.globalreport.com.ng/2021/09/the-rise-of-paternity-fraud-in-nigeria.html> [Accessed 10 January 2025].

6 Premium Times, 'DNA Confirms Three Children from my Ex-wife not mine - Judge' Premium Times Nigeria (2 February 2021)

It is worth subtly pointing out that the well these stories comes from, runs deeper than it seems. To add to this, Nigeria has been cited with one of the highest rates of paternity disparity globally, with some sources claiming up to 30%, though these numbers are often contested due to lack of national surveys.[7] At least, in Lagos, a report by Smart DNA (one of the leading DNA testing centres in Lagos) placed the rate at 27%. The report divulged that 27% of paternity tests conducted between 2022 and 2023 returned negative results, indicating that more than one in four men were not the biological fathers of the children they believed to be theirs.[8]

Deductively, if there is any sort of clarity amidst the above rates currently, it is angled at the debates of even having an established trend of crashing societal values. Though, I often question if 'crashing' is the right term. It is easy to find oneself wondering: has it always been like this? Were these paternity disparity rates simply concealed in the past due to limited technological advancement, or are societal values truly deteriorating? To use my term, crashing. Well, whatever the actual state of things may be, the appropriate stance remains that these Heart-breaking Stories must stop.

3.0 WHAT DOES THE LAW SAY?

Ironically, the law says nothing, at least when it comes to paternity fraud. Presumably, this silence creates a fertile ground for the sowing of paternity fraud, and it is also spurred my resolve to embark on this work. However, in spite of this, an evaluation of the current legal framework relating to paternity will be undertaken in order to capture any form of semblance to paternity fraud.

<https://www.premiumtimesng.com/news/headlines/440030-dna-confirms-three-children-from-my-ex-wife-not-mine-judge.html?tztc=1> [Accessed 12 January 2025].

7 Allwell Okpi, 'No data shows 30% of Nigerian men "not biological fathers of their children"' Africa Check (29 November 2019) <https://africacheck.org/fact-checks/reports/no-data-shows-30-nigerian-men-not-biological-fathers-their-children> [Accessed 15 January 2025].

8 Health Digest Nigeria, 'Paternity Fraud: 27% Of Nigerian Men Not Biological Fathers' Health Digest Nigeria (2 September 2024) <https://healthdigest.ng/paternity-fraud-nigerian/> [Accessed 16 January 2025].

3.1. EVIDENCE (AMENDMENT) ACT, 2023

The Evidence (Amendment) Act[9] comes first in this list. Section 165 of this statute is definitely one to take note of, as it makes provision for the presumption of legitimacy. To reproduce, it states as thus:

> Without prejudice to sec. 84 of the Matrimonial Causes Act, where a person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, the court shall presume that the person in question is the legitimate child of that man.[10]

The import of the aforementioned provision serves as one of the methods by which paternity could also be proved or established in Nigeria. To emphasise, the Supreme court of Nigeria in *Idahosa v Idahosa,*[11] offers one of the most declarative judicial endorsements on this principle that has its paternity rooted in the provision of section 165 of the Evidence Act, by holding that the law is trite that any person born during the continuance of a valid marriage shall be presumed to be a child of the husband.

To capture the facts in this case, the Respondent, Christopher Idahosa, claimed to be the legitimate eldest son of the late Pa Egharevba Idahosa and consequently entitled to inherit his estate. The Appellant, Sgt. Stephen Idahosa, a member of the extended Eronmwon family (the family lineage from which Pa Egharevba Idahosa hailed), challenged this claim. He contended that Christopher was not the biological son of the deceased but was fathered by another man, Pa Osayande, during a period when Madam Onaiwu Idahosa, wife of Pa Egharevba Idahosa was temporarily separated from her husband and residing with her parents in Benin City due to illness.

During this separation, Madam Onaiwu allegedly cohabited with Pa Osayande and gave birth to Christopher and his sister. Upon her return to her matrimonial home in Lagos, she presented both children as those of her husband, Pa

9 2023 Cap. E14 LFN, 2004.
10 Section 165 of the Evidence (Amendment) Act, 2023.
11 (2020) LLJR-SC.

Egharevba Idahosa. After the death of Pa Idahosa, Christopher inherited as his eldest surviving son. Years later, following Madam Onaiwu's deathbed confession claiming that the children were fathered by Pa Osayande, Sgt. Stephen Idahosa sought to challenge the legitimacy of Christopher's paternity and inheritance rights.

The trial court accepted Christopher's claim. However, the Court of Appeal reversed this decision, siding with the Appellant. Upon further appeal, the Supreme Court reinstated the finding in favour of Christopher, affirming that the presumption of legitimacy under section 165 of the Evidence Act stood firm. The apex court held that the uncorroborated dying declaration of Madam Onaiwu and hearsay statements from the extended family were insufficient to rebut the presumption.[12]

However, it is pertinent to state that, this method or rather presumption is not absolute. This presumption can be rebutted after a successful pleading of section 84 of the Matrimonial Causes Act which provides for an avenue where couples in matrimonial proceedings could tender 'evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular'. Another alternative for the rebuttal of this presumption hinges on the result of scientific tests, blood and Deoxyribonucleic acid (DNA) testing as provided under the Child Rights Act.[13]

So, unless there is that irrefutable evidence pointing to the contrary, the man to whom a woman is validly married or got divorced from and remaining unmarried for a period not longer than 280 days as at the birth of the child will always be the legitimate father of the child in question under the presumption of law.

12 Ibid.
13 2003 Cap. C50 LFN, 2004; Section 63.

In summary, the Evidence (Amendment) Act only established a black and white model as regards paternity-related issues where it literally just says (translating to Nigerian Pidgin):

> *"If you dun marry and your wife born, na your pikin be that, if you con say no be your pikin, then prove am say you and your wife no knack. But one thing be say you no fit call your wife, make she prove say una no knack."*[14]

Funny as it sounds, paternity-related issues involve a lot of complexities and the law ought to move away from a simplistic model in order to effectively tackle paternity fraud. Meanwhile, it is pertinent to state that nowhere in the Evidence Act was 'Paternity Fraud' mentioned.

3.2 MATRIMONIAL CAUSES ACT, 1970

The Matrimonial Causes Act (MCA) is a pivotal statute governing matrimonial proceedings in the country.[15] Underscoring the function of the Matrimonial Causes Act to this discussion, section 84 is most essential to point out. It states:

> Notwithstanding any rule of law in proceedings under this Act, either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, but shall not be compellable to give such evidence if it would show or tend to show that a child born to the wife during this marriage was illegitimate.[16]

This provision directly intersects with the presumption of legitimacy under section 165 of the Evidence Act, which presumes a child born during a valid marriage (or within 280 days of its dissolution) to be the legitimate offspring of the husband unless rebutted.

Section 84 of the Matrimonial Causes Act provides a mechanism to challenge this presumption by permitting evidence of non-access, which could establish that the husband is not the biological father. However, this mechanism is not airtight as

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14 When a person becomes married, any child born within that marriage is legally presumed to be the offspring of the spouses, regardless of the biological truth. This presumption, as allowed by the Evidence Act, may be rebutted through a successful plea of non-access. However, compelling such evidence of non-access is not permitted.

15 1970 Cap. M7 LFN, 2004.

16 Matrimonial Causes Act, 1970 Cap. M7 LFN, 2004.

either of the parties cannot be compelled to provide such evidence if it will show that the child is illegitimate, thus, reinforcing the presumption of legitimacy. This non-compellability Clause could, in some ways, enable paternity fraud within the legal system as it creates significant difficulty in rebutting the presumption of legitimacy.

It should also be noted that, over time, there have been a stringent interpretation in the context of section 84 by the Nigerian courts. In *Oduche v. Oduche*[17], Rhodes-Vivour, J.C.A held that:

> [W]here the husband and wife have cohabited together and no impotency is proved to the satisfaction of the court, the child or children are conclusively presumed to be the legitimate even though the wife is shown to have been, at the same time guilty of infidelity, and even where the parents are living apart a very strong presumption of legitimacy still arises, and it can only be rebutted by irresistible proof of non-access to sex.

The emphasis on 'irresistible proof of non-access' seeks to underscore that the provision of section 84 of the MCA is not a free pass at rebutting the presumption of legitimacy or rather disproving paternity.

From this analysis, it appears that the seemingly simplistic model of the Evidence Act may not be so simplistic after all, as rebutting the presumption of legitimacy through the Matrimonial Causes Act often proves to be a complex challenge. Again, still no mention of 'Paternity Fraud'.

3.3 CHILD'S RIGHTS ACT, 2003

The Child's Rights Act[18] establishes legal standards for children's well-being, including their education, health, protection from abuse, and parental responsibilities. In underscoring this statute, the provisions of section 63, 64 and, 66 are most essential to this discussion, as the law seems to delve into the arena of using scientific tests, blood and DNA testing in paternity disputes.

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17 [2006] 5 NWLR (Pt 972) 102.
18 2003 Cap. C50 LFN, 2004.

Section 63(1)(a) generally empowers the court to direct the use of scientific tests, blood and DNA tests, to determine paternity or maternity in civil proceedings. The provision specifies that the court may issue such a direction 'on an application by a party to the proceedings'. By authorising courts to order DNA testing, section 63(1) ensures that judicial decisions on paternity are grounded in scientifically accurate evidence. However, as always, every rule comes with an exception and as thus, this provision is subjected to some caveat as exemplified in section 64.

Section 64(1) establishes consent requirements for DNA testing by stating that, 'scientific sample which is required to be taken from any person for the purpose of giving effect to a direction under section 63 of this Act shall not be taken from that person except with his consent.'

The Act furthers this position by positing that, for a child aged 16 years or older, their consent is required. While, for a child under 16 years, the consent of the person with care and control (a parent or guardian) is necessary.

Furthermore, section 66 deals with the consequences when someone does not follow the court's instructions regarding the taking of scientific tests (such as DNA tests) to determine a child's paternity or maternity. In simple terms, it infers that, if the court orders a person to take a scientific test under section 63 and that person fails to do what is required, the court is allowed to draw negative conclusions from that failure.

In situations where a legal presumption exists that a person is the child's parent (for example, when legitimacy is presumed), if the party who relies on that presumption does not take the steps ordered by the court to confirm it (by having the test done), then the court may postpone the hearing to give that party a chance to comply. However, if after the adjourned period the person still fails to comply without a reasonable excuse, the court may dismiss their claim for relief.

In essence, section 66 warns that not following the court's directions on taking scientific tests can lead to adverse inferences against the non-compliant party,

potentially resulting in the dismissal of their case or claim. This ensures that parties cooperate in providing the necessary evidence for the court to make an informed decision.

Honestly, the Child's Rights Act is currently the only Nigerian statute that mentions the use of scientific methods in determining or disproving paternity. It is important to note that the provisions of the Child's Rights Act are fundamentally grounded in the principle of the 'best interests of the child'.[19] Consequently, courts adopt a cautious and considerate approach when adjudicating matters under the Act. Therefore, where a person is a minor and his paternity is in dispute, the court may order the conduct of a DNA test in the overall interest of the child, to ascertain where he belongs.[20]

In light of this, the Nigerian Supreme Court noted in *Rabiu v. Amadu*,[21] that "paternity is an inalienable right of the child as every child must have a father, and only one father," hinting at a right to truth. This line of reasoning was also supported by the United Nations Convention on the Rights of the Child (CRC) which provides "… that a child has, as far as possible, the right to know and be cared for by his or her parents."[22] Thus, it is entirely valid to canvass the idea that a child's right to identity aligns with their best interests. However, the decision ultimately rests with the court.

However, does this imply that the Nigerian legal system is sophisticated enough to address paternity fraud? I do not think so. Just like a disagreement between couples requires communication that addresses the issues. Paternity fraud, as a legal term, must be defined or recognised by statute for it to be effectively addressed.

19 Section 1 of the Child's Rights Act.
20 *Tony Anozia v Mrs Patricia Nnani* [2015] 8 NWLR (Pt 1461) 241.
21 [2012] LLJR-SC.
22 United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, Article 7.

3.4 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

The 1999 Constitution[23] is usually referred to as the 'fons et origo' of the legal system where it serves as its foundation.[24] In regard to the current subject matter, the right to privacy under section 37 is relevant to this discussion pertaining particularly to the requirements of consent in taking of scientific samples. Some scholars of the legal jurisprudence are of the opinion that, this consent requirement is quite in line with the constitution and therefore, courts should do well to maintain the autonomy of one's body.[25]

However, in light of section 45(1)a of the same Constitution (which will be highlighted later), a counterargument could assert that the consent requirements may be waived in accordance with Constitutional provisions.[26] Thus, there is still a lot of scepticism surrounding the legal community as to the true position concerning the interpretation of the Constitution with the jurisprudence on paternity related issues. This work and the 1999 constitution will play a much essential role in exploring the remedies within the paternity fraud context.

3.5 EVIDENCE OF NON-ACCESS VS EVIDENCE OF SCIENTIFIC TESTING

While conducting research for this work, I came across a newspaper publication that presented an argument I found quite flawed. The relevant portion of the publication is:

> One of the modern scientific means of determining the paternity of a child is the DNA test. Section 57 of the Child Right Law of Lagos State empowers the court to order the use of scientific tests including blood test and DNA where paternity is in dispute. However, consent of the parties concerned have not attained the age of sixteen, the consent of the person who has the care and control of the child is to be sought. Where the father or mother refuses to give the requisite consent, it will

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23 1999 Cap. C23 LFN, 2004.

24 *Dapianlong & Ors v Dariye & Anor* (2007) LPELR-8241 (CA) 62.

25 Amusan Tawfiiq' Lekan, 'Proof of Paternity' LawPavilion Blog (12 August 2022) <https://lawpavilion-com.cdn.ampproject.org/v/s/lawpavilion.com/blog/proof-of-paternity-in-nigeria/amp/> [Accessed 26 February 2025].

26 "(1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society -
(a) In the interest of defence, public safety, public order, public morality or public health;" Section 45(1)(a) of the 1999 Constitution.

> be presumed that the child is legitimate, in line with section 84 of the matrimonial causes act to the effect that parties to a marriage cannot be compelled to give evidence that will prove a child illegitimate.[27]

Foremostly, while I agree that consent is a strong requirement as regards the taking of scientific samples as conspicuously pointed out by the Child's Rights Act/Law, I see no interplay of this stance in view of section 84 of the Matrimonial Causes Act. It is pertinent to clarify that section 84 of the MCA relates specifically to the 'Evidence of Non-Access' and does not, in fact, make reference to consent or non-consent of taking scientific samples.

Although, some may argue that the evidence of scientific testing could dispute the paternity of a child, therefore, inferring that he/she is illegitimate, but that argument is an unfair stretch of section 84 of the MCA, considering that, at the time of enactment of the MCA, scientific methods for the determination of paternity were seemingly a myth. Thus, the justification of the refusal of consent in taking of scientific samples is not embedded in the non-compellability clause of evidence of non-access.

To conclusively capture the Nigerian legal framework relating to paternity, it is succinctly clear that, much more work is needed to tackle paternity fraud as the absence of the recognition of paternity fraud is truly damning.

4.0 PATERNITY FRAUD IN GLOBAL PERSPECTIVE

Tackling this analysis with the laws of the United States of America (USA), the Parentage Fraud Law of Tennessee seeks to be particularly striking. For context, Tennessee law addresses paternity fraud under the broader category of 'Parentage Fraud' which essentially contains the same elements. Reproducing some aspects of this law, the definition below was accorded to parentage fraud:

> "(a) A person commits parentage fraud:

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27 Yejide Gbenga-Ogundare, 'Nigeria, India Walk Similar Path on Controversial Paternity Ruling' *Nigerian Tribune* (5 February 2025) <https://tribuneonlineng.com/nigeria-india-walk-similar-path-on-controversial-paternity-ruling/#google_vignette> [Accessed 27 February 2025].

> (1) Seeks to legally establish another individual as the biological parent of a child in the person's custody with intent to deprive the individual of property or to prevent the child's actual biological parent from exercising parental rights to the child and the person knows or reasonably should know that the individual is not the child's biological parent; or
>
> (2) Seeks to be legally established as a child's parent based on the person's status as a biological parent of the child and the person knows or reasonably should know that the person is not the child's biological parent…"[28]

The above law seemingly presents itself as a perfect prototype for addressing paternity fraud or more semantically appropriate, parentage fraud. It also classifies Parentage Fraud as a Class B Misdemeanour, punishable by up to six months in jail or a fine.

However, the question almost certainly becomes; What's the catch? Upon closer examination (not that close, really, it is quite obvious), the law contains exceptions embedded within the application of the above definition of parentage fraud. Reproducing the provision, it says:

> "(c) Subsection (a) does not apply when:
>
> (1) The child involved was concieved as a result of an act that would be aggravated rape… rape… rape of a child…especially aggravated rape… or especially aggravated rape of a child
>
> (2) When the child involved has been, or is, in the process of being adopted: or
>
> (3) When the victim of the offense was the defendant's spouse at the time of the offense."[29]

While several exceptions such as rape, lawful adoption are understandable, the final carve-out exempting any child 'born of the defendant's spouse' rests on an illogical premise, as it appears to undermine the entire purpose of a parentage fraud statute. In essence, it seems to reinforce paternity/parentage fraud within

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28 Tennessee Code § 39-14-111 (2023) - Parentage fraud, available at: <https://law.justia.com/codes/tennessee/title-39/chapter-14/part-1/section-39-14-111/> [Accessed 23 March 2025].

29 Ibid.

marital relationships, which has been the main subject of this discussion. The exception suggests a scenario akin to: '*Thou shalt not decieve thy neighbour unless that neighbour is thy husband'*. If an act constitutes an offense when committed against anyone else, why should a spouse be treated as an exception, especially in a case as heart-wrenching as this?

By carving out a 'spouse exception', Tennessee effectively excludes the very scenario that most closely resembles Nigerian experience under section 84 of the Matrimonial Causes Act. In future references, the Nigerian legal system could be more encompassing by defining Paternity fraud to include any deliberate misrepresentation of genetic parentage within a marriage with the exception only being that such spouse, fully aware of the truth, has chosen to accept the child in which case it could still be subject to the legal process.

Compared to the present Nigerian framework, at least Tennessee has a legal structure addressing paternity fraud, flawed as it may be, which shows some effort, despite its shortcomings.

Moving towards the United Kingdom, paternity fraud is not classified as a crime in England and Wales.[30] Paternity fraud in England & Wales claims usually appears as a civil wrong which comes under the tort of deceit.[31] In consideration, the direction of this piece is structured towards advocating for the criminalisation of paternity fraud. Thus, a further analysis of the United Kingdom's framework would certainly not align well with this terrain.

In Asia and South America, although data are sparse, most countries lack specific frameworks targeting paternity fraud.

30 Natalie Dunn, 'Is Paternity Fraud a Crime in the UK?' Moore Barlow lawyers (19 January 2024) <https://www.moorebarlow.com/blog> [Accessed 23 March 2025].

31 Ibid.

5.0 CHARTING THE WAY FORWARD

Identifying an issue is often easy, but navigating that issue in search of a solution frequently proves a major challenge. This difficulty likely stems from our innate resistance to change. Thus, it is no surprise that people often announce the severity of an event by asking the question 'What if the heavens fall?' But, what about it? My desired answer would be that, in such an event, we should consider ourselves fortunate enough to witness the sight of angels. For what it's worth, I am desperately in need of one, and perhaps we all are.

To this end, whatever contemptuous criticism or resistance the solution to paternity fraud incurs, the Nigerian society nevertheless needs it and should not be distracted by the accustomed fear tailored to novel solutions. These are my recommendations.

5.1 DRAFTING AND ENACTMENT OF A PATERNITY FRAUD PREVENTION BILL

A specific statute should be enacted to define and criminalise intentional paternity fraud, with penalties such as fines or imprisonment to deter deceit.[32] Section 84 of the Matrimonial Causes Act should also be amended to allow compelled testimony in cases where non-access evidence could reveal fraud, prioritising truth over outdated notions of family harmony, while balancing this with procedural safeguards to prevent abuse.

Furthermore, subsidised mandatory DNA testing at birth or during marital disputes should be legislated among the provisions of this proposed Paternity Fraud Prevention Bill, supported by government funding to reduce costs,

[32] In Tennessee (USA), parentage fraud is classified as a Class B Misdemeanor punishable by imprisonment up to 6 months or a fine. Nigerian legislators could adopt a similar approach by classifying paternity fraud as a misdemeanor (usually punishable with imprisonment ranging from six months to under three years or fine).

currently around N250,000[33] and ensure accessibility, with testing facilities expanded to rural areas through public-private partnerships.

A critical challenge in enacting these reforms is reconciling mandatory DNA testing with Section 37 of the 1999 Constitution, which guarantees the right to privacy, and Sections 63 and 64 of the Child's Rights Act, which require consent for scientific tests. To navigate this, the proposed Paternity Fraud Prevention Bill could establish a public interest exception with its basis in section 45(1) of the constitution, to consent requirements in cases of suspected fraud, arguing that the societal harm of undetected deception outweighs individual privacy in limited, court-supervised circumstances.

Courts could issue testing orders upon credible evidence such as affidavits of non-access or infidelity, with strict procedural oversight to prevent frivolous claims, thus aligning with constitutional protections while advancing justice. As noted by the court in *Oyewolo v Oyewolo*,[34] the Nigerian society is patrilineal in nature, further emphasising the weight of issues bordering on paternity.

For children under 16, where parental consent is required under Section 64, the law could designate the state as a guardian ad litem in paternity fraud proceedings, empowering it to consent on the child's behalf when the mother's refusal obstructs truth. This is a more simplified position than the court overriding consent on the child's best interest. This approach mirrors exceptions in public health laws such as mandatory vaccinations and, balances privacy with the child's right to identity under the UN CRC, which Nigeria has ratified.

Also, if DNA testing reveals that the child is not the biological offspring of the man, the state must take proactive steps to address the child's identity, protect their

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33 Oluoma Vivian Aneke, 'How to do DNA Paternity test in Nigeria' Semic Health (12 January 2025) <https://www.semichealth.com/public-health/how-to-do-dna-paternity-test-in-nigeria> [Accessed 24 March 2025].

34 [1987] 2 NWLR (Pt 56) 239.

rights, and ensure accountability, while avoiding undue disruption to existing family structures.

The proposed Paternity Fraud Prevention Bill should mandate that courts, upon confirming non-paternity, initiate a process to identify the biological father, guided by the child's best interests as enshrined in Section 1 of the Child's Rights Act and Article 3 of the UN Convention on the Rights of the Child. The State could require the mother to disclose the identity of potential biological fathers under oath, with penalties for non-compliance such as contempt of court or fines, leveraging the amended Section 84 of the Matrimonial Causes Act to compel testimony. If the mother refuses or claims ignorance, the state could employ investigative measures, such as cross-referencing birth records, witness statements, or additional DNA testing with male candidates identified through circumstantial evidence, funded by the subsidised testing framework.
Once the biological father is identified, the State should facilitate his legal recognition through a streamlined paternity establishment process, updating the child's birth certificate and notifying him of his rights and obligations under Sections 13 and 14 of the Child's Rights Act (right to parental care and maintenance).[35]

In cases where the biological father cannot be located or identified (common in transient or informal relationships), the state should establish a welfare fund, supported by public-private contributions, to provide interim maintenance for the child, preventing them from bearing the burden of parental deceit.

Courts should still retain discretion to maintain existing familial bonds if severing them harms the child such as if the deceived father has been the primary caregiver, allowing him to petition for legal guardianship despite non-biological status. By seeking out the biological father, the State upholds the child's right to identity and support, deters future fraud through accountability, and restores

35 2003 Cap. C50 LFN, 2004.

trust in familial relationships, aligning with the broader societal goals of the proposed legislation.

5.2 AWARENESS CAMPAIGN

Societal awareness campaigns should be launched via media and community platforms to destigmatise paternity testing and promote transparency, encouraging a cultural shift toward truth-based family values.

5.3 'HONEST HERITAGE' SCHOOL INITIATIVE

In a society where family trust forms the very foundation of our lives, the 'Honest Heritage' School Initiative will offer Nigerian students a clear path toward embracing honesty and openness at home. This four-week program will be woven seamlessly into the Senior Secondary 1 (SS1) Civic Education curriculum in schools across the Federation.

Students will explore the timeless values of trust and communication through interactive exercises that root these principles in their everyday experiences. As they grow more confident in discussing family dynamics, lessons will gently unfold the concepts of biological truth and personal identity using relatable metaphors such as family trees, to help each young person appreciate their unique place in their lineage.

In the final weeks, thoughtfully chosen stories and animations will illustrate the real-world impact of paternity deception, showing how choosing truth (even when difficult) can heal and strengthen families. To ensure every conversation is handled with care, a three-day training workshop led by the federal government and complemented by state governments, will equip teachers with culturally sensitive strategies for guiding discussions and supporting students from Nigeria's diverse communities.

By planting seeds of integrity early, the 'Honest Heritage' School Initiative aspires not only to educate but also to inspire a generation that values truth as deeply as tradition, forging stronger, more resilient families across the nation.

5.4 GROUP THERAPY AND SUPPORT GROUPS

Group therapy and support groups are also highly actionable solutions for victims of paternity fraud in Nigeria, particularly given the cultural and economic barriers to accessing paid individual therapy. These formats provide a supportive environment where individuals can share experiences, process emotions, and learn coping strategies without the financial burden of private sessions.

Group therapy, facilitated by a trained mental health professional, involves a small group (typically six to twelve people) meeting regularly to discuss shared challenges under guided therapeutic techniques. For paternity fraud victims, group therapy can address trauma, betrayal, and identity issues through structured activities like cognitive-behavioral therapy (CBT). Sessions are often themed around emotional regulation. Funding for these groups can be provided by non-governmental organisations.

For Support Groups, these are less formal, often peer-led gatherings where individuals with similar experiences share stories and offer mutual support. They may not involve a licensed therapist but can be facilitated by trained volunteers or community leaders. Support groups for paternity fraud could focus on emotional validation, sharing coping strategies, or discussing legal and social challenges.

Thus, both formats are effective for reducing the isolation and shame often experienced by victims of paternity fraud. They foster a sense of community, normalize emotional struggles, and provide practical tools for healing, which is critical in Nigeria's collectivist culture where family and community ties are central.

6.0 CONCLUSION

It will honestly be interesting to see the reaction of the courts to the above proposed statute. Currently, in *Tony Anozia v Mrs Patricia Nnani,*[36] the Appeal Court through Mbaba, JCA had this to say:

> [I]t is unimaginable for a court to order two unwilling adults or senior citizens to submit to DNA test, in defiance of their fundamental rights to privacy for the purpose of extracting scientific evidence to assist.

The above statement shows the court reiterating section 37 of the 1999 Constitution over the attempt of taking of scientific samples without consent. But then, the decision of the court of appeal in a later case of *Peace Izontimi v Steven Izontimi,*[37] produced a different view where the court affirmed an order of the High Court compelling a mother to submit to DNA test. Again, as earlier noted, it will be curiously arousing to witness the interplay of these decisions as regards the proposed Paternity fraud Prevention statute.

Lastly, Paternity fraud in Nigeria transcends individual betrayal, emerging as a societal wound that demands urgent legislative and cultural healing. This study has illuminated its corrosive effects such as shattering trust, and eroding the family unit, a bedrock of Nigerian life. The absence of targeted laws has allowed this crisis to fester, threatening the nation's moral fabric amid broader challenges. Therefore, this research sounds a clarion call: act now, or risk bequeathing a legacy of deception to future generations. Truth must prevail, for without it, no family or nation can endure. Once again, *Éràmà, Nàigbià!*[38]

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36 [2015] 8 NWLR (Pt 1461) 241.

37 (2017) LPELR-45004 (CA).

38 "Good morning, father!". This language is indigenous to the Etsako People of Edo North, Nigeria.

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FORENSIC SCIENCE EVIDENCE: AN EXAMINATION OF CRIME SCENE INVESTIGATION PROCEDURE AND THE CONTEMPORARY CHALLENGES IN NIGERIA

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FORENSIC SCIENCE EVIDENCE: AN EXAMINATION OF CRIME SCENE INVESTIGATION PROCEDURE AND THE CONTEMPORARY CHALLENGES IN NIGERIA

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Abstract

Although forensic science evidence has risen sharply to assist in criminal and civil litigations in Nigeria and around the world, the environment is not exempted from the challenges this type of evidence may pose. The study carried out an examination of forensic science evidence with the specific aim to discuss crime scene investigation procedure for generating this type of evidence in Nigeria. To achieve this, the doctrinal research methodology was adopted and the study systematically analysed existing literatures on forensic evidence around the world. The study concluded that for many years, forensic science investigations have generated useful and trustworthy evidence. The study therefore made recommendations to improve the evidentiary jurisprudence of forensic evidence in Nigeria, particularly in criminal matters.

1.0 INTRODUCTION

The entire world, including Nigeria is dynamic and it changes legal perspectives as it evolves.[1] The courts and their arbiters should not to be left behind in situation where everything else is shaped by the dynamism of the society, even if they are not at the forefront of the change movement.[2]

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1 Y.O Ali, 'The Nigerian Evidence Act and Electronically Generated Evidence: A Need to Fast Track the System' in A. Onigbinde and S. Ajayi (ed.), *Contemporary Issues in Nigerian Legal Landscape* (1st edn, Goldmine Communications Limited 2010) 66.

2 *Ibid.*

The advent of the technological age has had significant effect on litigation practice, particularly in the area of forensic evidence gathered, analysed and presented in court. A significant proportion of evidence that is gathered for both criminal and civil matters are forensic in nature and this necessitates a change in the way that lawyers review and submit on evidential issues.[3]

The advent in technology has been regarded as a vital catalyst in the transition of scientific findings. This scientific evidential finding assists the court in maintaining objectivity and precision[4] while demonstrating the defendant's guilt or innocence, giving that it comes from a presumed genuine source, in which there is no subjectivity whatsoever.

The use of forensically generated evidence has risen sharply to assist in criminal and civil litigations in Nigeria and around the world. However, with the massive use of forensic evidence, the environment is not exempted from challenges or from fraudulent or criminal practices in Nigeria. This is predicated on the indisputable fact that the traditional methods of committing crimes have been modified to use new channels of perpetration, and thus incorporate new criminal categories.[5]

With these new ways of perpetration and new types of crimes, a new tool has appeared that would make it possible to prove crime: forensic evidence. This is an instrument that is becoming a part of our daily life and is acquiring increasing

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3 D.H. Wong, 'Educating for the Future: Teaching Evidence in the Technological Age' (2013) 10 (18) *Digital Evidence and Electronic Signature Law Review* 17; C.C. Nweze, 'Contentious Issues and Responses in Contemporary Evidence Law in Nigeria' (2006) 2 *Enugu Institute for Development Studies* 209; R. Widdison, 'Electronic Law Practice: An Exercise in Legal Futurology' (1992) 60 (2) *The Modern Law Review* 144. The term "dematerialization" "omnipresence" "malleability" means the process of the migration of information from the material world to the electronic world popularly called Cyberspace, a process, where physical or geographical distances have been removed as if were through the use communication gadgets, the adaptation of computer to the mutation of IT process from one form to another.

4 M.C. Bangerter, 'Importance of Forensic Evidence in Court' (2016) available at <https://www.bargerterla.com> Retrieved 30th November, 2019; J.L. Peterson, 'Use of Forensic Evidence by the Police and Court (National Institute of Justice, 1987) available at <https://www.ncjrs.gov> Retrieved 30th November, 2019.

5 Cybex Initiative, *'The Admissibility of Electronic Evidence in Court: Fighting Against Hi-Tech Crimes'*, (1st Edition, Cybex Publishers 2004) 2.

importance in litigation.[6] It is assumed that forensic evidence is the most reliable method to prove the perpetration of crimes committed.[7]

Presentation of evidence are sometimes confounded by inexperienced investigators, and exacerbated by faulty case management,[8] like in Nigeria. However, the introduction of forensic science into the investigatory procedure seeks to eradicate contestable investigations and confessional evidence.

In recent times, prosecutors have relied majorly on forensic science evidence of all kinds gathered from a crime scene investigation to help identify and link suspects to a crime or exclude them from a crime. Although, forensic science evidence is known to Nigeria, there are inhibiting factors against its use in courts, such as, manipulation of forensic evidence, lack of forensic tools for crime scene investigation, lack of standardized procedure for generating forensic evidence, and interpretation of forensic evidence.

1.1 LITERATURE REVIEW

A review of the existing state or body of knowledge on forensic evidence is essential in order to identify gaps that needs to be filled in the course of this study. Marasa and Mirandab,[9] posited that forensic science is the application of natural, physical, and social sciences to legal issues. No matter the associated field, the majority of forensic scientists believe that the investigation begins at the scene.

As a result, thorough investigation, collection, and preservation of evidence are crucial for establishing the truth as well as for ensuring accurate evaluation and interpretation of all types of evidence, including bloodstains, human remains, hard drives, ledgers, and files, as well as medical records. They observed that for

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6 Ibid (n3) 209.

7 T. McEwen, *The Role and Impact of Forensic Evidence in the Criminal Justice System* (1st edn, Institute for Law and Justice Inc 2010) 18.

8 R. Boddington, 'Cyber CSI: The Challenge of Digital Forensics' (2015) available at <https://www.theconversation.com> Retrieved 10th June, 2019; E.A. Vincze, 'Challenges in Digital Forensics' (2016) 17 (2) *Police Practice and Research Journal,* 183.

9 M. H. Marasa and M. D. Mirandab, 'Forensic Science' (2014) 11 (1) *Encyclopedia of Law and Science,* 1.

the purpose of recreating events using scientific techniques, crime scene investigations are concerned with the documentation, preservation, and evaluation of a location where a criminal act may have occurred and any associated evidence within the location.

Therefore, it is crucial to accurately record a scene and collect, package, and store the evidence that results. In their view, to preserve the integrity and avoid loss, contamination, or harmful alteration, evidence must be gathered meticulously. It is crucial to keep the evidence's chain of custody intact as it travels from the scene to a laboratory or storage facility.[10]

Kruse,[11] in her work postulated that media and popular cultures are paying close attention to forensic science and the evidence it provides to the criminal justice system, with a recurrent theme appearing to be the accuracy with which forensic science can link suspect bodies to crime sites. She noted that bodies in the criminal justice system are simultaneously material and sociocultural. Contrary to common belief, traces evidence at crime scenes do not speak for themselves, instead, they are employed by law enforcement and the courts to identify who committed a certain crime. These traces, however, need to be processed in a variety of ways through particular specializations, skills, and practices in order to be useful as evidence to get criminal convictions.

According to her, finding and gathering promising and relevant traces from the crime scene is the first step in the production of forensic evidence. This presupposes that there are traces to be located and gathered, although it is uncommon to find traces that can be used as evidence. Not everyone's touch leaves equally obvious traces, and not all surfaces receive and maintain fingerprints, much alone sufficiently clear fingerprints. Criminals can (and frequently do) wear gloves to prevent leaving fingerprints. Conversely, DNA-

10 *Ibid,* p. 2.

11 C. Kruse, 'Forensic Evidence: Materializing Bodies, Materializing Crimes' in Boel Berner and Corinna Kruse (eds) *Knowledge and Evidence: Investigating Technologies in Practice*, (1st edn, Department of Thematic Studies, 2013).

containing traces are common. DNA-containing traces are left behind when skin cells or microscopic salivary droplets are expelled during speech. Finding these residues while preventing DNA contamination is challenging.[12]

In her observation, the crime scene officers must determine which surfaces or objects are likely to contain and retain traces from the crime, and ideally only from the crime, in order to function objectively and effectively. Finding these traces can be challenging because they are frequently difficult to see without a tool. That is why technology like fingerprint powders and ultraviolet light, which fluoresces[13] body fluids (which typically contain a lot of DNA), are an essential aspect of crime scene investigations.

For these traces to be considered evidence, they must not only be left and discovered to become evidence, but have to be gathered in way that fingerprints and body fluids will not be smudged or polluted so as to prevent their analysis.[14] In order to achieve this, the collected traces must also be recorded and packaged so that they may be delivered to the lab without being subject to the risk of deterioration, cross-contamination, or mix-ups. This calls for the necessary tools, as well as knowledge and experience.

1.2 CONCEPTUAL ANALYSIS

Forensic science evidence according to Black's Law Dictionary,[15] is evidence acquired through scientific methods, including ballistics, blood tests, and DNA tests to be used in court. It is evidence obtained by scientific methods and with the aid of laboratory equipment.[16] In court, forensic evidence frequently aids in proving a defendant's guilt or innocence of a suspect. In the investigation and trial of civil and criminal actions, scientific examination of forensic evidence is

12 *Ibid.*
13 *Ibid.*
14 H. Barad and T. Karen, 'Meeting the Universe Halfway: Realism and Social Constructivism without Contradiction' in L.H Nelson and J. Nelson (eds) *Feminism, Science and the Philosophy of Science* (Kluwer Academical Publishers, 1996).
15 B.A. Garner, *Black's Law Dictionary* (12th edn, Thomson West Publisher, 2023).
16 *Ibid.*

applied.[17] Forensic evidence can be used to link crimes that are thought to be related to one another.

The application of forensic science has advanced beyond the traditional techniques, like fingerprints, ballistics and DNA in the apprehension of offenders. The more recent contemporary application of forensic science is the development of digital forensic, which has its origin in law enforcement's effort to combat the rise of computer-based crimes. Traditional paper crimes have been replaced with cybercrimes,[18] as a result of the transition from paper-based to paper-less transactions.

This switch has made digital forensic evidence a necessary element to deal with in order to solve crimes committed with or through electronic devices.[19] Digital forensic evidence usually leaves traces and digital exhibits, each comprising of array of bit. This traces, such as digital logs left on the computer are typically latent (requires specialised instrument to be viewed), and can be extracted from many devices using a variety of forensic techniques.

According to Locard's exchange theory, contact will cause an exchange between the two things.[20] This rule applies to all interactions at a crime scene, including those between the perpetrator, the victim and the crime scene. Despite the fact that it might not be obvious to the eye, there will always be evidence of the interaction. One criminal may be connected to a number of crimes or crime sites using trace evidence. The police can uncover trends in crimes and restrict the pool of potential suspects by connecting related crimes. This makes it easier to find and charge suspects. Blood spatter or stain patterns, fingerprints, impressions,

17 *Ibid.*

18 B. Michael and S. Jones, 'Staying ahead of Cybercrimes' (2018) available at <https://www.ukfinance.org.uk> Retrieved 4th February, 2020.

19 S. Mohammed, 'An Introduction to Digital Crimes' (2015) 5 (3) *International Journal in Foundation of Computer Science & Technology*, 13-17.

20 E. Casey, 'Foundation of Digital Forensics' in E. Casey (ed), *Digital Evidence and Computer Crime* (3rd edn, Elsevier Inc 2011).

hair, fibre, body fluids, soil, glass, narcotics, and chemicals are some of the most frequently discovered and transmitted evidence.[21]

2.0 FORENSIC EVIDENCE IN NIGERIA

In a judicial proceeding, where a deceased person's body has been damaged or disfigured beyond recognition, it may be required to confirm their identity in a thorough visual identification. Under such circumstance, the expertise of a forensic scientist, either an anthropologist[22] or odontologist[23] becomes necessary. In Nigeria, the court determines which facts establish which consequences. As a result, forensic evidence is classified as opinion or hearsay, but it sometimes gets the patronizing moniker opinion evidence.[24]

Generally, under the Nigerian Law of Evidence, opinion of witnesses is inadmissible in court-trials.[25] There is, however, an exception to this principle under Evidence Act (Ev.A).[26] An expert is a person particularly skilled, qualified or who has gained specific experience in any of the fields listed in the applicable section of the Ev.A. When called as such in a case based on his credentials qualification and experience, such expert becomes an expert witness.[27] Though expert witnesses are usually called by parties to a case, they have a duty to assist a judge in arriving at a just determination of the case before him.[28]

An expert witness must satisfy the court that he possesses requisite expert qualification or experience in the area he has come to give evidence and must also show that the nature of duty of his office falls under the purview where he gives evidence. Ordinarily, the judge will accept and be bound by the evidence of an

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21 H.C Lee and E.M Pagliaro, 'Forensic Evidence and Crime Scene Investigation' (2013) 1 (1) *Journal of Forensic Investigation,* 1.

22 Someone who scientifically studies humans and their customs, beliefs, and relationships.

23 A person who studies the structure and diseases of teeth, especially one who uses their knowledge to identify people and help solve crimes.

24 P. O. Nwachukwu, 'Admissibility of the Opinion of a Computer Forensics Examiner as an Expert Evidence Under Nigerian Law of Evidence', (2013) available at <http://www.scribd.com/doc/47821269/admissibility-of-opinion-of-computer-forensics-examiners-under-nigerian-law-of-evidence> Retrieved 20th June, 2019.

25 Evidence Act, 2011, s 67.

26 *Ibid,* s 68.

27 *Shell Petroleum Development Co. v. Tiebo* (1996) 4 NWLR (Pt. 445) 657.

28 *Idudhe v. Eseh* (1996) 5 NWLR (pt. 451) 337.

expert, unless such evidence is contrary to common sense.[29] However, where conflicting expert opinions are placed before a court, the judge has the discretion to admit one and reject the other.[30]

Expert evidence should be restricted within the area of the expert's specialty.[31] An expert witness needs to make his evidence simple and understandable and he may also refresh his memory by relevant notes prepared contemporaneously at the time of carrying out his examination or other materials. Where a Report is prepared by a team of experts, any member of the team is qualified to present the Report in court.[32]

In other jurisdictions, like the United Kingdom (UK) which is regarded as the source of forensic science evidence,[33] forensic science activities have constantly receive critical assessment of its laws.[34] The Forensic Science Regulatory Act (FSRA), 2021 provides for the admissibility of forensic activities, such as applying scientific method for the purpose of crime detection, gathering, examination and production of forensic and digital evidence,[35] not as hearsay but as expert opinion evidence. In Australia, the dynamic nature of the Australian legal framework allows some States to admit forensic evidence as expert opinion evidence, while

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29 ***Okoh vs. The State* (1971) NMLR 140.**

30 The evidence of an expert is generally an aspect of the entire evidence to be evaluated by the Court. Thus, where there is conflict in the opinions of expert, it is the duty of the court to come to the conclusion in the case by resolving the conflict and can do so by rejecting one or the other opinion. See *A.G Federation v. Ogunro* (2001) 10 NWLR (pt. 720); A Eluwa, ' Witnesses, Experts and Victims: Imperatives for the Criminal Justice System in Nigeria (2013) available at <https://www.bibilioteca.cejaerica.org> Retrieved 20th June, 2019; M. Hor, 'When Experts Disagree'(2000) 1 *Singapore Journal of Legislative Studies* 241 available at <https://www.jstor.org> Retrieved 20th June, 2019; R.J Wong, 'Judging Between Conflicting Expert Evidence: Understanding the Scientific Method on its Impact on Apprehending Expert Evidence' (2014) 26 *Singapore Academy Law Journal* 154.

31 *Egesimba v. Onuzuruike* (2002) FWLR (pt.128); *Shell Dev. Co. v. Otoko* (1990) 6 NWLR (pt.159) 286, 289- Expert evidence or opinion is only necessary where the expert can furnish the court with scientific or other information of a technical nature that is likely to be outside the experience of the judge.

32 *Ogiale v. Shell Dev. Co.* (1997) 1 NWLR (pt. 480) 512

33 S. Watson, 'History of Forensic' (2010) available at <https://www.science.howstuffworks.com/forensiclabtechnique1.Htm> Retrieved 12th June, 2019.

34 E.N. Amoako and C. McCartney, 'The UK Forensic Science Regulator: A Model for Forensic Science Regulation? (2018) 34 (4) *Georgia State University Law Review*, Pp. 945-962.

35 *Ibid,* p 951.

other territories like the Australian Capital Territory (ACT) admit forensic evidence as scientific evidence.

Recently, the considerable means in the proof of criminal charges has been the ability of the prosecution to adduce highly scientific DNA evidence, tendered to reduce significantly the risk of false accusations and unjust conviction. The result has been a potent enhancement of accurate investigation, leading to what is effectively a revolution in the techniques of ascertaining the guilt or otherwise of an accused under the Australian evidentiary legal framework.[36]

3.0 TYPOLOGIES OF FORENSIC SCIENCE EVIDENCE

One of the most crucial abilities for anyone conducting an investigation is the capacity to compile and analyse various sorts of evidence. Even if they are not direct proof of an event or allegation, there are many different sorts of forensic evidence that aid the investigator in making decisions throughout a case. However, such evidence must be pertinent to the investigation,[37] it is not relevant if it is not directly related to the case.[38]

A result in a workplace investigation or other non-criminal investigation can be reached using a variety of forensic evidence that, while not acceptable in court, can be helpful to an investigator. In addition, certain forensic evidence that is inadmissible on its own could be accepted when combined with other types of evidence.[39] The expression "forensic" means "for the courts".[40] Its use is often restricted to serious cases that could end in court in workplace investigations.

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36 M. Kirby, 'Forensic Evidence: Instrument of Truth or Potential for Miscarriage' (2010) available at <https://www.academia.edu> Retrieved 12th June, 2019.

37 R. Gehi, Introduction to Criminal Investigation: Process, Practices and Thinking (1st edn, Pressbooks 2019).

38 D. Lomer, 'Types of Evidence and How to Use Them' (2019) available at <https://i-sight.com/resources/15-types-of-evidence-and-how-to-use-them-in-investigation/> Retrieved 20th June, 2019.

39 *Ibid.*

40 *Ibid.*

Forensic evidence is scientific evidence, such as forensic DNA, trace evidence, impression and patterns, ballistics reports, forensic anthropology, controlled substance, forensic toxicology, questioned document, digital forensics and forensic pathology. These classifications of forensic evidence are discussed hereunder.

3.1 FORENSIC ANTHROPOLOGY

The study of human remains for medico-legal purposes of determining identity is known as forensic anthropology.[41] When human remains are skeletonized or when a thorough knowledge of the growth and development, morphology, or reactive norms of the human body can help other disciplines in positive identification, it is a multidisciplinary endeavour that applies the knowledge of biological anthropology and human osteology.[42]

Due to its application to both the living and the dead, it is therefore arguably best positioned as a sub-discipline within the broader practice of forensic human identification.[43]

Anthropology evidence is routinely used to help identify people whose remains are extensively decayed, burned, disturbed, mangled, or otherwise impossible to identify. Evidence from anthropology has been particularly useful in three areas:[44]

(i) Homicide, unexplained natural deaths, accidents, and mass fatality investigations;
(ii) Non-criminal occurrences causing many deaths, such as those caused by natural disasters; and
(iii) War crimes and genocide investigations. However, the anthropology evidence may also be used to support the evaluation

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41 H.A Walsh-Haney, 'Forensic Anthropology' (2020) available at <https://www.emedicine.medscape.com> Retrieved 3rd February, 2021; S. Blau and D.H Ubelaker, ' Forensic Anthropology and Archaeology: Moving Forward in S. Blau and D.H Ubelaker (eds) *Handbook of Forensic Anthropology and Archaeology* (2nd edn, Routledge Press 2016); E. Gualdi-Russo and G. Fonti, 'Recent Trend and Perspectives in Forensic Anthropology: A Bibliometric Analysis (2013) 37 (2) *Coll Antropol*, 595.

42 *Ibid.*

43 P.S Randolph-Quinney and X. Mallett and S.M Black, 'Forensic Anthropology 'in A. Jamieson and A. Moenssens (eds) *Wiley Encyclopedia of Forensic Science* (1st edn, Wiley & Son Ltd 2011) 52.

44 *Ibid.*

of the living, supplying proof of identity like chronological age for legal accountability, immigration, or asylum status.

3.2 CONTROLLED SUBSTANCES

Controlled substances are drugs that are known to be legally capable of abuse[45] and can have a detrimental effect on a person's health.[46] They include both "prescription drugs" like oxycodone and "street drugs" like heroin. One of the most important steps in law enforcement's campaign against drug-related crime and violence is the detection and identification of restricted drugs.[47] Controlled substances present law enforcement and criminal justice professionals with the following problems:[48]

(i) Crime laboratories receive and process copious amounts of drug evidence, which causes backlogs.
(ii) Many substances are identical in appearance and qualities, making it very difficult to differentiate their exact identification, necessitating the development of new analytical procedures and increased analysis time in crime laboratories.

However, with the introduction of new technology such as more sensitive detection tools used at crime scenes to identify, analyse controlled substance, the efforts of law enforcement to resolve these issues have improved.

3.3 COMPUTER FORENSIC EVIDENCE

The recent development of computer forensics has its origins in law enforcement's efforts to combat the rise of computer-related criminality. United States law enforcement agencies started collaborating in the late 1980s and early 1990s to provide training and increase their capabilities to address the problem.[49]

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45 C.V Preuss and A. Kalava and K.C King, Prescription of Controlled Substances: Benefits and Risks (Stat Pearls Publishing, 2020).
46 United States Controlled Substance Act, 1970.
47 National Institute of Justice, 'Overview of Controlled Substance' (2015) available at <https://nij.ojp.gov/topics/articles/overview-controlled-substances> Retrieved 3rd February, 2021.
48 *Ibid.*
49 E. Casey, 'Foundation of Digital Forensics' in E. Casey (ed), *Digital Evidence and Computer Crime* (3rd edn, Elsevier Inc 2011).

Computer forensic evidence usually leaves traces and exhibits,[50] each comprising of array of bit. Where tendered by witnesses in a judicial proceeding, it helps the judge to establish the justice of the case and support or refute legal theories of the case. Computer traces, such as digital logs left on the computer are analysed and presented by experts using a suitable methodology that addresses the legal theories in issue.[51]

Computer forensic evidence is typically latent, meaning that it requires specialised instruments to be viewed at the necessary degree of detail by the fact-finder. It is typically necessary for those who utilize these tools to be knowledgeable, well-trained, and able to provide expert witness in order for them to be used properly.[52] By showing that the other side made or missed mistake with regard to content, context, meaning, process, relationships, ordering, timing, location, corroboration, or consistency, and that this resulted in false positives or false negatives in the result presented by the other side, digital forensic evidence is challenged.[53]

Computer evidence collection calls for a set of abilities that are not necessarily required for physical evidence. Computer evidence can be extracted from many devices using a variety of techniques, and both the techniques and the devices that contain the information evolve often. Investigators must either acquire specialised technical know-how or enlist the help of professionals to perform the extraction. It can be difficult to preserve digital evidence since, unlike physical evidence, it can be remotely changed or removed.[54] The evidence must be able to

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50 K. Keltus, 'An Assessment of the Application and Impact of Forensic Science in the Nigerian Criminal Justice System, (2017) available at <https://www.academia.edu> retrieved 12th June, 2019.

51 F.B Cohen, 'Fundamental of Digital Forensic Evidence' in P. Stavroulakis and M. Stamp (eds), *Handbook of Information and Communication Security,* (Revised edn, Springer 2010) 789 available at https://www.researchgate.net/publication. Retrieved 17th June 2019.

52 M. Pollitt, *et.al.*, 'Digital Forensics: Operational Legal and Research Issues' (2004) 17 *Data and Application Security Journal* 393.

53 Ibid (n51) *Op.cit,* 792.

54 E. Casey, *Digital Evidence and Computer Crime* (2nd edn, Academic Press 2004).

be verified by the investigators, who must also provide documentation to prove its integrity.[55]

3.4 FORENSIC DEOXYRIBONUCLEIC ACID

Deoxyribonucleic Acid or DNA has been designated as the most significant means of identification in modern era.[56] It is a molecule that encodes the genetic information in all living organisms.[57] DNA or deoxyribonucleic acid is the inherited, coded genetic material that determines much of one's appearance and physiology.

Forensic scientists extract DNA from samples of blood, semen, saliva, skin, or hair follicles found at the scene of the crime and develop a profile by analyzing several locations in the DNA where individual variations are common.[58] This profile is compared with DNA taken directly from the suspect. If the profiles do not match, the suspect is cleared but remains a secondary suspect.

The power of DNA testing is such that examination of biological items can produce very compelling evidence.[59] In criminal investigations because of the accuracy and reliability of forensic DNA analysis, this evidence has become an invaluable tool for exonerating or convicting individuals who have been wrongfully convicted or acquitted.[60] This is particularly important to the convicted of serious crimes solely on the basis of eye witness testimony which is not always reliable. In civil matters

55 Ibid (n51) *Op.cit.*

56 H Machado and R. Granja, 'DNA Technologies in Criminal Investigation and Courts' in H Machado and R. Granja (eds) *Forensic Genetics in the Governance of Crime* (1st edn, Palgrave Pivot 2020).

57 J. Seladi-Schulman, 'DNA Explained and Explored' (2019) available at <https://www.healthline.com> Retrieved 3rd November, 2020.

58 D.B Muhlhausen, 'Forensic Science: Types of Evidence' (2015) 2 (164) *National Institute Journal* 1.

59 *Ibid.*

60 E. Conner *et.al.*, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1st edn, *National Institute of Justice 1996*)

it is used in investigation of paternity on child support cases,[61] identifying the remains of crime and accident victims and to conduct genealogical research.[62]

The Nigerian courts have taken cognisance of the role DNA evidence plays in the justice system. In *Tony Anozia v. Okwunwa Nnani & Anor,*[63] the court held that the whole case at the trial court was founded on speculation and assumption that if the DNA test was ordered, the result was likely to favour the Claimant and that he cannot be allowed such whimsical past time, as it has no place in law.

Therefore, it is unimaginable for a Court to order two unwilling adults or senior citizens to submit to DNA test, in defiance of their fundamental rights to privacy for the purpose of extracting scientific evidence to assist a party to confirm or disprove his wish that a 57-year-old man is his child, of an illicit amorous relationship.

3.5 IMPRESSION AND PATTERN EVIDENCE

Impression and pattern evidence is one of the most frequent types of evidence that detectives may find and gather at a crime scene.[64] Impression evidence is produced when two items make enough forceful contact to leave an "impression." Typically, impression evidence is either two-dimensional such as a fingerprint or three-dimensional such as the marks on a bullet caused by the barrel of a firearm.[65]

Pattern evidence on the other hand may be more identifying details discovered within an impression. For example, an examiner will compare shoeprint evidence with several shoe-sole patterns to identify a particular product, prototype or size.

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61 Olay*inka v. Adeparusi & Anor* (2011) LPELR 8691. The court held *"If a party is claiming paternity, it is trite that the court of law should be allowed to determine same on proof of evidence relating to paternity, which could only be done by referral for a DNA test of the parties involved. After such test, the court has the duty to declare, the actual father of the child in dispute in consonance with the evidence at its disposal"* Per Denton-West JCA

62 Ibid (n58).

63 (2015) 8 NWLR (Pt. 1461) 241 at 256-257.

64 National Institute of Justice, 'Overview of Impression and Pattern Evidence' (2016) available at <https://nij.ojp.gov/topics/articles/overview-impression-and-pattern> Retrieved 3rd February, 2021.

65 *Ibid.*

If a shoe is recovered from a suspect that matches this initial pattern, the forensic examiner can look for unique characteristics that are common between the shoe and the shoeprint, such as tread wear, cuts or nicks.[66]

Impression and pattern evidence can help link a suspect or tool to a particular crime scene. New or improved methods to detect, gather, examine and keep impression and pattern evidence would greatly aid the forensic community.[67]

3.6 FORENSIC PATHOLOGY

The treatment of human remains as forensic evidence is distinct from other types of evidence. When a death is violent, unusual, or unexpected, the reason and manner are investigated through an autopsy of the remains.[68] A post-mortem examination will be performed by a forensic pathologist, who will also take death scene evidence into account. To help evaluate whether the death was a result of a natural, unavoidable, or unlawful cause, the person's medical history may also be examined. During the examination, the pathologist can find important evidence, like a bullet, that could help identify the cause and manner of death.[69]

In addition, in cases of fatalities caused by firearms or other projectiles, the pathologist may spot a wound pattern that can be linked to a specific weapon or can identify entry and exit wounds. More investigation is required into the use of virtual autopsy as an alternative to conventional post-mortem examinations in order to better equip forensic pathologists.[70]

3.7 QUESTIONED DOCUMENTS

Questioned documents (QD) are any documents that may be used as evidence in a trial, ranging from handwritten notes to counterfeit currency to contracts. QD provides analysis applied to many types of investigations and types of documents.

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66 *Ibid.*
67 *Ibid.*
68 National Institute of Justice, 'Overview of Forensic Pathology' (2013) available at <https://nij.ojp.gov/topics/articles/overview-forensic_pathology> Retrieved 3rd February, 2021.
69 *Ibid.*
70 *Ibid.*

It outlines the methods for ascertaining genuineness, age, ink and paper sources, handwriting identification, equipment used, counterfeits, modifications, erasures, and more.[71]

QD is a comprehensive text which established a greater focus on not only the examination of handwriting and signature but of other types of evidence appearing on documents including paper, ink, typewriter and alteration.[72] It carefully considers the potential variations in people's handwriting, including variations in letter size, character spacing, connections, pen movement, finger dexterity, writing skill, grammar, spelling, punctuation, margins, crowding, phraseology, and alignment. It can provide details about the writer's mindset, disposition, drive, intelligence, and emotional stability.

Given that certain character structures are more prevalent in specific geographic regions of the world, it may even be feasible to determine the writer's nationality from their handwriting.[73]

Investigators often need to examine or verify the authenticity of a document that could be used as evidence in court or aid in an investigation. Such documents are known as "questioned documents." Through visual examination, changes that are not visible to the naked eye can be detected using photography and ultra-violet imaging devices or advanced chemical analysis of inks and paper to determine information relating to a questioned document's authentication, authorship or creation date.

Such documents, printed or handwritten, could include cheques, criminal confessions, counterfeit money and journal entries. It needs not necessarily be a ‘document’ per se. For example, a suicide note bearing a handwritten or

71 J. Levinson, Questioned Documents: A Lawyers Handbook (1st edn, Academic Press 2000).

72 S.K Niyogi and O. Hilton, ‘Discussion of History of Questioned Document Examination in the United States’ (1980) 25 (3) *Journal of Forensic Science* 465.

73 B.R. Sharma, *Forensic Science in Criminal Investigation and Trials* (4th edn, Universal Law Publishing 2011).

typewritten text and a forged will, can both be considered as a questioned document.[74]

3.8 FORENSIC TOXICOLOGY

Forensic toxicology is the science of applying the principles of analytical chemistry and toxicology for medico-legal purpose where the results are likely to be used in court or for administrative actions.[75] Forensic toxicology disciplines covers death investigation, and aspects related to behavioral or human performance such as impaired driving due to drug consumption, steroid use by athletes, and workplace drug testing.[76] Analysed items may include biological samples, drugs, toxins, plants, environmental chemicals, and any product where the results of the analysis may clarify criminal activities and past or current events.

The examination of biological samples for the presence of poisons, including drugs, is known as forensic toxicology. The type of drugs present in a person and whether their quantity is within the range of a therapeutic dosage or above the threshold for harm can both be determined by the toxicology report.[77] These findings can be utilised to draw conclusions about a substance's potential impact on a person's demise, disease, or physical or mental disability. For instance, the results of a blood test on a driver involved in a collision can be used to ascertain if that person was under the influence of alcohol or drugs.[78]

Most forensic investigations incorporate forensic toxicology, especially when there is suspicion that a harmful substance was consumed prior to death. In rape situations where the victim had ingested a date-rape drug, making them unable to defend themselves while being sexually assaulted, drug testing techniques are frequently employed.

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74 Ibid n71.

75 G. Husein, 'Forensic Toxicology' in S. Rajat (ed), *Toxicology-Past, Present and Future of Basic Clinical and Forensic Medicine* (1st edn, Nova Science Publishers 2014).

76 J. Wyman, 'Principles and Procedure in Forensic Toxicology' (2012) 32 *Clinical Laboratory Medicine Journal,* 493.

77 Ibid (n58) *Op.cit,* 5.

78 *Ibid.*

Unfortunately, a lot of these medicines pass through the body quickly. Investigators can frequently learn something about what the victim may have consumed by looking at the crime scene. Pill bottles, powders, trace residues, and any other compounds could all be considered as evidence.[79]

The field of forensic toxicology is one that is constantly developing. The continuous development of new medicines necessitates the development of inventive methods for their detection. New instrumentation is being deployed, and new detection techniques are continually being developed, to meet this challenge.

3.9 TRACE EVIDENCE

The phrase "trace evidence" is typically used to refer to any sort of evidence that appears in sizes small enough to transfer or interchange across two surfaces covertly. This type of evidence is based on the Locard's exchange idea, which holds that anything he steps on, touches, or leaves behind will silently testify against him. Not just his prints or footprints, but also his hair, clothing fibres, the glass he breaks, tool marks he makes, paint he scrapes, blood or semen he deposits or gathers. These and other things serve as silent witnesses against him. This is proof that one should not forget.[80]

Trace evidence is small, even microscopic remnants of materials discovered at the scene of a crime or on the victim's body. The term "mute witnesses" is commonly used to refer to these small bits of evidence such as paint smears, fibers, hair strands, dirt particles, glass fragments, and other items.[81] Trace evidence is used to tell the story of how a crime was committed and to identify and convict suspects. Recent improvements in the techniques used to collect and analyze

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79 S. Rankin, 'Forensic Science Central' (2014) available at <https://www.forensicsciencecentral.co.uk/toxicology.shtmil> Retrieved 17th June, 2019.

80 P.L Kirk, *Crime Investigation* (1st edn, New York: Inter-Science Publishers, 1953); T. Jergovich, "Trace Evidence Overview" (2011) available at <https://dofs.gbi.georgia.gov/sites/dofs-gbi.georgia.gov/files/imported/vgn/images/portal/cit_1210/57/14/180852003GBI-TraceEvidence> Retrieved 15th June, 2018.

81 Ibid (n80), 7.

trace evidence have played a key role in solving many cases that might have gone unsolved just a few years ago.[82]

Trace evidence examinations encompass a wide variety of evidence types that include trace (transfer) evidence, fractured materials (physical matches) and material identifications. This category of evidence includes materials that are often microscopic in nature and are readily exchanged between people, places and objects upon contact. The examination of questioned and known materials can determine whether samples could (or could not) have the same source of origin. Trace evidence may be hidden from the bare eye, therefore, special caution must be taken to preserve it and avoid loss or contamination.[83]

The importance of trace evidence can be critical to an investigation. Awareness of this type of evidence cannot be overemphasized. Photographing the area where any evidence is collected not only provides documentation of the collection but also assists in locating trace evidence.[84] Even if identification cannot be made in the laboratory, the investigator and prosecutor may use trace evidence as part of a convincing circumstantial case. Skill and effort during collection, testing and case preparation can help ensure a successful presentation of trace evidence in the courtroom.

3.10 ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) evidence refers to materials formed through the use of AI to analyse and produce opinions which are used to prove case facts. AI evidence which is scientific in nature is distinct from other forms of evidence as it manifests in the application of technologies.[85]

Artificial Intelligence (AI) represents an extensive domain of multifaceted endeavours focused on creating intelligent machines, or cognitive technologies

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82 M. M. Houck, *Trace Evidence* (1st edn, Academic Press, 2001).

83 Ibid (n58) *Op.cit,* 2.

84 S. Staggs, 'Evidence Photography at the Crime Scene' in S. Staggs (ed), *Crime Scene and Evidence Photography* (2nd edn, DBA Staggs Publishing 2014) 12.

85 C. Li, 'Artificial Intelligence Evidence: Concept, Nature and Application' (2025) *Frontiers in Humanities and Social Sciences* 5 (5), 62-69.

that have practical benefits for several spheres of human activity. While AI is gradually been deployed by criminals to actualize new possibilities in the commission of crime, forensic investigators are also actively integrating AI into automated repetitive task, such as gathering, analyzing and generation of forensic science evidence.[86]

Precisely, AI is utilized as an application in law enforcement and judicial systems, yielding improved and expedited outcomes with minimal error owing to its independence from human intervention.[87] For instance, the AI technology "Rosie" is being used in Brazil to find evidence of corruption and atypical spending by elected officers, in the UK, investigators are already making use of face recognition technology (FRT) and automated license plate scanners (ALPR) to track offenders in real time.[88] In other jurisdictions, like the USA, Correctional Offenders Management Profiling for Alternative Sanction (COMPAS), an AI-based predictive analytic tool has been deployed by courts to estimate the chances of a defendant committing another crime after been released on bail.[89]

Although, it is widely applied in assisting judicial proceedings, Judges face challenges in evaluating the admissibility of such evidence with concerns related to manipulation (deepfakes, i.e., artificial images, video clips and audio recordings), authentication, chain of custody, reliability, transparency, interpretability and the bias of such evidence.[90]

AI-generated evidence encompasses a wide range of materials from documents, photos, videos and communications synthesized by AI to data analysis and patterns identified through machine learning algorithms. How accurately the AI-

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86 F. Adeoye, 'The Role of Artificial Intelligence in Revolutionizing Criminal Justice: Opportunities and Challenges for Nigeria' (2023) *Benue State University Law Journal* 12 (2), 347-371.

87 A. Idder and S. Coulax, 'Artificial Intelligence in Criminal Justice: Invasion or Revolution' (2021) available at <https://www.ibanet.org/dec-21-ai-crimina-justice#_edn3> Retrieved 6th June, 2025.

88 *Ibid*

89 *Ibid.*

90 E. Gentry, 'The Challenge of Integrating AI-Generated Evidence into the Legal System' (2024) available at <https://akerman.com/en/perspectives/the-challenges-of-integrating-ai-generated-evidence-into-the-legal-system.html> Retrieved 6th June, 2025.

generated evidence is, as well as its reliability (i.e., the consistency with which the AI produces accurate results when applied to the same or substantially similar circumstances) depends on the objective testing of AI application before it is released to the courtroom.[91]

4.0 CRIME SCENE INVESTIGATION PROCEDURE

The major objectives of any investigation are to connect the perpetrators to the victims and crime scene by following the trails that criminals leave behind while committing a crime. Despite the possibility of witness identification, concrete proof of a suspect's involvement is typically more convincing and trustworthy. Finding strong connections between the criminal, victim, and crime scene is the goal of forensic analysts.[92]

The key principle underlying crime scene investigation (CSI) is the concept of Locard's exchange principle. The logic behind the principle allows investigators to collect wide variety of physical and trace evidence at a scene that is deemed valuable.[93]

Depending on the crime's nature and the law enforcement agency's resources, types of evidence gathered will vary. While smaller agencies could insist on first responders or detectives processing the scene in addition to their other responsibilities, larger agencies frequently have specialised, highly trained crime scene specialists.[94] The method adopted in gathering of evidence at a crime location depends on the first responder to the scene and the circumstances the investigators encounter,[95] however in most forensic crime scene, it is preferred to follow these procedures.

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91 P.W. Grimm and M.R Grossman and G.V. Cormack, 'Artificial Intelligence as Evidence (2012) *Northwestern Journal of Technology and Intellectual Property* 19 (1).

92 Ibid (n49) *Op.cit,* 17.

93 National Forensic Science Technology Center, 'How It's Done' in *A Simplified Guide to Crime Scene Investigation* (2013). Available at <https://www.forensicsciencesimplified.org/csi/how.html#top> Retrieved 16th June, 2019.

94 *Ibid.*

95 *Ibid.*

4.1 FIRST RESPONDER AT THE CRIME SCENE

A first responder detective is frequently assigned to a case and is in charge of questioning potential witnesses and victims, following up on leads, and compiling the information gathered at the site. The detective collaborates with a group of professionals at the crime scene who assist in gathering information and rescuing surviving victims, if any. This information may include personal information of the victim; time and place of crime; eye witness testimony; description of the suspect or possible video evidence; and the essence of the information obtained.

It is significant to note that if a large number of officers and support personnel responded to a crime scene but there is little direction or coordination of the activities that go on, a case may actually be damaged more than it is helped.[96] The team at the crime scene investigation may include para-medics; police officers; photographer and evidence collecting officer specialized in collecting trace samples, latent prints, DNA and the likes.[97]

4.2 RESTRICTING ACCESS TO THE CRIME SCENE

According to Locard's Exchange Principle, every person who enters or leaves the scene will contribute to or take away from the environment, hence it is imperative to promptly secure the area. After investigating officers have responded to the crime scene and a decision is made to search the scene for or collect evidence, the perimeter of the crime scene must first be established.

It is generally best to set the perimeter at the outermost distance that seems likely to contain evidence, since investigators can contract the scene as needed but if they do not set the scene big enough, evidence may be sullied in its quality or lost before realizing the scene should expand.[98]

The division of labour at a crime scene investigation is an important aspect of managing the case. Investigating officers are to secure the scene and determine if

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96 R. Finner, *The Crime Scene and the Laboratory in Forensic Evidence* (1st edn, SAGE Publication 2021) available at <https://us.sagepub.com> *Retrieved 21st February, 2021.*

97 National Forensic Science Technology Center, (n86) *Op.cit,* 8.

98 Ibid (n89).

suspects or witnesses are present when they arrived. Where investigator is conducting an indoor investigation and he is waiting for other personnel, he will have to close off the access to the crime scene, where it is outdoor securing off the entire public place may be a little challenging as evidence may be exposed to bad weather conditions.[99]

Securing either type of scene is a function intended to protect potential evidence from intentional damage, as well as, to limit access to witnesses who need to be interviewed and the reduce the distractions for official personnel working at the crime scene.

By plotting out the scene of the event, personnel can determine what sequence area will be searched in and who will be responsible for marking locations, photographing or recording images, collecting and documenting actions taken by everyone at the scene, including the cataloging and transportation of any located evidence, utilizing a chain of evidence that lists the hand-off of items from one person or place to the next.[100]

4.3 EMPLOYING STANDARD PROCEDURE AND EQUIPMENT

The tool used in the location, collection, identification, and comparison of physical evidence varies. Some crime scene requires simple equipment, while some require complex equipment. Just as with the preliminary and follow-up investigations, the equipment utilised in these two phases of the investigation can generally be distinguished.

Under the simple equipment procedure, investigators commonly have access to basic equipment that allow them to perform rudimentary examination of the scene and perhaps dust for fingerprints and take limited photography. An important piece of basic equipment is often a roll of crime scene tape for the officer to use to erect a visual barrier around the area until it can be properly search. For

99 *Ibid.*
100 *Ibid.*

technicians, basic equipment will include a variety of bags, both paper and plastic, and other containers suited to gathering various types of physical evidence.

In advanced crimes, more sophisticated equipment are used. This requires thorough recording using digital and video cameras, or a 3-D scanner if one is available for fingerprint evidence or chemicals present at the scene. Sketches and diagrams are also produced for some circumstances. It is essential that the crime scene investigator adheres to the correct methods for gathering, packaging, and conserving evidence during the evidence collection process, especially if the evidence is of a biological type.[101] At the laboratory, science and technology combined are used in identification of substances, in the linking of such substances to people and to places.

4.4 CONDUCTING PRESUMPTIVE TEST

The most convincing evidence is taken from the scene and delivered to a forensic lab for analysis, or if the lab does not have a specialist in that forensic field, to an independent analyst. The crime scene personnel may perform an initial screening test, known as a "presumptive test," at the scene to aid in identifying the evidence that is most important. Investigators might focus their inquiry on a particular class of material or person using presumptive tests,[102] however, they are insufficiently specific to prove the existence of particular chemicals.

Presumptive testing can assist in reducing the amount of evidence submitted to the lab so that only the most crucial items are included, in addition to aiding in providing hints as to how the crime may have occurred and who may have been involved. This speeds up the laboratory's procedure. Additional testing evidence will probably be done on-site as technology develops and devices become more portable and inexpensive.[103]

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101 *Ibid.*

102 A. Grine and S. Rackley 'Advantages and Disadvantages of Presumptive Test' (2010) available at <https://www.studentshare.org/chemistry/1664718-presumtive-have-both-advantage-and-disadvantage> Retrieved 3rd February, 2021; See Testimony of Dr. Robin Cotton on 5th November, 1995 in the *State of California v. O.J Simpson* Case.

103 *Ibid.*

4.5 RECORD AND PRESERVE SAMPLES

Since trace evidence associated with a crime can provide information that may solve the case, it is essential to correctly document, collect, and preserve this type of evidence.[104] An inventory log is made to make sure that all the evidence is present. The descriptions written down in the log must coincide with the descriptions in the crime scene report and the photo of the evidence obtained at the scene. For instance, if a firearm is retrieved from the crime scene, its serial number must coincide with the one on the photograph that was taken there. The chain of custody that will follow the evidence throughout the case's lifecycle is established via this paper trail.

5.0 GENERATING FORENSIC SCIENCE EVIDENCE

Finding and gathering pertinent and promising traces from the crime scene is the first step in the production of forensic evidence. This implies that there are traces to be discovered and gathered, but it is not always the case because criminals can wear gloves, which prevent them from leaving fingerprints at crime scenes, and they frequently do.

On the other hand, DNA-containing traces are common. When speaking, little droplets of saliva are expelled, and skin cells shed also leave useable evidence. Finding these remnants and preventing contamination from them is challenging.[105] The crime scene officers must determine which surfaces are likely to carry and keep traces from the crime, and ideally only from the crime, in order to function properly and effectively. Finding these traces can be challenging because they are frequently difficult to see without a magnifying glass. For this reason, forensic investigation frequently uses fingerprint powders or ultraviolet light to make body fluids fluoresce.[106]

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104 G. Schiro, 'Collecting and Preservation of Blood Evidence from Crime Scene'(2011) *Louisiana State Police Crime Laboratory* available at <https://www.crime-scene-investigator.net/blood.html> Retrieved 13th January, 2021.

105 Ibid (n95) *Op.cit*, 16.

106 *Ibid.*

The term "the legal chain" refers to the route that cases take through the legal system, conjuring (perhaps mistakenly) images of a rigid connection between the scene of the crime and a conviction. In its ideal state, this legal chain starts when a police patrol arrives at the location of the reported incident and concludes when the verdict is rendered.[107]

5.1 MAINTAINING THE CHAIN OF CUSTODY

The connection between "the first investigator on the scene" and "the final verdict," which is generally emphasized about the legal chain, is actually made up of a number of links or agents. Traces from crime scenes go through a number of changes as they pass through this chain.

The crime scene is reduced to traces, and the information contained in those traces is then recorded into evidence log sheet which stays with the piece of evidence throughout the life of the evidence until it is no longer retained, stored or otherwise needed.[108] This information is contrasted with further data, and the outcome is reported in standardized expert statements, or "forensic" statements.[109] This evidence is then shaped into narratives about a series of events and transformed into legal categories of responsibility along with other pieces of evidence, such as witness accounts.

These changes are made possible by a system of actors, tools, and understandings that creates the phenomenon of forensic evidence, and in doing so actively materializes both bodies and crimes, establishing rather than merely establishing the link between a specific body and a specific crime.[110]

Maintaining a chain of custody of evidence gathered at a crime scene is crucial in criminal cases and important in the admissibility of forensic science evidence. A

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107 C. Kruse, 'Forensic Evidence: Materializing Bodies, Materializing Crimes' in Boel Berner and Corinna Kruse (eds), *Knowledge and Evidence: Investigating Technologies in Practice* (1st edn, Department of Thematic Studies 2013).

108 L.R. Johnson, 'Forensic Team Policies and Procedure' in M. Kessler (ed), *Computer Incident Response and Forensic Team Management* (1st edn, Syngress Press, 2014).

109 C. Kruse, (n100) *Op.cit,* 34.

110 *Ibid.*

broken chain of custody can compromise evidence integrity, leading to inadmissibility of evidence and case dismissal.[111] Therefore, it is important for law enforcement and legal professionals to understand the key factors behind custody breaks, their legal consequences, and how digital evidence management systems ensure an unbroken chain.

5.2 LABORATORY ANALYSIS

The laboratory analysis is transforming these traces into information. The transformation between DNA and fingerprint traces differs from laboratory procedures intended to prevent deterioration, contamination, cross-contamination, and mix-ups. The laboratory regularly works with numerous traces, extracting DNA from them, and building profiles of this DNA, a substantial portion of which is completed by tools and computers.[112]

The analysis of fingerprints is substantially less automatic. The fingerprints from the crime scene are compared to the suspects' fingerprints by specialised fingerprint examiners. On a computer screen, they examine enlarged photographs of the fingerprints, highlighting so-called features in the lines such lines that halt or split.

When there is no suspect, the police's fingerprint database is searched using the prints from the crime site, and several alternatives are given. These ideas are then carefully matched with the fingerprints from the crime scene one by one, or in the case of a known suspect, their fingerprints.[113] The examiners claim that because fingers are supple and malleable, no two prints left by the same finger are ever precisely the same, making this comparison challenging.

If the trace was left by someone other than the suspect, typically referred to as a random member of the population, it is said that a full profile match, for example,

111 *Brown v. The State* 690 So.2d 26.
112 Ibid (n100) *Op.cit,* 34.
113 *Ibid.*

is "practically impossible" to establish. In other words, the laboratory's statement only refers to the analysis result; the court will make the determination on what the finding means regarding whether or not it is reasonable to assume that the suspect is the source of the trace found at the crime scene. These findings are detailed in expert reports that follow the legal process from the police to the prosecution, the defence, and finally the courts, where they will be incorporated with other pieces of evidence.[114]

It worth noting that the examination and comparison of fingerprints from the crime scene with that of the suspects' through specialised fingerprint examiners does not totally exonerate the likelihood of bias or error that may occur during the examination process, particularly where the examination is carried out by a single examiner with little or no experience and supervision.

Laboratory analysts, occasionally are prone to mistakes, such as mismatching of samples and cross-contamination, a two-step authentication cross-check by a neutral examiner for possible errors and biases that can negatively influence a decision would certainly be helpful to eradicate undetected flaws in the analysis result before getting into the courtroom.

5.3 EXPERT STATEMENT

An expert statement, however, does not establish conviction. The courts must examine, assess, and, in conjunction with the other evidence, translate the laboratory results into a verdict. Adding that, it is only assumed by the prosecution, defence, and court that the laboratory did a good job and delivered accurate results.

Therefore, the focus of a trial is whether or not the prosecution can establish the defendant's guilt of a specific offence beyond a reasonable doubt, or in legal terms, what conclusions may be taken from the trial proceedings.[115]

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114 *Ibid.*
115 *Ibid.*

5.3 AUTHENTICATION OF STATEMENT

Preservation and recording of the chain of custody of the evidence is one of the most crucial components of authenticity. Each person who handled the evidence may be asked to provide a testimony or sign an authentication document stating that the evidence is identical to what it was when it was processed throughout the investigation and is being presented in court.[116]

Even while not every person who touched the evidence must be present at trial, it is best to keep the list to a minimal and retain records to prove that the evidence has not been changed since it was obtained. Therefore, it might be argued that the evidence was handled inappropriately and may have been changed, replaced with damning evidence, or contaminated in some other way in the absence of a strong chain of custody.[117]

6.0 ADMISSIBILITY OF FORENSIC EVIDENCE IN NIGERIA

Forensic evidence, similar to other kind of evidence is guided by evidentiary principles of evidence under the current Ev.A, 2011. Admissibility of proof is strictly based on these rules, that is, relevancy and admissibility. Thus, these rules are considered hereunder.

6.1 RELEVANCY AND ADMISSIBILITY

The standard for admissibility is relevance, and the relationship between relevance and admissibility forms the basis of the law of evidence.[118] Although relevance and admissibility are closely related concepts, they nevertheless have certain differences. The former is predicated on common sense thinking, whereas

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116 *Ibid.*

117 *Ibid.*

118 C.E Ochem, 'Relevance and Admissibility of Electronically Generated Evidence' (2012) A Thesis submitted to the College of Law, Igbinedion University, in partial fulfillment of the requirements for the award of the degree of Doctor of Laws (Ph.D.) of the Igbinedion University, Okada, Edo State.

the latter is predicated on law. Evidence must be pertinent in order to be admitted,[119] however, it might be pertinent without being admissible.[120]

In *R v. Killbourne,*[121] Lord Simon stated:

> *"Your Lordships have been concerned with four concepts in the law of evidence: (i) relevance; (ii) admissibility; (iii) corroboration; (iv) weight. The first two terms are frequently, and in many circumstances legitimately, used interchangeably; but I think it makes for clarity if they are kept separate, since some relevant evidence is inadmissible and some admissible evidence is irrelevant…"*

Sagay, stated that the general rule guiding the law of evidence is that all evidence that is sufficiently relevant to a matter before the court is admissible, subject to some particular exceptions, and all evidence that is not relevant is inadmissible.[122] Evidence in support of facts that the Ev.A declares to be relevant is admissible evidence. Evidence used to support a fact that has been declared irrelevant or not relevant is not admissible.[123]

As a fundamental principle of our law of evidence, the connection between relevance and admissibility has been confirmed by the courts in a number of cases. In the famous *Agunbiade v. Sasegbon,*[124] Coker JSC held:

> *"Admissible evidence under the Evidence Act is evidence which is relevant and it should be borne in mind that what is not relevant is not admissible".*

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119 *Nwite v. People's Democratic Parties & Ors.* SC/CV/1353/2022. Judgment delivered on 9th December, 2022.

120 F. Nwadialo, *Modern Nigerian Law of Evidence* (2nd edn, Ethiope Publishing Corporation 1999) 75.

121 (1973) A.C. 729 at 756.

122 I. Sagay, 'Relevance and Admissibility' in *Afe Babalola, Law and Practice of Evidence in Nigeria* (1st edn, Sibon Books 2001) 15.

123 P.L Kirk, *Crime Investigation* (1st edn, New York: Inter-Science Publishers, 1953) 8; T. Jergovich, "Trace Evidence Overview" (2011) available at <http://dofs.gbi.georgia.gov/sites/dofs-gbi.georgia.gov/files/imported/vgn/images/portal/ne> Retrieved 15th June, 2018.

124 (1968) NSCC 147 at 150; See also, *Sadau v. The State* (1968) ANLR 125 at 129; *Torti v. Ukpabi* (1984) ANLR 185 at 195.

6.1.1 EXCLUSIONARY RULES

According to the general rule of admissibility, relevance is what determines whether or not evidence is admissible; evidence must be relevant in order to be admitted, but it may be relevant without also being admitted. The latter is the exception to the general rule since relevant factual evidence may still be excluded from evidence under any exclusionary rule of the Evidence Act.[125] Relevant evidence may be excluded because it is hearsay evidence of a document without the production of the document itself.[126] Also, if evidence of bad character is allowed and its detrimental impact outweighs its probative value, the court may rule that it is inadmissible.[127]

The expression of provision (a) to section 1 referred to above state that the court may reject testimony from facts that, while important or deemed relevant to the issue, appear to it to be too remote to be significant when all the circumstances of the case are taken into account. Although, the Act did not define remote, a scholar's[128] defines the term "remote" to mean things like "no probative value," "little probative value," or "highly prejudicial evidence without satisfactory probative value." It is established that the Act primarily governs the admissibility of evidence.[129] However, no rule of law would permit the admission of evidence that is prohibited by the Act or any other legislation in force in Nigeria. The Evidence Act expressly provides for this.[130]

According to the second provision in section 1(b), testimony regarding any relevant truth is inadmissible if the witness is prohibited from testifying about that fact by any currently in effect legal provision. All exclusionary standards of evidence, such as the prohibition on hearsay and the prohibition on opinion evidence, are currently covered by the law. The caveat also applies to any witness

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125 Section 1(a)(b) Evidence Act, 2011; *Adegboye v. United Bank for Africa*, CA/IL/20/2021 Judgment delivered 14th April, 2022.
126 *Okereke v. Umahi & Ors* (2016) LPELR 40035 (SC).
127 Ibid (n113) *Op.cit,* 98.
128 Ibid (n115) *Op.cit,* 17.
129 Evidence Act, 2011, s 1.
130 *Ibid,* s 2.

who is prohibited by privilege from providing evidence of crucial facts.[131] In light of the aforementioned, the proper definition of admissible evidence is evidence of any fact in dispute or significant fact, unless prohibited by the Act or any other legislation in Nigeria.

6.2 RELEVANCE OF FACTS

Generally, facts that tend to make the existence of other truths probable or improbable as a matter of common sense or experience are relevant facts to those other facts.[132] According to the provisions of the Ev.A, relevant facts are defined as facts for which the Ev.A specifies that evidence must be provided. Facts that have been declared as relevant under the Ev.A are, in a nutshell, relevant facts. Under the Ev. A, 2011 two forms of evidence are admissible:[133]

(i) facts relevant to the facts in dispute; and

(ii) other facts related to the facts in dispute, assuming the courts do not exclude them as being far away or having any legal effect.[134]

In *Chevron (Nig) Ltd. v. Aderibigbe,*[135] it was held that, the relevance test determines whether or not a document is admissible, and the method used to obtain the document is irrelevant. If a document has been deemed acceptable by law and is pertinent to the circumstances under consideration, it may be used as evidence. If a document is relevant, the court will admit it; the question of weight will only be raised once the document has been admitted. Relevance and admissibility inhabit separate compartments. The first requirement for any evidence or document to be admissible under the Act is relevance.[136]

The rules governing the relevancy of facts are spelt out in Sections (4)-(13) of the Act.[137] In the interpretation section, a fact is in dispute if it "includes any fact from

131 Ibid (n116) *Op.cit,* 9.
132 Ibid (n113) 7 *Op.cit,* 3.
133 Evidence Act, 2011 (n122) *Op.cit.*
134 L. Atsegbua, *Law of Evidence* (1st edn, Justice Jeco Printing and Publishing Global, 2012) 14.
135 (2012) 4 NWLR (pt. 1289) 1.
136 *Suberu v. State* (2010) 1 NWLR (pt. 1176) 495.
137 Evidence Act, 2011.

which, either by itself or in connection with other facts, the existence, nonexistence, nature, or extent of any right, liability, or disability asserted or denied in any suit or proceeding necessarily follows".[138] Every fact that is under discussion is relevant and can support evidence.

In *Olufosoye v. Olorunfemi,*[139] the Supreme Court held that, an admitted fact is not a fact in issue. Facts are only considered in dispute when there is disagreement over them. The court further stated that the pleadings, which primarily deal with facts, are where problems are decided. Therefore, a truth that is in dispute is one that serves as the foundation for the disagreement between the parties. Whether the accused actually shot and killed the victim is at issue in a murder case. Whether the defendant entered onto land that belonged to the plaintiff is the fact at issue in a trespass to land action. The court must issue a ruling based on the relevant fact. The court's conclusion regarding the relevant fact is the *ratio decidendi* of a case. The court's ruling on additional facts that the Act deems pertinent may likewise be included.

In some cases, it may not be easy to determine with clarity what the relevant fact is. The result of such a mistake is that the judge will ultimately make a decision based on the incorrect fact. An appeal could be made based on a decision that was based on such misidentification. Additionally, it is possible for more than one fact to be at dispute in a given case. The judge must also specify this and render a decision on each fact in issue.

6.3 JUDICIAL DISPOSITION TO ADMISSIBILITY OF FORENSIC EVIDENCE

The courts are believed to have initially rejected the results of forensic tests because of perceived flaws. However, courts now routinely accept forensic evidence. Once the samples have been properly gathered and examined, a person

138 *Ibid,* s. 258(1).
139 (1989) 1 NWLR (pt. 95) 26.

can say with a great deal of certainty that the profiles are accurate.[140] DNA testing, for instance, has been used to both condemn and exonerate people who have been found guilty of crimes.[141] DNA evidence is typically subjected to severe examination standards by the court.[142] And once the standard procedure is observed and the chain custody is maintained, such evidence will be deemed admissible.[143]

There has been countless use of forensic science to prove drug offences in Nigeria[144] and other countries.[145] Once a drug is seized, they should be taken to a laboratory for testing to determine what kind of drug they are and whether they even are drugs at all.

Unfortunately, in Nigeria, the exhibit keeper is required to test the drug using a test kit before sending it to a laboratory for testing and confirmation. The laboratory then sends the results back to the inquiry officer, who then offers the test results as evidence in court.[146] Also, under the Evidence Act, the judicial disposition of courts on expert's opinion as regards finger print impressions and patterns is to admit such evidence where credible and relevant. Thus, a hand-writing expert can give opinion evidence in his field of expertise and once the evidence is found to have been properly analysed and credible, the court is bound by the provisions of the Act to admit such evidence.[147]

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140 *Castro v. State*, 545 NYS 2d 985 (N.Y. Sup Ct, 1989) hearings held over 12 weeks featuring a total of 10 expert witnesses in admissibility of DNA evidence.

141 O.J Ajisigwe and O.M Oluwafemi, 'The State of forensic Science in Crime Investigation and Administration in Nigeria' (2019) 10 (7) *International Journal of Scientific and Engineering Research,* 1720.

142 *Castro v. State* (*Supra*).

143 *Ibid.*

144 M. Ediru, 'A Critical Examination of Forensic Evidence in the Trial of Drug Offences in Nigeria' (2017) 8 (4) *The Gravitas Review of Business and Property Law* 130; *Ugochukwu v. Federal Republic of Nigeria* (2016) NGCA 15; *Wanzam v. FRN* (2019) LPELR 48006 (CA).

145 United Kingdom, United States of America, Canada, South Africa; See *State v. Ward* (2010) 364 N.C 133.

146 M. Ediru, (n123) *Ibid,* 132.

147 Evidence Act 2011, sections 67 and 72; *Ize-Iyamu v. Alonge* (2007) ALL FWLR (Pt. 371) p. 1570.

6.4 JUDICIAL DISPOSITION TO EVIDENCE FROM MEDICAL EXAMINATION

Medical examination of victims or persons involved in a crime is a relatively old provision in the Criminal Code Cap C39 LFN, 2004.[148] Medicine is a fundamental component of forensic science,[149] this is relevant.

It should be noted that despite the non-inclusion of forensic evidence in the Evidence Act, one particular area which medical examination is often used is in homicide trials or bodily injury causing grievous harm (assault and or battery), rape and indecent assault. This evidence has and is still regarded as the most accurate and reliable form of evidence[150] in the absence of modern forensic evidence in Nigeria.

6.5 PROBATIVE VALUE OF FORENSIC EVIDENCE

In law, if evidence is sufficiently helpful to prove something in court, it has probative value.[151] Thus, testimonial evidence given under oath by a witness that is not probative, is irrelevant and inadmissible or will be excluded from the record as a result of objections from the defence. Similar to this, forensic evidence analysis must be pertinent in order to be useful; it must reveal the identity of the criminal, victim, or other relevant person.[152] For instance, a latent print has probative value when an AFIS hit is received identifying a person of interest, the

148 Criminal Code, 1916.
149 Section 68 of the Evidence Act of 2011.
150 *Akinfe v The State* (1988) 7 SCNJ (Pt. 2) p. 226. In that case, the Appellant who was standing trial for murder admitted administering Garmaline 20, an acclaimed poison on the deceased, The deceased died four days later. However, in between the time of taking the alleged poisonous liquid and her death, the deceased had taken other concoctions prepared by one Ijebu man and she also had undergone treatment in other hospitals before her death. Autopsy was carried out but not tendered; the doctor did not also give evidence on the Autopsy performed. The report of forensic expert was tendered, it did not say, Garmalin 20 could kill. The Appellant conviction was quashed.
151 R.M Gardner, *Practical Crime Scene Processing and Investigating* (2nd edn, CRC Press, 2004).
152 R. Puch-Solis et.al., 'Assessing the Probative Value of DNA Evidence' (2012) (2) available at <https://www.maths.ed.ac.uk> Retrieved 16th June, 2019.

latent print matches the fingerprints of a person from the scene, or the latent print omits a person from the scene.[153]

Similar to this, a DNA profile derived from evidence found at the scene has probative value if, for instance, it matches the DNA profile of a suspect, a CODIS hit is discovered, or the profile excludes someone from the scene (i.e., the DNA profile does not match a suspect thought to have been at the scene).[154]

Probative evidence is a fair indicator of the value of forensic evidence in investigations and prosecution. It should be noted however, that even though forensic evidence has probative value, an investigator or prosecutor may not be happy if it contradicts their understanding of the crime. The suspect could be cleared of the crime if the DNA profile does not match the suspect. Although, a latent print may correspond to a suspect, further inquiry may show that the suspect is able to explain why the prints were present and provide evidence that he or she was not present when the crime was committed. However, because there are established evidentiary facts, the forensic evidence has probative value.[155]

7.0 CONTEMPORARY CHALLENGES OF CRIME SCENE INVESTIGATION PROCEDURE IN NIGERIA

The essence of adhering strictly to the rulebooks of crime scene investigation is to find strong connections between the criminal, victim and the crime scene. This strict adherence theory in developed countries around the world like UK and Australia, have been discovered to play a pivotal role in assisting investigators gather accurate and credible trace evidence.

153 T. McEwen, 'The Role and Impact of Forensic Evidence in the Criminal Justice System, Final Report' (2011) Institute for Law and Justice, Inc., available at <https://www.ncjrs.gov/pdffiles1/nij/grants/236474> *Retrieved 16th June, 2019.*

154 Ibid.

155 *Ibid.*

It should be noted that the usefulness of forensic science evidence largely depends on the investigation procedure and technique adopted by crime scene investigators, and it either make or mar the entire case.

In Nigeria, forensic science evidence gathering suffers a major setback due to lack of proper procedure. It is observed that up till date, the Nigeria Police Force and other law enforcement agencies still adopt the conventional brutish procedure of carrying out investigations and extracting evidence. This is not implausible because contemporary crime scene investigation procedure is confronted with several challenges in Nigeria. It is therefore imperative at this juncture to consider these challenges from Nigeria's perspective.

7.1 CRIME SCENE INVASION AND OVER-CROWDING

The primary assignment of the first-responder at a crime scene is to obtain relevant information about the victim and the culprit from eye-witnesses or bystanders and secure the scene of crime before the arrival of the team of investigators. The first-responder is the police officer within an area that receives a distress call, respond to it and arrives at the scene first. In most cases the police officer has little or no experience in forensic examinations, therefore, all he does is to uphold the golden rule of the crime scene that is, ensuring that access to the crime scene is restricted in order to preserve vital evidence from contamination or damage.[156] This is usually done by marking-off the scene with barrier tapes which are conspicuous and easy to identify by the team of experts investigating the crime scene.

In Nigeria, the lack of quick response and presence of first-responders at the scene of crime has been a major set-back in crime scene investigation. This ineptness often-times inhibit and frustrates the gathering and use of vital forensic science evidence, because by the time police officers dispatched to the crime scene arrives,

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156 Technical Working Group on Crime Scene Investigation, 'Crime Scene Investigation: A Guide for Law Enforcement' (2000) available at <https://www.ojp.gov> Retrieved 3rd August, 2024; O.O Ajayi, *Crime and Forensic Investigation* (2nd edn, Malthouse Law Books, 2022) 64.

the crime scene is already taken-over by rescuers, spectators, sympathisers, passers-by and social media content enthusiast.

Some of these persons enter the crime scene carelessly and without required caution, only to take personal pictures and make video recordings of victims and scenes to post online without bothering about the possibility of contaminating or damaging relevant evidence which could be helpful in cause of investigation. This crime scene attitude particularly, ingress and egress of unknown persons leaves numerous unconnected, irrelevant and undistinguishable trace evidence which further complicate the investigation carried out by a forensic expert. When this occurs, it becomes a problem to analyse all trace evidence at the crime scene and identify which is useful, credible and connected to victims and perpetrators of the crime without conducting additional investigation outside the crime scene.

To minimize conducting further investigations in support of crime scene forensic science evidence in Nigeria, it is essential to educate the general public on the evidential value of forensic science evidence and the need to protect every scene of crime from interference and cross-contamination through over-crowding.[157]

7.2 LACK OF CRIME SCENE FORENSIC INVESTIGATORS

Another major challenge of crime scene investigation procedure in Nigeria is the lack of crime scene forensic investigators.[158] Forensic investigators are personnel saddled with the responsibility of conducting forensic analysis of evidence collected at a crime scene to develop objective findings that can assist in the investigation and prosecution of perpetrators of crime or absolve an innocent person from suspicion. These experts are specially trained in forensics having the capability of integrating knowledge and techniques in the examination, analysis, interpretation, reporting and testimonial support of physical evidence.[159]

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157 H.N Singh, 'Crime Scene Investigation' (2021) 10 (11) *International Journal of Science and Research*, 642.

158 Ibid (n134) 66.

159 M.T Miller, 'Crime Scene Investigation' in *Forensic Science: An Introduction to Scientific Investigative Techniques* (CRC Press LLC, 2003) 43.

However, in Nigeria, forensic investigators are not considered as an integral part of every crime scene investigation. This neglect has invariably eradicated the need for crime scene forensic investigator at crime scenes, thereby affecting the collection and preservation of material evidence. It should be noted that crime today is solved by the teamwork of investigators and crime scene personnel and the combined use of techniques and procedure recognizing the power of crime scene, physical evidence, records and witnesses.

Unfortunately, numerous cases have shown that despite available crime scene technologies and specially trained personnel, the productiveness of a crime scene investigation is only as good as the supportive management team.[160] Hence, the need for forensic investigation experts at crime scenes in Nigeria.

7.3 LACK OF FORENSIC SCIENCE EQUIPMENT

Deploying the right equipment at a crime scene to gather relevant forensic science evidence is as important as the evidence itself. Crime scenes usually have a combination of evidence identifiable to the naked eyes and others that are latent that sometimes require complex equipment to discover or carry out a presumptive test. The detection and gathering of evidence at a sophisticated crime scene invariably requires the use of more advanced equipment than those used in committing the crime.

However, the challenge in Nigeria is that, crime scene investigators are not adequately equipped with this necessary equipment, and where they are, the equipment are either obsolete or dysfunctional. In Nigeria, a lot of murder cases[161] would not have become 'cold cases' if the appropriate technique and equipment were deployed by investigators at the crime scenes.

In Folusho William's murder case, a forensic pathologist testified in court that the deceased died from lack of air intake, due to manual strangulation.[162] This testimony suggests that the deceased body had the finger prints of the culprit on

160 *Ibid.*
161 See Bola Ige's Murder Case; Funsho William's Murder Case.
162 See Premium Times, 14th April, 2014.

it at the time the crime was committed, but maybe due to lack of necessary forensic equipment or experience in forensic impressions,[163] the finger prints analysis could not be carried out, and as such, no one could be linked to the crime. Although, some accused persons were arrested, detained and prosecuted in connection to the crime, they were later acquitted 8 years after by the court because the evidence adduced by the prosecution was weak and superficial and amounted to speculation.

Crime scene investigation outcomes in Nigeria has been discovered to be marred as a result of not using the right equipment or the misuse of some. Thus, it is essential that an investigator should be abreast with the equipment required for different crime scene investigation, because where an investigator lacks the experience and unequipped, the investigation becomes a futile adventure. It is high time Nigeria criminal investigation system migrate away from the primordial investigative method to the scientific based approach, so as to make the detection of forensic evidence easy and the identification of culprits effortless.

7.4 NON-OBSERVATION OF STANDARD PROCEDURES

In crime scene investigation, the observation of standard procedure by investigators is essential to prevent conflict and overlapping of assignments. Crime scene investigation standard procedure demands that forensic investigators are to examine a crime scene for possible evidence, but with the consciousness of not interfering or prejudicing the investigation of team members.

To avoid chaos at a crime scene, investigators assigned must adhere to the standard procedure of restricting themselves to specific areas of the investigation assigned to them. It has been discovered that because of the severity of the crime, all investigation apparatus and personnel may be dispatched to the crime scene all at once. In such a situation, failure to follow the proper crime scene protocol,

163 Ibid (n134) 66.

standard investigative Police process and ethics could lead to a systematic failure,[164] invariably affecting the overall investigation.

Where Police officers, paramedics, fire-fighters, forensic pathologists and analysts, photographers, bomb experts and ballistic experts all converge to the crime scene at the same time, there is the tendency that there would be conflict of interests and protocols will be breached. To avoid such situation, there is the need for investigators to follow a sequential procedure while carry out investigation.

In Nigeria, it has been discovered that investigators barely follow any standard procedure at crime scenes. Investigations are significantly bereft of the required apparatus and personnel. As such, lone investigating officer carrying out his assignment rely majorly on experience and not on standard procedures. This investigative approach has been found to have narrowed down the discovery of possible vital evidence at a crime scene needed in prove of a crime.

7.5 SEDATE RESPONSE TO CRIME SCENE

In developed countries like the UK and United States of America (USA), police response to crime alert and mobilisation to the scene is usually swift. This work ethic is to ensure that victims of crimes, if still alive are rescued in order to assist in investigations. Also, responding swiftly to crime scenes allow investigators to gather first hand information and testimonies from eye witnesses while it is still fresh in their memory before they are distorted and also gather relevant evidence from the crime scene before they are cross-contaminated.

In Nigeria, the sedate response of police officers to crime scenes has been the major reason why criminals escape easily from the scene of crime. Although, despite receiving prompt information about an ongoing crime, the Nigeria Police in their usual behaviour give excuses of lack of fuel, lack of personnel and lack of sophisticated ammunitions as reasons for not responding to the scene of crime on time, and by the time they arrive at the scene of crime, it would have been

164 *Ibid.*

taken over by sympathizers whose DNA and finger-prints may have cross-contaminated relevant forensic evidence at the scene,[165] despite not being involved in the crime.[166]

7.6 UNRELATED DNA SAMPLES AT CRIME SCENE

For the purpose of identifying which evidence is relevant, the crime scene investigator carries out a presumptive test because not all evidence particularly, forensic evidence is usable. Investigators during investigations are faced with the challenge of distinguishing which of the DNA samples present at the crime scene is relevant and related to the crime. At crime scenes, there are DNA samples of people that appear on surfaces and objects they have never touched or come in contact with, this is referred to as secondary DNA transfer.[167]

Primary DNA transfer occurs where a person touches an object or surface at a crime scene. Where multiple DNA samples appear at the scene of crime, an investigator should be meticulous in retrieving vital evidence. It should be noted that, foreign DNA samples on door knobs, cigarette butt, cups and other materials are sometimes introduced or transferred into a crime scene unintentionally, however where introduced intentionally, it is done to create a diversion to confuse the investigator. Where the DNA of an unknown person is mixed with that of the victim and accused person, carrying out a presumptive test helps the investigator to eliminate unrelated DNA evidence.

The itinerant nature of DNA evidence has serious implication on forensic investigation, as such investigators always analyse all evidence before arriving at a conclusion. Where unrelated DNA samples such as secondary DNA transfer are not properly examined and eliminated, this can lead to a wrongful conviction of an innocent person.[168]

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165 J.J. McShane, 'Contamination and Cross-Contamination: Understanding the Risk of DNA Evidence' (2023) available at <http://www.thetruthaboutforensicscience.com> Retrieved 20th September, 2024.

166 Ibid (n134) 67.

167 *Ibid.*

168 *R. v. Farah Jama* (2009) VSCA 764.

In Nigeria, carrying out forensic evidence presumptive test at the crime scene to eliminate unrelated DNA evidence is unknown. Investigations particularly, at the scene of crime are usually done hurriedly and without supervision, and where related and unrelated DNA evidence are recovered, all persons whose DNA samples are found are arrested as prime suspects without first ascertaining their connection to the crime. To prevent punishing an innocent person unjustly, it necessary for investigators to critically examine and distinguish which DNA evidence is related and which is not related to the crime before drawing conclusions.

8.0 CONCLUSION AND RECOMMENDATIONS

Forensic science evidence clearly impacts the administration of criminal justice in Nigeria. This evidence literally speaks for the dead, voiceless, the dispossessed, oppressed and the living who can be implicated at a crime scene. Although, forensic science evidence has its challenges, it provides more accurate and usable evidence making it invaluable in identifying crime perpetrators.

It is evident that apart from the fact that forensic science has real value in detecting and apprehending a suspect, it equally has the tendency of turning a frustrating investigation into a solved case if the proper procedure for carrying out crime scene investigation is strictly adhered to. Forensic science evidence is regarded as infallible especially when the defendant is not caught at the scene of crime, it must however be obtained following the laid down procedure, otherwise the accuracy of such evidence may be in doubt. Crime scene investigation procedure in Nigeria should be transformed from the conventional and brutish investigative method to the contemporary approach adopted by developed countries of the world in crime scene investigation.

These countries like USA and UK have developed a regulated standard procedure for crime scene investigation which has been proven over the years to be reliable. These procedures have been replicated in criminal investigation television series like the Naval Crime Investigation Service (NCIS) and Crime Scene Investigation

(CSI) in the USA to educate criminal investigators around the world on how crime scene investigation is conducted and how effective it can be.

Thus, it is recommended that the Nigerian Police architecture should emulate these crime scene investigation standard procedures. The crime investigators in collaboration of forensic evidence experts and necessary stakeholders should develop quality standards and process to guarantee the precision and dependability of forensic investigations and the work of forensic professionals.

A standard procedure should be created to spot errors, fraud, and bias, as well as to confirm the ongoing dependability and validity of protocols and standard operating procedures, check that best practices are being followed, and amend protocols and procedures that are discovered to need improvement. Long-term credibility for the results of the laboratory findings will be provided by this.

Also, with respect to securing crime scenes from unwanted intruders and contamination, it is suggested that first-responders at crime scene must ensure by all means within their orders to restrict human movement in and out of the crime scene pending the scene is taken over by forensic professionals. To detect credible forensic evidence, it is important that the crime scene is secured and protected from contamination by foreign bodies.

In Nigeria, it has been discovered many times that the influx of humans into the scene of crime have ruined the chances of detecting foolproof evidence against a suspect. At such instances, many DNA samples are recovered from the scene of crime, thereby making it difficult or impossible to ascertain which is connected to the crime. To prevent a situation where the crime scene is taking over by social media enthusiast, sympathisers and freelancers, the sedate responses to crime scene by Police Officers should be addressed. It is recommended that a Rapid Response Team (RRT) should be established the Inspector General of Police in all Police Stations across Nigeria. The team should comprise of all necessary personnel both combatant and non-combatant saddled with the responsibility of

combating crime, saving lives and ensuring that all viable forensic evidence are gathered before been erased or contaminated.

Another typical issue with crime scene forensic evidence investigation in Nigeria is the lack of equipment and which is as a result of poor financing. It has been discovered that Crime Investigation Departments (CID) under the Nigerian Police are inadequately funded, frequently have staffing shortages and outdated equipment. The lack of funds compromises quality standard and frequently encourages hasty or non-existent investigations. Police Forensic Departments in Nigeria frequently struggle to recruit and maintain highly competent analysts due to lack of funds. An essential body like this cannot function effectively without adequate financing and staff. The Paul Coverdell National Forensic Science Improvement Act, passed in 2000, was a sign that the US Congress understood the value of proper financing of forensic science evidence. This is laudable and should be adopted in Nigeria.

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TAXING THE ELUSIVE GAIN: A LEGAL AND POLICY ANALYSIS OF CAPITAL GAINS TAX IN UGANDA AND EAST AFRICA

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TAXING THE ELUSIVE GAIN: A LEGAL AND POLICY ANALYSIS OF CAPITAL GAINS TAX IN UGANDA AND EAST AFRICA

Calvin Stewart Obita*

"The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities."[1]

Abstract

This paper analyses the legal and policy frameworks surrounding capital gains taxation (CGT) in Uganda and East Africa, focusing on the implications for economic development and tax equity. It critiques Uganda's integration of CGT into business income taxation, leading to ambiguity and compliance challenges that disproportionately affect individuals outside the business sector. The study explores regional comparisons, particularly with Kenya, Tanzania, and Rwanda, highlighting the need for a distinct and coherent CGT policy to enhance revenue mobilisation and reduce reliance on external funding. Ultimately, it advocates for reforms to align Uganda's CGT practices with international best standards, promoting fairness and efficiency in the tax system while addressing significant revenue leakage issues.

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1 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776) (*An Electronic Classics Series 2005*) Part 2.

INTRODUCTION

Taxation is a fundamental aspect for every economy in the world. Taxation has been defined as the "imposition of duties to raise revenue.[2] It is a device used by government to extract money or valuables from people and organisations by the use of law. In the words of Pinson:

> *"All forms of taxation are imposed by Parliament. Taxation is a creature of the Statute."*[3]

Taxation takes on various forms and shapes and Capital Gains Taxation (CGT) is one of such forms.

1.1 BACKGROUND TO CAPITAL GAINS TAXATION

Capital gains taxation (CGT) has increasingly attracted global attention as governments seek to diversify domestic revenue streams and ensure equitable taxation across different income categories. A capital gain refers to the increase in the value of a capital asset that is realised when it is sold.[4] In other words, a capital gain occurs when you sell an asset for more than what you paid to purchase it. Such assets include land, buildings, shares, and intellectual property.

Developing countries often depend on consumption taxes (like Value Added Tax VAT) and labour taxes early in their fiscal development,[5] shifting to income taxes as administrative capacity grows. For example, Uganda has similarly utilised VAT though it has prioritised the taxation of labour income through mechanisms such as PAYE due to their ease of administration and frequent occurrence.

However, over-reliance on these taxes leads to narrow tax bases and disproportionate burdens on lower-income individuals. The absence or weak enforcement of capital gains taxation allows high-net-worth individuals and

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2 The Osborn Concise Law Dictionary 8th Edition page 320.
3 Pinson on Revenue Law (1982) 677.
4 Capital Gains: Definition, Rules, Taxes, and Asset Types, <https://www.investopedia.com/> [Accessed on May 27 2025].
5 Esteban Ortiz Ospina and Max Roser, Taxation (September 2016) <https://ourworldindata.org/taxation> [Accessed on May 27 2025].

corporations, who hold and transact in high-value capital assets, to escape meaningful taxation, undermining vertical equity in taxation systems.[6]

The theoretical underpinning of taxing capital gains is derived from the Haig-Simons income concept, which defines income as consumption plus change in net worth.[7] Specifically, the Haig-Simons definition considers an individual's income to be the sum of wages, salaries, privately earned profits, dividends and interest receipts, transfer payments and employee benefits, gifts or inheritances received, the value of free or subsidized services consumed and the net increase in the real value of assets.[8]

According to this theory, any increase in the value of capital assets, whether realised or unrealised, constitutes income and should be taxed. In this sense, a CGT seeks to correct asymmetries between the taxation of income derived from work and income derived from capital.

Moreover, in emerging economies such as Uganda, characterised by expanding urban real estate markets, growing financial sectors, and increasing foreign direct investment, the scope and relevance of capital gains taxation continue to grow. Nonetheless, the imposition and enforcement of CGT remains controversial due to administrative difficulties, valuation disputes, political resistance, and the complexity of distinguishing between capital gains and business income.

This paper seeks to achieve the following specific objectives: To explore and explain the legal framework governing CGT in Uganda, focusing on statutory provisions, administrative practices, and case law; To analyse the administrative and practical challenges affecting the implementation of CGT in Uganda; To conduct a comparative analysis of CGT frameworks in East African countries, particularly Kenya, Tanzania, Rwanda, and where possible, Burundi and South

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6 Raising Capital Gains Taxes Would Reduce Inequality Without Economic Costs, <https://inequality.org/> [Accessed on May 27 2025].

7 Joint Committee on Taxation, Overview of the Definition of Income Used by the Staff of the Joint Committee on Taxation in Distributional Analyses (February 8, 2012) 3.

8 Nicholas Santosuosso, Obstacles to Tax Reform: Income Definition and Capital Gains Taxation (Spring 2016) 3.

Sudan; To propose policy and legal reforms aimed at strengthening CGT in Uganda, with an emphasis on aligning it with international best practices and regional harmonisation goals.

What this paper finds is the uncertain, fragmented, and ineffective nature of Uganda's capital gains tax regime. Unlike other EAC countries with distinct CGT frameworks, Uganda's reliance on treating capital gains as business income results in: Inconsistency in taxation practices; Low compliance and poor enforcement; Widespread tax avoidance, especially in land transactions; Legal ambiguity due to lack of express statutory guidance and; Revenue leakage thereby undermining the country's domestic revenue goals.

1.2 IMPORTANCE OF CAPITAL GAINS TAX IN ECONOMIC DEVELOPMENT

1.2.1 REVENUE MOBILISATION

Developing countries should broaden their tax base by incorporating underutilized sources such as CGT to reduce dependency on volatile external funding.[9] Many emerging and low-income nations possess "significant untapped tax potential,"[10] and strengthening core domestic taxes including those on capital income is key to bridging this gap and reducing reliance on external funding.

As Uganda grapples with rising public debt which has risen to unprecedented levels reaching shillings (UGX) 96.1 trillion ($25.3 billion or 52 percent of GDP) as of June 2023, of this 44.6 trillion is domestic while 52.8 trillion is from foreign sources.[11] This amount excludes the UGX 7 trillion worth of loans pending approval by Parliament. Each of the 45 million Ugandans is now indebted to the

9 IMF, Countries Can Tap Tax Potential to Finance Development Goals, <https://www.imf.org/> [Accessed on May 27 2025].

10 Ibid.

11 Uganda's Public Debt Dilemma: What Lies Ahead in 2024, <https://blog-pfm.imf.org/> [Accessed on May 27 2025].

tune of UGX 2.5 million. Improving CGT enforcement would enhance fiscal sustainability.

1.2.2 EQUITY AND FAIRNESS

CGT plays a role in wealth redistribution. As Thomas Piketty argues, unchecked capital accumulation increases inequality. He repeatedly argues that when the rate of return on capital (r) exceeds the growth rate of the economy (g), wealth accumulates faster than income from labour, leading to growing inequality. He concludes:

> *"The inequality r > g implies that wealth accumulated in the past grows more rapidly than output and wages. This inequality expresses a fundamental logical contradiction. The entrepreneur inevitably tends to become a rentier, more and more dominant over those who own nothing but their labor. Once constituted, capital reproduces itself faster than output increases. The past devours the future."*[12]

Taxing capital gains ensures that those whose wealth grows through asset appreciation contribute fairly to the national purse. In the absence of CGT, high-income earners may re-characterise ordinary income as capital income to benefit from lower tax rates. Uganda's current regime allows such loopholes, especially where CGT is not enforced on non-business transactions.

1.2 GLOBAL AND REGIONAL CONTEXT

Globally, most advanced economies, such as the United States, United Kingdom, Canada, and Australia, impose capital gains tax, albeit with different exemptions, deferral provisions and different rates.[13]

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12 Thomas Piketty, Capital in the Twenty-First Century (The Belknap Press of Harvard University Press Cambridge, Massachusetts London, England 2014), 398.

13 Capital gains tax (CGT) rates, <https://taxsummaries.pwc.com/> [Accessed on May 27 2025].

In Africa, CGT is unevenly applied. Kenya suspended CGT in 1985, reintroduced it in 2015 at a flat rate of 5%,[14] and has since made several amendments. There is no separate capital gains tax in Tanzania. Instead, income tax is charged on the taxable profit arising on a gain arising from the realisation of an 'investment asset'.[15] Rwanda[16] and Ethiopia[17] treat capital gains as corporate income but provide detailed provisions on asset disposal and exemption regimes.

Uganda's approach stands out for its lack of specificity and its case-by-case application. For example, while gains from business asset sales are taxed, the Income Tax Act is silent on gains by individuals, such as those from personal asset sales not linked to a business enterprise.

The East African Community Treaty[18] encourages partner states to harmonise tax policies to remove tax distortions. CGT harmonisation remains elusive, but Uganda's current policy divergence undermines regional integration efforts.

2.0 CONCEPTUAL FRAMEWORK AND THEORETICAL UNDERPINNINGS

2.1 DEFINING CAPITAL, INCOME, AND GAIN

A comprehensive analysis of capital gains taxation (CGT) requires conceptual clarity around the notions of capital, income, and gain. These concepts are central to distinguishing what qualifies as taxable under CGT regimes and where the legal line is drawn between capital receipts and revenue receipts.

In ordinary terms, capital refers to the wealth or asset base of a person or enterprise, while income is the return derived from the use of that capital. There are two concepts of income. First, the traditional view which holds that income as distinguished from capital is the fruit from the tree. Second, the modern approach

14 KPMG, Accounting for Capital Gains Tax in Kenya: Accounting Perspectives 1.
15 <https://taxsummaries.pwc.com/> [Accessed on May 31 2025].
16 Rwanda: Corporate - Other taxes, <https://taxsummaries.pwc.com/> [Accessed on May 31 2025].
17 Company tax liabilities on ceasing operations in Ethiopia, <https://www.ibanet.org/> [Accessed on May 31 2025].
18 Article 83.

regards incomes as an accretion to wealth or to economic power.[19]

Adam Smith, in his book, opines that income is revenue drawn from either labour, stock or land.[20] That derived from labour is wages, that derived from stock by the person who employs or manages it is profit, that derived from it by the person who does not employ it himself but lends it to another is interest on the use of money. Revenue from land is rent belonging to the landlord.

Stock is distinguished into two.[21] First, the part which a person expects to afford him revenue is capital and secondly, that which is reserved for purpose of revenue is reserve. In this vein, stock in trade is circulating capital, while investment in the improvement of land, purchase of useful machines and instruments of trade or things which yield revenue or profit without changing masters is fixed capital.

In *John Smith and Sons v Moore*,[22] a tax payer bought a coal business which included certain forward contracts worth 30,000 pounds to supply colliery owners. He claimed to be entitled to deduct the cost of the contracts from the profit of the business. It was held that the deduction was not permitted being of a capital nature. Viscount Haldane stated that assets of a business including its goodwill and inherited contracts by which to employ circulating capital constituted fixed capital.

In *Eisner v Macomber*,[23] the U.S. Supreme Court defined income as the gain derived from capital, labour, or both, combined. It held that a stock dividend (bonus issue of shares) did not constitute a gain derived from capital because it did not increase the shareholder's wealth or provide a tangible benefit. This case entrenched the principle that capital and income are distinct, and only the gain, the increase in value or return on capital, may be subject to taxation, depending on how it is realised.

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19 Prof. David Bakibinga, Revenue Law in Uganda (Professional Books Publishers 2003) 18.
20 Ibid (n2).
21 Ibid (n2) Book II, Chapter I.
22 *John Smith and Sons v Moore* [1921] A.C. 13.
23 *Eisner v Macomber,* (1920) 252 U.S. 189.

It has been suggested that taxable income is the value of what a taxpayer could have consumed during the year without diminishing his capital wealth in the process.[24] Additionally, it is suggested that no income would be recognised as arising unless an actual receipt had taken place, although a receipt, may take the form of a benefit having money's worth received in kind, as well as, money or from a payment made to a third party in discharge of another's legal debt.[25]

Nevertheless, no mere improvement of a person's financial or material position is recognised as constituting income.[26] Thus, an increase in the value of the property of an individual is excluded from the computation of his income but this is not the case for CGT, where one sells his property, the profit he gets due to the increase of the value of said property is taxed.

In Uganda, the Income Tax Act, Cap 338 (ITA), does not define "capital gain" explicitly. However, it does define "business income" to include the amount of any gain arising from the disposal of a business asset. Furthermore, the ITA defines "disposal" to include sale, exchange, transfer, distribution, and other means by which ownership ceases.[27] This indirectly accommodates the taxation of capital gains by classifying them as part of business income.

However, most tax systems, including Uganda's, adopt a realisation principle, that is, gains are taxed only when the asset is sold or otherwise disposed of. The fact that capital gains arise from the disposal of a business asset, which takes place only when the asset is sold, gifted, destroyed, or otherwise disposed of, confirms that Uganda taxes capital gains only upon realisation. This leads to considerable tax deferral and planning opportunities.[28]

2.2 THE CAPITAL VS. REVENUE DISTINCTION

24 Meade J.F, The Structure and Reform of Direct Taxation (1976) 30-33.
25 Final Report of the Royal Commission on the Taxation of Profits and Income (1955).
26 Ibid (n19) 19.
27 Section 49(1) of the ITA.
28 OECD, Tax Policy Reforms 2022: OECD and Selected Partner Economies, OECD Publishing, Paris 2022) <https://doi.org/10.1787/067c593d-en> [Accessed on May 31 2025].

The distinction between capital and revenue receipts is a fundamental concept in income tax law, significantly impacting the tax liabilities of entities. The case of *Commissioner of Income-Tax Petitioner v M/S. Motor & General Finance Ltd.,*[29] underscores the complexities involved in classifying receipts. This case revolved around whether specific sums received by a company should be treated as capital receipts, thereby exempt from immediate taxation, or as revenue receipts, subject to taxation.

The crux of the Delhi High Court's reasoning lay in the inherent nature of the receipts received by the assessee. The Tribunal, and subsequently the High Court, analysed the agreements between the assessee and its sub-distributor to ascertain whether the funds were advances (loans) or trade receipts (revenue).

> The Agreement contained two primary clauses:
>
> Clause 2: Involved a deposit of Rs. 40,000/- as security for contract performance, refundable upon satisfactory execution.
>
> Clause 3**:** Pertained to an advance payment of Rs. 2,30,000/- against future realisations, with provisions for adjustment and refund in case of non-recovery.

The Tribunal discerned that the Rs. 40,000/- under Clause 2 was purely a security deposit, devoid of any linkage to trade activities, thereby classifying it as a capital receipt. The Rs. 2,30,000/- under Clause 3, despite being an advance against future sales, was determined to function as a loan. This classification was reinforced by the fact that the sub-distributor could only recover this amount through specific contractual mechanisms, independent of the realisations.

The Revenue's argument, positing that these were advance payments for realisations and thus trade receipts, was systematically rebutted by illustrating the distinct functional and relational aspects of the funds. The Court held that the nature of the receipts is inherent and not subject to reclassification based on their accounting portrayal.

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[29] *Commissioner of Income-Tax Petitioner v. M/S. Motor & General Finance Ltd,* ITR 29 of 1969. (Adjudicated by the Delhi High Court on August 8, 1973).

This judgement reinforces the principle that the intrinsic nature of receipts prevails over their accounting classification. For practitioners and taxpayers, it underscores the necessity of scrutinising the functional essence of transactions rather than their formal characteristics when determining tax liabilities.

A transaction classified as a capital receipt may not be taxable unless there is an express provision, such as in the case of CGT. On the other hand, revenue receipts are generally taxable under the ordinary rules of income taxation.

In *Atherton v British Insulated & Helsby Cables Ltd*, Viscount Cave LC famously stated:

> '*…when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.*'[30]

In sum, the tax treatment of a transaction must be guided by its substantive economic purpose rather than its accounting label. As the *Atherton* case affirmed, the enduring benefit test remains pivotal: capital receipts (creating lasting assets or advantages) escape ordinary taxation unless expressly captured under regimes like CGT, while revenue receipts (serving operational or recurring purposes) fall squarely within income tax's ambit. This functional analysis of prioritising substance over form demands rigorous scrutiny by practitioners to align tax liabilities with the true character of gains."

2.3 THEORETICAL JUSTIFICATIONS FOR CAPITAL GAINS TAXATION

2.3.1 EQUITY THEORY

Equity is a principle which stands for Justice and which is reached through the principle of contributive capacity, which Adam Smith called the "capacity to

[30] *Atherton v British Insulated & Helsby Cables Ltd*, 10 TC 155.

pay".[31] Equity, in terms of contributive capacity, is generally considered in two senses: vertical and horizontal. The central theoretical justification for CGT lies in the principle of vertical and horizontal equity.

The "horizontal" concept is that those who are in a similar situation, in terms of contributive capacity, should pay the same amount of tax.[32] Hence the import that the tax should be "personal" in the sense of taking into account the taxpayer capacity as a whole, for which it is required to be "global". Yet, Uganda's current regime departs from this principle. As capital gains are only taxed if realised in the course of business, individuals not engaged in trade may benefit from tax-free appreciation of assets. This raises serious horizontal equity concerns.

The "Vertical" concept means that people who are at different levels in terms of contributive capacity, must be taxed differently. For this reason, it is essential to use progressive rates, where the aliquot part increases more than proportionally with the increase in the tax base. This is the opposite of a regressive tax, where the fraction of income necessary to pay the tax decreases when the income increase. Progressivity is not only reached by the structure of the scale of the rates, but also by the non-taxable minimums (minimum level of subsistence for the taxpayer).

Uganda's Gini coefficient/index[33] stood at 42.7 in 2019, making it the 3rd most unequal in East Africa after South Sudan (44.1) and Rwanda (43.7).[34] The top 5% of Africans hold more wealth than the bottom 95% combined.[35] Four richest

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31 Ibid (n2).

32 Ceferino A.C Gonzalez, The Principles of Equity, Contributive Capacity and Equality – Brief Conceptual Synthesis, Inter-American Center for Tax administrations (CIAT), March 2017. <https://www.ciat.org/> [Accessed on June 02 2025].

33 The Gini coefficient/ index is a statistical measure of economic inequality that quantifies the distribution of income or wealth within a population, ranging from 0 (perfect equality) to 1 (perfect inequality). Available at <https://ourworldindata.org/what-is-the-gini-coefficient> [Accessed on July 07 2025].

34 Wealth Inequality by Country 2025, <https://worldpopulationreview.com/country-rankings/wealth-inequality-by-country> [Accessed on July 07 2025].

35 Oxfam, Africa's richest four hold more wealth than half the continent (9th July 2025) <https://www.oxfam.org/en/press-releases/africas-richest-four-hold-more-wealth-half-continent-oxfam> [Accessed on July 13 2025].

Africans own more wealth than 750 million Africans (half the continent's population).[36] In America, the top 1% holds nearly as much wealth as the bottom 90%.[37]

By taxing capital gains, governments redistribute wealth and promote fairness in the tax system.

2.3.2 HAIG-SIMONS INCOME THEORY

The Haig-Simons definition of income, elaborated earlier, underpins the economic logic for taxing capital gains. It supports a comprehensive income tax model, where all increases in economic capacity are taxed, regardless of their form. This approach informs tax systems in countries like Canada[38] and Australia, where CGT is firmly integrated into the income tax framework.

In contrast, Uganda's reliance on a partial inclusion model[39] where only business-related gains are taxed, falls short of Haig-Simons ideals. This divergence contributes to inequities and inefficiencies, as it allows for tax planning to manipulate the timing and nature of disposals to avoid tax.

2.3.3 OPTIMAL TAXATION THEORIES

Optimal tax theory is built on the idea that taxes should be designed to maximise social welfare while considering behavioural responses, equity, and revenue goals.[40] A well-calibrated CGT can balance revenue generation with investment incentives by offering more deferrals and exemptions: tools that Uganda's system currently lacks.

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36 Ibid.

37 M. Smith, O. Zidar & E. Zwick, Top Wealth in America: New Estimates under Heterogeneous Returns, Princeton Economics (October, 2021) <https://economics.princeton.edu/> [Accessed on June 02 2025].

38 Canada's Income Tax Act, section 38.

39 The partial inclusion is the fact that Uganda taxes only gains from business assets while excluding non-business or personal asset disposals. This creates a loophole where taxpayers can reclassify assets as non-business to avoid taxation, exacerbating inequities.

40 <https://www.numberanalytics.com/> [Accessed on June 02 2025].

A step in the right direction is seen in the Income Tax (Amendment) Act 2025[41] which introduces a CGT exemption, under Section 76, for individuals transferring assets such as land, shares, business assets, into companies they establish and control will not pay CGT on that transfer.[42] Clause 3 of the Act amends Section 76(4)(a) of the Income Tax Act by redefining the term "reorganisation."

The previous definition limited reorganisation rollover relief to transactions between companies with the same ownership structure, excluding transactions where individuals transfer assets to companies they control. The Amendment addresses this imbalance by extending reorganisation relief to include asset transfers by individuals to companies under their control.[43]

This measure I argue aims to encourage formal business structuring, succession planning, and governance. For example, retirement relief in Ireland allows tax-free transfers of business assets to a qualifying family member (generally a child) or to somebody else other than the child provided the transfer does not exceed the threshold of the amount or conditions set by law.[44]

2.4 CAPITAL GAINS TAX AND TAX POLICY PRINCIPLES

To be alive to the changes that must and should occur for CGT to achieve the purposes of taxation generally, it must not only adhere to the canons of taxation propounded by Adam Smith,[45] but also the workings and effect of the system as a whole.[46]

The expense of government to the individuals of a great nation, is like the expense of management to the joint tenants of a great estate, who are all obliged to

41 The Parliament approved the Income Tax Act Amendments for the financial year 2025-26. These amendments are pending assent by H.E. the President of Uganda and will come into force effective July 01, 2025.
42 Grant Thornton, Uganda Budget 2025 (June 12, 2025) 22.
43 Ibid.
44 Retirement Relief, <https://legalblog.ie/retirement-relief/> [Accessed on July 13 2025].
45 Ibid (n2) Book V, ch II, pt II.
46 Prof. David Bakibinga (n19) 5.

contribute in proportion to their respective interests in the estate. This thus calls for the tax system to meet certain standards.

CGT must be assessed against the fundamental canons of sound tax policy: equality (equity), economy (efficiency), simplicity (ease of compliance), and revenue adequacy (canon of productivity or fiscal adequacy), though not one of Adam Smith's original four. And these four are discussed here below.

2.4.1 EQUALITY (EQUITY)

Following Adam Smith's maxim, equality demands that taxpayers contribute "in proportion to their respective abilities".[47] By this logic, taxes on capital gains generally serve vertical equity by ensuring that wealthy individuals, who disproportionately realise capital gains, pay their fair share.

In practice, however, concessional CGT treatment such as low rates, exemptions, inflation, often undermines horizontal and vertical equity.[48] The OECD notes that many countries' CGT systems "often undermine equity, introduce economic distortions, and constrain revenue-raising potential".[49] Thus, a principled CGT regime should aim to tax capital income fairly by minimising favourable treatment while recognising arguments for relieving only the excess burdens of inflation or double taxation.

In Uganda's case, the equity dimension has been problematic. Under the ITA, capital gains on non-business assets are broadly exempt, except for sales of unlisted private-company shares or commercial buildings.[50] In effect, large classes of wealthy individuals, for example those selling land or personal real estate pay no CGT, whereas only "business assets" are taxed.[51] This carves out privileges

47 Adam Smith on Public Policy: Four Maxims of Taxation, <https://www.libertarianism.org/> [Accessed on June 02 2025].
48 OECD Taxation Working Papers No. 72, Taxing capital gains: Country experiences and challenges, 6, 32.
49 Ibid, 6.
50 Section 21(j) of the ITA.
51 Tax Justice Alliance Uganda, CSO Position Paper on The Tax Bills for FY 2023/24 (April 2023), 35.

property owners and investors who structure their holdings outside of active business. The Equity theory would view this as a shortfall as the wealthy/ elite can avoid tax on appreciation of their assets, exacerbating inequality.

2.4.2 ECONOMY (EFFICIENCY)

Every tax ought to be so contrived, as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the State.[52] This foundational principle captures the heart of efficiency in taxation as it seeks to minimise the economic disruptions or deadweight loss that taxes inevitably cause while still generating needed public revenue.

Deadweight loss occurs when a tax causes market transactions to be foregone or distorted, reducing overall societal welfare even beyond the revenue that is collected.[53] In the realm of CGT, this becomes particularly salient when investors defer realising gains, not based on economic rationale, but simply to avoid triggering a tax liability. This is known as the lock-in effect.[54]

Uganda's CGT framework partially aligns with efficiency principles through its treatment of business asset gains, which are taxed as ordinary income. This simplifies administration and avoids the complexity and cost associated with maintaining separate CGT regimes.

By eliminating special CGT rates or exemption thresholds for business asset gains, the system reduces compliance burdens, an important dimension of tax efficiency. On the other hand, non-business asset gains are entirely untaxed,

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52 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1st edn, 1776) Book V, ch II, pt II.

53 Julia Kagan, Deadweight Loss of Taxation: Definition, How It Works, and Example (Investopedia, updated 22 March 2025) <https://www.investopedia.com/> [Accessed July 01 2025].

54 OECD Taxation Working Papers No. 72, Taxing capital gains: Country experiences and challenges, 25.

producing no distortion, but equally yielding no revenue. Thus, the system is neutral by omission, rather than by design.

In a fully efficient CGT system, additional mechanisms, like rollover relief, exemptions or indexation for inflation would allow taxpayers to shift or retain assets without triggering immediate tax liability, thereby reducing lock-in effects and improving capital mobility.[55] Although Uganda's amendments expand rollover relief,[56] they stop short of addressing broader inefficiencies tied to inflation. As a result, the potential for economically rational but tax-driven delays in transactions remains unmitigated, preserving inefficiencies in investment decisions.

2.4.3 SIMPLICITY

Adam Smith's canon of certainty holds that taxpayers should easily understand what they owe and when.[57]

While CGT regimes are often complex because they require asset valuations, basis adjustments, and event timing, Uganda's existing CGT framework is relatively simple for businesses though it is silent on most individual property not being used for business.

2.4.4 REVENUE ADEQUACY (CANON OF PRODUCTIVITY OR FISCAL ADEQUACY)

A tax is said to be a productive one only when it acts as an incentive to production. Accordingly, this canon implies that a tax must yield sufficient revenue and not adversely affect production in the economy.

Revenue adequacy asks whether CGT can meaningfully fund public services. In many countries, CGT yields are modest. OECD data show individual capital gains

55 United Nations, Note on Capital Gains Taxation and Taxation of Indirect Asset Transfers (2015) 9.
56 Section 76 as amended in 2025.
57 Canons of Taxation, Equity and Equality, <https://www.ciat.org/> [Accessed on June 02 2025].

taxes netted only about 1.2–2.0% of total tax revenue of countries' tax revenues between 2019 and 2021 for countries with available data.[58]

3.0 LEGAL AND INSTITUTIONAL FRAMEWORK OF CAPITAL GAINS TAX IN UGANDA

3.1 THE CONSTITUTION OF THE REPUBLIC OF UGANDA 1995 (AS AMENDED) (THE CONSTITUTION)

Article 152 states that no tax shall be imposed except under the authority of an Act of Parliament,[59] hence the saying that tax is a creature of statute. Every citizen has a duty to pay taxes.[60] Taxation encompasses all burdens and charges imposed by the Sovereign upon persons and property for the use and support of government activities.[61] A tax is therefore a charge or burden imposed by a Sovereign, on the citizen, created by statute for purposes of raising revenue to finance activities of the Sovereign.

Further, the Constitution requires that any authority with the power to waive or vary taxes must account for its use of this power to Parliament,[62] bolstering transparency and democratic oversight. Also, the establishment of tax tribunals, such as the Tax Appeals Tribunal is provided for, reinforcing procedural safeguards and reinforcing citizens' rights to challenge assessments.[63]

Ugandan courts have consistently interpreted tax laws with caution, insisting on strict statutory clarity before legitimising any tax claim. In *Airtel Uganda Ltd v URA*,[64] the Supreme Court emphasised that not just the right to tax, but even penalties and interest provisions must be expressly provided for in law,

58 OECD Taxation Working Papers No. 72, Taxing capital gains: Country experiences and challenges, 34.
59 Article 152(1) of the Constitution.
60 Article 17(1)(g).
61 Bakibinga J David, Revenue Law in Uganda (Law Africa Publishing, Nairobi, Kampala & Dar-es-salaam, 2012).
62 Article 152(2).
63 Article 152(3).
64 TAT No. 10 Of 2019. (28th November, 2022).

reaffirming that "tax is a creature of statute" and cannot rely on administrative overreach.

Therefore, all elements of CGT-taxable events, rates, exemptions, rollover relief, must be clearly defined in an Act of Parliament (such as the Income Tax Act). Any attempt to enforce CGT beyond that scope risks being ruled unconstitutional.

3.2 THE INCOME TAX ACT CAP. 338

The relevant statutory basis for capital gains taxation in Uganda is found primarily in the Income Tax Act. In Uganda, capital gains are not taxed as a distinct category. Instead, they are treated as part of business income under the Income Tax Act Cap 338 (ITA).[65]

Income Tax is defined, in the Uganda Revenue Authority handbook, as a tax imposable on a person's taxable income at specific rates. Tax is defined under Section 2 of ITA as any tax imposed under that Act. Persons may, for the purpose of definition, be an individual, partnership, trust, company, retirement fund, government, a political subdivision of a government and a listed institution. Income tax is thereby charged on every person who has chargeable income for each year of income.

Chargeable income is derived from three main types of income namely; business, employment and property. The ITA regulates the administration of Income Tax in Uganda under Section 4 which provides:

> *"Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of income and is imposed on every person who has chargeable income for the year of income."*

Subsection 2 makes provision for the income tax payable by a taxpayer for a year of income to be calculated by applying the relevant rates of tax determined under the Act to the chargeable income of the taxpayer for the year of income and from

65 Section 18(1)(a) of ITA.

the resulting amount are subtracted any tax credits allowed to the taxpayer for the year of income.

It is important that the chargeable income must be received, or be in possession of the tax payer before income is imposed on it. Thus, in *Brown v National Provident Institution*,[66] it was held that in order to be chargeable to income tax for a particular year in respect of income from any source, a person must possess that source of income in that year.

A person's gross income includes "*the total amount of business income derived during the year by the person, other than income exempt from tax."*[67] Business income, in turn, means income derived by a person in carrying on a business and includes amounts, whether of a revenue or capital nature to include:

> the amount of any gain, as determined under Part VI of this Act which deals with gains and losses on disposal of assets, derived by a person on the disposal of a business asset, or on the satisfaction or cancellation of a business debt, whether or not the asset or debt was on revenue or capital account.

The Act defines "business" broadly to include a trade, profession, vocation, or adventure in the nature of trade.[68] "Business asset" is defined as property used or held for use in any business, regardless of whether the business has ceased.[69] This wide definition is critical because, under Section 18(1), the Act provides that any gain derived from the disposal of a business asset is included in chargeable income as part of business income.

Thus, Uganda's CGT regime operates through inference and integration, unlike other jurisdictions that legislate it as a separate tax. The implication of this integration is that only gains arising in the course of business are taxed, whereas capital gains realised by individuals outside business, such as gains from selling a residential plot or inherited land, may escape taxation unless they are part of a broader business operation. This legal

66 [1921] 2A.C.222.
67 Section 17 of ITA.
68 Section 2 of the ITA.
69 Ibid.

construction results in ambiguity, poor compliance, and significant revenue leakage.

For emphasis, taxation of capital gains is only triggered when the asset being disposed of qualifies as a business asset. In contrast to jurisdictions that impose a general CGT on the disposal of capital property regardless of context, Uganda only captures such gains if they arise in the ordinary course of business or as part of a business transaction.

The Act employs a realisation principle, meaning gains are only taxed upon disposal, not upon mere appreciation in value. This principle stems from the meaning of disposal:

> *A taxpayer is treated as having disposed of an asset when the asset has been-*
>
> *(a) sold, exchanged, redeemed or distributed by the taxpayer;*
>
> *(b) transferred by the taxpayer by way of gift; or*
>
> *(c) destroyed or lost.*[70]

Of crucial importance is the cost base of an asset.[71] The cost base of an asset purchased, produced or constructed by the taxpayer is the amount paid or incurred by the taxpayer in respect of the asset, including incidental expenditures of a capital nature incurred in acquiring the asset, and includes the market value at the date of acquisition of any consideration in kind given for the asset.[72]

In computing business income, a person is allowed to deduct the cost base of the asset that is, the acquisition cost and any related expenditures from the proceeds received during disposal. This ensures that only the net gain is taxed, rather than the entire sale amount.

The cost base of an asset acquired in a non-arm's length transaction is the market value of the asset at the date of acquisition.[73]

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70 Section 49{1) of the ITA.
71 Section 50(1) of the ITA.
72 Section 50(2) of the ITA.
73 Section 50(3) of ITA.

Gains on the sale of land, for instance, are only taxed if the land was part of a business enterprise, such as property developed and sold by a real estate company. This is evidence in the recent case of *Dr. Amos Nzeyi v URA*[74] where the Tribunal ruled that the sale of Dr. Nzeyi's 42-acre undeveloped land in Kitende (held for nine years without development or commercial use) did not qualify as a business asset under the ITA. The URA's assessment of Shs 1.8 billion in capital gains tax was quashed because the land was deemed a private investment, not part of a trading enterprise.

Similarly, gains on shares are taxed if they arise in the course of share trading or if the shares were held as part of a commercial portfolio. However, gains from long-term passive investments or casual asset disposals by individuals fall outside the tax net. This narrow application is a direct consequence of the statutory framework, which fails to impose a comprehensive capital gains charge.

3.3 THE UGANDA REVENUE AUTHORITY ACT CAP. 218

The Uganda Revenue Authority (URA), established under the Uganda Revenue Authority Act (URA Act),[75] is mandated to assess, collect, and account for all revenue due to the government,[76] including capital gains captured under the business income rubric.

URA's interpretive approach has tended to apply CGT rules conservatively. This is evidenced best in the recent case of *Heritage Oil & Gas Ltd v URA*,[77] where URA initially excluded a $150 million exploration cost from the cost base when calculating CGT, effectively increasing the taxable gain. However, the Court ruled that URA's approach was incorrect, exploration costs must be included in the cost base, underscoring that URA's application of cost-base rules can be over-literal or narrow, necessitating judicial correction.

3.4 THE TAX APPEALS TRIBUNAL ACT CAP. 341

74 *Dr. Amos Nzeyi v Uganda Revenue Authority (URA)* (TAT Application No. 005 of 2024).
75 Section 2.
76 Section 3(a).
77 *Heritage Oil & Gas Ltd v URA*, [2024] UGCommC 344.

The Tax Appeals Tribunal (TAT) is established pursuant to Article 152(3) of the Constitution, to provide for mediation as a mechanism for resolution of tax disputes. TAT is established[78] consisting of a Chairperson and eight other Tribunal members appointed in accordance with the Act.[79]

The Tribunal is empowered to review any "taxation decision" made by the Uganda Revenue Authority,[80] explicitly including Capital Gains Tax assessments. TAT exercises the same powers as a court by affirming, varying, setting aside, substituting, or remitting tax decisions in writing.[81] These provisions ensure that CGT disputes, from deemed disposals to rollover eligibility, are adjudicated within a constitutionally mandated forum.

To enhance efficiency and reduce litigation burden, the Act incorporates mandatory mediation,[82] allowing preliminary referral to a Registrar or a mediator before formal hearings. This process has proven effective in resolving up to 70% of all tax disputes,[83] including CGT-related cases, pre-empting full tribunal hearings and reducing legal costs.

Moreover, while mediation fosters settlement, full adjudication remains available, ensuring that complex CGT issues such as valuation discrepancies, rollover relief eligibility, and enforcement of deemed disposal provisions, are judged on economic substance rather than formal structure. The TAT thus plays a central dual role: facilitating early resolution through mediation and providing authoritative adjudication on CGT matters, preserving both judicial rigour and procedural accessibility.

3.4.1 TRIBUNAL DECISIONS ON CGT

78 Section 2(1) of TAT Act.
79 Section 2(2) of TAT Act.
80 Section 14 of TAT Act.
81 Section 20 of TAT Act.
82 Section 18 of TAT Act.
83 The New Tax Appeals Tribunal Is Transformational And A Real Breath Of Fresh Air – Tax Lawyers Speak Out, <https://www.ceo.co.ug/> [Accessed on June 27 2025].

Tribunal decisions have played a role in not only shaping the scope of CGT application but also serve as a notable illustration of the uncertainty surrounding its application, as seen in *Registered Trustees of Free Masons v URA.*[84] In this case, the taxpayer sold property (Masonic Hall) to the National Social Security Fund (NSSF), relying on a private ruling issued by URA that the sale would not attract income tax. However, URA subsequently issued a CGT assessment of over UGX 3,343,400,000 asserting that the property was a business asset.

The Tribunal rejected this move, holding that URA could not issue a new assessment without formally revoking its prior ruling, which remained binding. The Tribunal found that URA incorrectly computed the CGT by applying 30% of the sale price rather than calculating the gain based on the cost of acquisition and other incidental expenses. The failure to revoke the private ruling further complicated the situation, and thus the assessment was deemed improperly issued. The application was allowed with costs awarded to the Free Masons.

This decision is significant because it demonstrates how inconsistent administration of CGT, particularly around what qualifies as a business asset and how private rulings operate, can create legal uncertainty. It also reinforces that taxpayers are entitled to rely on binding rulings unless lawfully revoked. Moreover, it highlights a persistent gap in URA's internal application of CGT rules, especially in cases involving historical assets or inflation-adjusted values. Ultimately, the case underscores the importance of clear procedural safeguards and consistent interpretation, both of which are crucial for building taxpayer trust and the legitimacy of CGT enforcement in Uganda.

The case of *Blandina Nshakira v URA*[85] adds more jurisprudence to this area of CGT in Uganda. The Tribunal held that the Applicant was liable to pay CGT on the purported sale of her property. The sale agreement with Innocent Mugisha for USD 550,000 constituted a disposal under the Income Tax Act, even though full payment had not been completed and the buyer was not yet registered as the

84 Application No. 51 of 2019.
85 *Blandina Nshakira v URA,* Application No. 172 of 2020.

proprietor. The Tribunal emphasised that a "disposal" under the Act includes a sale, and equitable interests transferred to the buyer (such as a chose in action) were sufficient to trigger tax liability.

The Tribunal interpreted "sold" literally, concluding that a sale occurs when consideration is exchanged, even if legal title has not yet been transferred. The Applicant's failure to rescind the contract or refund payments indicated the transaction was ongoing, not void. The property was deemed a "business asset" under Section 2(h) of the Income Tax Act because it was rented to Arch Designs, converting it from residential to commercial use (from a non-taxable to a taxable use).[86] Section 21(1)(k) of the Act (as it was then) exempted certain capital gains but not those from commercial buildings, which applied here. The gain was computed as the excess of the sale price (USD 550,000) over the cost base (purchase price, lease premiums, and incidental costs). URA used a 12% industrial profit margin to estimate the gain at UGX 216,000,000, yielding a tax of UGX 78,198,820. The Tribunal upheld this method which allows the Commissioner flexibility in assessment.

The recent decision of *Chandaria Foundation Registered Trustees v URA*[87] addressed several key points regarding capital gains, the cost base, and the taxability of the gain from the sale of shares. The Tribunal held that the capital gain derived from the sale of shares in Uganda Baati Limited (UBL) (a public limited company) is exempt from income tax under Section 21(1)(j) of the ITA. The exemption applies because:

> *The gain was not derived from a business asset (the shares were held as a passive investment, not for trading).*
>
> *The gain was not from the sale of shares in a private company (UBL is a public company).*

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86 Section 49(3) provides that where the Commissioner General is satisfied that a taxpayer— *(a) has converted an asset from a taxable use to non-taxable use; or (b) has converted an asset from a non-taxable use to a taxable use, the taxpayer is deemed to have disposed of the asset at the time of the conversion for an amount equal to the market value of the asset at that time and to have immediately reacquired the asset for a cost base equal to that same value.*

87 *Chandaria Foundation Registered Trustees v URA,* TAT Application No. 331 of 2024.

The gain was not from the sale of a commercial building.

The Tribunal rejected URA's argument that the shares were business assets, emphasising that the Applicant (a charitable trust) was not engaged in share trading and held the shares for over 20 years as a long-term investment.

The Tribunal analysed Section 2(h) of the ITA, which defines a business asset as one used or held for use in a business. It concluded that the shares were not business assets because:

> The Applicant was not engaged in a business (no trade, profession, or share-trading activity).
>
> The holding period (22 years) indicated an investment purpose, not a trading motive.
>
> The Applicant (a trust) is not a company or partnership, so the shares did not fall under the extended definition of business assets.

Although the Tribunal ruled that the gain was exempt, it criticised URA's failure to properly index the cost base of the shares when calculating the tax assessment. Section 48(3) of the ITA requires adjusting the cost base for inflation when computing gains on long-held assets. The Tribunal noted that URA failed to provide evidence of indexation, making its assessment arbitrary and unlawful.

4.0 THE POLITICAL ECONOMY OF CAPITAL GAINS TAXATION

The resistance to CGT in many jurisdictions, including Uganda, stems partly from the preference of indirect taxes (which include excise duty, value added tax (VAT)), and taxes on international trade) over progressive direct taxes. At the national level, indirect taxes make up two-thirds of total tax revenues.

The situation at Local Government (LG) levels is similar to that at the national level - the share of indirect taxes in total LG revenue is about 67 percent.[88] URA itself has acknowledged this pattern through the then Commissioner General of the URA Ms. Doris Akol who said:

[88] SEATINI and Oxfam, Taxation in Uganda: Review and Analysis of National and Local Government Performance, Opportunities and Challenges, 4.

> *"Uganda, just like any other Sub Saharan African Country, wants to increase indirect tax to raise government revenue. Uganda's potential of increasing domestic revenue lies in indirect tax."*[89]

This preference is consistent with insights from fiscal sociology and the political economy of taxation, which show that tax policy design is deeply shaped by political power, state-building dynamics, and the interplay between the state and various social groups.

Uganda's tax system has historically relied more heavily on indirect taxes (e.g., VAT, excise duties, and customs levies) than on direct taxes (e.g., income tax and corporate tax), as evidenced by URA.[90] In 2022/2023, while direct taxes showed strong growth exceeding targets by UGX 724.62 billion, indirect taxes (including VAT and excise duties) remained the dominant revenue source, particularly when factoring in international trade taxes such as import duties, petroleum duty.

The URA Annual Performance Report of 2022/2023 highlighted that indirect taxes contribute the largest share of total revenue (approximately 60-70%),[91] reflecting their broader base and administrative efficiency in a largely informal economy. However, the underperformance of domestic indirect taxes (falling short by UGX 553.54 billion) suggests challenges in enforcement, even as direct taxes gain traction. This structural reliance on indirect taxation aligns with trends in many developing economies, where consumption-based taxes are easier to administer and less prone to evasion compared to income-based levies.

This is thus a trend driven by political power dynamics, class relations, and administrative pragmatism rather than pure economic rationality. Here's a breakdown of the key factors:

i. EASE OF ADMINISTRATION

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89 We can raise revenue from indirect taxes, says URA (Monday, December 16, 2019 — updated on January 02, 2021) <https://www.monitor.co.ug/> [Accessed on June 27 2025].

90 Uganda Revenue Authority (URA) Annual Performance Report 2022/2023, 3-4.

91 Ibid.

Indirect taxes (like VAT) are easier to administer and enforce, especially in economies with large informal sectors. Uganda's tax to GDP ratio currently stands at 13.9%. The tax to GDP ratio is a measure of a nation's tax revenue relative to the size of its economy as measured by gross domestic product (GDP). In simple terms, it indicates the extent to which a country's economic output contributes to its tax revenue. A low tax to GDP ratio indicates that a significant part of the country's economic activity is untaxed and that there are fewer actors contributing to the country's tax revenue. The IMF's structural adjustment programs in the 1990s pushed for VAT adoption thereby replacing sales taxes, and reduced reliance on hard-to-enforce direct taxes like the abolished graduated tax.[92]

ii. LOBBYING

Wealthy individuals and businesses have successfully lobbied for exemptions and lower direct tax burdens. For example, big businesses in Uganda have secured VAT threshold increases and sector-specific exemptions through lobbying.[93] Uganda's top income tax rate (40% post-2012 reform) is high by African standards, but enforcement is weak, and top earners often shift income to lower-tax bases.[94]

iii. THE ABOLITION OF THE GRADUATED TAX

It was a local direct tax abolished in 2005 that had the effect of reducing citizen engagement with taxation, making indirect taxes (less visible to taxpayers) the default revenue tool. This eroded accountability, as taxpayers no longer perceived themselves as funding government services.[95]

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92 Promoting Tax Bargains in Uganda and Beyond: The Importance of Civil Society and Parliamentarians (31st July 2015), <https://www.ictd.ac/blog/> [Accessed on June 04 2025].

93 Ibid.

94 Taxpayer response to greater progressivity: evidence from personal income tax reform in Uganda, 16 (November 2024), <https://link.springer.com/> [Accessed on June 04 2025].

95 Ibid (n92).

Indirect taxes are less politically contentious because their regressive impact on low-income households is obscured. An example is VAT on essentials like salt was exempted only after public pressure.[96] However, the exemption was removed so the supply of salt was and is subject to VAT at 18%.[97]

iv. LOW FORMAL EMPLOYMENT RATES

With low formal employment where 83% informality is in non-agricultural sectors, direct tax collection is challenging. PAYE reforms in 2012–2013 raised revenue but faced limited behavioral responses due to weak enforcement.[98] Indirect taxes, while regressive, are more reliable in a low-capacity state. For instance, Uganda's VAT and excise duties on goods like fuel and alcohol are easier to collect at borders or production points.[99]

The IMF and donors have historically favoured indirect tax reforms, an example being the introduction of VAT in 1996 to boost revenue without destabilising elite interests.[100] Civil society and parliamentarians lack technical capacity to challenge these policies, leaving tax bargains dominated by international actors and domestic elites.[101]

4.1 CAPITAL GAINS AND TAX AVOIDANCE IN UGANDA

Tax avoidance entails techniques by which the lawyer and an accountant can so arrange a client's affairs as to achieve a reduction in the amount of tax that he would otherwise have to pay.[102]

Tax avoidance is distinguishable from tax evasion. Tax evasion is all those activities which are responsible for a person not paying the tax that the existing

96 Ibid.
97 Pwc Insight and Analysis: Understanding Uganda's National Budget 2014/15, Indirect Taxes 2.
98 Ibid (n94).
99 Impact of fiscal policy on inequality and poverty in Uganda 12 Sep 2016, <https://www.theigc.org/> [Accessed on July 13 2025].
100 Ibid (92).
101 Ibid.
102 Ibid (n3) 686.

law charges upon his income.[103] While tax avoidance is lawful, tax evasion is illegal. Tax avoidance is said to denote:

> *"….. some act by which a person arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement. Consequently, the situation which he brings about is one in which he is legally in the right, except so far as some rule may be introduced that puts him in the wrong."*[104]

Recognition of the right of the tax payer to avoid tax by lawful means so as to reduce minimise, nullify or simply defer a liability to tax can be found in judicial endorsements. In *IRC v Duke of Westminster*,[105] Lord Tomlin stated:

> *"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise be."*

In practice, the ambiguity in Uganda's CGT regime has created fertile ground for tax avoidance schemes. These include:

4.1.1 RECHARACTERISING GAINS AS NON-TAXABLE CAPITAL RECEIPTS

One common avoidance strategy is simply to keep assets "off books" as personal or non-business investments so that any gain on disposal is exempt. Because the ITA treats only gains from "business assets" as taxable, taxpayers routinely designate investment properties, land, or shares as personal holdings. For example, a landowner who claims that the sold land was held privately pays no tax on the profit, citing Section 21(1)(j) of the ITA.[106] Similarly, the value of any property acquired by gift, bequest, devise or inheritance that is not included in business, employment or property income is exempted.[107] In practice, one can transfer property among relatives or trusts and then sell it, treating proceeds as non-business.

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103 The Royal Commission on Taxation of Profits and Income, United Kingdom (1955) para 1016.

104 Ibid.

105 *IRC v Duke of Westminster,* [1936] AC 19.

106 Parliament rejects withholding tax on land purchase, <https://www.independent.co.ug/> [Accessed on June 06 2025].

107 Section 21(1)(i).

Thus, a wealthy individual could hold land in a personal portfolio or pass it through an exempt trust or charity and later sell it tax-free. This re-characterisation is especially common in land markets: rural or urban land is frequently treated as a household asset, not a business asset, making tax avoidance relatively easy. Until recently the law essentially endorsed this approach and indeed, proposals to tax gains on personal land have explicitly noted that Section 21 currently exempts them.[108]

4.1.2 STRUCTURING DISPOSALS THROUGH ASSOCIATES, SHELL COMPANIES, AND TRUSTS

Taxpayers also exploit related-party and corporate structures to minimise or evade gains tax. A classic scheme is to route an asset sale through a connected entity or offshore vehicle so that Uganda's tax net never catches the gain. For instance, an owner might sell a Ugandan asset to an affiliated local or foreign company at a suppressed price, shifting the real value indirectly. The Commissioner has power to adjust prices between associates to arm's-length levels,[109] but enforcement depends on URA's audit capacity.

The general anti-avoidance rule[110] also allows recharacterising transactions entered into as part of a tax avoidance scheme, yet in practice, proving this is onerous. By contrast, for major players, outright offshore restructuring has been attempted.

In the 2010 Heritage Oil/Tullow case, the seller tried to re-domicile from the Bahamas to Mauritius just before completing a Ugandan sale, exploiting a Mauritius–Uganda tax treaty to nullify the Ugandan CGT.[111] URA ultimately countered this scheme, arguing that domestic law required taxing the gain despite the treaty. The intricate details of *Tullow Oil v URA,*[112] where in arriving at the cost

108 Ibid (n106).
109 Section 116 of the ITA.
110 Section 117 of the ITA.
111 Panama Papers: Uganda foils company's dogged bid to avoid tax (14 April 2016), <https://mg.co.za/> [Accessed on June 06 2025].
112 *Tullow Oil vs URA,* TAT Application No.4 of 2011.

base for CGT purposes, the Commissioner General invoked the GAARs Section 91 in the ITA to recharacterise Tullow Oil's transaction of disposal of its interests in oil blocks (Exploration Areas (EA), 1, 2 and 3A) located in Uganda to Total E&P and China National Offshore Oil Company (CNOOC). Tullow's claim of an economic loss also arose from the Last In First Out (LIFO) method of allocation of costs in arriving at a capital loss as per their computation.

On the other hand, URA disputed the use of the LIFO method in arriving at the tax base for CGT purposes and instead contended that the First In First Out (FIFO) method or the Average Cost method were the accurate methods in computing the tax base for CGT purposes since Tullow's interests in the blocks were deemed to be indivisible rights or some form of intangible assets. URA further argued that the use of LIFO was a tax avoidance mechanism and thus invoked the GAAR as per Sec 91 of the ITA.

Such cross-border "shell company" manoeuvres vividly illustrate Uganda's vulnerability: as an IMF report notes, existing treaty provisions are not effective where transfers take place in a treaty country.[113]

Domestically, arrangements with trusts or family companies can also be used. A taxpayer might transfer a business asset into a related company or trust perhaps exempt or foreign and then trigger an internal sale or liquidation to avoid immediate recognition of gain. Uganda's roll-over relief[114] actually permits tax-deferral when a business asset is contributed to a domestic company other than an exempt one, but transfers to an exempt entity explicitly fall outside this relief. In other words, if one could get a personal asset conveyed to an "exempt organisation" in Section 2 of the ITA and then sold, the law provides no roll-over, and yet the receiving organisation itself would not pay tax.

Anecdotally, unscrupulous taxpayers have tried to use trusts or non-profits as intermediaries though Uganda's trust rules[115] are designed to negate separate

113 IMF Country Report No. 17/207, Uganda Selected Issues (July 2017), 59.
114 Section 76 of ITA.
115 Sections 70–72.

entity treatment. Under these rules any "settlor trust" or beneficiary trust is treated as transparent, with income and assets deemed those of the settlor/beneficiary. In effect, the ITA already anticipates family-trust avoidance: "one of the clear cases of tax avoidance is the use of family settlements,"[116] and the law provides that such trusts *"are not treated as a separate entity"*.[117]

Nonetheless, more opaque corporate or trust structures especially involving offshore entities remain a risk. Taxpayers may use shell companies or layered transactions to disguise the actual disposal as something other than a straightforward sale, forcing URA into costly legal fights over economic substance versus form. This dynamic was at the heart of the landmark *Enviroserve (U) Ltd. v URA* decision,[118] where the TAT affirmed that an indirect change of control exceeding 50% via offshore share transfers, constituted a deemed disposal under Sections 74(2) and 78(h) of the Income Tax Act, despite the structure being offshore-based. URA's UGX 9.27 billion assessment was largely upheld, marking a decisive turn toward enforcing capital gains on indirect structures.

4.1.3 MISUSE OF SECTION 21 EXEMPTIONS

Uganda's Income Tax Act contains a long list of exempt incomes under Section 21, and these exemptions can be abused in CGT avoidance. For example, Section 21(1)(f) exempts income of exempt organisations such as charitable, religious or education institutions; Section 21 further exempts income of certain government bodies. In theory, these apply only to income or assets used for exempt functions.

However, taxpayers have sometimes sought to route a private sale through a supposedly exempt body. One could imagine a scenario where a business owner donates or leases property to a closely associated exempt organisation, which then sells it, hoping the gain escapes tax. Under current law, since the exempt

116 John Mugalula, Anti-Tax Avoidance Provisions Under the Income Tax Act Cap 340: A Perspective Analysis (Uganda Law Society – Lawyers' Voice, April–June 2010) 4.
117 Section 70(5) of the ITA.
118 *Enviroserve (U) Ltd. v URA* Application No. 378 of 2024.

organisation's profit would not be "business income," it might fall under the broad Section 21 exemptions.

Recognising this loophole, draft amendments have targeted it: for instance, a 2022 Amendment Bill revised the definition of "exempt organisation" implicitly narrowing who qualifies as *"a religious, charitable, educational institution or research institution whose object is not for profit;*"[119] and the 2023 draft repealed Section 21(t) for unit trusts to bring such gains into tax. In mid-2023, the Parliamentary Committee on Finance, Planning, and Economic Development removed the proposed repeal, deciding *"To maintain income for collective investment schemes as exempted from tax in order to encourage saving and investment culture."*[120]

But, as of 2024, the risk remains that Section 21 can cloak gains from *"qualified"*[121] disposals.[122] In practice, URA has flagged such abuses. During a debate on land taxes, MPs noted that capital gains by non-profits are not taxed, effectively acknowledging that if a non-profit held the asset, its sale would not generate taxable income.[123] This confirms the structural anomaly: exempt entities and trusts are not subject to CGT, so routing assets through them can nullify tax liability. While Uganda's CGT-gap is mainly due to personal assets, the misuse of exempt-entity provisions is an additional avenue for avoidance that remains inadequately policed.

5.0 COMPARATIVE ANALYSIS OF CAPITAL GAINS TAXATION IN EAST AFRICA

The treatment of capital gains taxation in East Africa reflects a mosaic of legal philosophies, fiscal priorities, and administrative capacities. While all East African Community (EAC) member states have income tax regimes, only some have

119 Amendment 2 of section 2 of the Income Tax (Amendment) Bill of 2022.
120 Controversy erupts in Uganda's parliament over proposed taxes (04 May 2023) <https://www.pulse.ug/> [Accessed on June 27 2025].
121 "Qualified disposals" refer to asset transfers or sales that meet specific criteria under the Income Tax Act to be subject to or exempt from CGT.
122 Section 21(1)(j) of the ITA of Uganda.
123 Ibid (n106).

chosen to isolate capital gains taxation as a standalone or specifically regulated tax head. Others, like Uganda, have subsumed it under general business income.

This section conducts a comparative analysis of the capital gains tax (CGT) regimes in Kenya, Tanzania, Rwanda, Burundi, and South Sudan, juxtaposing them against Uganda's approach. It seeks to illustrate not only the diversity in structure and implementation but also the implications of these differences for tax equity, compliance, and revenue mobilisation in the region.

5.1 KENYA

Kenya provides one of the most instructive examples of a reformed CGT regime within East Africa. The Kenyan Capital Gains Tax (CGT) was reintroduced in 2015 after being suspended for nearly three decades since 1985,[124] ostensibly to encourage investment and ease tax administration.

Kenya's CGT framework is governed by the Eighth Schedule to the Income Tax Act Cap. 470. Unlike Uganda, where capital gains are integrated into the computation of business income under the Income Tax Act, Kenya adopts a standalone statutory approach. The Eighth Schedule delineates the accrual and computation of gains from two distinct types of transfers: property other than investment shares (Part I), and investment shares listed on the Nairobi Securities Exchange (Part II). This structure allows for tailored taxation mechanisms depending on the asset class involved, offering a level of procedural clarity absent in Uganda's generalised treatment.

Under Part I, Kenya taxes gains arising from the transfer of property situated in Kenya, including land, buildings, and unlisted securities, whether acquired before or after 1 January 2015. It also taxes indirect transfers such as shares that derive more than 20% of their value from Kenyan immovable property and direct transfers where the alienator held at least 20% of a company's capital within the

[124] The Resumption of Capital Gains Tax in Kenya, <https://www.primerus.com/> [Accessed on June 08 2025].

preceding 365 days.[125] These rules reflect OECD-inspired anti-avoidance provisions and mirror Uganda's more recent efforts to tax offshore indirect disposals, as seen in cases like *Zain International BV v URA*.[126]

Here, Zain International BV, a Netherlands-based parent company sold its 100% interest in Zain Africa BV (also Dutch). Zain Africa BV, in turn, indirectly controlled Celtel Uganda Ltd, which owned immovable property and assets in Uganda. The transaction took place entirely offshore, with no direct transfer of Celtel Uganda Ltd shares or property. The URA issued an USD 85 million CGT assessment on Zain International BV, invoking Sections 74(2) and 78(h) of the Income Tax Act. URA argued that the offshore share sale constituted an indirect disposal of Ugandan property, tantamount to a deemed disposal of Celtel Uganda's assets.

Justice Eldad Mwangusya of the High Court ruled that URA lacked jurisdiction and could not tax Zain International BV, as the disposal was entirely offshore and involved non-residents. The Court of Appeal reversed this decision, affirming URA's jurisdiction and taxation power. It held that an indirect change of control involving 92% immovable Ugandan assets triggered a deemed disposal, taxable under Ugandan law, even if the sale occurred overseas via Dutch entities. Following the ruling, Uganda amended its tax laws (July 2018) to formally recognise indirect disposals: any change in direct or indirect ownership exceeding 50% of a resident entity within three years triggers a deemed disposal and CGT liability.[127]

Back to Kenya, the gain is computed as the difference between the "transfer value" and the "adjusted cost," which includes acquisition price, improvement expenditures, legal and valuation fees, and costs incurred to secure title. These rules are laid out in Paragraphs 7 through 9 of the Eighth Schedule, providing

125 Paragraph, 2(c).
126 *Zain International BV v URA*, Civil Appeal No. 0011 of 2012.
127 Section 74(2) of Uganda's ITA.

detailed guidance similar to, in substance but more prescriptive in form than, Uganda's Sections 49 and 50 of ITA.

Exemptions in Kenya are both explicit and extensive. Paragraph 6 of the Schedule excludes from CGT a wide range of transactions, including transfers between spouses or former spouses, transfers to immediate family members, estate administrations, and certain group restructuring exercises, provided the group has existed for at least 24 months. These are echoed, though less precisely, in Uganda's non-recognition provisions under Sections 49 and 52, which exempt disposals such as gifts between spouses, inheritances, and internal reorganisations.

However, Kenya goes further by incorporating express anti-avoidance safeguards for valuation manipulation and related-party transactions, with Paragraph 9 deeming such transfers to occur at fair market value as determined by the Commissioner.

Kenya imposes a flat 15% CGT, which is a final tax, not subject to the progressive income tax brackets that apply to other forms of income. This rate was raised from 5% through the Finance Act, 2022.[128] Uganda, by contrast, taxes capital gains on business assets at the corporate rate of 30%. Although Uganda's integration of CGT into the income tax base promotes simplicity, the absence of a differentiated rate may discourage investment and fails to account for the inflationary effect on long-held assets, an issue that Kenya has resolved through preferential rates, albeit without indexation.

One notable feature of Kenya's CGT regime is its treatment of investment shares. Part II of the Eighth Schedule establishes a system in which stockbrokers are obligated to withhold CGT from share transfers at the Nairobi Securities Exchange and remit it to the Kenya Revenue Authority. This creates a clear enforcement mechanism with legal consequences for non-compliance. Uganda lacks a comparable system for listed securities; capital gains from shares are taxed under

[128] Capital Gains Tax Increase, <https://www.afriwise.com/> [Accessed on June 08 2025].

general business income rules without a mandatory withholding system, placing a heavier burden on voluntary taxpayer compliance and URA's audit capacity.

In terms of payment enforcement, Kenya excels in procedural clarity. Paragraph 11A of the Eighth Schedule stipulates that CGT becomes due at the earlier of either the full receipt of purchase price or the registration of the property transfer. This prevents deferral through delayed payments or registration and ensures immediate tax recovery. In Uganda, disposal is generally recognised upon realisation under Section 49 of the ITA, but there is no fixed "tax point" and URA's application often hinges on factual interpretation, leading to potential administrative uncertainty.

Finally, while Uganda provides a rare inflation adjustment Consumer Price Index (CPI indexation under Section 48, ITA), Kenya does not. However, Kenya's CGT regime offers better precision in areas such as allowable deductions, transfer valuation, and scope of exemption, particularly with regard to intra-group and family transfers. Uganda, despite having a broader statutory base, has struggled with inconsistent URA interpretations, as seen in the *Heritage Oil & Gas Ltd v URA,*[129] where the Court had to correct URA's improper exclusion of exploration costs from the cost base. Kenya's reliance on fixed rules and administrative tools like broker-led withholding may offer a more efficient a predictable model.

In terms of 2025 amendments to CGT, President William Ruto signed the Finance Bill 2025 into law and it introduces a reduced rate of 5% for high-value investments certified by the Nairobi International Financial Centre Authority (NIFCA).[130] This incentive is designed to attract large-scale, high-impact capital inflows into Kenya's financial hubs, and applies only to eligible projects within the Nairobi International Financial Centre. Exemptions for property transfers within Special Economic Zones and gains on listed securities is also introduced.[131]

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129 *Heritage Oil & Gas Ltd v URA*, [2024] UGCommC 344.

130 Kenya: Ruto Mandates Automatic Tax Reliefs As He Signs Finance Bill 2025, <https://allafrica.com/stories> [Accessed on June 26 2025].

131 Ibid.

5.2 TANZANIA

Under the Income Tax Act, Cap 332, Tanzania's Income Tax Act Cap. 332 similarly has no separate "CGT" label: gains are taxed as income, but a single-instalment tax is collected on land and building transfers (10% of gain for resident sellers.[132] The single instalment CGT rate for non-residents selling land or buildings increased from 20% to 30%.[133]

Gains from disposal of property such as immovable assets or investment assets, are included under taxable income, as defined in Section 2 and realised under Sections 42-47 and 90 of the Income Tax Act Cap. 332. These "realisation" provisions explicitly describe taxable events, including sales, gifts, transfers, involuntary disposals, and abandonment. Gains are determined by subtracting the adjusted cost base from the transfer proceeds, mirroring Kenya's approach under the Eighth Schedule and Uganda's cost-base regime.

Sections 42-47 set out various realisation rules: for instance, Section 43 covers transfers to spouses without tax, Section 44 governs transfers to associates, and Section 45 relates to involuntary changes with optional roll-overs. Section 47 guides apportionment of costs, aligning with Uganda's Section 51 which mandates split of gain for mixed-use assets. These provisions allow Tanzania to treat complex disposals consistently within its tax system.

A single-instalment tax is mandated on gains from land or buildings: 10% for residents and 30% for non-residents. If sellers lack reliable proof of cost (such as purchase documents), the law imposes an alternative 3% tax on the sale proceeds or approved value, whichever is higher, a leverage to enforce compliance where records are absent. This amount is credited against annual income tax for corporate entities (taxed at 30%) or progressive rates for individuals.[134] This dual

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132 Capital Gains Tax, <https://www.tra.go.tz/> [Accessed on June 10 2025].

133 The Finance Act, 2025 (the Finance Act or the Act) was enacted by Parliament, assented to law by the President and subsequently published in the Special Gazette on 30 June 2025. Available at <https://aln.africa/insight/analysis-of-the-tax-changes-introduced-by-the-finance-act-2025-aln-tanzania/> [Accessed on June 09 2025].

134 KPMG, Tanzania Fiscal Guide 2017/18, 1.

structure where income tax for investment asset gains and a single-instalment tax for real estate, mirrors Uganda's integration of CGT in business income and deviates from Kenya's standalone CGT regime.

The Tanzania Revenue Authority (TRA) enforces CGT at the point of property registration or contract execution. A clearance certificate confirming payment is a pre-condition for registering land or building transfers, driving prompt tax collection. Sellers must settle the instalment tax within 30 days of the realisation event and notify TRA within 14 days, establishing clear administrative deadlines.[135] This reflects Tanzania's effective enforcement mechanism, similar to Kenya's, and contrasts Uganda's more flexible URA approach.

5.3 RWANDA

Rwanda's Income Tax Act No. 016/2018 (repealed 2022) created a specific CGT on share transfers (5%),[136] while retaining a 30% tax on gains from commercial immovable property.[137]

Rwanda's 2018 Income Tax Law (Law No. 016/2018) introduced a capital gains tax focused on the sale or transfer of shares, setting out provisions on scope, computation, rates, withholding, and exemptions. However, this 2018 law was subsequently repealed and replaced by the 2022 Income Tax Law (No. 027/2022),[138] which itself underwent further amendment in September 2023.

Rwanda's Income Tax Act, enacted in 2022[139] provides a structured, stand-alone framework for the taxation of capital gains. Unlike Uganda, where capital gains are only implicitly taxed through the broader concept of "business income," Rwanda's approach offers clear statutory guidance, thereby enhancing certainty and enforceability. The relevant provisions are discussed.

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135 PricewaterhouseCoopers Tanzania website, (Last reviewed - 20 January 2025), <https://taxsummaries.pwc.com/> [Accessed on June 10 2025].

136 Rwanda Income tax alert April 2018, 11.

137 <https://www.mondaq.com/> [Accessed on June 10 2025].

138 EY, Rwanda gazettes new Income Tax Law, <https://taxnews.ey.com/> [Accessed on June 26 2025].

139 Law No. 027/2022 of 20 October 2022.

The foundation of capital gains taxation in Rwanda's current legal regime begins at Article 2 of the Rwanda ITA. This provision provides that the Income Tax Act relates to the certain categorises of income that include capital gains. CGT is one of the distinct types of income subject to tax under the Act and is within the overall individual taxable income.[140] This classification is significant because it affirms that capital gains, though often arising from non-recurring transactions, are not outside the purview of regular income tax. It reflects a deliberate legislative choice to treat capital gains as part of comprehensive income, rather than as a separate class requiring distinct legislation, which is common in dual-income tax systems. Importantly, this inclusion creates the basis for enforcement by the Rwanda Revenue Authority (RRA), ensuring that realised gains from qualifying disposals must be declared and taxed accordingly.

Article 35 of the Rwanda Income Tax Law provides a focused and clear legal basis for the taxation of capital gains arising from the sale or transfer of shares, whether such transactions occur within Rwanda or abroad. This provision marks an important feature of Rwanda's residence-based taxation regime, as it ensures that gains made by resident taxpayers even from offshore share disposals fall within the domestic tax net. By explicitly including both direct and indirect transfers, the law closes potential loopholes often exploited through offshore holding structures or intra-group reorganisations.

The taxable gain is computed as the difference between the acquisition cost and the final selling or transfer price, reflecting the classic "realisation principle" in capital gains taxation. This approach ensures that only actual, realized gains rather than speculative increases in value are brought into tax.

Article 36 had set the applicable capital gains tax rate at a flat five percent (5%) on the net gain. As amended in 2025, the capital gains tax rate is now 10%,[141] replacing the earlier rate of 5%. This rate is still relatively low compared to other

140 Section 13.

141 Parliament passes law hiking capital gains tax, <https://www.africa-press.net/> [Accessed on June 26 2025].

regional economies like Kenya (15%) or Uganda (30%, where capital gains are taxed as business income if the asset qualifies). The use of a flat rate, regardless of the holding period or size of the transaction, enhances administrative simplicity and predictability for both taxpayers and the RRA. This low and uniform rate signals Rwanda's policy intent to promote capital investment, particularly in equity markets, while still ensuring the government captures a share of wealth accumulation. It reflects a balancing act between revenue generation and maintaining an investor-friendly tax environment.

The 2025 Amendment to Article 37 of Rwanda's Income Tax Law significantly expands the withholding and declaration obligations associated with capital gains tax (CGT), building upon the narrower original provision. Under the original 2022 formulation, Article 37 imposed a withholding obligation solely on the resident company whose shareholding structure was altered due to a sale or transfer of shares. That company was responsible for both withholding and remitting CGT within 15 days of the transaction month. This model, while innovative, was limited in scope, it applied only to share disposals and placed the entire compliance burden on the affected company.

By contrast, the 2025 Amendment broadens both the scope of taxable assets and the range of responsible parties. It now includes not only shares but also licenses, debt instruments, options, guarantees, and similar assets within its CGT regime.[142] It also diversifies the withholding and payment obligations: where shareholding changes occur, the resident company must still withhold and pay the CGT, but in the case of other capital assets such as licenses or guarantees, the seller or buyer becomes responsible.

It further clarifies that any of the parties listed such as resident company, shareholder, or buyer, must declare and pay the CGT within 15 days of the month following the transaction.[143] This Amendment represents a substantial

[142] Article 37(1), as amended. Official Gazette n° Special of 29/05/2025. Available at <https://www.rra.gov.rw/> [Accessed on June 26 2025].

[143] Article 37(2) as amended in Official Gazette n° Special of 29/05/2025.

administrative enhancement, improving clarity, closing enforcement gaps, and aligning Rwanda's CGT enforcement model more closely with OECD standards on broad-based asset taxation and transactional accountability.

Article 38 provides a crucial exemption from capital gains tax for certain types of financial instruments. Specifically, gains derived from the sale or transfer of listed shares and other securities on the Rwanda Securities Exchange, as well as gains from shares or units in collective investment schemes, are fully exempt from CGT. This exemption serves two primary policy objectives: first, to stimulate public participation in formal capital markets, and second, to promote collective investment vehicles such as mutual funds and pension schemes. By removing tax disincentives from these asset classes, Rwanda seeks to encourage long-term investment, enhance capital market liquidity, and deepen financial inclusion.

Article 54 provides for CGT relief during business restructurings, ensuring that legitimate internal reorganisations are not penalised through immediate taxation. Specifically, it exempts the transferring business entity from CGT on capital gains or losses realised during restructuring processes such as mergers, spin-offs, or asset transfers. Instead of taxing the transaction, the law allows the receiving entity to inherit the book values of the transferred assets and liabilities, effectively maintaining continuity for tax purposes.

Furthermore, the receiving entity must apply depreciation rules as though the restructuring had not occurred, thereby preserving the original tax treatment and preventing any artificial inflation or suppression of asset values. This provision reflects a policy choice to facilitate corporate reorganisations that are commercially motivated rather than driven by tax avoidance, aligning Rwanda's regime with international best practices that favour tax neutrality in intra-group business transformations.

5.4 BURUNDI AND SOUTH SUDAN

Burundi and South Sudan currently do not operate standalone CGT regimes and impose minimal taxation on capital gains.

In Burundi, capital gains other than gains derived by a resident individual as part of business income are classified under a schedule where income is taxed at 15%.[144] However, the only capital gains that are taxable for a non-resident are those resulting from the sale of shares in a resident company or an interest in a building located in Burundi.[145]

Capital gains is taxed together with business income. 15% (Capital gain resulting from sale or cession of commercial immovable property).[146] In Burundi, the Office Burundais des Recettes (OBR) collects the 15% CGT on property deals (often withheld by the notary).

On the other hand, South Sudan, still in the early stages of revenue administration following prolonged conflict, has not yet developed a CGT regime. South Sudan's 2009 Taxation Act treats all capital gains as business income (no standalone CGT).[147]

There is a structured framework for taxing capital gains, treating them as part of a taxpayer's gross income.[148] The law defines capital gains broadly, encompassing profits from the sale or disposition of assets such as real estate, securities, and other capital assets. Capital gains are calculated as the positive difference between the sales price and the asset's cost or depreciated value, whichever is lower.[149] This approach ensures that taxpayers cannot artificially inflate deductions by selectively applying higher cost bases.

The legislation distinguishes between different asset categories for tax purposes. For assets falling under Categories 2 and 3 of depreciable assets, the entire sales price is treated as taxable income, reflecting a stricter recapture mechanism to

144 Global Expansion, Global Hiring Guide Burundi (March 2023), 3.
145 Ibid.
146 KPMG, Burundi Fiscal Guide 2015/16, 2.
147 Deloitte, International Tax South Sudan Highlights 2024 (Updated January 2024), 1.
148 Section 57 of South Sudan's Taxation Act 2009 (as amended).
149 Section 77(4) of South Sudan's Taxation Act.

prevent tax avoidance. For other assets, including land and securities, the gain is computed based on the actual appreciation in value, net of allowable costs.[150]

6.0 INSTITUTIONAL, ADMINISTRATIVE AND POLICY CHALLENGES IN THE ADMINISTRATION OF CAPITAL GAINS TAX IN UGANDA

The administration of capital gains tax (CGT) in Uganda is fraught with a variety of policy, legal, and institutional challenges. These obstacles impede the effective taxation of gains from asset disposals and contribute to significant revenue leakages.

Unlike other jurisdictions in the East African region that have taken deliberate steps to establish clear CGT regimes, Uganda continues to treat capital gains as a subset of business income. This structural setup has far-reaching implications for both the efficiency and fairness of Uganda's tax system. This section explores the multifaceted policy challenges that frustrate the administration of CGT in Uganda.

6.1 LEGAL AMBIGUITY AND STRUCTURAL AMBIVALENCE

Uganda's current legal framework for capital gains taxation is structurally ambiguous and institutionally weak. The absence of a dedicated CGT statute means that Uganda continues to rely on piecemeal provisions under the broader definition of business income in the ITA. Specifically, Section 18(1)(a) includes within business income "any gain made on the disposal of a business asset," but the Act lacks an explicit definition of "capital gains", and there is no standalone CGT regime akin to that found in neighboring jurisdictions. In contrast, Kenya's Eighth Schedule to its ITA outlines detailed CGT rules, and Tanzania clearly identifies and taxes gains from investment assets. Uganda's reliance on business-use qualifiers thus restricts CGT enforcement to assets held in the course of business, excluding private asset disposals from taxation entirely.

This foundational gap has significant policy and equity implications. Because

150 Section 77(3) of South Sudan's Taxation Act.

private individuals who dispose of assets like land or shares without doing so in the course of a business fall outside the scope of section 18, such disposals remain untaxed. This undermines horizontal equity, as economically similar transactions are taxed differently depending on their classification. It also encourages speculative behaviour, as individuals can hold appreciating assets passively and dispose of them tax-free, while active enterprises bear the full tax burden. As a result, Uganda's current regime rewards asset-holding over productive enterprise and distorts investment incentives.

The two landmark cases involving *Bank of Baroda (India) and URA*, first before the TAT[151] and subsequently on appeal to the Commercial Division of the High Court[152] provide a revealing case study of the challenges surrounding CGT in Uganda's evolving economic landscape. These cases exposed fundamental tensions between privatisation policies, tax administration, and legal interpretation that continue to resonate in Uganda's fiscal framework.

At the heart of both cases was the question of whether Bank of Baroda's sale of 20% of its shares in Bank of Baroda Uganda Limited to the public constituted a taxable capital gain. The transaction stemmed from Uganda's privatisation program under the Public Enterprises Reform and Divestiture (PERD) Act of 1993, which required the government to sell its 49% stake in the bank to the existing majority shareholder (Bank of Baroda India), with the condition that 20% of the shares be subsequently offered to the Ugandan public.

The TAT's 2005 ruling established several critical findings that were later affirmed by the High Court. First, it determined that the share sale was not a voluntary commercial transaction but rather a compliance exercise with government policy. Second, it accepted that the transaction qualified as an "involuntary disposal" under Section 54(1)(c) of Uganda's ITA (by then), which exempts such disposals from capital gains tax if proceeds are reinvested in similar assets within one year.

151 *Bank of Baroda Ltd v Commissioner General of URA* TAT Case 5 of 2004.
152 HCT – 00 – CA – 05 - 2005.

Third, it found that URA had prematurely assessed the tax before the one-year reinvestment window had elapsed.

The courts' interpretation of "involuntary disposal" proved particularly significant. While URA argued that the bank had voluntarily entered into the share purchase agreement knowing the conditions, both tribunals emphasised the compulsory nature of the transaction within Uganda's privatisation framework. The High Court noted that Bank of Baroda had no genuine commercial discretion regarding the timing, pricing, or terms of the public share offering, all key indicators of a voluntary market transaction. The courts rejected URA's rigid reading of the law in favour of a purposive interpretation that considered the policy context. As Justice Kiryabwire noted in the appeal to the High Court, the tax authority's position would have created an unreasonable situation where compliance with government divestiture policy automatically triggered tax liability.

The consequences of these legal ambiguities are well illustrated in the case of *Makerere University Retirement Benefits Scheme v URA & Pokino Properties Ltd.*[153] The case revolved around the sale of land by Pokino Properties Ltd to Makerere University Retirement Benefits Scheme. The URA assessed withholding tax (WHT) on the buyer under Section 118B(2), claiming the land was a business asset. However, the Tribunal ruled that the land constituted trading stock, not a capital asset. Since Pokino Properties was engaged in the business of real estate development, the land was part of its inventory, and the sale generated ordinary business income, not a capital gain. Therefore, no WHT obligation arose under the law. The Tribunal also emphasised that URA could not retroactively reclassify the asset as a business asset after the buyer had relied on the seller's representation that the land was inventory.

Importantly, the Tribunal clarified that under Section 124 of the Income Tax Act, the withholding agent's liability applies only where the asset is a business asset,

153 *Makerere University Retirement Benefits Scheme v Uganda Revenue Authority & Pokino Properties Limited* TAT Application No.17 of 2021.

not trading stock. It found URA's UGX 600 million WHT assessment unjustified and ordered that 30% of the disputed amount be refunded to the applicant. This case underscores two critical flaws in Uganda's CGT regime: first, the lack of a clear and consistent asset classification system, and second, the legal uncertainty arising from URA's reactive and discretionary approach to enforcement.

6.2 INSTITUTIONAL FRAGMENTATION AND WEAK INTER-AGENCY COORDINATION

A significant impediment to effective capital gains taxation in Uganda is the institutional fragmentation that characterises the country's tax enforcement ecosystem. Despite URA's formal mandate to assess and collect tax on asset disposals under the ITA, inter-agency coordination remains weak, particularly between URA, the Uganda Registration Services Bureau (URSB), and the Ministry of Lands, Housing and Urban Development. These institutional silos not only impair data sharing but also allow substantial high-value transactions to occur outside the tax net.

In contrast to jurisdictions like Kenya where CGT is tightly integrated into the land registration framework, Uganda lacks any automatic trigger for tax enforcement at the point of transfer. In Kenya, the Kenya Revenue Authority (KRA) mandates CGT payment prior to the registration of the transfer instrument, and all payments are processed through the i-Tax online portal.[154] This model provides both transactional transparency and real-time tax verification, enabling KRA to verify declared gains against officially recorded transfer values before legal title is issued.

Uganda, by comparison, offers no such integration. Properties may change hands without any corresponding tax declaration, especially through private or informal arrangements. URA lacks a reliable valuation database[155] and must often depend

[154] KRA, File & Pay, <https://www.kra.go.ke/> [Accessed on June 12 2025].

[155] Traders tipped on changes in URA's valuation database (18 December 2023), <https://www.pulse.ug/> [Accessed on June 08 2025].

on self-reported values or outdated municipal assessments. The Uganda National Land Information System (UgNLIS), launched by the Ministry of Lands, allows URA limited access to land records.[156] However, this system only provides basic ownership and title information, it does not include sales history, declared consideration, or past transfer pricing. As a result, underreporting and valuation manipulation remain widespread,[157] particularly in the real estate sector, where buyers and sellers often conspire to undervalue transaction agreements in order to minimise both stamp duty and income tax exposure.

URA's inability to reliably determine market value is compounded by the lack of a centralised capital asset registry. Unlike countries with integrated digital tax platforms, Uganda's administration remains largely paper-based and reactive.[158] There is no mandatory system requiring disclosure of capital gains upon disposal of land, shares, or intangible assets, outside of limited corporate declarations. Even where URA attempts enforcement, the evidentiary burden is high. Without verified data on original acquisition cost, historical valuation, or improvement expenses, taxpayers can easily contest assessments, leaving URA unable to demonstrate real gains.

The cumulative effect of these weaknesses is a CGT enforcement framework that depends overwhelmingly on voluntary compliance, a notoriously unreliable mechanism for taxing high-net-worth transactions. Without mandatory integration between land registries, securities regulators, and tax authorities, Uganda's CGT regime will continue to suffer from data asymmetry, administrative inertia, and selective enforcement.

6.3 ABSENCE OF A WITHHOLDING MECHANISM

156 New online public portal to address land encumbrances (Thursday, October 17, 2024), <https://www.monitor.co.ug/> [Accessed on June 08 2025].

157 Is Kampala's housing sector an avenue for money laundering?, <https://observer.ug/> [Accessed on June 08 2025].

158 IMF asks govt to prioritise digitisation of tax register, <https://www.monitor.co.ug/> [Accessed on June 08 2025].

The absence of such a mechanism reveals a broader policy failure: the lack of innovation in tax administration. While the URA has made strides in e-filing and digital payment systems, it has not yet leveraged these tools for effective CGT enforcement.

6.4 POLITICAL ECONOMY CONSTRAINTS AND ELITE CAPTURE

In Uganda, land remains a highly politicised asset particularly in urban and peri-urban areas where tenure is often informal, customary, or legally contested. Around 75% of land in Kampala, for example, is unregistered, making it effectively invisible to tax systems.[159]

Past government attempts to impose a CGT-style levy on land transactions have met strong resistance: in 2020, Parliament outright rejected a 0.5% withholding tax on land purchases, while in 2024 it blocked a proposed 5% tax on gains from urban land disposals, deeming it inequitable and likely to inflate land prices.[160]

7.0 POLICY RECOMMENDATIONS FOR REFORMING UGANDA'S CAPITAL GAINS TAX FRAMEWORK

As the Ugandan economy grows and diversifies, particularly in sectors such as real estate, financial markets, and digital trade, there is an urgent need for comprehensive reform. Drawing from regional best practices and international standards, this section offers practical and context-sensitive policy recommendations to strengthen the capital gains tax framework in Uganda.

A foundational step toward effective capital gains taxation in Uganda would be the enactment of a standalone statute, or at the very least, a dedicated schedule within the ITA, specifically addressing capital gains. Such a regime would offer clarity on key elements including asset classification, computation of gains, applicable exemptions, and the treatment of complex transactions such as inheritances, gifts, and corporate reorganisations. A useful precedent is Kenya's

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159 KAA: Proposed Tax to Have Ripple Effect on Prices of Land <https://chimpreports.com/> [Accessed on June 26 2025].

160 Ibid.

Eighth Schedule of the ITA, which provides clear definitions, computational rules, and administrative procedures that have enhanced both compliance and legal certainty.

In addition to structural reform, Uganda should introduce a distinct and moderate CGT rate, separate from ordinary income tax. A flat rate of 10-15% or a tiered structure that rewards long-term holding, would promote tax equity and efficiency, while encouraging formal asset registration and voluntary compliance thus, improving revenue mobilisation without discouraging investment.

Another critical reform involves strengthening the enforcement and scope of Uganda's existing inflation adjustment mechanism the ITA, which requires adjusting the cost base for business assets held over twelve months in accordance with the CPI. This provision, though present, is inconsistently applied by the URA, as seen in several Tribunal decisions. Jurisdictions like India and Chile have implemented more comprehensive inflation indexing regimes, and Uganda could follow suit by automating this adjustment through digital tools, such as a URA-administered CGT calculator. Doing so would ensure that only real economic gains are taxed, improving fairness and reducing taxpayer resistance.

To improve compliance, Uganda must also reform its enforcement mechanisms and introduce withholding tax obligations on certain capital gains transactions. Uganda could mandate withholding of CGT by parties such as land registrars, notaries, stockbrokers, and the Uganda Securities Exchange before transfer documents are finalised. This mirrors Tanzania's rule that mandates payment within 30 days of the transaction. Statutory provisions under Part XIV of Uganda's ITA could be expanded to include such obligations. Not only would this create automatic compliance, but it would also improve revenue forecasting and reduce URA's administrative burden. Introducing a CGT clearance certificate, as is done in Tanzania, could be a simple but powerful administrative reform.

Uganda should consider expanding rollover relief to include individual taxpayers and personal asset disposals, allowing capital gains tax deferral when proceeds

are reinvested in qualifying assets[161] within a prescribed time frame. This measure would support entrepreneurship and investment growth, aligning Uganda's capital gains tax regime with global practices and reducing public resistance.

Equally important is the need to increase public awareness and taxpayer education regarding capital gains tax. The URA must intensify its outreach efforts through taxpayer clinics, targeted media campaigns, and partnerships with legal and professional bodies. These efforts should be supported by user-friendly guidance materials, such as flowcharts, FAQs, and mobile apps. Creating a simplified online CGT calculator and integrating it with URA's e-Tax portal would further reduce compliance costs and taxpayer errors.

Uganda's recent digitisation initiatives, such as the Electronic Fiscal Receipting and Invoicing Solution (EFRIS), offer an opportunity to further integrate CGT into the national tax compliance ecosystem. As the digital economy expands, so do the avenues for capital gains on digital assets, including cryptocurrency, NFTs, and intangible rights. These new asset classes must be brought within the CGT framework through specific legislative provisions and digital monitoring tools. Uganda could draw valuable lessons from Rwanda's recent efforts to regulate cryptocurrency transactions and South Africa's classification of digital tokens as "financial instruments" under CGT law.

In early 2025, Rwanda introduced a draft regulatory framework for virtual assets, aiming to govern digital financial transactions and mitigate risks such as money laundering. The framework defines virtual assets as digital representations of value that can be traded, transferred, or used for payments and investments, encompassing assets represented on blockchain or similar technologies, whether cryptographically secured or not. The regulations also prohibit the use of virtual assets as legal tender within the country and impose bans on activities such as

[161] Qualifying assets are specific types of assets that meet predefined criteria to receive tax benefits, preferential treatment, or special accounting recognition.

crypto mining, crypto automated teller machines (ATMs), and virtual asset service providers (VASPs) offering mixing services.[162]

Finally, Uganda should actively engage in regional and continental efforts to harmonise CGT rules, particularly under the EAC integration framework. A harmonised CGT regime, at least with common definitions, thresholds, and basic exemptions, would reduce such distortions and improve regional revenue mobilisation. Uganda should also engage in initiatives with the African Tax Administration Forum (ATAF) and the African Union's Continental Tax Strategy,[163] that regularly meets to develop policy recommendations for African leaders on cross-border taxation and base erosion. This is particularly important given recent international disputes, such as the *Vodafone v. India*[164] and *Zain v. Uganda*,[165] which illustrate the complexity and importance of taxing offshore transfers with domestic implications.

8.0 CONCLUSION

Capital gains taxation in Uganda occupies a complex and often misunderstood position within the broader income tax framework. This paper has unpacked the theoretical foundations, legal design, administrative features, and comparative dimensions of capital gains tax (CGT), revealing both the strengths and significant weaknesses in Uganda's current approach. It has also provided substantive policy

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162 Rwanda Moves to Regulate Virtual Assets With New Draft Law, <https://allafrica.com/stories> [Accessed on June 26 2025].

163 3rd Sub-Committee on Tax and Illicit Financial Flows of the Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning, and Integration, <https://au.int/en/newsevents/> [Accessed on June 26 2025].

164 *Vodafone International Holdings BV v Union of India* 6 SCC 613; *Vodafone International Holdings BV v. India (I),* PCA Case No. 2016-35. In this case, India's Supreme Court held that a 2007 offshore sale of Cayman Islands shares despite the underlying assets being in India, was not taxable under domestic capital gains law because the transaction involved two foreign entities and occurred outside India's jurisdiction. In response, India enacted retrospective amendments in the Finance Act 2012, deeming such indirect transfers taxable and expanding the definition of "transfer" to encompass offshore deals. Vodafone then pursued arbitration under the Netherlands-India bilateral investment treaty, and in 2020 a PCA tribunal ruled that the retrospective tax violated fair-and-equitable-treatment obligations, ordering India to cease enforcement and pay costs. Available at <https://lawbhoomi.com/> [Accessed on June 26 2025].

165 *Zain International BV v URA*, Civil Appeal No. 0011 of 2012.

recommendations aimed at aligning Uganda's regime with best practices both within East Africa and globally.

Uganda taxes capital gains as part of business income under the ITA. This structure creates legal uncertainty, as capital gains are not clearly defined and no distinct CGT rates, exemptions exist. Enforcement is inconsistent, particularly in transactions involving land, shares, or investment assets, often due to administrative weaknesses, vague legislation, and limited taxpayer awareness. Uganda's reliance on a realisation-based model, without proper asset tracking or third-party reporting, further contributes to underreporting and widespread noncompliance.

Compared to regional peers like Kenya, Rwanda, and Tanzania, Uganda lags in legal clarity and administrative innovation. Kenya applies a dedicated CGT rate of 15%, while Rwanda adjusts for inflation and uses transaction-specific rules. These countries have also made progress in digitising CGT administration to boost transparency and compliance. Uganda, on the other hand, risks revenue loss from cross-border and offshore transactions, especially in the absence of rules for taxing indirect transfers, a weakness Uganda's own *Zain* case. The lack of reform has also discouraged formal asset registration and burdened unsophisticated investors, ultimately undermining tax fairness and capital formation.

To address these systemic shortcomings, Uganda must enact a codified CGT framework that includes clear definitions, moderate and transparent rates, inflation indexing, and reporting obligations. It should also harmonise CGT rules regionally under the EAC and align with the African Union's Continental Tax. Such reforms are not merely administrative, they are essential for equity, revenue sustainability, and economic confidence. With the right political will and institutional commitment, Uganda can modernise its CGT regime, close legal loopholes, and build a more predictable, fair, and development-oriented tax system.

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ENVIRONMENTAL JUSTICE AND EVICTIONS: A COMMENTARY ON THE TENSIONS BETWEEN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS IN THE LUBIGI WETLAND

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ENVIRONMENTAL JUSTICE AND EVICTIONS: A COMMENTARY ON THE TENSIONS BETWEEN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS IN THE LUBIGI WETLAND

Cynthia Amiri L. E. *

Abstract

The National Environment Management Authority's eviction crackdown in the Lubigi wetland has left thousands homeless. Human rights organisations and civil society groups have also strongly criticised the use of force during these evictions. This situation has raised concerns about the tension between the right to a clean and healthy environment and other fundamental human rights. This paper reviews the substantive and procedural laws governing evictions, aiming to reconcile them with the safeguarding of human rights. It also highlights the necessity of balancing environmental justice with respect for human rights, providing potential remedies for those impacted. The paper also addresses the realities of accessing some of these remedies and makes recommendations for a human rights-based approach to evictions.

1.0 INTRODUCTION

Environmental justice is the belief that all people deserve to live in a clean and safe environment.[1] It emphasizes equitable access to environmental resources

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1 Cambridge English Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/environmental-justice> [Accessed on 23rd June, 2025].

and protection from environmental harm, while advocating for inclusive participation in environmental decision-making.[2]

In this context, the protection of wetlands becomes a critical component of environmental justice. Recognised as some of the most biologically rich and productive ecosystems on the planet, wetlands support a vast array of plant and animal species.[3] They also provide vital ecosystem services to communities, including water purification, flood control, and climate regulation.[4] However, these are dependent on the sustainable and proper use of wetlands.

The protection of wetlands is therefore not just an environmental concern, but a matter of justice, particularly for vulnerable populations who are the most dependent on the benefits that wetlands provide.

According to the Ministry of Water and Environment, wetlands cover 8.3% of Kampala City, 2% of Mukono District, and 8.6% of Wakiso District.[5] Additionally, the three largest wetland systems in Kampala are Kinawataka, Nakivubo, and Lubigi; underscoring the critical need to protect the Lubigi wetland due to its significant environmental value.[6]

The 1995 Constitution of the Republic of Uganda, as amended, guarantees the right to a clean and healthy environment and,[7] makes it the responsibility of every citizen of Uganda to preserve and safeguard the environment.[8] In order to protect and preserve the environment, the constitution mandates the Parliament to enact laws to this effect.[9] It is upon this basis that the National Environment Act (NEA)

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2 The Oxford Review Briefings, <https://oxford-review.com/the-oxford-review-dei-diversity-equity-and-inclusion-dictionary/environmental-justice-definition-and-explanation/> [Accessed on 22nd June, 2025].

3 "The Importance of Wetlands", The Convention on Wetlands, <https://www.ramsar.org/about/our-mission/importance-wetlands> [Accessed on 16th June, 2025].

4 Ibid.

5 Uganda Wetlands Atlas Vol. I, <https://www.unep.org/resources/report/uganda-wetlands-atlas-volume-i> pp. 17 [Accessed on 20th May, 2025].

6 Ibid.

7 Article 39: Every Ugandan has a right to a clean and healthy environment.

8 Article 17(1)(j): "*It is the duty of every citizen of Uganda to create and protect a clean and healthy environment.*"

9 Article 245 of the Constitution of the Republic of Uganda as amended.

of 2019 established the National Environment Management Authority (NEMA), whose mandate was continued by the National Environment Act Cap. 181.[10] NEMA is the statutory body charged with the enforcement of the National Environment Act.[11]

In May 2024, NEMA embarked on the evictions of persons inhabiting the Lubigi wetland. These evictions are a part of NEMA's broader policy initiative to restore degraded wetlands across Uganda.[12] Resultantly, a total of 214 households were evicted from the wetland.[13] Whereas the evictions are necessary to ensure environmental justice, questions have arisen in regard to the process through which the evictions were carried out. While NEMA has a legal duty to safeguard the environment, its methods have disregarded the fundamental rights and well-being of the affected communities.[14]

This paper discusses the legal framework governing evictions in Uganda. It examines Uganda's responsibilities under environmental and human rights treaties, analysing how these obligations shape the procedures for conducting evictions in a manner that upholds fundamental human rights.

2.0 BACKGROUND

The National Environment Act Cap. 181 defines a wetland as an area permanently or seasonally flooded by water, where plants and animals have become adapted and gazetted as such.[15] Additionally, Article 1 of the Ramsar Convention on Wetlands, which entered into force in Uganda on 4th July 1988,[16] defines

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10 Section 8 of the National Environment Act, Cap 181.

11 Section 9(1)(t) of the National Environment Act Cap. 181.

12 *"NEMA Evictions in Lubigi: A Detailed Overview"*, <https://realmuloodi.co.ug/nema-evictions-in-lubigi-a-detailed-overview/> [Accessed on 22nd May, 2025].

13 Uganda Broadcasting Corporation, *"NEMA has Evicted 214 Households from Lubigi Wetland as Operations Proceed"*, <https://ubc.go.ug/2024/06/26/nema-has-evicted-214-households-from-lubigi-wetland-as-operations-proceed/> [Accessed on 20th May, 2025].

14 Uganda Radio Network, *"Lubigi Evictions: Legitimate Process Marred by Human Rights Abuses"*, <https://ugandaradionetwork.net/story/lubigi-evictions-legitimate-process-marred-by-human-rights-abuses> [Accessed on 19th May, 2025].

15 Section 2 of the National Environment Act Cap. 181.

16 "Contracting parties to the Ramsar Convention", <https://www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf> [Accessed on 16th June, 2025].

wetlands as areas of marsh, fern, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brakish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.[17]

The Lubigi wetland is located on the northwest side of Kampala in Rubaga and Kawempe divisions about 7.5 km from the city centre. It is part of the system of waters which flow north towards Lake Kyoga.

Furthermore, the Lubigi wetland is a tributary to the Mayanja-Kato system in the north and receives water from Nsooba wetland system. This wetland covers an area of 2.98 km^2 and is permanently water logged. Lubigi is fed by the rivers Mayanja, Bwaise, Nabisasiro, Nalukolongo and Kiwunya.[18] It is also a water catchment area that extends to the areas of Busega round about, Nakuwadde, Ssentema round about, Nansana, Ganda, Naluuma up to Kawaala, Kiwumbiro, Nabisasiro,and Bwaise.[19]

One of the critical roles played by wetlands are their regulation function, which refers to their ability to control and stabilise essential ecological processes. These include local climate regulation, managing water flow to prevent flooding, and recharging groundwater supplies. Such functions are vital for maintaining a healthy environment and supporting both biodiversity and human communities.[20]

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17 Convention on wetlands of international importance especially as waterfowl habitat. Concluded at Ramsar, Iran, on 2 February 1971, <https://treaties.un.org/doc/publication/unts/volume%201405/volume-1405-i-23489-english.pdf> [Accessed on 22nd May, 2025]. The Ramsar Convention on Wetlands is an intergovernmental treaty that provides the framework for the conservation and wise use of wetlands and their resources, <https://www.ramsar.org/> [Accessed on 16th June, 2025].

18 Ibid pp. 34.

19 Nile Post, *"Big Interview: Lubigi Evictions were a painful necessity to prevent greater disaster-NEMA Boss"*, <https://nilepost.co.ug/big-interview/204748/big-interview-lubigi-evictions-were-a-painful-necessity-to-prevent-greater-disasters-nema-boss> [Accessed on 21st May, 2025].

20 Richard Davis Rafik Hirji Richard Davis Rafik Hirji, "Water Resources and Environment Technical Note G.3", World Bank pp. 14, <https://documents1.worldbank.org/curated/en/491081469672156743/pdf/263270NWP0REPL10Wetlands0Management.pdf> [Accessed on 16th June, 2025].

The inhabiting of wetlands such as Lubigi poses key threats to this regulatory function through activities such as, drainage of the wetland, introduction of new crops that are harmful to the existing biodiversity of the wetland, pollution, over-harvesting and reclamation for settlement as well as, industrial developments.[21]

Additionally, the general inhabiting of wetlands by individuals has led to major problems associated with pollution, drainage issues, habitat loss, overexploitation of wetland plants and animal species and, the increased proliferation of alien invasive species.[22] These activities have severe ecological consequences that undermine the wetland's ability to provide critical ecosystem services. As wetlands provide a crucial habitat to a wide range of species, including mammals, reptiles, amphibians, fish, insects, waterfowl, crustaceans, plants and many other living organisms, their destruction threatens their survival and reduces biodiversity.[23]

Satellite images and monitoring revealed that most encroachments into the Lubigi wetland took place between 2011 and 2015, with re-entry continuing till date.[24] Despite regulatory efforts, re-entry and further encroachment have continued up to the present day, highlighting the persistent challenge of wetland degradation in the face of urban expansion. The earliest major reported evictions in the Lubigi wetland took place in 2012 leading to the successful removal of a taxi park.[25] This marked a significant turning point in the enforcement of wetland protection laws, setting a precedent for future environmental enforcement efforts.

According to NEMA the encroachment on wetlands and swamps in Kampala is largely responsible for the frequent floods, especially in Kalerwe, Bwaise,

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21 Uganda Wetlands Atlas Vol. II pp. 13, <https://www.unep.org/resources/report/uganda-wetlands-atlas-volume-ii> [Accessed on 24th May, 2025].

22 Ibid.

23 Richard Davis Rafik Hirji Richard Davis Rafik Hirji, "Water Resources and Environment Technical Note G.3", World Bank pp. 14, <https://documents1.worldbank.org/curated/en/491081469672156743/pdf/263270NWP0REPL10Wetlands0Management.pdf> [Accessed on 16th June, 2025].

24 Frank Kisakye, "No compensation for Lubigi evictees", The Observer, <https://observer.ug/news/no-compensation-for-lubigi-evictees/> [Accessed on 23rd June, 2025].

25 Ibid.

Kawempe, Zana, Ndeeba and Kanyanya suburbs that have led to both the loss of property and of lives.[26] As a result of this, numerous reasons have arisen for the restoration of wetlands, these include, habitat replacement, water quality enhancement and flood minimization among others.[27]

Unlike the Lubigi wetland, the Nyamuhizi wetland, located in Mitooma district, Uganda, illuminates an example of human rights-based wetland rehabilitation. The rehabilitation of Nyamuhizi wetland centered the supporting of former wetland-dependent communities in transitioning to alternative livelihoods. Former users of the wetland were supported with training and resources to engage in alternative livelihood activities such as beekeeping, poultry rearing, dairy production, and irrigation- based farming.

These sustainable options helped the community to reduce dependence on the wetland while enhancing their capacity to adapt to the evolving environmental challenges.[28] This provides an example of a human rights-based approach to environmental justice.

3.0 THE LEGAL FRAMEWORK GOVERNING EVICTIONS

3.1 LEGAL FRAMEWORK PROTECTING UGANDA'S WETLANDS

The protection of Uganda's fragile ecosystems, particularly wetlands, lies at the heart of the country's environmental governance framework. Wetlands, which provide critical ecological functions such as water filtration, flood control, and biodiversity conservation, are increasingly under threat from encroachment and unregulated development. Wetlands protect water quality by naturally filtering out pollutants through a range of physical and biological processes. These include

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26 State of Environment Report for Uganda, 2010 pp. 82. Retrieved from <https://wedocs.unep.org/20.500.11822/9085> [Accessed on 23rd May, 2025].

27 William J Mitsch, Xinyuan Wu, et al. "Creating and Restoring Wetlands: From Theory to Ecological Engineering" (1998) *BioScience* pp. 1019, <https://www.jstor.org/stable/1313458> [Accessed on 22nd May, 2025].

28 Annette Akimanzi, "Revitalizing Nyamuhizi Wetland: A Model of Collective Action and Ecosystem Restoration in Uganda", (March 20, 2024), <https://www.undp.org/uganda/blog/revitalizing-nyamuhizi-wetland-model-collective-action-and-ecosystem-restoration-uganda> [Accessed on 16th June, 2025].

sedimentation, filtration, absorption into soil and plant surfaces, and the interaction of microorganisms with plant roots.[29] This regulatory function illuminates the importance of preserving wetlands like Lubigi, which act as natural purification systems amidst increasing urban and industrial pressures.

The Lubigi wetland, a prominent ecological asset in Kampala, has been the subject of high-profile evictions carried out by the National Environment Management Authority (NEMA), sparking legal, social, and environmental debates. This section of the paper examines the legality and justification of these evictions through the lens of Uganda's constitutional, statutory, and regulatory framework, as well as the country's international environmental obligations.

3.1.1 THE 1995 CONSTITUTION OF THE REPUBLIC OF UGANDA AS AMENDED (1995)

The Constitution provides that every Ugandan has a right to a clean and healthy environment.[30] It also makes it the duty of every Ugandan to create and protect a clean and healthy environment.[31]

The Constitution also provides for the protection from deprivation of property,[32] and states that no person shall be compulsorily deprived of an interest or right in their property of any description except where the taking is necessary for public safety or health among other reasons.[33] Therefore, as the eviction by NEMA was for the protection of the environment, it was necessary and a qualified exemption to the right to property.

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29 Carl S.S Ferriera et al, "Wetlands as nature-based solutions for water management in different environments", Current Opinion in Environmental Science & Health (2023), <https://www.sciencedirect.com/science/article/pii/S2468584423000363> [Accessed on 16th June, 2025].

30 Article 39 of the Constitution.

31 Article 17(j) of the Constitution.

32 Article 26(1) of the Constitution.

33 Article 26(2) of the Constitution.

3.1.2 THE NATIONAL ENVIRONMENT MANAGEMENT ACT CAP. 181

The National Environment Management (NEA) Act states that no person is to erect any structure in, on or under a wetland without the written approval of a lead agency in consultation with NEMA.[34]

In line with this, the Executive Director of NEMA, Dr. Akanwatsa Baririega while appearing before the Parliamentary Committee on Commissions, Statutory Authorities and State Enterprises (COSASE) stated that those that had not been evicted had approvals from different lead agencies, the most notable of which was Stabex (U) Limited. He stated that demolishing the properties of persons with approvals from lead agencies would incur liability for the government and was therefore avoided.[35]

3.1.3 PHYSICAL PLANNING ACT CAP. 142

The Act provides that each sub-county physical planning committee of a lower local government shall have the power to ensure the preservation of all environmental areas in accordance with the approved physical planning development plan.[36]

This provision places a legal duty on local authorities to actively monitor, regulate, and guide land use within their jurisdiction to prevent encroachment on environmentally sensitive areas such as wetlands, forests, and riverbanks. It ensures that physical development aligns with sustainable environmental goals, and that any proposed construction or land alteration must comply with existing land use plans aimed at conserving natural ecosystems.

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34 Section 55 of the National Environment Act Cap. 181.

35 214 Evicted from Lubigi as Operations Proceed, <https://youtu.be/qmJlrjSXUeM?si=3oCeSN1N2fkVZaeC> [Accessed on 23rd June, 2025].

36 Section 34 of the Physical Planning Act Cap. 142.

a. THE NATIONAL ENVIRONMENT (WETLANDS, RIVER BANKS & LAKE SHORES MANAGEMENT) REGULATIONS

The Regulations make it an offence to reclaim and construct in a wetland.[37] They provide that any person found guilty of any offence under the Regulations is liable on conviction to imprisonment of not less than three months or to a fine not exceeding three million or both.

Some of the inhabitants of the Lubigi wetland stated that they had been given ownership of the land by the Buganda Land Board. Ms. Zulaikah Kyobijja, a resident of Nansana South II, recounted the experience of her 95-year-old mother, Hadijjah Najjemba, who lived on the land in Lubigi for over seven decades. Kyobijja noted that theirs was among the earliest families to settle in the area. She raised concerns about the Buganda Land Board's continued collection of nominal ground rent (commonly known as *busuulu*), despite the land being located within a gazetted wetland. According to her, they possess receipts as evidence that payments were made, questioning why such transactions occurred if the land was officially recognized as a protected wetland.[38]

However, the wetland was not owned by the Buganda land board as it is kept in trust for the common good of all citizens.[39] This is buttressed by the Land Act Cap. 236 which provides that wetlands are held in trust for the people by the government or local government for the common good of the citizens of Uganda.[40]

b. THE SUSTAINABLE DEVELOPMENT GOALS (2015)

Additionally, the carrying out of these evictions is for the general benefit of the country and in line with Sustainable Development Goal (SDG) Number 15: Life on

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37 Regulation 37 of the National Environment (Wetlands, River Banks & Lake shores Management) Regulations.

38 "Lubigi Evictees Claim Legal Ownership of Land Amid Ongoing Dispute", <https://realmuloodi.co.ug/lubigi-evictees-claim-legal-ownership-of-land-amid-ongoing-dispute/> [Accessed on 16th June, 2025].

39 Article 237(b) of the Constitution.

40 Section 45 of the Land Act Cap. 236.

Land.[41] Target 15.5 of SDG 15 calls for urgent and significant action to reduce the degradation of natural habitats and to protect biodiversity.

Target 15.8 emphasises the need to introduce measures that prevent the introduction and spread of invasive alien species, as well as to control or eradicate those that pose significant threats to land and water ecosystems. Additionally, Target 15.A highlights the importance of mobilizing financial resources from all available sources to support the conservation and sustainable use of biodiversity and ecosystems.[42]

c. RAMSAR CONVENTION (1971)

Uganda is also required to meet her obligations under the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971 (Ramsar Convention),[43] therefore, making the evictions justified and necessary. As a signatory, Uganda is required to promote the conservation and wise use of wetlands within its territory, recognizing their ecological, hydrological, and socio-economic significance. This includes preventing degradation through encroachment, pollution, or unplanned development.

In this context, the evictions from the Lubigi wetland can be viewed as both justified and necessary, as they were aimed at upholding Uganda's national and international environmental obligations, protecting biodiversity, and preserving vital ecosystem services such as flood control, water purification, and climate regulation. Failure to act would not only contravene Uganda's commitments

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41 This SDG serves to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, halt and reverse land degradation as well as halt biodiversity loss.

42 15: Life on Land, <https://www.globalgoals.org/goals/15-life-on-land/> [Accessed on 16th June, 2025].

43 Article 2(1): "*Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance, hereinafter referred to as "the List" which is maintained by the bureau established under Article 8. The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat.*"

under the Ramsar Convention but also undermine national efforts toward environmental sustainability and climate resilience.

3.2 THE PROCEDURAL REQUIREMENTS FOR CARRYING OUT EVICTIONS

Before NEMA initiates an eviction, they are required to issue an environmental improvement notice to the person whose activity is causing or is likely to cause pollution.[44] NEMA alleges that notices were given to the inhabitants of Lubigi wetland in 2016 and 2021 which they did not heed to leading to their unfortunate eviction.[45]

The National Environment Act further provides for the issuance of a restoration order to the person whose activities are harmful to the environment.[46] It states that restoration orders may apply to environmental improvement notices or environmental compliance notices with such modifications as may be necessary, but should be executed with immediacy.[47]

Lastly, In *Godfrey Nyakaana v NEMA*,[48] it was held that the right to a clean and healthy environment must be protected by the state and that the demolition of the Appellants structures was justified and necessary as it is the mandate of the state to protect the environment.

Therefore, in light of the constitutional, statutory, and jurisprudential framework governing environmental protection in Uganda, the evictions from the Lubigi wetland emerge as a legally grounded and environmentally necessary action. And as such, while the evictions were socially contentious, they were not only legally permissible, but also, consistent with Uganda's obligations under both domestic and international environmental law.

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44 Section 135 (1) of the National Environment Act Cap. 181.
45 Supra.
46 Section 130 of the National Environment Act Cap. 181.
47 Section 135(4) of the National Environment Act Cap. 181.
48 *Godfrey Nyakaana v National Environment Management Authority*, Constitutional Appeal No.5 of 2011.

4.0 THE HUMAN RIGHTS LEGAL FRAMEWORK GOVERNING EVICTIONS

While environmental protection is a legitimate and urgent objective, it must be pursued in a manner that respects fundamental human rights. The legal framework governing evictions in Uganda is rooted not only in national environmental laws but also in constitutional protections and international human rights obligations. Resultantly, evictions implicate broader human rights concerns, including the right to dignity, housing, livelihood, and family life, among others.

4.1 INTERNATIONAL LEGAL FRAMEWORK

4.1.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights, it was drafted by representatives with different legal and cultural backgrounds from all regions of the world. Though not legally binding, it sets out, for the first time, fundamental human rights to be universally protected.[49]

The UDHR recognises the right to an adequate standard of living, which includes access to housing.[50] As the forced evictions in Lubigi wetland have resulted in homelessness for many individuals and deprived them of their means of livelihood, this fundamental human right has been violated.

4.1.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)

The International Covenant on Civil and Political Rights (ICCPR) is one of the key human rights treaties in international law. Adopted by the UN General Assembly in 1966, it turned the ideals of the UDHR into binding legal duties for countries

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49 Universal Declaration of Human Rights, <https://www.ohchr.org/en/UDHR/Documents/UDHR_Translations/eng.pdf> [Accessed on 16th June, 2025]

50 Ibid.

that ratify it. The ICCPR sets the groundwork for protecting personal freedoms and holding governments accountable for respecting these rights in different political contexts around the world.[51]

The ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[52] The reports of police force being used in the eviction process as well as against peaceful protestors directly violates this right.[53] The ICCPR also provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation,[54] and states that everyone has the right to the protection of the law against such interference or attacks.[55]

In *Assenova Naidenova et al. v Bulgaria*,[56] the Authors' (read as Petitioners) claimed a violation by Bulgaria of their rights under articles 2, 17 and 26 of the ICCPR in case an eviction and demolition of housing in the Dobri Jeliazkov community was to be pursued. The Committee on Civil and Political Rights was tasked with determining whether the eviction of the Authors' and the demolition of their houses would constitute a violation of article 17 of the Covenant if the eviction order of 24 July 2006 were to be enforced. The Committee held:

> *"In the light of the long history of the authors' undisturbed presence in the Dobri Jeliazkov community, the Committee considers that, by not giving due consideration to the consequences of the authors' eviction from the Dobri Jeliazkov, such as the risk of their becoming homeless, in a situation in which satisfactory replacement housing is not immediately available to them, the State party would interfere arbitrarily with the authors' homes, and thereby violate the authors' rights under article 17 of the Covenant, if it enforced the eviction order of 24 July 2006."*

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51 The International Covenant on Civil and Political Rights: A Milestone in Human Rights Law, <https://thelaw.institute/human-rights-evolution-concepts-and-concerns/international-covenant-civil-political-rights-milestone/> [Accessed on 26th June, 2025].

52 Article 7 of the ICCPR.

53 Among condemns force used in Lubigi evictions, demands government response, <https://www.monitor.co.ug/uganda/news/national/among-condemns-force-used-in-lubigi-evictions-demands-govt-response-8> [Accessed on 24th June, 2025].

54 Article 17(1) of the ICCPR.

55 Article 17(2) of the ICCPR.

56 *Assenova Naidenova et al. v Bulgaria*, CCPR/C/106/D/2073/2011, <https://juris.ohchr.org/casedetails/1464/en-US> [Accessed on 24th June, 2025].

The Committee therefore illuminated the principle that any eviction carried out without satisfactory replacement housing being made immediately available to the affected persons violates their rights to not be subjected to arbitrary or unlawful interference with their privacy, family or home.

4.1.3 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESR) acknowledges the right of everyone to an adequate standard of living themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties to the ICESR are mandated to take appropriate steps to ensure the realization of this right.[57]

The forceful removal of residents of the Lubigi wetland without meaningful consultation, compensation, or resettlement undermines this right. Many of the evicted individuals relied on the wetland for both shelter and livelihood, and their displacement, without adequate safeguards, contravenes Uganda's obligations under the ICESCR to progressively realize and protect the right to adequate housing and living conditions for all, especially of the most vulnerable.

Furthermore, General Comment No. 7 of the ICESCR (1997) defines forced eviction as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.[58] However, the prohibition on forced evictions does not apply to evictions carried out by force, provided they are conducted in accordance with the law and in full conformity with the provisions of the International Covenants on Human Rights.

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57 Article 11 of the ICESR.

58 General Comment No.7: The Right to Adequate Housing (Art. 11.1): Forced Evictions, <https://www.refworld.org/legal/general/cescr/1997/en/53063> [Accessed on 24th June, 2025].

The evictions carried out in the Lubigi wetland would have only been lawful if they adhered strictly to the requirements of due process, including adequate notice, meaningful consultation, access to legal remedies, and provision of alternative housing or compensation. In the absence of these safeguards, the evictions fall within the definition of forced evictions under General Comment No. 7 and therefore constitute a violation of Uganda's obligations under the ICESCR and other international human rights instruments.

4.1.4 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) protects the rights of rural women, especially regarding land use and access to natural resources.[59] As many rural women depend on wetlands for their livelihood, these forced evictions that disproportionately affect women reveal a blatant disregard for Uganda's obligations under this convention.

To align with the CEDAW, Uganda must ensure that the evictions from the Lubigi wetland, are conducted in a manner that respects the rights, roles, and voices of rural women. This includes meaningful participation in decision making, gender-responsive impact assessments, and the development of sustainable alternatives that do not leave women in conditions of greater vulnerability.

4.1.5 THE CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The Convention on the Rights of the Child (CRC), requires states to ensure that every child has an adequate standard of living, including housing.[60] These evictions have severely affected children living in the wetland and ought to have

59 Article 14 of the CEDAW.
60 Article 27 of the CRC.

been carried out with special attention to their rights and welfare,[61] ensuring they are not left homeless or without access to education, healthcare, and protection.

Failure to consider the best interests and specific needs of children during evictions not only disrupts their immediate living conditions but also has long-term consequences on their development and well-being. The state must therefore adopt child-sensitive eviction procedures in the Lubigi wetland, to ensure that no child is deprived of shelter, education, or healthcare as a result of environmental enforcement actions.

4.2 REGIONAL LEGAL FRAMEWORK

4.2.1 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1981)

The African Charter on Human and Peoples' Rights does not directly stipulate the protection of the right to shelter. Nevertheless, the Charter guarantees rights within a similar ambit such as, the right to property,[62] the Charter also provides for the enjoyment of the best attainable state of physical and mental health and,[63] protects the rights of families.[64]

In *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria,* the Lagos military forcibly evicted the Ogoni people from the Maroko settlement. It bulldosed and looted dwellings, terrorized residents trying to flee, and rendered hundreds of thousands homeless.[65]

The ACHPR in its decision, considered evidence that the Nigerian Army, in collaboration with state authorities and oil interests, carried out ruthless military operations that left thousands of Ogoni people homeless. Official memos revealed

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61 Johnson Mayamba, "Secure the future of Lubigi children", <https://www.monitor.co.ug/uganda/oped/letters/secure-the-future-of-lubigi-children-4698100> [Accessed on 16th June, 2025].

62 Article 14 of the African Charter on Human and Peoples' Rights.

63 Article 16(1) of the African Charter on Human and Peoples' Rights.

64 Article 18 of the African Charter on Human and Peoples' Rights.

65 *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96), <https://www.refworld.org/jurisprudence/caselaw/achpr/2001/en/149449> [Accessed on 24th June, 2025].

directives calling for "psychological tactics of displacement", while military officers openly admitted to shooting unarmed civilians and destroying homes of perceived activists. This case illustrates how state-sanctioned evictions, carried out with force and without due process, amount to gross human rights violations.

While addressing the right to shelter, the Commission stated:

> *"Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the African Charter a right to shelter or housing which the Nigerian Government has apparently violated."*

The African Commission in *SERAC v. Nigeria* affirmed that although the African Charter does not explicitly guarantee the right to housing, it is implied therein. Therefore, the Lubigi evictions, much like the forced displacement of the Ogoni people in the SERAC case, contravene the African Charter's standards, as interpreted by the African Commission. This illustrates the urgent need for Uganda to adopt eviction practices that are rights-compliant, procedurally fair, and humane, ensuring that environmental justice does not come at the cost of fundamental human rights.

4.2.2 THE AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS (2009)

The African Union Convention for the Protection and Assistance of Internally Displaced Persons requires states to prevent arbitrary displacement and to protect the rights of displaced persons.[66] Therefore, in failing to adhere to the above legal framework, NEMA violated the human rights of the inhabitants of the Lubigi wetlands.

[66] Article 3 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons.

Additionally, the African Commission on Human and Peoples' Rights Principles and Guidelines on Economic, Social, and Cultural Rights emphasize that evictions, particularly of vulnerable populations, should only occur in accordance with human rights standards.

4.3 NATIONAL LEGAL FRAMEWORK

4.3.1 THE 1995 CONSTITUTION OF THE REPUBLIC OF UGANDA

The Constitution of Uganda provides for the protection from deprivation of property.[67] It further provides that no person shall be compulsorily deprived of an interest or right in their property of any description except where the taking is necessary for public safety or health among other reasons and made under a law that makes provision for prompt and adequate compensation before taking possession.[68] As the evicted persons were not compensated prior and have still not been compensated, their human rights have been violated. While the protection of the environment may qualify as a legitimate public interest, the failure to compensate the affected persons prior to their eviction constitutes a clear violation of their constitutional rights.

This failure reflects a broader systemic disregard for human rights safeguards during enforcement of environmental protections, and raises serious questions about the balance between environmental protection, respect for property and socio-economic rights. To ensure legal and ethical compliance, future evictions (no matter how justified by public interest) must strictly adhere to constitutional guarantees of compensation and due process.

The Constitution also provides for the respect of human dignity and protection from inhuman treatment.[69] The reported use of police force in the carrying out of these evictions point to a blatant disregard for the right to dignity.[70]

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67 Article 26(1) of the Constitution.
68 Article 26(2) of the Constitution.
69 Article 24 of the Constitution.
70 Supra.

4.3.2 THE CONSTITUTION (LAND EVICTIONS) (PRACTICE) DIRECTIONS, 2021

These Directions provide that evictions must be carried out in a way that respects the dignity, right to life, property and security of all persons affected as well as ensures the effective protection of vulnerable persons, including women, children, the elderly and persons with disabilities.[71]

Numerous reports have been made of loss of livelihoods, businesses and inability to send children to school due to these evictions as well as the use of the Uganda Police Defence Forces (UPDF) to carry out the evictions.[72] All the above further constitute violations of human rights.

4.4 CASE LAW

In *James Muhindo v Attorney General,*[73] it was held that the absence of clear and adequate procedures governing evictions violates human rights and undermines Uganda's obligations to protect human rights under international law. It was further stated:

> *"…where the State allows people to occupy land be it government or private for a considerable period of time so that the people consider the said land to be their homes, it would be inhuman for the State or the private developer to suddenly evict them forcefully therefrom without affording them an opportunity to seek alternative mode of accommodation/decent shelter. It must always be remembered that under Article 20, it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and freedoms of the individual and groups and is therefore mandated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under the Constitution. It should be noted that the obligations under Article 20 also extends to private actors and therefore the state has the responsibility to protect people even in circumstances where the eviction is being carried out by a private developer…"*

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71 Direction 5 of the Constitution (Land Evictions) (Practice) Directions, 2021.

72 Arthur Arnold Wadero, "Among condemns force used in Lubigi evictions, demands government response", <https://www.monitor.co.ug/uganda/news/national/among-condemns-force-used-in-lubigi-evictions-demands-govt-response-4662788> [Accessed on 16th June, 2025].

73 *James Muhindo v Attorney General,* Miscellaneous cause No. 127 of 2016.

The Lubigi wetland evictions highlight the complex intersection between environmental justice and the safeguarding of human rights. While the preservation of wetlands is a legitimate and necessary public interest in line with national and international environmental obligations, such actions must be conducted within the strict confines of constitutional and human rights law. A rights-based approach to evictions is essential to ensure that both environmental and human development goals are met in a lawful, fair, and humane manner.

5.0 LEGAL REMEDIES AVAILABLE TO THE EVICTED PERSONS

In the aftermath of the Lubigi wetland evictions, the affected individuals have legal remedies available to them under the Constitution and other relevant laws of Uganda. The Constitution guarantees access to courts for the enforcement of rights, including the right to property and redress for any violations of fundamental rights. Additionally, judicial remedies such as compensation for unlawful eviction and injunctive relief to prevent further demolitions are legally accessible. This section explores the avenues of legal redress available to the evicted persons, emphasising their right to seek justice and appropriate relief through the judicial system.

The pursuit of these remedies is however not without hindrances, as Uganda's judicial machinery is frequently marred by procedural delays, limited access, and institutional inefficiencies that frustrate the realization of justice. Additionally, many Ugandans especially the poor and marginalised face enormous challenges in accessing equality and equitable justice.[74]

Uganda's judiciary is also experiencing a mounting crisis due to a critical shortage of Judges, which has significantly worsened delays in the delivery of justice and eroded public trust in the legal system. As a result, case backlogs have increased,

[74] Richard Adjadeh, Fred Male, and Ssevume Stevenson Male, "Access to justice? As public trust in courts declines, many Ugandans have their doubts", pp.1. Available at <https://www.afrobarometer.org/wp-content/uploads/2024/07/AD821-Access-to-justice-Ugandans-have-their-doubts-Afrobarometer-11july24.pdf> [Accessed on 24th June, 2025].

hindering litigants' ability to access timely and equitable trials nationwide.[75] This is worsened by the high-income inequality and alienation of illiterate persons from access to justice.

Chapter 9 of the Equal Opportunities Commission (EOC) Report of Annual Report on the State of Equal Opportunities in Uganda Financial Year 2023/2024 reported on the status of access to justice by vulnerable groups in Uganda. The assessment revealed that 56.1% of respondents had limited knowledge of legal procedures. Vulnerable groups such as women, persons with disabilities, youth, older persons, and children often lacked information on how to report offenses committed against them.[76]

In the key informant interviews, one participant observed that the existence of multiple jurisdictions created confusion among residents about where to report particular cases.[77] Furthermore, a Court Clerk noted that many vulnerable individuals are unaware of how to initiate legal proceedings and do not understand the specific roles played by different judicial officers within the court system.

The report further highlighted additional obstacles to accessing justice, including a lack of adequate interpretation services in various local languages, exploitation of individuals stemming from poverty and illiteracy, intimidation during contract negotiations, and threats to personal safety.[78] Other challenges identified were prolonged case timelines and difficulties related to old age, disability, geographical location, and gender.[79]

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75 Jamila Mulindwa, "Judicial dilemma: The Challenges of Few Judges in Uganda" <https://nilepost.co.ug/justice-law-and-order/191515/judicial-dilemma-the-challenges-of-few-judges-in-uganda> [Accessed on 24th June, 2025].

76 Annual Report on the State of Equal Opportunities in Uganda Financial Year 2023/2024, <https://www.eoc.go.ug/wp-content/uploads/2024/11/11th-ANNUAL-REPORT-ON-THE-STATE-OF-EQUAL-OPPORTUNITIES-IN-UGANDA-FY-2023-2024_compressed.pdf> [Accessed on 22nd June, 2025].

77 Ibid.

78 Ibid.

79 Legal system locking out poor- report, <https://www.monitor.co.ug/uganda/news/national/legal-system-locking-out-the-poor-report-4821926> [Accessed on 24th June, 2025].

Notwithstanding, the Constitution provides for the right of access to court by any person with an interest in a property or having rights over it.[80] Any person that claims that a fundamental right of theirs under the Constitution has been violated can apply to a competent court for redress.[81] The Constitution also provides that any person or organisation may bring an action against the violation of another person or groups human rights.[82]

However, since this constitutes a case of compulsory acquisition in the public interest, the evicted persons may not be able to invoke certain constitutional protections typically available in cases of arbitrary eviction.[83]

The Constitution also provides recourse by allowing any person who alleges a violation of a constitutional provision to petition to the Constitutional Court.[84] In line with this, the evicted individuals, through Eyotre and Company Advocates, intend to petition the court to sue the Attorney General, NEMA, and the Buganda Land Board.[85] Unfortunately, no updates have been made regarding the success of this petition or whether it has been filed.

Further, the evicted individuals should be compensated by the government. This is because, while the Constitution provides for the compulsory taking of property, it makes provision for prompt and adequate compensation before the taking of possession. However, this compensation can also be made after as was in the case of *Godfrey Nyakaana v NEMA,*[86] where it was held that as the Appellant's house was demolished by NEMA without due process of the law, he was entitled to compensation for the value of the house and such other attendant relief arising from NEMA's conduct.

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80 Article 26 of the Constitution.
81 Article 50(1) of the Constitution.
82 Article 50(2) of the Constitution.
83 *Attorney General v Ostraco Limited* (Civil Appeal 32 of 2002) [2005] UGCA 84 (30 June 2005).
84 Article 137 of the Constitution.
85 Hundreds of people evicted by NEMA from Lubigi, <https://www.ntv.co.ug/ug/news/national/hundreds-of-people-evicted-by-nema-from-lubigi-4660784> [Accessed 28th May, 2025].
86 Ibid (n20).

The pursuit of legal redress by the evicted persons and civil society agencies is not merely a reaction to injustice, rather, it is a necessary assertion of constitutionalism and accountability in environmental governance. While the State has a legitimate interest in preserving ecologically sensitive areas, this interest cannot override the obligation to act lawfully, humanely, and with respect for fundamental human rights.

The Courts, therefore, have a critical role to play not just in compensating the aggrieved individuals, but in setting a precedent that state agencies like NEMA must balance environmental protection with procedural fairness and respect for human dignity. A favourable ruling would affirm that environmental sustainability and human rights are not mutually exclusive, but must coexist within the rule of law.

6.0 CONCLUSION

While the need to protect Uganda's fragile ecosystems like the Lubigi wetland is urgent and undeniable, environmental justice must not come at the cost of constitutional rights and human dignity. The Lubigi evictions, executed without adequate procedural safeguards, have exposed a troubling gap between environmental protections enforcement and the state's obligations under both domestic and international human rights law. True sustainability demands more than enforcement, it requires justice, empathy, and due process.

Legal frameworks such as the Constitution, alongside Uganda's international commitments, compel the state not only to act lawfully but to remedy harm when rights are violated. The pursuit of compensation, constitutional petitions, and injunctive relief are not acts of defiance but of civic engagement. They are tools to ensure that the rule of law governs state power.

Uganda should enact a comprehensive National Evictions and Resettlement Act to provide a clear legal framework governing all evictions, including those related to environmental enforcement. This legislation should define what constitutes lawful and unlawful evictions, mandate minimum procedural safeguards such as

adequate notice and consultation, and establish mechanisms for compensation and relocation. The State should also create a Resettlement and Rehabilitation Fund to support affected individuals and communities, particularly the most vulnerable.

Secondly, there is an urgent need to institutionalize mandatory Human Rights Impact Assessments (HRIAs) alongside existing Environmental Impact Assessments (EIAs). These assessments should be a precondition for any eviction or large-scale environmental enforcement action and should identify potential violations of housing, livelihood, or dignity rights. The findings should be subject to public disclosure and independent review to ensure transparency and accountability.

Lastly, resettlement policies must be developed. These should ensure inclusive planning that incorporates gender and disability considerations. Women, persons with disabilities, and other marginalized groups should be meaningfully included in consultations and provided with tailored support to meet their specific needs. This includes access to safe, accessible housing and social services post-eviction.

Other tools that would bolster an equilibrium between environmental justice and human rights include, ensuring that evictions are implemented in ways that respect, protect, and fulfil the human rights of the affected communities.

Additionally, such as in the Nyamuhizi wetland, displaced persons should be integrated into environmental conservation programs through eco-tourism and the carrying out of sustainable farming practices in wetlands. The empowerment of local communities through education, awareness campaigns, and participatory mechanisms will allow them understand the value of wetlands and prevent future inhabiting of wetlands or unsustainable farming practices.

There should also be strengthened collaborations between environmental agencies and human rights bodies or civic societies to ensure that there is harmonisation between environmental laws and socio-economic protections. It is necessary to acknowledge the traditional rights of communities who have lived in

or near wetlands for generations. Their ecological knowledge can be incorporated into wetland management strategies so as to ensure sustainable use of these wetlands for purposes other than settlement.

As Uganda moves forward with its development and environmental agenda, it must adopt a more inclusive, rights-sensitive approach. This is not only essential for fostering social harmony but for legitimizing environmental governance itself. Striking this balance is not a burden, it is rather the blueprint for a just and sustainable future.

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LAND, LAW AND IDENTITY: THE BANYARWANDA COMMUNITY'S LEGAL STRUGGLE IN THE SHADOW OF UGANDA'S EXPULSION OF THE ASIANS IN 1972

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LAND, LAW AND IDENTITY: THE BANYARWANDA COMMUNITY'S LEGAL STRUGGLE IN THE SHADOW OF UGANDA'S 1972 ASIAN EXPULSION

James Kamanzi Zawadi*

Abstract

The paper examines the lived reality of Uganda's Banyarwanda community, citizens by law, yet often treated as outsiders. Although constitutionally recognised as indigenous, many are routinely denied the identification documents needed to claim land and assert basic rights. Drawing comparisons with the 1972 expulsion of Asian Ugandans, the study highlights how vague laws, politicised identity, and bureaucratic bias continue to marginalise entire communities. It reveals a painful gap between the law's promises and the state's actions, leaving the Banyarwanda vulnerable to statelessness and dispossession. The paper calls for urgent reforms, equitable access to documentation, civic education, and strategic legal action. At its core, this is a call for Uganda to confront its past and make citizenship meaningful for all.

1.0 INTRODUCTION

The term "Banyarwanda" as used to describe citizens in Uganda evokes mixed reactions across Ugandan society. The name, which fuses "Rwanda" with the Bantu prefix "Ba" used to denote ethnic groups, is often misinterpreted by some

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as an attempt to smuggle a foreign identity into the list of Uganda's indigenous communities.[1]

Additionally, the mixed reactions often reflect underlying anxieties about land ownership. Some individuals perceive foreigners as a threat to their presumed inherent or indigenous entitlement to land. This perception fuels exclusionary attitudes, rooted in historical notions of territorial belonging, sovereignty, and the protection of national resources from perceived external encroachment.

Yet, for members of this community, "Banyarwanda" signifies a legitimate claim to belonging to a heritage rooted in long-standing presence within Uganda's borders and a constitutional right to citizenship.

The Banyarwanda are expressly recognised in the Constitution as an indigenous Ugandan community, making them entitled to all the rights that status guarantees, including access to national identification documents and the right to own land.[2]

However, in practice, many continue to encounter systemic discrimination and bureaucratic obstacles. These barriers, especially delays or denials in obtaining national identification, undermine their constitutional rights and call into question their legal status as Ugandan citizens.[3]

A recent Parliamentary Committee Report of 2024 even recommended that some Banyarwanda individuals seek naturalisation. This is despite their constitutional recognition as indigenous, exposing a paradox where constitutional guarantees are overridden by administrative practice.[4]

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1 Parliament of Uganda, *Report on the Petition of the Council for Abavandimwe Regarding Alleged Infringements by the Government on the Rights of Banyarwanda Who Were Born and Raised in Uganda* (DIA1-24, December 2024) 6.

2 Constitution of the Republic of Uganda 1995, Third Schedule, No 24 (as amended).

3 Yoweri Museveni, 'Museveni Orders Overhaul of Passport and ID Issuance Process' Nile Post (online, 14 March 2025) <https://nilepost.co.ug/news/247873/museveni-orders-overhaul-of-passport-and-id-issuance-process> [Accessed 20 July 2025].

4 *Council for Abavandimwe 6.*

This paper critically examines this paradox, focusing on the legal framework that governs citizenship and land rights in Uganda. It argues that despite the Constitution's unequivocal recognition of the Banyarwanda as indigenous Ugandans, institutional discrimination and legal ambiguity have rendered their status precarious.

The paper adopts a doctrinal legal methodology, supplemented by comparative and critical analyses, to assess the state of the Banyarwanda's citizenship and land rights. It draws upon constitutional and statutory provisions, judicial decisions, parliamentary reports, and historical precedent, including the 1972 expulsion of the Asian community from Uganda. This is to illuminate how ethnic identity has been weaponised to justify exclusion from land and citizenship rights.[5]

Ultimately, this paper contends that unless legislative clarity and institutional accountability are prioritised, the Banyarwanda community will remain vulnerable to discrimination and dispossession. The lessons of the past, if ignored, risk repeating themselves, a warning that is as urgent today as it was in 1972.

2.0 THE ORIGIN OF THE BANYARWANDA COMMUNITY IN UGANDA

Like many other tribes and communities in Uganda, the Banyarwanda community formed through a combination of migration, conflict, and reproduction over time. This resulted in a distinct community of Ugandans with Rwandan origins now known as the Banyarwanda.

Historically, areas such as Kisoro and Kigezi in southwestern Uganda were part of the larger Kingdom of Rwanda. In 1910, colonial powers redefined Rwanda's boundaries, resulting in thousands of people, previously part of Rwanda, being

[5] K C Kotecha, 'The Shortchanged: Uganda Citizenship Laws and How They Were Applied to Its Asian Minority' (1975) 9(1) *The International Lawyer* 1.

left within Ugandan territory.[6] These included the Bafumbira of Kisoro and others who were gradually assimilated into various tribes in western Uganda.[7]

A significant wave of migration occurred in 1959-1961 during the Rwandan Revolution, which was sparked off by the attack on a Tusti subchief on 1st November 1959. The violence, exacerbated by colonial divisions and the influence of missionaries, led to the deaths of between 20,000 and 100,000 Tutsi and forced approximately 50,000 into exile in neighbouring countries, including Uganda and the Congo.[8]

Another major influx occurred starting on 7 April 1994, coinciding with the outbreak of the Genocide against the Tutsi, which was driven by longstanding ethnic tensions between the Tutsi and Hutu. The assassination of President Juvénal Habyarimana on 6 April triggered coordinated mass killings, prompting thousands of Tutsi and others at risk to flee across Rwanda's borders in search of safety.[9] The genocide, largely executed by the Interahamwe militia, resulted in the massacre of nearly 1 million Tutsi and forced many survivors to flee into exile, again swelling the Banyarwanda population in Uganda.[10]

Thus, the Banyarwanda community in Uganda today is a product of both colonial boundary decisions and repeated waves of ethnic violence in Rwanda. Although many initially arrived as refugees, over time they integrated into Ugandan society

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6 Francis Dusabe, *Report on Citizenship Law: Rwanda* (European University Institute 2020) 2 <https://www.ecoi.net/en/file/local/2107307/RSCAS_GLOBALCIT_CR_2020_10.pdf> [Accessed 20 July 2025].

7 CHELO Angela Katabarwa, *A Collection of 100 Rufumbira Proverbs and Wise Sayings* (2019) 2.

8 Dusabe n(6) 2.

9 Paul Magnarella, *Explaining Rwanda's 1994 Genocide* (University of Florida, Gainesville, 2002) 28 <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1026&context=hrhw> [Accessed 20 July 2025].

10 Lemarchand, R. (1999) 'The fire in the Great Lakes', *Current History*, 98(628), pp. 195–201.

and participated in various aspects of national life, such as the military, business, and the struggle for independence.[11]

3.0 CITIZENSHIP RECOGNITION OF THE BANYARWANDA COMMUNITY IN UGANDA

Citizenship refers to the legal and social status that defines the relationship between an individual and the state, encompassing rights, duties, and a sense of belonging.[12] It involves both formal legal recognition and the broader socio-political processes through which membership in a political community is constructed, negotiated, and at times contested. In democratic societies, citizenship is fundamental to the enjoyment of constitutional rights and the fulfilment of civic responsibilities.[13]

Banyarwanda is a community in Uganda whose members trace their ancestry to Rwanda. They share linguistic, cultural, and historical ties with Rwanda but have long established their presence in Uganda through settlement, integration, and constitutional recognition.[14]

Uganda's constitutional history reflects a complex relationship between citizenship, land, and identity, particularly for communities like the Banyarwanda. Article 9 of the 1995 Constitution provides:

> *"Every person who, on the commencement of this Constitution, is a citizen of Uganda shall continue to be such a citizen."*[15]

While this clause ensures continuity of citizenship, it does not create new entitlements. Instead, it depends entirely on whether one qualified as a citizen

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11 John-Jean B. Barya, *Reconstituting Ugandan Citizenship Under the 1995 Constitution: A Conflict of Nationalism, Chauvinism and Ethnicity* (Working Paper No 55/2000, 2000) 19.

12 Ernst B Haas, *Citizenship and Identity* (2002) 5 <https://epicemed.fr/refs/grundtvig/docs/citizenship%20haas.pdf> [Accessed 27 July 2025].

13 Ibid 1.

14 Ibid n(11) 26.

15 *Constitution n(2) , art 9.*

under earlier constitutional regimes, most notably, the 1962 Independence Constitution.

Under Article 7 of the 1962 Constitution, citizenship was granted on the following basis:

> *"Every person who, having been born in Uganda, is on the ninth day of October 1962 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Uganda on that day if one of his parents or grandparents was born in Uganda."*[16]

This provision significantly narrowed access to citizenship by requiring not just birth in Uganda, but ancestral birth as well. As a result, individuals whose parents or grandparents were not born in Uganda, including many Banyarwanda whose families had settled in Uganda well before independence, were excluded. Despite their long-term presence, they were not recognised as citizens, simply because their lineage was considered "non-indigenous."

The 1995 Constitution attempted to address such historical exclusions through *Article 10(a)*, which states:

> *"The following persons shall be citizens of Uganda by birth—(a) every person born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926, and set out in the Third Schedule to this Constitution."*[17]

The inclusion of the Banyarwanda in the Third Schedule was a progressive step, formally recognising them as one of Uganda's indigenous communities. On the face of it, this should qualify them for citizenship by birth. However, the provision introduces a historical cut-off: it only applies to communities present in Uganda *as of 1st February 1926*, the date colonial boundaries were finalised.[18]

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16 Constitution *of Uganda* (Independence) 1962*, art 7.*

17 *Constitution n(2) art 10 (a),* Third Schedule.

18 Ibid n(4) 1.

This has created a legal and bureaucratic gap. While the broader Banyarwanda community is recognised, the descendants of Banyarwanda refugees who arrived after 1926, particularly during the 1959 Rwandan Revolution and the 1994 Genocide, remain excluded. If neither parent nor grandparent was present in Uganda before the 1926 threshold, such individuals fall outside the definition of "indigenous" and are thus ineligible for automatic citizenship by birth. Consequently, they are often regarded by state institutions as "immigrants," despite decades, or even lifetimes, of residence in Uganda.

The result is a persistent misinterpretation and contestation of Banyarwanda citizenship. This confusion is worsened by the difficulty in distinguishing between those who were constitutionally recognised and later migrants, since they share language, culture, and names. The problem is further compounded by the fact that, unlike most other ethnic communities in Uganda, the Banyarwanda do not have a clearly defined home district of origin, making it harder for officials to verify ancestral ties within Uganda's borders.

Regardless, the state's failure to resolve this ambiguity should not justify the denial of identification documents to individuals from the Banyarwanda community. Uganda is also bound by international law, particularly the International Covenant on Civil and Political Rights (ICCPR), which provides that the state has a duty to ensure equality and prohibit discrimination of any kind, including on the basis of ethnicity, descent, or national origin.[19]

Given the long-standing presence of Banyarwanda in Uganda and their legal recognition in the Constitution, the real solution lies in legislative and administrative clarity, not exclusion.

Critics argue that recognition with a broad term caused a risk of recognising the entire nation of Rwanda as Ugandan citizens.[20] However, this argument is

19 *International Covenant on Civil and Political Rights (ICCPR) 1966*, articles 2 and 26.
20 *Ibid (n 4) 8.*

fundamentally flawed. It improperly reads into the Ugandan Constitution a reference to a foreign state, Rwanda, that is nowhere mentioned in its provisions on citizenship.[21] This line of reasoning reflects a deeper bias: the persistent conflation of the ethnic identity 'Banyarwanda' with the nationality 'Rwandan.' The Constitution does not equate the two, nor does it require such an association. By framing the Banyarwanda as foreigners despite their constitutional recognition, such critiques misinterpret both the letter and spirit of Uganda's citizenship framework.

Institutions such as the National Identification and Registration Authority (NIRA) and the Directorate of Citizenship and Immigration Control are mandated under the Uganda Citizenship and Immigration Control Act, Cap 66, to issue national identification documents to all Ugandan citizens.[22] In practice, however, both institutions have been at the centre of persistent allegations of discrimination against members of the Banyarwanda community.[23]

These institutions typically assess applications on a case-by-case basis, applying the *balance of probabilities* standard commonly used in civil matters. This means that any applicant, including one identifying as a Munyarwanda, is expected to provide sufficient evidence of Ugandan citizenship.[24] While this standard is, on paper, applied uniformly across all ethnic groups, serious concerns have been raised that Banyarwanda applicants are subjected to disproportionate scrutiny.

Reports suggest that individuals who present themselves as Banyarwanda are often either summarily rejected or required to meet evidentiary thresholds that far exceed what is reasonable under the balance of probabilities standard. In effect, they are forced to prove their citizenship beyond realistic or legally appropriate

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21 Constitution (n 3) art 10(a); Third Schedule, item 24.

22 Uganda Citizenship and Immigration Control Act, Cap 66, s 30 and s 40.

23 Elizabeth Kamurungi, 'The constant question of Banyarwanda citizenship' (Daily Monitor, 19 August 2024) <https://www.monitor.co.ug/uganda/special-reports/the-constant-question-of-banyarwanda-citizenship-4730172.> [Accessed 17 July 2025].

24 *Ibid (n 4) 8.*

measures, turning what should be a procedural exercise into a deeply exclusionary process.[25]

Where an application is denied, individuals may pursue internal appeals within the respective institution and, if necessary, escalate the matter to the High Court.[26] However, the appeal process itself has been criticised for being slow, opaque, and inaccessible to many, further compounding the sense of institutional bias. Ultimately, what is framed as a neutral bureaucratic process is, in practice, experienced by many Banyarwanda as systemic discrimination.

Allegations of bias prompted members of the Banyarwanda community, under the Council for Abavandimwe, to petition Parliament to address these concerns.[27] This ultimately led to the issuance of the 2024 Parliamentary Committee Report, which sought to provide guidance and clarification on the issues and allegations raised.

3.1 THE PARLIAMENTARY REPORT ON BANYARWANDA CITIZENSHIP STATUS: STATE RECOGNITION AND STRUCTURAL CONTRADICTIONS

On 16 April 2024, Hon. Joseph Ssewungu, Member of Parliament for Kalungu West, tabled a matter concerning the citizenship status of the Banyarwanda community in Uganda, specifically citing complaints raised through the Council of Abavandimwe.[28] In response, the Speaker of Parliament referred the matter to the Committee on Defence and Internal Affairs for investigation and reporting. The resulting report provides a rare, state-sanctioned case study into the

25 New Vision, 'Banyarwanda in Uganda' (New Vision, 2007) <https://www.newvision.co.ug/news/1162957/banyarwanda-uganda> [Accessed 11 March 2025].
26 *Uganda Citizenship and Immigration Control Act*, s 10.
27 Ibid n(4) 2.
28 Ibid n(4) 1.

marginalisation faced by the Banyarwanda, particularly in relation to the denial of identification documents.[29]

Although prior media reports, academic commentaries, and civil society petitions have drawn attention to the discriminatory experiences of the Banyarwanda, the 2024 Parliamentary Report is significant.[30] It is an official acknowledgment of both the community's constitutional recognition and the systemic institutional barriers they continue to face. Its relevance lies not only in its content, but in its legal and political status.

The Committee's findings and recommendations are central to this analysis. While affirming the Banyarwanda's longstanding presence and legal status in Uganda, the report paradoxically proposes measures that are legally incoherent and ethically questionable. This contradiction illustrates how formal legal recognition does not necessarily translate into substantive equality. As such, the report lays bare the underlying structural inconsistencies within Uganda's citizenship framework.

3.1.1 ACKNOWLEDGEMENT OF EXISTENCE AND LEGAL STANDING

The report affirms that the Banyarwanda community has been part of Uganda since the 1910s and is already listed among the indigenous communities in the Constitution. This state recognition is crucial: it legally anchors their claim to citizenship by birth in the Constitution.[31]

It also reaffirms that the Council of Abavandimwe's members face denial of legal documentation purely based on self-identification with the Banyarwanda

29 Ibid n(4) 1.

30 See, for example, J Twine, *The* Banyarwanda Citizenship Question in Uganda: A Case Study of Ntungamo District (1959–2002) (MA thesis, Makerere University 2002). While academic studies such as this have addressed the issue, the 2024 Parliamentary Report on the Petition of the Council for Abavandimwe represents the first formal parliament investigation into the matter.

31 Ibid n(4) 1.

community.[32] This acknowledgement by a state body confirms the systematic and bureaucratic discrimination that has long been denied in public discourse.

3.1.2 CONFUSION AROUND THE "BANYARWANDA" LABEL AND CONSTITUTIONAL INTERPRETATION

One of the more controversial aspects of the report is its claim that the term *Banyarwanda* confuses, supposedly because it might be interpreted as referring to the entire Rwandan nation. This misinterpretation, the committee argues, justifies a recommendation for a constitutional amendment to change the tribe's name, suggesting that it be split into "more specific subgroups" such as Bahutu, Batutsi, and Batwa.[33]

This recommendation is flawed for several reasons; it demonstrates a shallow reading of the Constitution, which lists the Banyarwanda as an indigenous community. The reference to subgroups recognised in *another country* (i.e., Rwanda) introduces a foreign lens to the internal classification of Ugandan tribes.

Additionally, this points to institutionalised tribal bias. Bias, which amounts to discrimination by tribe, infringes on the right to freedom from discrimination in the Constitution[34] Unlike other indigenous communities in Uganda, the Banyarwanda have uniquely borne the burden of being asked to alter their constitutional identity or tribal designation to avoid perceived confusion with ethnic groups from neighbouring countries.

This discriminatory expectation stands in stark contrast to the treatment of similarly situated groups such as the Maragoli community, who also face

32 Ibid n(4) 7.
33 Ibid n(4) 7.
34 Constitution of the Republic of Uganda 1995 Art 21.

challenges related to documentation and ethnic classification.[35] However, to date, no official parliamentary recommendation or directive has been issued requiring the Maragoli or any other indigenous group to change their recognised name. The singling out of the Banyarwanda for such an identity revision raises serious questions about equal protection, constitutional recognition, and the selective application of state authority.

3.1.3 THE RECOMMENDATION OF "ALTERNATIVE ROUTES" TO CITIZENSHIP

Perhaps the most worrying recommendation is that Banyarwanda individuals who are denied documentation should simply "seek other avenues" to acquire Ugandan citizenship. This suggestion treats them as foreigners, despite their historical presence and constitutional recognition.[36]

The idea that "born Ugandans" should pursue naturalisation or registration processes reserved for immigrants reinforces their exclusion and stigmatises them as perpetual outsiders.

3.1.4 STATE KNOWLEDGE OF DISCRIMINATION AND PASSIVE COMPLICITY

What is most damning in this report is that the state acknowledges that discrimination is happening, and yet still places the burden of rectifying the issue on the victims. There is no meaningful recommendation to hold accountable the officials who deny IDs based on tribal profiling. Instead, the solution offered is to 'change your name or apply for citizenship elsewhere'.[37]

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35 The Maragoli community is a minority ethnic group residing in Kiryandongo District, Uganda, which the state has failed to recognise in the Constitution. As a result, many Maragoli individuals have been denied national identification documents, placing them at risk of statelessness and exclusion from public services. For further information, see *Voice*, 'A Quest for Citizenship: The Maragoli in Uganda' (Voice Global, 28 March 2022) <https://voice.global/stories/a-quest-for-citizenship-the-maragoli-in-uganda/> [Accessed 20 July 2025].

36 Ibid n(4) 8.

37 Ibid n(4) 8.

This does not merely suggest state neglect: it reveals a deeper complicity in the marginalisation of the Banyarwanda community. The Constitution envisions a Uganda where every individual, regardless of ethnic background, is embraced as part of one nation, while still being allowed to carry their cultural, religious, and ideological identity with pride.[38] Instead, what we see is a betrayal of that promise.

When the state turns a blind eye or worse, selectively enforces citizenship laws based on tribe, language, or assumed allegiance, it doesn't just violate a legal standard. It breaks the very spirit of unity and shared nationhood that the Constitution calls for. It sends a message that belonging in Uganda is conditional, that some histories and identities must prove themselves more than others. And it is at this painful intersection where land, identity, and politics collide that the true cost of this selective belonging is most deeply felt.

The 2024 Parliamentary Report reveals the uncomfortable truth that even official recognition of injustice does not always lead to corrective action. Instead, the Banyarwanda community continues to be asked to prove and reprove their belonging. This undermines not only their right to documentation and land, but also the integrity of Uganda's legal order itself.

4.0 LEGAL FRAMEWORK ON BANYARWANDA LAND OWNERSHIP IN UGANDA

Land ownership in Uganda is grounded in the 1995 Constitution of Uganda (as amended). Article 26(1) provides that *"Every person has a right to own property either individually or in association with others."* However, this general guarantee is qualified by Article 237(1), which states that *"Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."*[39] This provision firmly limits absolute

[38] National Objectives and Directive Principles of State Policy, Objective III(ii) in the 1995 Constitution of Uganda.

[39] Ibid n(2) Articles 26(1), 237(1).

land ownership to Ugandan citizens, recognising the four tenure systems of mailo, freehold, leasehold, and customary.

Further, Article 237(2)(c) clarifies the position of non-citizens, providing that *"noncitizens may acquire leases in land in accordance with the laws prescribed by Parliament."*[40] In line with this constitutional framework, Section 41(7)(a) of the Land Act, Cap 236, reinforces the restriction by defining a non-citizen as *"a person who is not a citizen of Uganda as defined by the Constitution."*[41] Consequently, non-citizens are prohibited from owning land under mailo or freehold tenure and may only acquire leasehold interests in land as permitted by statutory law.

In theory, this legal recognition entitles Banyarwanda to own land under any tenure. However, in practice, as noted in the parliamentary report, sections of the Banyarwanda community face issues acquiring identification documents, which makes them unable to register land.

Without identification documents, Banyarwanda cannot prove their citizenship, which is a prerequisite for land registration. This issue was addressed in *Oyee and Others v Zubeida*, where the respondent was unable to prove that her father belonged to an indigenous Ugandan community and was therefore entitled to land ownership in Uganda.[42]

The court held that national IDs and birth certificates can be used to prove citizenship on a balance of probabilities. Documents that many Banyarwanda do not have, and thus, if faced with such a circumstance, they may end up losing their land.

Moreover, for buyers of land from members of the Banyarwanda community, this legal ambiguity imposes an added layer of due diligence. In *Bagyire v. Ausi Matovu*, the court established that a purchaser must exercise utmost care,

40 *Ibid*, art 237(2)(c).
41 *Land Act*, Cap 236, s 41(7)(a).
42 *Zubeida Abdulrahman v Oyee Leodard and Others* [2017] Misc Civ App 33 (HC Arua) (arising from HC Civ App 27 of 2017) (Uganda).

extending their inquiry beyond the nature of the land itself to the status and legitimacy of the seller.[43] In other words, due diligence now encompasses verifying the seller's right to hold and dispose of the land. In the context of the Banyarwanda, where the parliamentary report has openly acknowledged systemic discrimination and confusion about the status of this group, buyers must be vigilant.[44]

The uncertainty surrounding the legal recognition of Banyarwanda landowners exposes buyers to the risk of acquiring titles that could later be contested or cancelled on the grounds that the seller was a 'foreigner' or otherwise lacked the capacity to own land. Without legislative clarity, this environment threatens both sellers and buyers, destabilising land transactions and undermining the security of property rights in Uganda.

Furthermore, the process of registering or transferring land titles at the Land Office mandates the presentation of valid identification documents. The Commissioner for Land Registration, exercising powers to amend the schedules and forms under the Registration of Titles Act, introduced a requirement for applicants to present a national identity card, an administrative response to the widespread fraud plaguing the land registration process.[45]

As a result, members of the Banyarwanda community who are routinely denied national IDs are effectively barred from accessing land registration services. This exclusion not only puts them at risk of losing their land but also exposes them to wrongful allegations of being non-citizens who unlawfully acquired land.

43 *Sir John Bageire v Ausi Matovu* (Court of Appeal of Uganda) [1996] UGCA 7.
44 Ibid n(4) 7.
45 Daily Monitor, 'Govt Sets New Terms for Land Registration' (30 November 2023) <https://www.monitor.co.ug/uganda/news/national/govt-sets-new-terms-for-land-registration2> [Accessed 11 June 2025].

Taken together, these legal and procedural hurdles expose how the Banyarwanda's constitutional right to land is rendered uncertain in practice. Highlighting the urgent need for legislative clarity and equitable enforcement.

5.0 SHADOWS FROM THE PAST: BANYARWANDA RELIVING THE UGANDA-ASIAN PREDICAMENT

The Uganda-Asian community, predominantly of Indian descent, traces its origins to the late 19th and early 20th centuries, particularly during the construction of the Uganda Railway.[46] Many arrived as clerks and labourers under British colonial contracts, but a significant number remained after the railway's completion, venturing into commerce and establishing themselves as a distinct business class.[47]

Over time, several generations were born in Uganda, and many acquired Ugandan citizenship either by birth, automatic acquisition in the 1962 Constitution and election, or through legal naturalisation. However, the law and more critically, its application created a distinction between citizens with rights and citizens with mere obligations.[48] This was particularly evident in the case of the Asian community, who, despite their prima facie citizenship under the law, were still viewed and treated as foreigners.[49]

Colonial policy and privileges sowed seeds of resentment. The structures established under British rule entrenched the marginalisation of native Africans by extending preferential treatment to the Asian minority.[50] Laws such as the Trading Ordinance 1938 restricted African traders to the outskirts of towns, while

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46 R Nakayi, 'Expropriation, Institutional Failure and the Right to Property: The Experience of Uganda's Asians and Idi Amin' (2022) 28 East African Journal of Peace and Human Rights 117.

47 S Muhammedi, 'Gifts from Amin': The Resettlement, Integration, and Identities of Ugandan Asian Refugees in Canada (PhD thesis, University of Western Ontario 2017) 48.

48 Ibid n(46) 111.

49 Mahmood Mamdani, 'The Uganda Asian Expulsion Twenty Years After' (1993) 28 Economic and Political Weekly 93,96.

50 Ibid n(46) 118.

Asians were permitted to operate in urban centres.[51] Furthermore, Asians were granted representation on the Legislative Council before Africans, reinforcing their privileged position in the eyes of the indigenous population.[52]

These legal advantages fostered deep-seated resentment among Africans, who viewed the Asian community as collaborators in colonial economic dominance. Property ownership disparities further exacerbated this, as Asians came to control significant amounts of land and commercial property.[53] In 1952, colonial efforts to "Africanise" the economy led to the compulsory acquisition of some Asian-owned land, signalling early attempts to recalibrate property rights along racial lines.[54]

Ultimately, the cumulative effects of colonial privilege and post-independence populist rhetoric laid the groundwork for the mass expulsion of Asians under Idi Amin in 1972.[55] Amin's government, driven by ethnic nationalism and anti-foreign sentiment, issued a decree giving Asians 90 days to leave the country.[56]

The historical treatment of the Uganda-Asian community echoes uncomfortably in the present-day experiences of the Banyarwanda in Uganda. Both communities were, at various points, legally recognised as Ugandan citizens, whether through birth, naturalisation, or constitutional inclusion. Yet were persistently viewed through the lens of foreignness.

For the Asian community, this perception culminated in their mass expulsion in 1972, despite generations of residence and significant contributions to Uganda's economy. Similarly, the Banyarwanda today face bureaucratic exclusion from

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51 D Parson, 'Africanizing Trade in Uganda: The Final Solution' (1973) 20 *Africa Today* 59, 62.

52 G W Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present* (LawAfrica Publishing (K) Ltd 2010) 13 <http://ebookcentral.proquest.com/lib/ugchristianu-ebooks/detail.action7> [Accessed 11 June 2025].

53 Ibid n(46) 110.

54 Ibid n(49) 94.

55 Ibid n(6) 1.

56 Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree No 13 of 1972 (Uganda).

national identity systems and public suspicion regarding their allegiance, even as the Constitution lists them among indigenous Ugandan communities. In both cases, citizenship has proven vulnerable to political manipulation, ethnic nationalism, and selective enforcement.

5.1 UGANDAN CITIZENSHIP AND THE ASIAN MINORITY

Before the 1962 Constitution, British colonial policy recognised anyone born on British soil or within its protectorates as a British subject. This framework was extended to the Asian community in Uganda, who were largely considered British protected persons.[57]

However, upon independence, a legal transition took place. The 1962 Constitution stipulated that British protected persons could become Ugandan citizens by operation of law, provided that at least one of their parents was a Ugandan citizen.[58] Consequently, several Asians became Ugandan citizens and were entitled to own property without fear of deprivation. This was further formalised when British laws were amended to state that those who became Ugandan citizens ceased to be British citizens.[59]

Despite this recognition, practical segregation persisted. While indigenous Ugandans were not required to prove their place of birth, Asians had to provide proof of their Ugandan birth, signalling early signs of institutionalised discrimination.[60]

When Idi Amin assumed power in 1971, he intensified existing discriminatory policies. He issued a swift directive that required all Asians asserting automatic

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57 C Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland (Stevens & Sons 1957) 228–235, cited in K C Kotecha, 'The Shortchanged: Uganda Citizenship Laws and How They Were Applied to Its Asian Minority' (1975) 9 International Lawyer 1, 4.

58 The Constitution of Uganda, art 7 (1).

59 Ibid n(6) 5.

60 Ibid n(6) 5.

Ugandan citizenship to produce original or certified birth certificates for both themselves and a Ugandan parent.

This requirement was highly impractical, as Uganda's civil registration system, which began only in the 1930s, lacked the capacity and infrastructure to process such documentation efficiently within a limited timeframe.[61] Thus, citizenship verification became a bureaucratic tool of exclusion very similar to the modern-day challenges faced by the Banyarwanda community in Uganda.[62]

The 1962 Constitution of Uganda attempted to manage the complex question of nationality in the wake of independence. While the constitution granted automatic citizenship to persons born in Uganda with at least one Ugandan parent or grandparent, it excluded many long-term residents, particularly those of Asian descent, whose families had lived in Uganda for decades but did not meet this strict parental requirement.

To address this, Article 8(1) provided that:

> *"Any person who, but for the proviso to section 7(1) of this Constitution, would be a citizen of Uganda by virtue of that subsection, shall be entitled, upon making application before the specified date in such manner as may be prescribed by Parliament, to be registered as a citizen of Uganda."*[63]

Similarly, Article 8(5) extended eligibility to individuals who had been naturalised or registered under British law, stating:

> *"Any person who, on 8th October 1962, is a citizen of the United Kingdom and Colonies, having become such a citizen by virtue of his having been naturalised or registered in Uganda under the British Nationality Act,*

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61 Ibid.

62 Continuous reports of Immigration officials insisting on documents and family verification of Banyarwanda community to verify citizenship reported in Council for Abavandimwe, Report on the Petition Regarding Alleged Infringements by the Government on the Rights of Banyarwanda Born and Raised in Uganda, DIA1/24 (Parliament Watch Uganda, December 2024) 12.

63 The *Constitution of Uganda 1962,* art 8(1).

> *1948, shall be entitled, upon making application before the specified date… to be registered as a citizen of Uganda."*[64]

These provisions appear generous at first glance, offering a path to citizenship for those who were otherwise excluded. However, the requirement to apply for citizenship before a deadline (later set as 9th October 1964 by the Uganda Citizenship Act) placed the burden on the individuals, rather than granting them automatic recognition.

In practice, this system was riddled with bureaucratic inefficiencies, delays, and silent denials. Thousands submitted the required documents, but many never received confirmation or faced unexplained rejections, a pattern that suggested either administrative neglect or deliberate obstruction.[65]

This legal uncertainty was compounded by the 1966 Constitution, which fundamentally altered the nature of citizenship rights. The equivalent provisions in the new Constitution specifically Article 8(1) and Article 8(5) respectively stated:

> *"Any person who, but for the proviso to clause (1) of article 4 of this Constitution would be a citizen of Uganda by virtue of that clause may, upon application made in such manner as may be prescribed by Parliament, be registered as a citizen of Uganda."*[66]

> *"Any person who, on the ninth day of October, 1962, was a citizen of the United Kingdom and Colonies, having become such a citizen by being naturalized or registered in Uganda under the British Nationality Act, 1948, may, upon application made in such manner as may be prescribed by Parliament, be registered as a citizen of Uganda."*[67]

The change from *"shall"* to *"may"*, though subtle, had profound legal consequences. It marked a shift from mandatory registration to discretionary approval, giving state authorities the power to deny citizenship even where the applicant had complied with all legal requirements. For applicants whose files

64 *Ibid,* art 8(5).
65 Ibid n(5) 5.
66 *Constitution of the Republic of Uganda 1966,* art 8(1).
67 *Constitution of the Republic of Uganda 1967*, art 8(5).

were still pending in 1962, this constitutional revision cast immediate doubt over their legal status.

The 1967 Constitution exacerbated the confusion by omitting these provisions entirely. Many Asians who had applied for citizenship under the 1962 Constitution were left in limbo, with no official documentation. When Amin came to power, he accused them of deliberately refusing to become Ugandan citizens, ignoring the fact that their applications had languished under previous regimes.[68]

Even Asians who had successfully verified their citizenship were later subjected to state-imposed discrimination. Amin announced that they would be relocated to rural areas to perform agricultural labour to become "proper" Ugandans.[69] This policy deprived them of urban property and livelihoods, reinforcing the idea that recognition under the law could be undone by discriminatory policy execution.

This historical trajectory demonstrates that citizenship in Uganda has often been determined not just by constitutional criteria but by subjective judgments of identity. Legal provisions are rendered ineffective when law enforcers operate with a bias toward certain groups.

Both the Asian and Banyarwanda experiences reflect a persistent issue: the failure of the state to implement inclusive citizenship laws without prejudice. Uganda must move beyond identity politics to embrace the constitutional principle that any individual who meets the legal requirements is Ugandan, regardless of ethnicity, appearance, or background.

5.2 ASIAN COMMUNITY'S RIGHTFUL CLAIM TO LAND IN UGANDA

By 1970, a substantial number of Asians were Ugandan citizens or presumed to be so. As such, they were entitled to constitutional protections, including the right

68 Ibid 5.
69 Ibid n(5) 8.

not to have their property deprived of except with adequate compensation and only under exceptions such as those in the public interest.[70]

In *Lutaaya v H.G. Gandesha & Anor*,[71] the court held that the property of Ugandan citizens was not lawfully expropriated and therefore was not subject to the Expropriated Properties Act. This affirmed that the Asian community, as Ugandan citizens, had the legal right to own land and other property. However, during times of ethnic tension and the rise of populist leaders, these rights were ignored or undermined by discriminatory implementation.

The Idi Amin regime, which seized power in 1971, was notorious for its disregard for the rule of law. Legal Notice No. 1 of 1971 effectively suspended the supremacy of the Constitution, granting presidential decrees overriding authority.[72] This allowed the regime to undermine constitutional safeguards against the deprivation of property from citizens. In 1972, the regime ordered the mass expulsion of Asians, giving them 90 days to leave the country.[73]

Following this, the Assets of Departed Asians Decree No. 27 of 1973, vested all properties of Asians who "failed to prove citizenship" into the government. The Departed Asians Property Custodian Board was established to manage these properties.[74] However, the failure to prove citizenship was often not due to lack of legal entitlement but to administrative barriers, deliberate bureaucratic delays, and racially biased practices.[75] Many Asians were denied recognition despite being legal citizens, and the short timeframe given made it virtually impossible to assert their legal rights.

Despite their Ugandan citizenship, the Asian community was collectively treated as foreign and their properties were seized and redistributed. This became one of

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70 Ibid n(16), art 22 and art 13.
71 *Lutaya v Gandesha and Another* (Civil Application 2 of 1989) [1989] UGSC 9 (14 November 1989).
72 Legal Notice No 1 of 1971 (Uganda), art 1.
73 Ibid n(46) 111.
74 Ibid.
75 Ibid n(5) 8.

the starkest examples of state-sanctioned expropriation based on race. The episode exposed the fragility of legal citizenship when faced with populist or militarised ethnic nationalism and set a dangerous precedent for using race or ethnicity to invalidate legitimate property claims.

This historical episode serves as a cautionary parallel for the Banyarwanda community today. Just as the rights of Asians were undermined despite their citizenship, the continued ambiguity around the legal status and land rights of the Banyarwanda suggests that, without legal clarity and protections, the right to land can be arbitrarily denied or revoked under the guise of state interest or ethnic populism

6.0 COMPARATIVE PATTERNS OF EXCLUSION AND DISPLACEMENT BETWEEN THE BANYARWANDA AND ASIAN COMMUNITIES

6.1 SIMILARITIES IN THE TREATMENT OF THE BANYARWANDA AND ASIAN COMMUNITIES

6.1.1 QUESTIONED CITIZENSHIP AND IDENTITY

The perception of foreignness played a significant role in the 1972 expulsion of Asians from Uganda.[76] The very use of the term "expulsion" implied that these individuals did not belong in the country, despite the fact that many of them were Ugandan citizens. Their factual link to Asian ancestry, specifically Indian descent, led to them being viewed as foreign intruders, a perception rooted in their initial migration under British colonial rule.

This mischaracterisation culminated in Idi Amin's directive to expel "foreign Asians," a term that overlooked the lawful citizenship of many individuals within

[76] William Tayeebwa, Carolyne Ntulume and Abraham Mbaine, 'The 1972 Asian Expulsion in Uganda and the Framing of Ethno-Racial Discourse in the Post-Colonial Press' (23 October 2024) *Oxford Research Encyclopedia of Communication* <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-1338> [Accessed 21 July 2025].

this community.[77] By denying their citizenship, the state effectively stripped them of legal protections, including rights to property and due process.

Similarly, the Banyarwanda community continues to face an identity crisis rooted in the misinterpretation of their status under the 1995 Constitution. The parliamentary committee observed that the recognition of "Banyarwanda" as an indigenous community has led to the mistaken belief that the entire nation of Rwanda is included under this category.[78] This interpretation ignores the Constitution's intent to recognise Ugandan Banyarwanda, not Rwandan nationals.

This persistent questioning of identity increases the risk that Banyarwanda individuals may be denied land ownership rights due to assumptions about their nationality. In both cases, Asians and Banyarwanda, citizenship has been weaponised to deny minorities access to property and protection under the law.

6.1.2 STATE-SANCTIONED DISCRIMINATION AND INACTION

The state actively facilitated the expulsion of the Asian community in 1972, using military force and enacting legislation that allowed for the compulsory acquisition of their properties.[79] For instance, in *Mohammed Ali Bhai v. Bukenya Mukasa*, the state failed to maintain leased property after the Asian owner was expelled, showing a willingness to seize property regardless of its ability to manage it.[80] This reflects a systemic bias against the Asian minority, further institutionalised by legislation aimed at "Africanizing" land ownership.

The Banyarwanda face a more subtle but equally harmful form of discrimination. Despite parliamentary recognition of the confusion surrounding the term

77 Ibid n(46) 119.
78 Ibid n(4) 8.
79 Ibid n(46) 120.
80 *Allibhai v Bukenya & Another* (Civil Appeal 56 of 1996) [1996] UGSC 17 (SC) (15 August 1996).

"Banyarwanda," no legislative amendments have been proposed to clarify who qualifies as a citizen.[81]

Immigration and ID registration processes continue to disproportionately scrutinise Banyarwanda applicants, often treating them as foreigners.[82] The constitutional and legislative silence on this issue exposes the community to bureaucratic injustices, particularly in land disputes where proof of citizenship is essential.

6.1.3 PORTRAYAL AS FOREIGN INTRUDERS

Both communities have been historically portrayed as foreign intruders. While the Asian community had settled in Uganda generations before independence, and were included within Uganda's borders as drawn in 1926, public and governmental perceptions continued to frame them as outsiders.[83] This narrative justified their exclusion from land ownership and ultimately led to their mass expulsion.

Likewise, the Banyarwanda have faced scepticism about their Ugandan identity, despite their long-standing residence. Even with constitutional provisions and avenues for naturalisation, members of this community are frequently required to defend their citizenship. The constitutional restriction of land ownership to citizens means that failure to meet these subjective standards can result in the loss of property rights, mirroring the fate of Asians who were expelled despite their legal status as citizens.

6.1.4 POLITICISATION OF IDENTITY AND PRESENCE

In both instances, identity has been manipulated for political gain. The British colonial government institutionalised economic and racial divisions that

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81 Ibid n(4) 8.

82 Musinguzi Blanshe, 'No Place to Call Home for the Banyarwanda of Uganda' *The Africa Report* (1 September 2023) <https://www.theafricareport.com/320665/no-place-to-call-home-for-the-banyarwanda-of-uganda/> [Accessed 17 June 2025].

83 Ibid n(49) 95.

marginalised Africans and sowed resentment toward the Asian community.[84] Post-independence, Amin capitalised on these sentiments, expelling Asians under the guise of economic nationalism.[85]

Similarly, the Banyarwanda community has long been politicised. From Obote's 1980 expulsion policies to the ongoing public debate about their status, political actors have used the community as scapegoats to rally populist support.[86] The confusion about whether the term "Banyarwanda" refers to Ugandan citizens or Rwandan nationals reflects not just a legal ambiguity, but also a politically convenient form of exclusion. Without clear legislative clarification, members of the community remain vulnerable to shifting political interests.

6.2 DISTINCTIONS IN THE TREATMENT OF THE BANYARWANDA AND ASIAN COMMUNITIES

6.2.1 ORIGINS AND RACIAL IDENTITY

The origins of the Asian and Banyarwanda communities in Uganda are markedly different. The Asian community, largely of Indian descent, originated from the Indian subcontinent and migrated to East Africa primarily during the colonial period.[87] Their skin colour, cultural practices, and foreign languages rendered them visibly distinct from the native African population.

In contrast, the Banyarwanda, although also a product of migration, are of Black African descent, often sharing linguistic, cultural, and even ethnic similarities with other Ugandan communities, especially in Western Uganda.[88] Their movement predates colonial boundaries, with many tracing their ancestry in Uganda to the pre-1926 era.

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84 Ibid n(46) 118.
85 Ibid 119.
86 Ibid n(46) 95.
87 G Oonk, 'Gujarati Asians in East Africa, 1880–2000: Colonization, De-colonization and Complex Citizenship Issues' (2015) 8 *Diaspora Studies* 66.
88 Ibid n(11) 26.

This distinction in origin has often been used, implicitly or explicitly, to justify the severity of treatment. The brutality of the 1972 expulsion of Asians is sometimes attributed to their racial and cultural otherness.[89]

However, such justifications quickly fall apart when viewed through the lens of African history. Intra-racial exclusion has proven equally, if not more, violent, as seen in the 1994 genocide against the Tutsi in Rwanda, where claims of foreign origin were weaponised to justify mass killings.[90]

Thus, while the difference in origins is real, it is insufficient to justify exclusion or marginalisation. Belonging, in a constitutional democracy, must be defined by law, not race or ancestry.

6.2.2 LEGAL STATUS AND CITIZENSHIP

A critical legal distinction between the two communities lies in citizenship status. In 1972, a majority of Asians in Uganda held British, Indian, or Pakistani passports and were not Ugandan citizens.[91] This made their expulsion, though morally reprehensible, legally possible under sovereign immigration powers.

In contrast, many Banyarwanda in Uganda today are citizens by birth or by descent, as explicitly provided for under the 1995 Constitution and the Uganda Citizenship and Immigration Control Act. Their legal status is not in doubt.[92]

However, in practice, they are often treated as de facto foreigners. The contradiction is stark: while Asians were expelled for being non-citizens, Banyarwanda are excluded despite being citizens. This exposes the disturbing reality that even legal citizenship can be rendered meaningless when the state chooses to disregard it.

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89 Ibid n(76).
90 Ibid (n9).
91 M Bristow, BN Adams and C Pereira, 'Ugandan Asians in Britain, Canada, and India: Some Characteristics and Resources' (1975) 4(2) *Journal of Ethnic and Migration Studies* 155.
92 Ibid n(2) art 10 (a), Third Schedule.

6.2.3 STATE NARRATIVE AND JUSTIFICATION

The difference in state rhetoric and justification is perhaps one of the clearest distinctions between the two cases. The Idi Amin regime loudly and proudly announced the 1972 expulsion of Asians as part of the "economic liberation" of Uganda. The government made no attempt to hide its intentions, speeches, decrees, and state propaganda openly framed Asians as exploiters and saboteurs of the national economy. The violence and dispossession that followed were thus publicly endorsed and institutionalised.[93]

In contrast, the marginalisation of the Banyarwanda today is largely denied by the state. Government officials often claim that Uganda applies its laws fairly and considers each citizenship or documentation case on its own merits.[94]

On the surface, there is no official policy of discrimination. However, beneath this silence lies a pattern of exclusion, often through bureaucratic practices that deny Banyarwanda access to IDs, passports, land titles, and other essential rights.[95]

The distinction, therefore, lies not in the absence of exclusion, but in how it is justified: for Asians, it was direct and unapologetic; for Banyarwanda, it is denied and disguised.

6.2.4 LAND AND PROPERTY RIGHTS

The manner in which both communities were denied land and property rights also highlights a significant distinction. For Asians in 1972, the loss was immediate and sweeping. Businesses were seized, homes were taken, and properties were reallocated to Ugandans under the "economic war." [96]

93 Ibid (n46) 119.
94 Ibid n(4) 9.
95 Ibid n(23).
96 Ibid n(46) 119.

By contrast, the Banyarwanda face gradual and systematic exclusion from land and property systems. Their dispossession is not the result of a single decree, but rather a slow erosion through administrative barriers.[97] Without national identification, many cannot register land, access formal land markets, or defend their property rights in court.

This quiet form of exclusion is perhaps more dangerous; it occurs in the shadow of legal silence and often escapes public scrutiny. Ultimately, both communities were deprived of land rights, but through very different mechanisms: one through overt confiscation, the other through institutional neglect and procedural obstruction.

In both cases, citizenship was manipulated as a tool of exclusion, enabling the denial of land and identity. While the Asian community suffered overt state-led expulsion, the Banyarwanda face a quieter, bureaucratic form of marginalisation. These parallel injustices reveal the enduring power of legal ambiguity and political narratives in displacing minority communities.

7.0 SHIFTING FOUNDATIONS: THE FRAGILE LEGAL STATUS OF THE BANYARWANDA IN UGANDA

The legal ambiguity surrounding the citizenship status of the Banyarwanda community poses a serious challenge to their land ownership rights in Uganda. Accusations of being "foreigners," compounded by shifting political regimes and inconsistent policy application, have left the community in a vulnerable and uncertain position.

7.1 CITIZENSHIP CONFUSION AND THE RISK TO LAND RIGHTS

The lack of constitutional clarity about who qualifies as Banyarwanda has direct implications for land rights. Suppose the Constitution is not amended to clarify

97 Ibid n(23).

whether "Banyarwanda" refers only to those whose ancestors resided in Uganda by 1926 as per colonial demarcations, or includes more recent Rwandan refugees who identify as Banyarwanda. In that case, their rights to own land will remain on shaky legal ground.[98]

This uncertainty opens the door to discriminatory and inconsistent application of the law by state officials, politicians, and judicial officers, each with their own interpretations and political motivations. The committee's concern that the term is "too wide" allows for extremist interpretations that may exclude large sections of the community.[99] As history has shown, such ambiguity can be exploited for populist or exclusionary agendas, as seen in the treatment of Uganda's Asian community under Idi Amin. Banyarwanda risk becoming pawns, victims of legal grey areas and shifting political winds.

7.2 A TOUGH CHOICE: CULTURAL IDENTITY VS. LAND SECURITY

Faced with legal discrimination and bureaucratic roadblocks, younger members of the Banyarwanda community may feel compelled to suppress or abandon their cultural identity in order to access land rights. This presents a deeply unjust trade-off that contradicts Uganda's constitutional and international human rights obligations. Article 37 of the Constitution explicitly provides that "every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others." [100]

This constitutional protection is reinforced by international instruments such as the Universal Declaration of Human Rights (1948) and the African Charter on Human and Peoples' Rights, both of which affirm the right of every individual to

98 *Ibid n(2) art 10, Third* Schedule.
99 Ibid n(2) 8.
100 Ibid n(2) art 37.

freely participate in their cultural life.[101] The continued marginalisation of Banyarwanda Ugandans based on cultural or ancestral identity thus represents a violation not only of domestic constitutional guarantees but also of binding international human rights norms.

However, these protections mean little in practice if the state continues to treat Banyarwanda cultural identity as a liability. To bypass discrimination, some members of the community are advised to assimilate into other groups, such as the Bafumbira, who are perceived as "more Ugandan." This forced assimilation undermines both their constitutional right to cultural identity and their dignity as Ugandan citizens.

7.3 RISK OF BECOMING POLITICAL PAWNS

The recognition of Banyarwanda land ownership in Uganda is heavily influenced by politics, placing the community at risk of becoming political pawns. Minority groups in Uganda have historically borne the brunt of shifting political agendas, often sacrificed for populist gain. For instance, during colonial rule, the British marginalised Asian communities while favouring native groups amid growing labour unrest.[102] Similarly, Idi Amin's 1972 expulsion of Asians was aimed at appeasing Ugandans and consolidating his regime through ethnic scapegoating.

The Banyarwanda now face a similar threat. The ongoing lack of clarity on which members of the Banyarwanda community qualify as Ugandan citizens and thus are entitled to own land creates space for dangerous, subjective interpretations of the law. The Parliamentary Committee on Defence and Internal Affairs acknowledged that the term "Banyarwanda" is confusing and overly broad.[103] Some extremist interpretations may go as far as suggesting that only

101 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 27; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 17(2).

102 Ibid n(49) 94.

103 Ibid n(4) 8.

Banyarwanda who can trace their ancestry back to Uganda's 1926 colonial boundary demarcation qualify as indigenous.

This ambiguity places the Banyarwanda community at the mercy of politicians, judicial officers, and law reformers, each influenced by their own interests, ideologies, or political motivations. Without clear and enforceable legal definitions, land ownership rights for Banyarwanda remain precarious. The law, instead of serving as a shield, becomes a tool of exclusion. As long as these uncertainties persist, the future of Banyarwanda land rights in Uganda cannot be guaranteed.

The Banyarwanda community in Uganda stands at a crossroads. Without legislative reform, they face the prospect of legal exclusion, landlessness, and cultural erasure. If Uganda is to truly uphold the principles of equality, justice, and non-discrimination enshrined in its Constitution and international obligations, it must act now. A future where a citizen's right to land depends on how Ugandan they appear or sound is a future built on sand, unstable, unjust, and unworthy of a democratic nation.

8.0 RECOMMENDATIONS

8.1 LEGISLATIVE CLARIFICATION

There is a pressing need for a constitutional amendment to clarify the status of the Banyarwanda community recognised under Article 10 and item 24 of the Third Schedule to the 1995 Constitution. Specifically, the amendment should affirm that the term "Banyarwanda" refers to those who were present in Uganda as of 1926, when colonial boundaries were drawn, as well as those whose parents were born in Uganda by the time of independence in 1962, in line with the citizenship framework under the 1962 Constitution.[104] Such legal clarification would resolve longstanding confusion arising from the successive influxes of Rwandan refugees and the persistent conflation of Ugandan Banyarwanda with nationals of Rwanda.

[104] *Ibid n(2) art 10,* Third Schedule.

This clarification would affirm that Banyarwanda individuals who meet these criteria are Ugandan citizens and, as such, are entitled to enjoy full constitutional rights, including the right to own land. It would also eliminate the dangerous misconception that all Banyarwanda are foreigners subject to leasehold land tenure or vulnerable to arbitrary eviction and bureaucratic exclusion.

By establishing clear and enforceable criteria, Uganda can ensure that land rights and citizenship are governed by the rule of law rather than political discretion or ethnic bias. Such reform is essential for promoting legal certainty, equal protection under the law, and national unity.

8.2 TARGETED NATIONAL ID AND PASSPORT ACCESS PROGRAMME

Inspired by Uganda's historic failure to protect the Asian-Ugandan community prior to the 1972 expulsion, the state must avoid repeating history by denying Banyarwanda citizens access to land ownership through bureaucratic denial of identity documentation.

To align with its international obligations, particularly under the African Charter on Rights and Welfare of the Child, which requires states to prevent statelessness, Uganda should instruct NIRA and immigration officials to proactively facilitate the issuance of National Identity Cards and passports to Banyarwanda who meet the constitutional criteria for citizenship.[105] This proactive approach would serve to reverse the long-standing marginalisation of this community, many of whom remain on an unstable legal footing, uncertain of their future within the country.

8.3 NATIONAL EDUCATION ON CITIZENSHIP AND INDIGENOUS IDENTITY

Just as anti-Asian sentiment was weaponised to justify the 1972 expulsion of Asian-Ugandans, present-day misinformation labelling the Banyarwanda as

[105] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990), art 6(4).

"foreigners" continues to fuel systemic discrimination. The Uganda Human Rights Commission (UHRC) should spearhead sustained nationwide civic education campaigns to clarify that Banyarwanda are constitutionally recognised Ugandan citizens.

They should emphasise that Banyarwanda are fully entitled to the rights of citizenship, including land ownership. Public education is crucial in dismantling dangerous narratives that delegitimise indigenous identity, especially where legal recognition has already been affirmed.

8.4 LEGAL AID AND STRATEGIC LITIGATION TO SECURE LAND RIGHTS

In partnership with civil society organisations, legal aid bodies, the state should support strategic legal interventions aimed at challenging unlawful evictions and denial of land rights based on perceived non-citizenship. These efforts would reaffirm the constitutional principle that citizenship is not contingent on ethnic appearance or origin, but on established legal criteria.

Furthermore, such actions would be consistent with Uganda's commitments under Sustainable Development Goal 16, which aims to promote peace, justice, and strong institutions by ensuring equal access to justice and safeguarding the land rights of all citizens.[106]

9.0 CONCLUSION

The legal and social treatment of the Banyarwanda community in Uganda reveals a troubling conflict between constitutional promises and administrative practice. Though recognised in the 1995 Constitution as indigenous citizens entitled to full rights, including land ownership, the community continues to face systemic

[106] United Nations, Transforming our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015) UNGA Res 70/1, Goal 16.

discrimination rooted in historical bias, political opportunism, and ethnic stereotyping.

The comparison with the 1972 expulsion of Asian-Ugandans is not merely academic; it is a sober warning that legal recognition alone is insufficient when bureaucratic and political actors remain empowered to subvert it.

By examining both historical precedent and present-day reality, this paper demonstrates that citizenship in Uganda, although legally defined, is often perceived as negotiable, contingent upon ethnic considerations, the prevailing political climate, or administrative discretion. This weaponisation of identity undermines the rule of law, destabilises property rights, and risks eroding the fragile trust between citizens and the state. The denial of national IDs, the reinterpretation of indigenous identity, and the subtle pressure to assimilate or remain landless all point to a broader crisis: the erosion of equal citizenship.

While legal and constitutional reform is essential, it is important to recognise that such efforts may face resistance from multiple fronts. Government institutions may be reluctant to relinquish discretionary power over citizenship verification, especially where it intersects with national security or migration control.

Similarly, some ethnic communities may view reforms as a threat to their perceived dominance over land or as a dilution of national identity. These fears, however unfounded, must be addressed through public education, civic dialogue, and inclusive policymaking that clarifies the distinction between historical migration, legal citizenship, and contemporary nationality. If Uganda is to avoid repeating its most exclusionary chapters, it must commit to constitutionalism in both letter and spirit. This includes legislative clarity, equitable access to documentation, and legal remedies for victims of discrimination.

Beyond institutional change, there lies an opportunity for national healing. Through dialogue, collaboration, and community engagement, the state and its citizens can begin to rebuild trust and affirm that belonging is not a privilege for

the few but a right for all. In doing so, Uganda can chart a more inclusive and just future, one where identity is not a barrier, but a bridge to shared citizenship and dignity.

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ECOCIDE IN UGANDA: ASSESSING THE LEGAL FRAMEWORK AND PATHWAYS FOR ENVIRONMENTAL PROTECTION

L.K. Ninsiima* & C.S. Obita**

Abstract

The paper investigates the concept of ecocide, highlighting its potential as a legal tool for addressing serious environmental damage in Uganda. The term has historical significance dating back to the Vietnam War but has recently gained recognition in global discussions regarding environmental accountability. Despite constitutional guarantees for a clean and healthy environment, Uganda's current legal framework falls short in effectively prosecuting large-scale environmental harms. The authors advocate for the establishment of ecocide legislation to enhance legal protection for communities affected by ecological degradation, particularly indigenous populations. By aligning national laws with international human rights standards, the proposed framework aims to prevent environmental destruction and promote sustainable development, reinforcing the state's responsibility to uphold environmental rights.

"The environment is where we all meet; where we all have a mutual interest; it is the one thing all of us share. It is not only a mirror of ourselves but a focusing lens on what we can become."[1]

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1 Lady Bird Johnson, A Speech at Yale University, White House Diary (October 9, 1967).

1.0 INTRODUCTION

The destruction of ecosystems and the depletion of natural resources have emerged as growing global concerns. Within this context, the concept of ecocide has gained recognition as a proposed legal framework for holding individuals and entities accountable for serious environmental destruction.[2]

Despite the fact that the concept of ecocide is unknown and strange to many, it has actually been around for a long time and has been present in political discourses, and writings, irrespective of the field they cover. The act of ecocide may only have gotten traction in recent times but some authors have even referred to it as old as recorded history itself.[3] Lytton refers to Herodotus, the world's first historian, who narrates how, as far back as 512 B.C. during the Persian and Scythian War, the Scythians implemented a scorched earth policy (the act of an army destroying everything in an area such as food, buildings, equipment that could be useful to an enemy) that led to a long-term famine.[4]

The term 'ecocide' combines 'eco' for 'ecosystem' (rooted in '*oikos*' for 'home') and '*cide*' for 'killing or cutting down'.[5] The term was coined in the early 1970s[6] during the horrors of the Vietnam War. The word 'ecocide' was first recorded at the Conference on War and National Responsibility that took place in Washington in 1970.[7] At this Conference, the American Biologist and Professor Arthur Galston called for an international agreement to prohibit ecocide[8] after the U.S.A. had

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2 Melissa Gordon, 'How a Global Ecocide Law Could Hold Polluters to Account' 19 February 2021 Time <https://time.com/5940759/ecocide-law-environment-destruction-icc/> [Accessed on December 28, 2024].

3 Christopher H. Lytton, Environmental Human Rights: Emerging Trends in International Law and Ecocide (2000) 81.

4 Ibid.

5 Mehta, Jojo; Jackson, Julia, 'To stop climate disaster, make ecocide an international crime. It's the only way' Guardian 24 February 2021 <https://www.theguardian.com/> [Accessed 09/07/2023.

6 Zierler, D., 2011. *The invention of ecocide: Agent Orange, Vietnam, and the scientists who changed the way we think about the environment.* University of Georgia Press.

7 History – Ecocide Law, <https://ecocidelaw.com/history/#> [Accessed on January 27, 2025].

8 Ibid.

devastated the environment in Vietnam through the use of Agent Orange during the Vietnam War. The use of Agent Orange had devastating effects on not only the Vietnamese but also the servicemen who served during the war.

These effects included abnormally high incidences of miscarriages, skin diseases, cancers, birth defects, and congenital malformations (often extreme and grotesque) dating from the 1970s.[9] Then in 1972, the Prime Minister of Sweden, Olof Palme, in his opening speech at the UN Stockholm Conference on the Human Environment, explicitly referred to the Vietnam War as an 'outrage sometimes referred to as ecocide'.[10]

Since it was first used to describe the environmental impacts of Agent Orange[11] in the Vietnam War, the term "ecocide" has been applied to a variety of environmental harms perpetrated around the world. These have ranged from acts of war, such as Russia's attacks on Ukrainian nuclear facilities in the past months,[12] to acts of business especially the mining and fossil fuel related extractive economies. Examples include the catastrophic Ok Tedi mine pollution in Papua New Guinea,[13] and the conceptual focus of mock trials involving tar sands and oil spills.[14]

Some have also applied the term to the ordinary acts that form part of our everyday lives, such as the release of micro plastics into the oceans, the emission

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9 Agent Orange, <https://www.britannica.com/science/Agent-Orange> [Accessed on January 27, 2025].

10 Koffi Dogbevi, Ecocide Law and Monsanto Past and Present Activities; 4.

11 Agent Orange <https://www.history.com/topics/vietnam-war/agent-orange-1> [Accessed on January 27, 2025].

12 Daniel Hryhorczuk, Barry S. Levy, Mykola Prodanchuk, Oleksandr Kravchuk, Nataliia Bubalo, Alex Hryhorczuk, and Timothy B. Erickson, The environmental health impacts of Russia's war on Ukraine (Journal of Occupational Medicine and Toxicology 2024) 19:1, 10.

13 Bob, Burton, BHP admits Ok Tedi mine is environmental disaster (August 13, 1999). Available at <http://atimes.com/oceania/AH13Ah01.html> [Accessed on January 27, 2025].

14 The Guardian, Test trial convicts fossil fuel bosses of 'ecocide', <https://www.theguardian.com/environment/damian-carrington-blog/2011/sep/29/ecocide-oil-criminal-court> [Accessed on January 27, 2025].

of greenhouse gases, and the disproportionate use of pesticides.[15]

These historical references and modern manifestations of environmental devastation underscore the urgency of recognising ecocide as a distinct and punishable crime. It is against this backdrop that the definition and legal framing of ecocide must now be examined.

1.1 DEFINITION OF ECOCIDE

Before I get into the definitions of ecocide by different scholars, ecocide is broadly defined as any unlawful act that causes widespread, long term and severe destruction of the environment. From the time the term ecocide was coined, there have been repeated efforts to provide a concise definition for it. Different definitions have been provided, definitions dependent on the era of the commentators with different mens rea requirements.

The legal scholar Richard Falk provided one of the earliest definitions for ecocide in 1973,[16] as an act committed during wartime, referring to environmental damage as a result of war actions, such as the use of weapons of mass destruction, the military use of defoliants and the bulldozing of forests or crops for military purposes.[17] This view is also mirrored in the definition of ecocide adopted by the author Franz Broswimmer in 2002[18] where he defined and analysed ecocide as a perpetual and auto-destructive war against nature.

In 1993, Lynn Berat provided a definition that made no distinction between acts committed during wartime or peacetime and rather focused on the impact on the species in general. He also drew a close connection between genocide and ecocide. He used the term 'genocide' to refer to the intentional destruction, in whole or in

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15 Rachel Killean, 'The Benefits, Challenges, and Limitations of Criminalizing Ecocide' (IPI Global Observatory, March 30, 2022) <https://theglobalobservatory.org/> [Accessed 20 July, 2023].

16 Curcio Lamas, Ecocide: Addressing the Large-scale Impairment of the Environment and Human Rights.

17 Richard Falk, Revitalising International Law (Ames, Iowa University Press 1989) 167.

18 Franz Broswimmer, Ecocide: A Short History of the Mass Extinction of Species (Pluto Press 2002) 109.

part, of any portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.[19]

Then in 1996, Mark Allan Gray referred to ecocide as causing or permitting harm to the natural environment on a massive scale, reflecting a breach of duty of care owed to humanity in general.[20] His definition focused more on the effects on humanity than on the other species in general. According to Gray, ecocide has three key characteristics which are:

> *(1) the act must have caused serious and extensive or long-lasting damage,*
>
> *(2) the damage must have had an international dimension, and*
>
> *(3) the act must have been wasteful (inflicting higher costs on society than benefits).*[21]

Around 2009, Scottish barrister and environmental lobbyist, Polly Higgins started to campaign for the inclusion of ecocide in the Rome Statute of the ICC[22] so that it would become an international crime. She provided a definition of ecocide as the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.[23] Polly Higgins goes ahead to identify two types of ecocide:

> *(1) human-caused ecocide, and*

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19 Lynn Berat, Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law (1993) 11 Boston University Law Journal.

20 Mark Allan Gray, The International Crime of Ecocide (1995) 26 California eastern International Law Journal 215.

21 Prisca Merz, Valerie Cabanes and Emilie Gaillard, Ending Ecocide – the next necessary step in international law 6.

22 Monbiot, George (28 March 2019). The Destruction of the Earth is a Crime. It should be prosecuted. Retrieved from the Guardian on 10 July 2023.

23 Polly Higgins, Eradicating Ecocide (2nd edn, Shepheard-Walwyn 2015) 63.

(2) naturally occurring ecocide.[24]

Human caused ecocide refers to the destruction of the environment caused by human activities such as poor disposal of industrial wastes, while nature-based ecocide refers to environmental harm caused by events such as floods and tsunamis. The United Nations Environment Programme (UNEP) has found that all internal conflicts have been linked to the exploitation of natural resources.[25] Higgins not only regards ecocide as a crime against the environment, but also a crime against humanity, nature, future generations and peace.[26]

The definitions by Mark Gray and Polly Higgins propose ecocide as a crime of strict liability, which does not require intent but is aimed at preventing corporations from harming the environment in the process of carrying on their business(es). It is also defined as committing any unlawful or detrimental act that one is well-aware will cause severe, irreversible long-term damage to the environment. Ecocide has a negative impact on the environment by causing mass destruction to our delicate ecosystems that are imperative to sustain all types of life on Earth.[27]

Until recently, despite all these definitions above, Ecocide had no universally accepted definition. However, in 2021, legal experts from across the globe drew up a 'historic' definition of ecocide, intended to be adopted by the ICC to prosecute the most egregious offences against the environment.[28]

The Stop Ecocide Foundation convened an Independent Expert Panel for the Legal Definition of Ecocide which was tasked with the duty to draft a definition of "Ecocide" which could sit alongside Genocide, Crimes Against Humanity, War

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24 Polly Higgins, Ecocide, the 5th Crime Against Peace (TEDx Talks, 2012) <https://www.youtube.com/watch?v=8EuxTzQ65H4> [Accessed 10 July 2023].

25 United Nations, <https://www.un.org/en/events/environmentconflictday/> [Accessed 10 July 2023].

26 Higgins, Ecocide the 5th Crime Against Peace.

27 Ecocide: Definition and Examples <https://greenly.earth/> [Accessed 10 July 2023].

28 Legal experts worldwide draw up 'historic' definition of ecocide <https://www.theguardian.com/environment/> [Accessed 10 July 2023].

Crimes and the Crime of Aggression in the Rome Statute of the International Criminal Court. The Panel defines ecocide as the unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.[29]

The Panel hopes that this definition will be considered by the ICC, leading to an amendment of the Rome Statute of the Court. The Statute addresses crimes that are deemed to be of international interest and relevance, and the time has come to extend protections for serious environmental harm, already regarded to be a matter of international concern.[30]

Given the fact that for all this time that ecocide has been around but there is still an absence of an internationally agreed definition, the increasing attempts to define the term and its recurring appearance in academic and legal discourse, as well as in the media, display the laxity which is present in ensuring that the environment is adequately protected.

Currently, Ugandan law does not explicitly define or recognise ecocide as a distinct offence. However, the legal framework contains provisions related to environmental offences, such as pollution, illegal wildlife trade and habitat destruction, thereby addressing aspects of environmental protection.

The fact that Uganda is one of the few countries in Africa that has explicitly constitutionalised the right to a clean and healthy environment shows the importance with which Uganda regards protecting the environment.[31] Uganda is

29 Independent Expert Panel for the Legal Definition of Ecocide Commentary and Core Text (June 2021) 5.

30 Birnie, Boyle, and Redgwell, International Law and the Environment (OUP, 3rd edition, 2009); Sands and Peel, Principles of International Environmental Law (CUP, 4th edition, 2018).

31 1995 Constitution of Uganda, Article 39.

a bio-diverse country and Winston Churchill referred to it as 'The Pearl of Africa' for its beauty, abundant wildlife and diversity.[32]

Uganda may lack a concise definition of ecocide but the various laws present in the country that are meant to combat environmental degradation and protect the environment, show an understanding of the horrors of environmental harm and the need to hold those who hold the environment accountable. However, while Uganda has environmental protection laws in place, these laws have proven inadequate in addressing environmental harm.

1.2 ECOCIDE AS A THREAT TO HUMAN POPULATIONS AND CULTURAL SURVIVAL

Ecocide can threaten human populations, especially indigenous people, and may result in cultural genocide.[33] The crime of genocide is already consolidated under Article 6 of the Rome Statute of the International Criminal Court (ICC) and despite the fact that ecocide is not present in the Statute, international environmental law is well established. Studies show that ecocide can be considered a method of genocide when the destruction of the ecology and geography of areas fundamentally threatens the existence and culture of a social group.[34]

Raphael Lemkin, the man who coined the term 'genocide', had a much wider perception of genocide than the one outlined in the 1948 Genocide Convention. For Lemkin, genocide included what he referred to as the cultural dimension, referring to 'the destruction of a nation's or ethnic group's way of life'. Lemkin tried to integrate this dimension into the Genocide Convention, but the proposal was rejected.[35]

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32 Stephen Oola, Uganda at 50: unfinished business. Available at <https://www.peaceinsight.org/en/articles/uganda-at-50-unfinished-business> [Accessed 10 July 2023].

33 Crook, & Short, Marx, Lemkin and the genocide-ecocide nexus.

34 Camila Misko Moribe, Flávio de Leão Bastos Pereira, Nathalia Penha Cardoso de França, Ecocide: A New Challenge for the International Criminal Law and for Humanity (Journal of International Criminal Law 2023), 29.

35 Polly Higgins, Damien Short and Nigel South, Protecting the planet: A proposal for a law of ecocide. (2013) 59 Crime, Law and Social Charge 251, 258.

In 1973, the idea of using environmental destruction as a method of cultural genocide is what the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to explore further,[36] with the conclusion being that it would constitute an exaggerated extension of the crime of genocide to include it.

The concept of ecocide resurfaced in 1985 with the publication of the Whitaker Report (authored by Benjamin Whitaker)[37] which was commissioned to review the scope and effectiveness of the Genocide Convention. The report revisited earlier debates on whether ecocide should be included within its framework. Notably, the report reflected growing support for the inclusion of ecocide, alongside cultural genocide, as an extension of the definition of genocide.

Members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed broadening the Convention's scope to recognise and address large-scale environmental destruction as a crime under international law. The final report, however, merely recommended further analysis.

In 1987, the International Law Commission (ILC) was instructed to consider the possibility of establishing an international crime on extensive environmental destruction. The ILC was established in 1947 and has the mandate to promote the progressive development of international law and its codification.[38] From the beginning of its mandate, the ILC had been charged by the United Nations General Assembly to develop principles of international law recognised in the charter of the Nuremberg Tribunal and in the judgement of the Tribunal, and to prepare the draft code of offences against the peace and security of mankind.[39]

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36 Nicodeme Ruhashyankiko, Study of the Question of the Prevention and Punishment of the Crime of Genocide (Sub-Commission on Prevention of Discrimination and Protection of Minorities, 4 July 1978) E/CN.4/Sub.2/416.

37 Benjamin Whitaker, Whitaker Report (2 July 1985) E/CN.4/Sub.2/1985/6.

38 Statute of the International Law Commission (adopted 21 November) Article 1.

39 UNGA Res 177(II) (21 November 1947).

Around the late 1980s, the ILC began to considerably engage with the prospect of including environmental destruction as one of the international crimes to be included in the Draft Code of Offences against the Peace and Security of Mankind.[40] Three options were considered on how to include such a crime and these were:

(1) as a stand-alone crime,

(2) as part of crimes against humanity or,

(3) as part of war crimes.

The decision was that the final version of the Code contained 12 crimes, including Article 26, which provided for the conviction and sentencing of an individual who causes damage to the natural environment.[41]

However, because the environmental crime was highly contested, the UN set up a Working Group to further discuss its inclusion in the Code.[42] The final decision was to propose only the inclusion of wilful and severe damage to the environment as a war crime.[43] The final text of the Code was adopted in 1996, laying the basis for the 1998 Rome Statute, which established the ICC.[44] The only trace of international environmental crimes is to be found under Article 8(2)(b)(iv) of the Rome Statute where it is classified under war crimes.

Ecocide may describe a wide range of acts and may occur with or without intent.[45] There is no international law against ecocide that applies in peacetime; Article 8(2)(b)(iv) of the Rome Statute outlaws ecocide during wartime if it is clearly excessive in relation to expected military advantage.

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40 UN, The Work of the International Law Commission (7th edn, New York 2007).

41 ILC, Report of the International Law Commission on the work of its 43rd session (29 April-19 July 1991) UN Doc A/46/10, 107).

42 UN, The Work of the International Law Commission, 105.

43 Ibid.

44 Andrea Curcio Lamas, Ecocide: Addressing the Large-scale Impairment of the Environment and Human Rights.

45 Eichler, Lauren J. (2020) 'Ecocide is Genocide: Decolonising the Definition of Genocide,' Genocide Studies and Prevention: An International Journal.

Ecocide and its possibilities have been subsequently explored by green criminologists and legal scholars.[46] Arguments for and against including ecocide as the fifth crime against peace under the Rome Statute have been raised, but a proposal to do so failed in 2010.[47]

Stop Ecocide International[48] has continued efforts to ensure ecocide is included as the fifth international crime and even proposed a definition for the international crime of ecocide in 2021.[49] The movement has gained a lot of traction with several Heads of States from Vanuatu, Tuvalu, Tonga, Fiji, Niue, and the Solomon Islands, as well as the EU Parliament[50] endorsing the inclusion of ecocide into international criminal law.

Thirteen countries have codified ecocide as crime within their borders during peacetime. These countries are Vietnam, Uzbekistan, Tajikistan, Russia, Moldovia, Kyrgyzstan, Kazakhstan, Ecuador, Belarus, Ukraine, Armenia, Georgia, and most recently France in 2021.[51] Those countries followed the wording of Article 26 of the International Law Commission (ILC) Draft which referred to intentionally causing "widespread, long-term and severe damage to the natural environment" within the content of war. However, it was never included in the final draft.[52]

Ecocide is the root cause of the climate emergency that the world including Uganda faces, and is a major contributor to climate change. This is such an important issue because ecocide, and its devastating impact on climate have been

46 R.A. Falk, 'Environmental Warfare and Ecocide: Facts, Appraisal and Proposals', 9.
47 Ibid.
48 A Body driving the global conversation on recognition of ecocide as an international crime and its potential for deterring destructive practices, protecting vital ecosystems and catalyzing positive system changes.
49 June 2021: historic moment as Independent Expert Panel launches definition of ecocide <https://www.stopecocide,earth/legal-definition> [Accessed 10 July 2023].
50 European Parliament proposes including ecocide in EU Law. Stop Ecocide International.
51 Alexej Ovchinnikov, On the path to international recognition of ecocide (September 4, 2023) <https://uwecworkgroup.info/on-the-path-to-international-recognition-of-ecocide> [Accessed 10 July 2023].
52 Higgins, Polly & Short, & South, Protecting the planet: a proposal for a law of ecocide. Crime, Law Social Change (2013) Vol 59, p.261.

perpetuated for decades by corporations, as well as political leaders who have been reluctant to take real action. The major examples of ecocide are oil spills, chemical and plastic pollution, deforestation, deep-sea mining all of which contribute to climate change and exacerbate the consequences of global warming.[53]

This paper aims to present the urgent need for introducing ecocide laws in Uganda alongside the existing environmental protection legislation. While Uganda has made strides in environmental governance, there have been no formal legislative attempts to define or criminalise ecocide as a standalone offence.

The current legal regime does not adequately address large-scale environmental destruction, nor does it impose strong criminal liability on perpetrators. Given the rising ecological threats in the country, the absence of ecocide-specific legislation underscores the need for a more comprehensive legal framework that can deter, prevent, and penalise severe environmental harm.

2.0 CONTEXTUALISING "ECOCIDE" IN UGANDA

Uganda, often referred to as the "Pearl of Africa," is endowed with a wealth of ecological assets including expansive freshwater systems, tropical forests, fertile soils, and a wide variety of flora and fauna.[54] However, these natural endowments are under threat from activities such as deforestation, wetland degradation, unregulated urbanisation, and fossil fuel exploration. The scale and persistence of environmental destruction raise critical questions about accountability and legal recourse.

In this context, the concept of ecocide defined as the unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and

53 Stop Ecocide International, What is ecocide and could it become an international crime like genocide?' <https://www.stopecocide.earth/what-is-ecocide> [Accessed 10 July 2023].

54 Uganda Vision 2040, <https://library.health.go.ug/> [Accessed 30 July 2025].

either widespread or long-term damage to the environment[55] offers a compelling lens through which Uganda's environmental crisis can be analysed.

2.1 HISTORICAL CONTEXT OF ENVIRONMENTAL DEGRADATION IN UGANDA

Uganda's environmental degradation is deeply rooted in historical patterns of land use and resource exploitation. During the colonial period, British administrators prioritized export-oriented agriculture, resulting in the clearing of forests for tea, coffee, and cotton plantations.[56] This model of extractive development laid the foundation for a post-independence trajectory where economic growth was often pursued at the expense of ecological sustainability. The rapid growth in population, projected to reach over 63 million by 2030, has only intensified these pressures.[57]

Forest cover has declined from 24% in 1990 to approximately 12.4% by 2015, largely due to agricultural encroachment, illegal logging, and charcoal production.[58] Wetlands, which once covered 15% of Uganda's territory, have shrunk by over 30% owing to urban development and rice cultivation.[59] In Kampala and Eastern Uganda, wetlands are routinely drained for infrastructure and real estate projects, disrupting flood control systems and water purification functions.

The discovery of oil in 2006 added a new layer of environmental risk, as mega-projects like the East African Crude Oil Pipeline (EACOP) threaten to devastate critical habitats and increase greenhouse gas emissions. These patterns of

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55 Minkova, Liana Georgieva. 2021. "The Fifth International Crime: Reflections on the Definition of 'Ecocide.'" *Journal of Genocide Research* 25 (1): 62–83.

56 Uganda Ministry of Lands, Housing and Urban Development, 'The National Land use policy, Final draft' <https://mlhud.go.ug/. [Accessed 30 July 2025].

57 Nangayi Guyson, 'How is Uganda prepared to manage fast growing population?' <https://www.developmentaid.org/> [Accessed 30 July 2025].

58 Ministry of Water and Environment, State of Uganda's Forestry 2015, <https://www.nfa.go.ug/images/reports/forestryreport.pdf> [Accessed 30 July 2025].

59 Ocaido, M. P. Report: Uganda's Wetlands face Depletion by 2040 <https://kampalapost.com/> [Accessed 2nd July, 2025].

destruction illustrate a systemic failure to balance development with ecological integrity.

2.2 SOCIAL AND CULTURAL DIMENSIONS

Environmental degradation in Uganda is not merely a matter of lost biodiversity; it constitutes a profound socio-economic and cultural crisis. Over 70% of the Ugandan population depends directly on agriculture and natural resources for their livelihoods.[60] Climate change intensifies these vulnerabilities. Agricultural yields, particularly for coffee a major export could decline by 50–75% by 2050 due to changing weather patterns.[61]

Culturally, many Ugandan communities hold deep spiritual and ancestral connections to the environment.[62] Forests, wetlands, and rivers are often regarded as sacred sites or inhabited by ancestral spirits. Among the Baganda and Banyoro, for instance, natural elements such as the "Nabugabo" lake system or sacred trees are integral to rituals and cosmology.[63] Destruction of these sites amounts not just to ecological loss but also cultural erasure. Indigenous peoples, such as the Batwa, face cultural extinction as deforestation eliminates their spiritual and material connection to the forest.[64]

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60 Telleria Juarez, Roberto Ariel, and Maxmillian Tusiime."Characterising Agricultural Holdings in Uganda: Inputs to Improving Policy Formulation." *Journal of Development and Agricultural Economics* 15, no. 1 (January–March 2023): 11–25.

61 Uganda's National Climate Change Policy (2015) <https://mwe.go.ug/library/national-climate-change-policy-0> [Accessed 2nd July, 2025].

62 African Development Bank Group, Independent Review Mechanism, *Lessons on Cultural and Spiritual in Uganda* (Abidjan: African Development Bank Group, 2021), <https://irm.afdb.org/>[Accessed 2nd July, 2025].

63 Uganda Society, The Uganda Journal: The Journal of the Uganda Society, vol. 30, pt. 1 (1966), <https://ufdcimages.uflib.ufl.edu/> [Accessed 2nd July, 2025].

64 Oromia Forest and Wildlife Enterprise (OFWE), *Indigenous Peoples Planning Framework* (Uganda: National Forestry Authority, n.d.) <https://www.nfa.go.ug/> [Accessed 2nd July, 2025].

3.0 THE LEGAL ARCHITECTURE OF ENVIRONMENTAL PROTECTION: INTERNATIONAL AND DOMESTIC PERSPECTIVES

International environmental law is a branch of public international law - a body of law created by States for States to govern problems that arise between States- concerned with the attempt to control pollution and the depletion of natural resources within a framework of sustainable development.

Multilateral environmental agreements are a subset of the international conventions acknowledged by Article 38 (1) of the Statute of the International Court of Justice (ICJ) as a source of international law with a specific focus on environmental matters.[65] International environmental law covers topics such as biodiversity, climate change, ozone depletion, toxic and hazardous substances, desertification, marine resources, and the quality of air, land and water.[66]

3.1 THE INTERNATIONAL INSTRUMENTS

Uganda is party to various international environmental agreements and conventions that aim to protect the environment and combat ecological degradation.

3.1.1 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1966

The ICCPR, ratified by Uganda in 1995,[67] is traditionally known for its focus on civil and political rights, but its provisions have been increasingly interpreted to include environmental dimensions, particularly the right to life under Article 6.

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65 Hanoi, 'International Environmental Law- Multilateral Environmental Agreements' (International Publishing House May 2017), p.11.

66 David Hunter, International Environmental Law International treaties and principles protect the environment and guard against climate change (January 05, 2021). <https://www.americanbar.org/> [Accessed on July 10 2023].

67 National Coalition of Human Rights Defenders-Uganda, Civil Society Report on the Implementation of the ICCPR (Contribution to the List of Issues) Submitted for the adoption of the List of Issues on the Second Periodic Report of Uganda at the 135th Session of the Human Rights Committee May 2022, 1.

The Human Rights Committee (HRC) has stated that environmental degradation, climate change, and non-sustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life,[68] all of which may result in premature death or undermine the right to live with dignity. Obligations of State parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of State parties to respect and ensure the right to life and thus reinforce their relevant obligations under international environmental law.[69]

This reading of Article 6 supports the criminalisation of ecocide, especially where large-scale environmental destruction causes deaths, chronic illness, or loss of livelihoods. Uganda has experienced flooding, prolonged droughts, landslides, and river pollution, which have directly led to deaths or forced displacement, particularly in Karamoja and Bududa regions.[70] These devastations, often caused or exacerbated by government inaction or corporate abuse, could fall within the scope of constructive violations of the right to life especially because of the duty of State Parties to take due note of the precautionary principle.

Despite no uniform understanding of its meaning, the definition contained in the 1992 Rio Declaration is widely recognised by States, and provides practical guidance in the development and application of international law. It states:

> *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*[71]

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68 General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.

69 Ibid.

70 Uganda: Floods and Landslides - Oct 2019, <https://reliefweb.int/disaster/> [Accessed on 02 June 2025].

71 Principle 15.

This principle has guided States in adopting anticipatory measures in environmental protection even in the face of scientific uncertainty. It underscores a proactive rather than reactive approach, requiring States to act when there is a credible risk to the environment or human health, even if the causal links are not fully established scientifically.

A practical application of this principle can be seen in *Tsama William and Others v. Uganda's Attorney General and Others.*[72] In that case, the applicants (victims of recurring landslides in Bududa district, Uganda) filed a suit against the Attorney General (representing the Government), the National Environment Management Authority (NEMA) and the Bududa Local Government Council alleging that the respondents have failed to put in place an effective machinery against landslides in Bududa district, and that the respondents' acts and/or omissions have led to the violation of applicants' fundamental rights.

The applicants argue that Bududa district, in the Mt Elgon region in Eastern Uganda, is an area prone to landslides, and according to several government documents set out in supporting affidavits, the respondents are fully knowledgeable of the recurring landslide problem in the area which has been exacerbated by climate change. The applicants argue that the respondents have positive obligations under national and international climate change and disaster management law to put in place effective machinery for dealing with landslides in Bududa district. That in not doing so, the Respondent failed in its duty and ought to be held accountable.

Unfortunately, the court is yet to issue out a decision on the matter, but the case exemplifies the relevance of the precautionary principle, as it questions the State's failure to take cost-effective and preventative action to avert serious and foreseeable environmental harm, even in the absence of complete scientific certainty.

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72 Miscellaneous Cause No. 024 of 2020.

Recognising ecocide as a national crime would thus align Uganda's domestic law with its ICCPR obligations, especially in prosecuting or preventing environmentally catastrophic actions that threaten human survival.

3.1.2 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR) 1966

The ICESCR, to which Uganda acceded in 1987,[73] obliges State parties to respect, protect, and fulfil rights linked to the environment, particularly mandating the improvement of "all aspects of environmental and industrial hygiene."[74]

The Committee on Economic, Social and Cultural Rights (CESCR), the body tasked with interpreting the Covenant in its General Comment No. 14 (2000), defragmented the right to a clean and healthy environment to refer to;

> *preventative measures... whose requirement is to ensure an adequate supply of safe and portable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health...*[75]

It explicitly affirms that a degraded environment can interfere with the enjoyment of the right to health. It notes that States must ensure access to safe and portable water, adequate sanitation, and a safe environment,[76] elements intrinsically tied to preventing ecocide. The ICESCR clarifies that State inaction in regulating pollution, toxic waste, and environmental hazards constitutes a violation of Article 12.

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73 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID> [Accessed June 04 2025].

74 Article 12(2)(b).

75 ICESCR, General Comment No. 14, the Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4 (2000), 15.

76 Ibid, para.4, pp. 2.

The ICESCR further reinforces these duties in General Comment No. 15,[77] which recognises the right to water as essential to the realization of other rights under the Covenant, particularly Articles 11 and 12. It states that the right encompasses sufficient, safe, and acceptable water for personal and domestic use.[78] It emphasises the duty of States to ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes,[79] and in the matter of combatting disease and malnutrition to take into consideration, 'the damages and risks of environmental pollution'.[80]

The Special Rapporteur on the Prevention of Discrimination and Protection of Minorities demystifies some environmental-related rights such as;

> *(a) The right to freedom from pollution, environmental degradation and activities which threaten life, health or livelihood*
>
> *(b) Protection and preservation of the air, soil and water, flora and fauna; and Healthy food and water; a safe and healthy working environment.*[81]

Uganda is thus urged under international law to enact stringent legal responses, including the introduction of ecocide as a crime, to align with its ICESCR commitments and mitigate irreparable environmental harm.

The interpretive authority of the ICESCR combined with evolving international jurisprudence, increasingly recognises that environmental protection is not merely a policy preference but a legal and justiciable obligation. The right to a clean, healthy, and sustainable environment is now a universally acknowledged human right,[82] reinforcing obligations under instruments like the ICESCR. In this

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77 General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11).
78 Ibid, 5.
79 Ibid, 3.
80 Article 24 (2) c.
81 ICESCR, General Comment No. 15, The Right to Water, 8 and 21.
82 UN Human Rights Council Resolution 48/13 (2021).

regard, acts of ecocide violate not only environmental norms but core socio-economic rights guaranteed under the Covenant.

3.1.3 THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989

The Convention which was ratified by Uganda in 1990 imposes a legally binding obligation on the State to ensure that children enjoy a standard of living conducive to their physical, mental, spiritual, moral, and social development.[83] This includes a duty to protect children from environmental degradation and the long-term consequences of ecological destruction, which can be argued as falling within the scope of potential ecocide. States must *"pursue full implementation of the right of the child to the enjoyment of the highest attainable standard of health"* and, specifically, *"take appropriate measures to combat disease and malnutrition… taking into consideration the dangers and risks of environmental pollution."*[84]

States are obliged to pursue the full implementation of the right of the child to the enjoyment of the highest attainable standard of health, including by taking appropriate measures to combat disease and malnutrition, while taking into account the dangers and risks posed by environmental pollution. This obligation aligns with the conceptual underpinnings of ecocide, particularly as defined by the Independent Expert Panel for the Legal Definition of Ecocide, which includes severe and either widespread or long-term environmental harm resulting from unlawful or wanton acts.[85]

Similarly, the UN Committee on the Rights of the Child has affirmed that States must act to mitigate the specific threats that environmental pollution poses to

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83 UHRC assesses Uganda's legislation against the UN Convention on the Rights of the Child commitments, to make Uganda a better place for children, <https://www.unicef.org/> [Accessed June 04 2025].

84 Article 24(2)(c) of the CRC.

85 Independent Expert Panel for the Legal Definition of Ecocide Commentary and Core Text (June 2021) 5.

children's health in all settings.[86] In its most recent interpretive guidance, the Committee emphasised that a clean, healthy and sustainable environment is not only a human right in itself but also indispensable for the realisation of a broad spectrum of children's rights.[87] The convergence of these standards reflects a growing recognition that environmental degradation is not merely an ecological concern, but a fundamental human rights issue one that has particularly grave implications for children.

3.1.4 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979

The CEDAW, ratified by Uganda in 1985, is a core human rights treaty that addresses gender-based discrimination.[88] While it does not explicitly mention the environment, recent interpretations, including General Recommendation on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change, recognise the gendered impact of environmental degradation.[89]

Women, especially in rural Uganda, are disproportionately affected by loss of biodiversity, deforestation, and water scarcity.[90] For example, women and girls, who are responsible for managing resources and running households, are particularly vulnerable to climate shocks. Women and girls bear the brunt of providing drinking, cooking, and sanitation water for their families,[91] and as a result, environmental destruction directly undermines their economic and social

86 General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24).

87 General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change.

88 Committee on the Elimination of Discrimination against Women Combined eighth and ninth periodic reports submitted by Uganda under article 18 of the Convention, due in 2018.

89 General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change, 16.

90 Examining the intersectionality of climate change and gender equality in Uganda through the lens of feminist organizations <https://memprow.org/blog6.html#:~:text> [Accessed June 04 2025].

91 Unpacking the care society: Caring for people and the planet (28 November 2023), <https://www.unwomen.org/> [Accessed June 04 2025].

rights. Failure to regulate harmful corporate activity or prevent illegal land degradation can amount to gender-based discrimination. Thus, recognising ecocide as a domestic crime could be a strategic tool for promoting gender equality.

The CEDAW Committee has affirmed that States must adopt gender-responsive environmental laws and policies,[92] which would logically include legislation that criminalises large-scale environmental harm. Incorporating ecocide laws would not only address environmental destruction but also fulfill Uganda's obligations under CEDAW to protect women's rights to health, livelihood, and participation in decision-making.

3.1.5 THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE 1992[93]

The UNFCCC, adopted in 1992 and ratified by Uganda on 8 September 1993, is the cornerstone of the international climate regime. It obliges State parties to combat climate change and its adverse effects through sustainable development, mitigation, adaptation, and public awareness strategies. Though the UNFCCC does not explicitly mention ecocide, its provisions especially when read alongside subsequent instruments like the Paris Agreement (2015), establish a legal foundation upon which State accountability for large-scale environmental damage can be framed.

States are required to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities.[94] This principle resonates with

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92 Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination against Women Report No. 4 (December 2013), 29.

93 UN Treaties <https://treaties.un.org/doc/source/recenttexts/unfccc_eng.pdf> [Accessed July 23 2023].

94 Article 3(1) of UNFCCC.

the preventive logic of ecocide law, which seeks to deter acts that cause severe, widespread, or long-term environmental damage.

Moreover, the UNFCCC compels all parties to formulate and implement national programs to mitigate climate change by addressing anthropogenic emissions.[95] Uganda's greenhouse gas emissions may be relatively low globally, but the country is experiencing severe consequences from climate change including floods, prolonged droughts, and landslides, phenomena that are worsened by domestic environmental mismanagement. The National Climate Change Policy of 2015 and the Climate Change Act Cap 182 represent Uganda's legislative efforts in line with Article 4. However, these laws lack provisions that criminalise acts amounting to ecocide.

3.1.6 THE 2015 PARIS AGREEMENT

The Paris Agreement represents the most ambitious global effort to combat climate change, emphasising the urgent need to limit global warming to well below 2°C above pre-industrial levels, with efforts to cap it at 1.5°C.[96] Uganda ratified the Agreement in 2016, committing to reduce greenhouse gas emissions and enhance resilience to climate impacts through its Nationally Determined Contributions (NDCs).[97] Central to the Agreement is the recognition that climate change and environmental degradation are intrinsically linked, thus requiring transformative action at national and international levels.

From an ecocide perspective, the Agreement's emphasis on reducing deforestation, protecting natural carbon sinks, and curbing harmful industrial activities directly aligns with the need to prevent large-scale environmental destruction.

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95 Article 4(1)(b).

96 The Paris Agreement. What is the Paris Agreement? <https://unfccc.int/> [Accessed June 04 2025].

97 Ministry of Water and Environment, Updated Nationally Determined Contribution (NDC) (September 2022).

In 2018, the Intergovernmental Panel on Climate Change (IPCC) highlighted the unprecedented scale of the challenge required to keep warming to 1.5°C. This underscores the catastrophic consequences of unchecked emissions and ecosystem destruction such as more intense heat waves, heavier rainfall and other weather extremes that further increase risks for human health and ecosystems.

In every region, people are dying from extreme heat. Climate-driven food and water insecurity is expected to increase with increased warming.[98] When the risks combine with other adverse events, such as pandemics or conflicts, they become even more difficult to manage. All these serve further to strengthen the argument that without robust legal mechanisms like ecocide laws, Uganda's climate commitments risk being undermined by on-going environmental harm.

3.1.7 THE KYOTO PROTOCOL 1997

The Kyoto Protocol, as the first binding international treaty mandating emission reductions, set important precedents for global climate governance. Although primarily targeting developed countries with binding targets, it recognised the role of developing nations like Uganda in climate action through flexible mechanisms and commitments to protect carbon sinks. Uganda's participation signalled its acknowledgment of the necessity to safeguard forests, wetlands, and other ecosystems that act as vital carbon reservoirs. The Protocol's provisions encourage State parties to formulate and implement sustainable development policies that integrate environmental protection.[99]

In light of ecocide, the continued degradation of Uganda's forests and water bodies contravenes the spirit and letter of these obligations, revealing gaps between international commitments and domestic enforcement. The Doha Amendment further extended these commitments,[100] emphasising transparency and

98 Urgent climate action can secure a liveable future for all, <https://www.ipcc.ch/> [Accessed June 04 2025].
99 Article 10.
100 European Parliament, Doha Amendment to the Kyoto Protocol (4 June 2015) 1.

adaptation, yet Uganda's struggle with balancing development projects and environmental conservation points to the need for stronger, clearer domestic laws that criminalise large-scale environmental damage. International cases such as *Urgenda Foundation v. Netherlands*[101] illustrate growing legal recognition that States may be held accountable for failing to meet climate and environmental protection duties, which bolsters the call for ecocide legislation as an enforcement tool in Uganda's climate governance framework.

3.1.8 THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD)[102]

The CBD, adopted at the Earth Summit in Rio de Janeiro in 1992, seeks to bring together agriculture, forestry, fishery, land use and nature conservation in new ways. Uganda signed and ratified the Convention on 12 June 1992 and 3 September 1993 respectively.[103]

The Convention obliges State parties to develop national strategies and action plans for the conservation and sustainable use of biological diversity,[104] while also requiring the establishment of protected areas and measures to rehabilitate and restore degraded ecosystems.[105] These obligations are crucial in addressing large-scale environmental damage, as they not only promote preservation but also require states to actively respond to biodiversity loss.

In relation to ecocide, the CBD offers a normative foundation for recognising the severity of ecological destruction as a crime. The CBD mandates parties to introduce procedures to assess and minimise the adverse environmental impacts of proposed projects that could significantly affect biodiversity.[106] The CBD's preventive and restorative provisions suggest that failing to regulate or prevent such destruction could be interpreted as a breach of international obligations.

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101 [2015] HAZA C/09/00456689.
102 <https://www.un.org/> [Accessed June 04 2025].
103 Uganda urged to use biodiversity for sustainable development <https://www/lied.org/> [Accessed on 06 November, 2023].
104 Article 6.
105 Article 8.
106 Article 14.

While the CBD does not expressly criminalise environmental destruction, it reinforces the argument for legal frameworks, both domestic and international, that would hold perpetrators accountable for ecocide.

Moreover, the CBD acknowledges the integral role of indigenous and local communities in conserving biodiversity, which calls for the respect and preservation of traditional knowledge and sustainable practices.[107] This aspect is particularly relevant for Uganda, where indigenous groups like the Batwa[108] and communities around protected areas depend directly on their natural environment for cultural and physical survival. Destructive environmental practices such as charcoal burning in Bugoma Forest[109] or wetland degradation in Lwera, threaten these communities, amounting to not only ecological harm but also social and cultural devastation.

3.1.9 THE 1972 STOCKHOLM DECLARATION

It declares that man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[110]

At the same time, it imposes on humanity a solemn responsibility to protect and improve the environment for present and future generations. This dual emphasis on rights and responsibilities underscores the foundational ethic of environmental stewardship. In the context of ecocide, the Stockholm Declaration sets a normative benchmark by affirming that massive environmental destruction violates both human dignity and intergenerational equity. For Uganda, this principle provides moral and legal grounding for introducing ecocide laws to

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107 Article 8(j).

108 Batwa People, <https://www.bwindiimpenetrablenationalpark.com/> [Accessed June 04 2025].

109 Activists decry threats, arrests over Bugoma forest protection campaign, <https://www.monitor.co.ug/> [Accessed June 04 2025].

110 Principle 1, Declaration of the UN Conference on the Human Environment held at Stockholm from 5 -16 June, 1972.

penalise actions that strip communities of the right to a safe and dignified environment.

3.1.10 THE 1992 RIO DECLARATION

Building on the Stockholm Declaration, the 1992 Rio Declaration on Environment and Development expanded the environmental agenda by emphasising the integration of environmental protection into development processes. It stresses human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature.[111]

Other key principles, such as Principle 15 (the precautionary approach) and Principle 16 (the polluter pays principle), encourage proactive measures to prevent environmental harm and ensure accountability. These principles are directly relevant to the legal framing of ecocide, as they shift the focus from remedial action to prevention and responsibility. Uganda, as a signatory to the Rio Declaration,[112] has incorporated aspects of sustainable development in policy, such as the National Environment Act Cap. 181. However, without a binding legal mechanism to hold individuals and corporations criminally liable for environmental destruction, these principles remain under-enforced.

3.1.11 THE SUSTAINABLE DEVELOPMENT GOALS (SDGs)

The SDGs also emphasise environmental sustainability.[113] Adopted in 2015 as part of the 2030 Agenda for Sustainable Development, they provide a comprehensive framework for achieving environmental, social, and economic sustainability. Uganda adopted the 2030 Agenda in 2015 and was among the first countries to prepare and present a Voluntary National Review (VNR) at the UN

111 Principle 1, Declaration of the UN Conference on the Environment and Development held in Rio de Janeiro from 3-14 June, 1992.

112 Uganda signed the Convention on 13th of June, 1992 and ratified it on 8th of September 1993.

113 The United Nations General Assembly in 2015 established 17 Sustainable Development Goals which aim to achieve a better and more sustainable future for all.

High-Level Political Forum in 2016.[114] The SDGs were fully integrated into Uganda's 30-year Vision 2040 and its rolling National Development Plans (NDPs). The third plan (NDP III) now aligns with over 90% of the SDG indicators, compared to 70% in earlier plans.[115] The SDGs are not binding but Uganda has taken them on seriously by even reporting on them.

Goals such as SDG 13 (Climate Action), SDG 14 (Life below Water), and SDG 15 (Life on Land) directly align with the objectives of preventing and punishing ecocidal activities. For example, SDG 15 calls on states to "halt biodiversity loss," "combat desertification," and sustainably manage forests. Uganda's natural endowments are under increasing threat from climate change and anthropogenic activities. Failure to safeguard these ecosystems not only undermines the SDGs but also constitutes acts of environmental harm that could reach the threshold of ecocide.

3.2 REGIONAL INSTRUMENTS

3.2.1 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR) 1981

The African Charter on Human and Peoples' Rights, to which Uganda is a party since 10th May 1986,[116] provides a regional human rights framework that has direct environmental implications. Notably, Article 24 of the Charter provides that: *"All peoples shall have the right to a general satisfactory environment favourable to their development."* This provision has been widely interpreted to create a collective right to a healthy environment, and its importance has been underlined by the African Commission on Human and Peoples' Rights. For example, in In *SERAC and another v Nigeria*, the African Commission noted while referring to the observation by Alexander Kiss, that: -

114 <https://sdgs.opm.go.ug> [Accessed June 04 2025].
115 Voluntary National Reviews 2024, <https://hlpf.un.org/countries/uganda/voluntary-national-reviews-2024> [Accessed June 04 2025].
116 Concluding Observations on the Combined 6th – 8th Periodic Report of the Republic of Uganda, 2013-2022 <https://achpr.au.int/> [Accessed June 04 2025].

> *"An environment degraded by pollution and defaced by the destruction of all beauty and variety is contrary to satisfactory living conditions and the development of personality as the breakdown of the fundamental ecological equilibriums is harmful to physical and moral health."*[117]

It thus held that the Nigerian government violated Article 24 by failing to protect the Ogoni people from severe environmental degradation caused by oil exploitation. The Commission emphasised that environmental rights are integral to the enjoyment of other rights such as health, housing, and life.

In Uganda's context, Article 24 of the Charter should be used as a legal foundation for introducing ecocide laws. The ACHPR imposes not just negative duties (not to harm the environment), but also positive duties on states to prevent environmental degradation and hold violators accountable. If ecocide were recognised as a domestic crime, Uganda would not only fulfill its duties under the Charter but also provide a mechanism for redress in line with regional human rights jurisprudence. The ACHPR's recognition of environmental rights as enforceable, even without a direct complaint mechanism in Uganda, can serve as a persuasive precedent for judicial activism or legislative reform.

3.3 UGANDA'S DOMESTIC LEGISLATIVE FRAMEWORK

3.3.1 CONSTITUTIONAL FOUNDATIONS OF ENVIRONMENTAL PROTECTION

The legal case for criminalising ecocide in Uganda finds a compelling foundation in the Constitution of the Republic of Uganda, 1995 specifically in National Objective XXVII and Article 39. These two provisions transform environmental protection from a discretionary policy aspiration into a binding constitutional imperative. Together, they create a dual framework of State obligation and citizen

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117 *Social and Economic Rights Action Center (SERAC) and Another v. Nigeria* (Communication No.155/965.

entitlement, offering normative and legal grounds for treating ecocide not just as a regulatory violation, but as a serious criminal offence.

To begin with, National Objective XXVII of the Constitution mandates the State to promote sustainable development and public awareness regarding the responsible management of natural resources. It explicitly requires that land, air, and water resources be utilised in a manner that balances present and future needs. This intergenerational concern reflects the precautionary principle, a core tenet in both environmental law and climate justice. Moreover, the directive compels the State to "take all possible measures" to prevent environmental degradation caused by pollution or other threats. While formulated as a directive principle, the wording "all possible measures" implies a duty of care, not a mere policy preference.

The importance of this duty is heightened by the fact that Objective XXVII of the Constitution is not limited to economic or administrative action but includes legal responsibility. The State is expected to take preventive, protective, and punitive measures to uphold environmental sustainability. In this context, a criminal law response to egregious environmental harm, especially where that harm is irreversible, systemic, or grossly negligent, is not only appropriate but constitutionally mandated. The gravity and permanence of ecocide fall well within the scope of conduct that should attract criminal sanction under a constitutional duty to "minimize damage and destruction."

Complementing the State's duty is Article 39, which establishes the justiciable right of every Ugandan to a clean and healthy environment. This right has been successfully litigated in cases such as *Greenwatch v Attorney General & NEMA,*[118] where the High Court affirmed that Non-Governmental Organisations (NGOs) and individuals have standing to protect environmental rights even without showing direct personal harm. Likewise, in *Advocates Coalition for Development and*

[118] *Greenwatch v Attorney General & NEMA* (Misc. Cause No. 140 of 2002).

Environment (ACODE) v Attorney General & NEMA,[119] the High Court held that environmental rights under Article 39 are enforceable, and recognised the State's positive obligation to prevent environmental degradation.

Unlike Objective XXVII of the Constitution which articulates duties and policy goals, the provision vests a substantive human right in individuals, empowering them to claim protection through the judiciary. Importantly, it aligns Uganda's domestic legal framework with international environmental human rights jurisprudence, particularly the African Charter on Human and Peoples' Rights under Article 24, which Uganda ratified.

However, rights without effective enforcement mechanisms are vulnerable to being undermined. While Article 39 currently provides a pathway for civil litigation, this is insufficient in cases of ecocide, where environmental destruction may be irreversible, trans-boundary, or driven by gross corporate or bureaucratic negligence. In cases where an oil spill destroys an entire wetland system or large-scale deforestation leads to species extinction, civil remedies cannot match the magnitude of loss. What is needed is criminal accountability, which serves not only to punish but also to denounce and deter conduct that undermines a constitutional right.

Therefore, Uganda's Constitution justifies criminalisation of ecocide both as a measure of compliance with State obligations and as a mechanism for protecting constitutional rights. The criminal law serves not only to punish but also deter and denounce conduct that strikes at the core of Uganda's constitutional environmental vision.

In addition, Article 245 places an obligation on the state to *"protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."* These provisions provide a normative

[119] *Advocates Coalition for Development and Environment (ACODE) v Attorney General & NEMA* (Misc. Cause No. 010 of 2004).

framework for sustainable development, ecological stewardship, and state accountability.

However, these constitutional provisions, while aspirational, are not self-executing. They do not define what constitutes and could amount to ecocide, nor do they establish criminal liability for systemic, irreversible environmental harm. The absence of jurisprudence elaborating the content of Article 39 or invoking Article 245 to restrain ecocidal activity reflects the need for implementing legislation that bridges the gap between constitutional rights and enforceable remedies.

3.3.2 THE NATIONAL ENVIRONMENT ACT CAP. 181

The National Environment Act (NEA) is the principal legislation governing environmental protection in Uganda. While it introduces progressive features such as the rights of nature and embeds foundational environmental principles, the current legal architecture is largely administrative and civil in nature. This is insufficient to respond to the severity and permanence of large-scale environmental destruction particularly acts that amount to ecocide.

This discussion provides a section-by-section analysis of key provisions in the NEA to show how, why, and where criminalization of ecocide should be integrated into Uganda's environmental law.

Firstly, the right to a clean and healthy environment is constitutionally enshrined in Uganda, yet it remains largely symbolic without effective enforcement. While Section 3 of the NEA echoes this right; it states that every person in Uganda has a right to a clean and healthy environment in accordance with the Constitution and the principles of sustainable development. This functions more as a declaratory principle than an actionable norm. Indeed, its current formulation lacks the legal force needed to hold perpetrators of large-scale, irreversible environmental harm especially powerful corporate actors, criminally liable. By

introducing criminal sanctions for ecocide under this section, the State would elevate environmental protection to a matter of public justice.

Although Uganda has embraced an eco-centric vision by recognizing the rights of nature, the legal system falls short in operationalising this commitment. Notably, Section 4 introduces the concept of nature as a rights-holder, inspired by Earth jurisprudence and developments in Latin America.[120] However, the absence of enforceable mechanisms renders this recognition largely theoretical. Without penalties for violating nature's rights, the provision remains aspirational. Criminalising ecocide would actualise this principle, allowing the State to prosecute offenders on behalf of ecosystems, thereby transforming symbolic recognition into legal protection.

Principles such as the precautionary principle, the polluter pays principle, and intergenerational equity are articulated under Section 5 of the NEA, reflecting Uganda's commitment to international environmental norms. However, their current status as soft law limits their practical impact, as they do not carry binding legal consequences. For example, if a company fails to adopt preventive measures, no sanction arises unless actual harm is demonstrated. This lack of enforceability undermines their protective potential.

However, judicial precedent from other jurisdictions demonstrates that these principles can carry legal weight when environmental rights are at stake. In *Leatch v National Parks and Wildlife Service and Shoalhaven City Council,*[121] the Land and Environment Court of New South Wales held that the precautionary principle is not merely aspirational but a principle of common sense that should guide decision-makers where there is scientific uncertainty about potential environmental harm.

120 Jérémie Gilbert, Ihtiyor Soliev, Annette Robertson, et al., "Understanding the Rights of Nature: Working Together Across and Beyond Disciplines," *Human Ecology* 51 (2023): 363–377, <https://doi.org/10.1007/s10745-023-00420-1> [Accessed June 04 2025].

121 (1993) 81 LGERA 270 (Land and Environment Court of NSW).

Justice Stein emphasised that serious or irreversible harm should be avoided, even when conclusive scientific proof is lacking. He acknowledged that although the principle may not have been codified in domestic legislation at the time, it had already been applied in practice and drew legitimacy from international instruments such as the Convention on Biological Diversity. This case provides persuasive authority for arguing that the precautionary principle can be judicially recognised and enforced, even in the absence of explicit statutory penalties. Thus, criminalising ecocide would serve to embed these principles within a legally binding framework.

Section 6 of the National Environment Act establishes the Policy Committee on the Environment, composed largely of cabinet ministers, including those overseeing finance, energy, and agriculture. While this structure aims to mainstream environmental issues into national development planning, it also creates ambiguity where economic and environmental portfolios overlap. This institutional arrangement risks subordinating environmental protection to short-term economic gain, especially in extractive sectors.

In *Save the Vaal Environment v Director, MEQC* (South Africa),[122] the case specifically addressed the authorisation of a mining license near the Vaal River, where the court recognised the potential for environmental degradation and emphasised the need for careful consideration of environmental impacts before development. The Constitutional Court emphasised that environmental governance must be shielded from political expediency, and that constitutional rights to a healthy environment cannot be undermined by development priorities without compelling justification.

In the absence of criminal liability, the current Ugandan framework allows state-sanctioned environmental harm to go unchecked. Criminalising ecocide would act as a legal safeguard and it would also align with the Principles on Human Rights

122 1999 (2) SA 709 (T), para 20.

and the Environment,[123] which stress the need for independent environmental authorities free from political interference.

Despite its broad mandate, the NEMA faces serious implementation challenges. Sections 8 and 9 of the National Environment Act assign NEMA responsibility for environmental monitoring, compliance, and enforcement. However, a chronic lack of resources, institutional politicisation, and limited technical capacity have severely undermined its effectiveness.

Follow-up environmental audits are conducted for less than 7% of approved projects, demonstrating a systemic enforcement gap.[124] This administrative weakness underscores the limitations of relying solely on civil and regulatory tools to address large-scale environmental harm. Moreover, Uganda's courts have acknowledged these institutional failures in cases like *ACODE v Attorney General & NEMA* and in *Greenwatch v Attorney General & NEMA*, where the Court recognised the standing of civil society to initiate legal action when state agencies fail to protect the environment.

In *Friends of the Irish Environment v Government of Ireland*,[125] the Irish Supreme Court invalidated the government's climate policy due to its failure to meet constitutional environmental obligations. These cases illustrate that where administrative bodies fall short, judicial and criminal mechanisms must intervene. Criminalising ecocide in Uganda would empower courts and law enforcement to act independently of regulatory agencies like NEMA, closing the accountability gap and reinforcing the constitutional right to a clean and healthy environment.

Pre-emptive environmental governance tools such as Strategic Environmental Assessments (SEAs) play a critical role in integrating ecological considerations

123 UN Special Rapporteur on Human Rights and Environment, *Draft Principles on Human Rights and the Environment* (1994), Principle 17.

124 NEMA (National Environment Management Authority) (2020) State of the Environment Report for Uganda for 2019/20. National Environment Management Authority, Kampala.

125 [2020] IESC 49 (Ireland SC).

into early-stage planning for national policies, programs, and projects. Under Section 47 of the National Environment Act, 2019, SEAs are legally required for major undertakings likely to have significant environmental impacts.

However, their application in Uganda remains inconsistent and often politically compromised, especially in sectors such as oil, infrastructure, and energy. For instance, the approval of the EACOP proceeded despite widespread criticism from civil society, scientists, and affected communities regarding ecological, climate, and human rights risks.[126] The precautionary principle, articulated under Section 5 of the Act, is foundational to the integrity of SEA processes. However, its current status as soft law undermines enforcement.

The experience from *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*[127] demonstrates how courts can interpret this principle in development disputes. In that case, Greenpeace Australia challenged a power plant's development consent on the basis that it would exacerbate the greenhouse effect through harmful air emissions. Although the court ultimately upheld the consent, Chief Justice Pearlman affirmed that the precautionary principle requires decision-makers to adopt a cautious approach when evaluating risks of serious environmental harm, especially in situations of scientific uncertainty.[128] The principle, while not determinative of outcomes, was recognised as a relevant legal consideration in assessing the environmental acceptability of proposed projects.

In Uganda's context, criminalising ecocide would reinforce compliance with SEA obligations and transform the precautionary principle from a procedural ideal into an enforceable standard. Where decision-makers proceed with high-risk projects in disregard of SEA findings resulting in grave environmental consequences, they

126 Andrew Bogrand et al., *Empty Promises Down the Line? A Human Rights Impact Assessment of the East African Crude Oil Pipeline* (Oxford: Oxfam, 2020), <https://doi.org/10.21201/2020.6423>

127 [1994] NSWLEC (Land and Environment Court of New South Wales).

128 Ibid.

would face legal accountability. Such a shift would close the current gap between environmental planning and enforcement, ensuring that early warnings are not ignored without consequence.

The degradation of aquatic ecosystems in Uganda, particularly Lake Victoria and its wetlands, reflects a troubling pattern of state inaction in the face of large-scale environmental harm, despite the existence of protective legal frameworks such as Sections 52 to 55 of the NEA. This pattern mirrors findings in the case of *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*,[129] where the Economic Community of West African States (ECOWAS) Court of Justice found that Nigeria had violated Articles 1 and 24 of the African Charter on Human and Peoples' Rights by failing to prevent and remedy oil-related environmental destruction in the Niger Delta.

In that case, the Court held that States have a positive obligation to take all necessary measures to protect, maintain, and restore environmental quality in a manner that respects and fulfills the right to a general satisfactory environment. Although Nigeria had passed several environmental laws, its failure to effectively enforce them and to hold private corporations accountable was ruled a breach of its regional human rights obligations.[130] This judgment is directly applicable to Uganda's context, where the continued pollution of lakes and wetlands, and the loss of vital ecosystem services, occur without serious legal consequences. Like Nigeria, Uganda has adopted legislation aimed at protecting the environment, but enforcement remains weak and accountability scarce. The ruling in *SERAP* demonstrates that legislative action without legal enforcement mechanisms such as criminal sanctions falls short of fulfilling environmental rights.

Hazardous substances and toxic chemicals pose a persistent threat to both public health and ecological integrity in Uganda. Sections 70 to 76 of the National

129 *SERAP v Federal Republic of Nigeria* (Judgment No. ECW/CCJ/JUD/18/12) [2012] ECOWAS Court of Justice.

130 African Charter on Human and Peoples' Rights 1520 UNTS 217, Arts 1 and 24.

Environment Act, 2019 regulate the importation, transportation, storage, and disposal of hazardous and toxic chemicals. However, enforcement remains weak, with illegal dumping and improper disposal particularly in the mining and medical sectors continuing to cause irreversible harm to soils, water bodies, and local communities. This regulatory gap mirrors concerns raised in the ECOWAS Court of Justice decision in *SERAP v Nigeria (supra)*, where the Nigerian government was found liable under Articles 1 and 24 of the (ACHPR) for its failure to prevent toxic contamination in the Niger Delta. The Court held that such environmental degradation violates the right to a satisfactory environment and imposes a positive duty on states to regulate, prevent and penalize environmental harm.

Despite the strict liability framework under Sections 78 to 80 of Uganda's NEA, environmental offences particularly those involving pollution and emergencies rarely culminate in criminal prosecution. Offenders frequently escape with administrative sanctions or minor fines, even in cases involving large-scale ecological harm. This enforcement gap significantly weakens the deterrent power of the current regime. Introducing a statutory offence of ecocide under these provisions would provide a firmer legal basis for prosecuting such acts.

In *R v. Thames Water Utilities Ltd*,[131] the UK Court of Appeal upheld a £250,000 fine against a water company for raw sewage discharges into a natural reserve, affirming that environmental crimes deserve strong punitive measures, especially where negligence causes substantial ecological harm. Moreover, the Inter-American Court of Human Rights, in its 2017 *Advisory Opinion OC-23/17*, emphasised that States have a duty under international law to prevent environmental damage with serious trans-boundary consequences, including through criminal accountability.[132]

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131 [2015] EWCA Crim 960.

132 Inter-American Court of Human Rights, *Advisory Opinion OC-23/17 of November 15, 2017:* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), requested by the Republic of Colombia (San José, Costa Rica: Inter-American Court of Human Rights, 2017).

Uganda's waste management regime, outlined under Sections 96 to 102 of the NEA, remains significantly undermined by persistent illegal dumping and weak enforcement mechanisms. This regulatory failure disproportionately impacts poor urban communities, who bear the brunt of industrial and medical waste pollution in informal settlements and wetlands.

This is so sadly seen in Kiteezi Landfill Landslide/ Disaster that occurred in August 2024. After heavy rains, a massive collapse occurred at the Kiteezi Landfill, Kampala's only official dumpsite. The result was catastrophic as sections of the unstable garbage mound gave way, engulfing nearby homes and informal living areas. At least 21 people were confirmed dead, including several children.[133]

By mid-August 2024, the confirmed death toll had climbed to 35, with dozens more missing. Local communities and waste scavengers were directly affected. The landfill received an estimated 1,500–2,000 tonnes of solid waste daily, including hazardous and industrial materials.[134] It had already exceeded its designed capacity and lacked proper waste segregation, drainage, and safety systems. Local residents had repeatedly complained about pollution, contaminated water, air quality, and structural risks. However, enforcement of waste management regulations under the NEA, remained lax.

Furthermore, in *Ashgar Leghari v. Federation of Pakistan*,[135] the Lahore High Court affirmed that state inaction in implementing environmental regulations particularly where it leads to disproportionate harm is a violation of constitutional rights, including the right to life and dignity. Environmental justice demands more than soft enforcement; it requires legal mechanisms that criminalise gross environmental misconduct, particularly where it targets already vulnerable populations.

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133 BBC, Landslide at Uganda rubbish dump kills 21 (12 August 2024) <https://www.bbc.com/news/articles> [Accessed July 19 2025].

134 Uganda, Kiteezi Landfill, Kampala City, <https://toxictours.org/> [Accessed July 19 2025].

135 W.P. No. 25501/2015 (Lahore High Court, Pakistan, 2015).

Section 163 of the NEA, criminalises specific pollution-related acts, including unauthorised emissions, failure to take preventive measures, and exceeding discharge limits. It imposes penalties of up to fifty thousand currency points or imprisonment for fifteen years, and courts may order remediation or compensation. While this provision represents one of the Act's strongest enforcement tools, its scope is narrowly confined to point-source pollution and regulatory breaches, lacking the capacity to address systemic or long-term environmental harm such as deforestation, habitat collapse, or ecologically destructive infrastructure projects.

Consequently, many corporations treat occasional fines as a cost of doing business, which blunts the deterrent effect of Section 163. This emulates the findings in other jurisdictions: for instance, in *ClientEarth v. Secretary of State for Business, Energy and Industrial Strategy*,[136] where the court criticised the UK government's weak regulatory follow-up on air quality violations, despite having formal laws in place highlighting the growing need for enforcement mechanisms with teeth and accountability.

Crucially, Section 163 reflects an anthropocentric legal logic, oriented around human health and property. It fails to internalise the emerging eco-centric paradigm embedded in Section 4 of the Act, which recognises nature as a rights-holder, in line with Earth jurisprudence. As the Inter-American Court of Human Rights emphasised in *Advisory Opinion OC-23/17*, environmental protection must transcend human interests and recognise the intrinsic value of ecosystems, Uganda's current criminal framework does not yet reflect this normative shift.

In *Blue Mountains Conservation Society Inc v. Delta Electricity*,[137] the court adopted a precautionary approach to cumulative air emissions from a coal power plant, emphasising the importance of stronger legal deterrents. While Section 163 plays

136 [2018] EWHC 315.
137 [2019] NSWLEC 1393.

a key role in penalising pollution, it is insufficient to address the full spectrum of ecological harm.

3.3.3 THE NATIONAL CLIMATE CHANGE ACT, CAP 182

The National Climate Change Act, marks a pivotal legislative milestone in Uganda's climate governance architecture. It lays the foundation for institutional coordination, stakeholder engagement, and obligations relating to climate change mitigation and adaptation.

However, while the Act introduces innovative procedural mechanisms and reflects progressive climate justice norms, a closer analysis of Sections 23 through 26 reveals a critical gap in enforceability and deterrence. Specifically, the absence of criminal sanctions in the face of severe or irreversible environmental harm limits the law's capacity to prevent conduct amounting to ecocide. The following section-by-section analysis highlights how these provisions could be strengthened through the incorporation of an ecocide offence into Uganda's legal framework.

To begin with, Section 22 of the National Climate Change Act, which empowers the Minister to prescribe climate change obligations for private entities and individuals, signals an important normative shift towards shared responsibility in addressing the climate crisis. It allows for the imposition of duties relating to mitigation planning, adaptation implementation, reporting compliance, and monitoring, thereby embedding climate accountability across sectors. However, while this provision is conceptually progressive, it remains largely aspirational in its current state due to the absence of enforceable benchmarks and legal consequences for non-compliance.

This regulatory vacuum becomes especially problematic when industrial actors or real estate developers knowingly or recklessly engage in ecologically harmful activities such as wetland encroachment, deforestation, or high-emission operations that directly frustrate Uganda's climate targets and constitutional environmental obligations. In such scenarios, administrative penalties alone fail

to reflect the gravity of harm, especially where the conduct results in irreversible ecological degradation or the displacement of vulnerable communities.

Moreover, the ICESCR has underscored that States have an obligation to prevent third parties from polluting or destroying vital environmental resources, including through legislative and criminal measures where necessary.[138]

Section 25 of the Act, which establishes a statutory right to climate litigation, stands as one of the most progressive innovations within Uganda's environmental legal framework. By empowering any person to seek judicial redress for acts or omissions that impede climate mitigation or adaptation without requiring proof of personal harm, the section effectively expands locus standi and affirms the public interest nature of climate protection.

This broad standing echoes developments in other jurisdictions, such as the Indian Supreme Court's recognition of public interest environmental litigation in *Subhash Kumar v. State of Bihar*,[139] and the Colombian Constitutional Court's decision in *Future Generations v. Ministry of the Environment*, which allowed youth to sue for long-term climate protection on the basis of intergenerational equity.[140]

However, while the section guarantees access to civil remedies such as declaratory relief, injunctive orders, and compensation, it fails to account for the irreversible and often trans-boundary nature of the most egregious ecological harms. Civil penalties cannot repair poisoned wetlands, restore extinct species, or reverse the displacement of climate refugees. This underscores a serious gap in the accountability framework. Criminal law here serves not only to punish but to morally condemn conduct that causes severe and either widespread or long-term damage to the environment.[141] Uganda's framework, while visionary in public

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138 Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The Right to Water' (2002) UN Doc E/C.12/2002/11, para. 23.

139 AIR 1991 SC 420.

140 (2018) Constitutional Court of Colombia, Judgment T-622/16.

141 Jojo Mehta and Philippe Sands et al., *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* (Stop Ecocide Foundation, 2021).

participation and legal access, lacks this moral condemnation and penal response.

3.3.4 THE PETROLEUM (EXPLORATION, DEVELOPMENT AND PRODUCTION) ACT CAP 161

Part X of the Act provides Uganda's primary legal framework for addressing environmental damage caused by petroleum activities. It establishes mechanisms for assigning liability, compensating affected parties, and delineating jurisdiction for pollution-related claims. This section-by-section analysis demonstrates that without a dedicated offence of ecocide, the current framework falls short of addressing the gravity of certain environmental harms, particularly those that are widespread, irreversible, and caused by reckless or unlawful conduct.

Section 129 of the Petroleum Act, sets out the territorial and jurisdictional scope for pollution liability, extending to damage that occurs within Uganda or arises from Ugandan vessels and installations operating beyond national borders. It also empowers the Minister to enter into bilateral agreements governing liability and compensation, provided that such agreements do not derogate from Ugandan law or limit a victim's right to redress.

While this demonstrates an important commitment to trans-boundary environmental accountability and harmonization with international norms, the section is limited in its scope: it provides only for civil liability, offering remedies such as compensation or restitution. It contains no provision for criminal sanctions, even in situations where environmental damage is foreseeable, reckless, or grossly negligent.

This civil-only approach is deeply inadequate in circumstances where pollution causes long-term or irreversible environmental destruction, particularly from extractive industries. In such cases, civil remedies alone do not reflect the moral

gravity or systemic impact of the harm.[142] In *People of the State of California v. Atlantic Richfield Co.*,[143] the court permitted broad restitution for ecological damage caused by lead contamination but also upheld the principle that civil accountability does not preclude criminal prosecution where harm is foreseeable and sustained.

In Section 130, the Act reinforces Uganda's civil liability framework by imposing strict liability on licensees for pollution-related damage, regardless of intent or negligence. This is a commendable approach as it acknowledges the inherently hazardous nature of petroleum operations and relieves victims of the near-impossible burden of proving fault in complex environmental cases.[144] However, the section also introduces a force majeure defence, which can exempt polluters from liability in exceptional circumstances such as natural disasters, acts of war, or other unforeseeable events.

While such defences may be justified in theory, they are frequently exploited in practice. Powerful petroleum companies with substantial financial and legal resources often treat civil liability as a cost of doing business, budgeting for potential fines and compensation pay-outs without altering harmful practices.[145] In effect, this blunts the deterrent value of strict liability and undermines environmental justice. In cases of reckless or systemic non-compliance, especially where catastrophic and irreversible damage occurs, such as oil spills that decimate fisheries or wetlands that sequester carbon, the absence of criminal sanctions leaves both ecosystems and affected communities vulnerable.

Section 131 of the Act imposes strict civil liability on any person who engages in petroleum-related activities such as drilling, refining, or transporting

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142 Christina Voigt and Jørn Øyrehagen Sunde, *Criminalizing Ecocide in the Context of Climate Change* (2023) 18(1) *Journal of Environmental Law* 67, 72–75.

143 Case No. BC 173 087 (Cal. Super. Ct., 2014).

144 Alan Boyle, "Liability for Injurious Consequences of Acts Not Prohibited by International Law" in James Crawford et al. (eds), *The Law of International Responsibility* (OUP 2010) 98–105.

145 Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, CUP 2022) 256–258.

hydrocarbons without a valid license. It further extends liability to individuals or entities that knowingly assist, enable, or conceal such unlicensed operations. This plays a crucial role in deterring underground or informal petroleum activities, which frequently bypass environmental safeguards and operate outside the scope of official oversight.

However, despite its preventive aim, the provision's exclusive reliance on civil liability leaves a critical enforcement gap. In *People v. Goldcorp Holdings Inc.,*[146] a mining company was held criminally liable for unlicensed extraction that contaminated a local watershed, with the court emphasising that strict environmental licensing regimes must be backed by penal consequences in cases of gross harm.

Section 133 permits licensees to seek indemnification from third parties who were initially exempt from direct liability. While this mechanism promotes financial fairness, it also highlights a deeper structural gap: the Act continues to treat environmental damage as merely a civil wrong, devoid of moral or penal consequence. In *United States v. Atlantic Richfield Co.*,[147] a petroleum refinery was criminally prosecuted for joint venture practices that contributed to wetland degradation, despite indemnity contracts among parties. Such decisions affirm that shared responsibility in environmental destruction must not be confined to private cost recovery, it must extend to criminal liability where warranted.

Section 163 of the Act is a pivotal provision in advancing corporate accountability for environmental harm, particularly in contexts approaching ecocide. It pierces the corporate veil by imposing personal criminal liability on directors, managers, secretaries, or other officers where an offence by a corporate entity is committed with their consent, connivance, or through their negligence. This aligns with emerging global standards on environmental criminal liability, as seen in *R v.*

146 [2014] ONSC 2957 (Ontario Superior Court of Justice).
147 774 F. Supp. 2d 1238 (D.N.M. 2011).

Thames Water Utilities Ltd,[148] where the English Court of Appeal affirmed that companies and their officers could be held criminally liable for environmental pollution under corporate manslaughter and environmental laws.

By authorising imprisonment in addition to monetary fines, section 163 reflects recognition that executive complicity in environmental degradation demands serious penal consequences. However, the practical effectiveness of this provision is severely constrained by its evidentiary demands. Establishing direct consent or gross negligence in complex corporate structures is notoriously difficult.

These gaps reduce its potency in addressing "slow violence" against the environment that may not be traceable to a single incident but which leads to irreversible ecological collapse such as that witnessed in the Niger Delta and addressed by the ECOWAS Court in the SERAP case where the State was held liable for failing to hold polluters accountable.[149]

These deficiencies expose a broader accountability gap in Uganda's petroleum governance framework. By treating environmental harm as predominantly civil or regulatory, rather than criminal, the law allows egregious violations to be sanitised as administrative infractions.

3.3.5 THE NATIONAL ENVIRONMENT (WETLANDS, RIVER BANKS AND LAKE SHORES MANAGEMENT) REGULATIONS, 2000

These regulations aim to conserve and manage wetlands, riverbanks, and lake shores. These regulations are designed to ensure the sustainable use of these areas, protect their ecological functions, and prevent pollution.

Regulation 37 is one of the most consequential environmental provisions in Uganda's subsidiary legislation, as it explicitly criminalises a wide array of harmful activities impacting wetland ecosystems. It covers conduct ranging from

148 [2015] EWCA Crim 960.
149 *SERAP v. Federal Republic of Nigeria* (ECW/CCJ/JUD/18/12).

the draining or reclaiming of wetlands, to construction, soil removal, introduction of exotic species, and unauthorised exploitation of protected wetlands. Notably, it further addresses both active forms of environmental degradation such as burning, tunnelling and construction, and passive failures to protect such as the refusal to restore a lakeshore.

Crucially, by framing these actions as criminal offences, the provision departs from the overwhelmingly civil and administrative tone of Uganda's environmental legal framework and aligns more closely with the emerging international principle that serious and foreseeable environmental destruction warrants criminal sanction.

In addition, Regulation 38 provides for the penal consequences of violating the environmental duties outlined in the preceding provisions, particularly those in Regulation 37. It prescribes a minimum custodial sentence of three months, a fine not exceeding three million Uganda shillings, or both, and further empowers courts to order community service geared toward wetland conservation. The inclusion of imprisonment reflects a critical shift toward criminal law as a tool for deterrence, particularly important in the context of escalating wetland degradation linked to commercial agriculture, construction, and urban expansion.

However, while this provision introduces commendable punitive mechanisms, the maximum fine and minimum sentence appear disproportionately lenient when weighed against the irreversible ecological consequences that may result from acts such as illegal wetland reclamation or biodiversity loss. Moreover, it does not differentiate between minor infractions and serious ecological destruction, thereby failing to create a legal gradation for crimes that may amount to ecocide.

3.3.6 NATIONAL ENVIRONMENT (OIL SPILL PREVENTION, PREPAREDNESS AND RESPONSE) REGULATIONS, 2020

These are a set of legal guidelines in Uganda aimed at preventing, preparing for, and responding to oil spills.

Under this legislation, Regulation 5 imposes a broad statutory duty on petroleum sector actors including upstream, midstream, downstream licensees, oil facility operators, and waste handlers, to prevent oil spills. Crucially, this duty extends vicarious liability to contractors and subcontractors acting on behalf of such entities, ensuring that environmental accountability cannot be outsourced. Notably, sub-regulation (4) codifies strict liability for harm to human health and the environment, regardless of fault.

However, the Regulation remains firmly within the realm of civil liability, offering no criminal penalties even where the breach leads to catastrophic or irreversible damage to ecosystems such as the pollution of wetlands, lake shores, or community water sources. The absence of penal sanctions means that a corporation could cause severe ecological degradation and merely face compensation claims, treating ecological destruction as a financial risk rather than a criminal offence.

Furthermore, Regulation 45 represents a rare and commendable use of criminal sanctions within the environmental regulatory framework. It criminalises a wide range of failures and misconduct related to oil spill preparedness and response, including the failure to develop contingency plans, non-compliance with directives, collusion in causing oil spills, and the unlawful use of dispersants. Penalties for these offences include fines of up to fifty thousand currency points or imprisonment of up to ten years, indicating the law's recognition of the seriousness of petroleum-related ecological harm. Importantly, Regulation 45(3) also criminalises the deliberate tampering with or destruction of installations that could lead to an oil spill, further strengthening preventive accountability.

Regulation 45 is a vital starting point; it should be extended to include categorical language on ecocide and linked to a national criminal offence that targets acts or omissions which result in widespread, long-term, or severe environmental destruction.

4.0 CASE STUDIES AND EXAMPLES

To illustrate the extent and nature of environmental destruction in Uganda, this section presents selected case studies of ecological harm that could constitute potential ecocide if such a crime were domestically recognised.

Uganda has witnessed alarming degradation of its natural ecosystems through activities such as illegal mining, wetland encroachment, pollution, and deforestation. These instances not only threaten biodiversity and public health but also expose the limitations of existing legal and institutional safeguards. The examples discussed below underscore the urgent need for robust enforcement mechanisms and legal reforms to address severe environmental harm.

4.1 DEGRADATION OF MABIRA CENTRAL FOREST RESERVE

Gazetted in 1932,[150] Mabira forest has been a target for illegal enrichment for many years while parts of the forest of the reserve were illegally settled in 1953. These early encroachments, as well as those of 1961-71 were easily contained allowing the forest to regenerate, with several parts having young trees. However, encroachment started again in 1971 to 1985 during which up to 7,000 hectares of the forest was cut down by encroachers.[151] Degradation has a strong grip on Uganda's largest remaining forest. An investigation by both Daily Monitor and a report by Nature and Livelihoods, a conservation organisation, reveal that several parts of Mabira Forest, 54 kilometres east of Kampala, and 26 kilometres away

[150] Forest cover declines to 9% as Mabira gives <https://www.monitor.co.ug/uganda/news/national/forest-cover-declines-to-9-as-mabira-gives-way-1720078> [Accessed June 04 2025].

[151] Mabira: A forest under encroachment <https://www.monitor.co.ug/uganda/> [Accessed June 04 2025].

from Jinja, have been degraded.[152]

The degradation occasioned violent protests in 2007 when government attempted to give part of it to Mehta, a Uganda – Asian industrialist to grow sugarcane. These protests did stop the process of the forest being used to grow sugarcane.[153] However, the forest is still plagued with illegal activities ranging from clearing the land for agriculture to cutting down trees for timber and charcoal burning. The forest has fallen susceptible to the environmentally hazardous task of charcoal burning.

A report by Ministry of Energy and Mineral Development (MEMD) shows that 90 percent of Ugandans use biomass (trees) for their fuel needs, ranging from small industries to household use.[154] Such use of the natural resources exacerbates the impacts of climate change placing the country at great environmental risk. The same report also indicated that biomass energy demands, especially from trees, may hit 135 million tonnes, up from the current 44 million by 2040.[155]

According to the MEMD 2014 report, charcoal use stood at 6 million tonnes, wood used in brick making at 71,000 tonnes, wood use in tea industry was 270,000 tonnes, wood consumed in lime production was 5,435 tonnes, wood consumed in prisons was 1,900 tonnes, wood consumed in educational institutions stood at 1.7 million tonnes. With such consumption of biomass, Uganda loses 200,000 hectares of forest cover annually due to agriculture, infrastructure development, industrialisation and urbanisation.[156]

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152 Ibid.

153 Uganda's forest grabbers are back - but the people are ready <https://www.iied.org/ugandas-forest-grabbers-are-back-people-are-ready> Accessed June 04 2025].

154 Ministry of Energy and Mineral Development (2014) report.

155 Ibid.

156 Homes takeover as 3 million hectares of forest disappear (Thursday, October 27, 2016), <https://www.monitor.co.ug/uganda/special-reports/homes-takeover-as-3-millionr> [Accessed on 10 September 2023].

Mabira Forest is home to immense biodiversity,[157] including 287 species of birds, 312 trees and shrub species, 199 species of butterflies,[158] and 97 species of moths. It is the only large forest in the bio-geographical zone of the Lake Victoria Crescent thus providing the only watershed for this already water-stressed area.

The watershed feeds the streams that flow into Lake Victoria and River Sezibwa and also provides sources of water for the neighbouring communities.[159] The cutting down of trees in Mabira will only escalate the water stress that already exists. The forest also plays an important role in regulating temperature as its dense vegetation absorbs carbon dioxide and releases oxygen in return. The conversion of forests into farmland and the demand for timber have contributed to ecocide.

Addressing the degradation of Mabira Forest and promoting its conservation is crucial to combatting ecocide, and preserving the unique and biodiverse ecosystem, thereby mitigating climate change and promoting sustainable development in Uganda.

4.2 POLLUTION OF LAKE VICTORIA

Lake Victoria, the largest lake in Africa and an important resource for Uganda, has been experiencing various forms of pollution, including untreated industrial and municipal waste, agricultural runoff, and invasive species.

A study examining the lake's water quality and degradation revealed that Lake Victoria has been heavily polluted with high traces of three dangerous minerals of lead, arsenic-aluminium and phosphorus, which are not good for humans to consume in certain quantities.[160] In Lake Victoria sediments (Kenyan side),

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157 <https://www.mwe.go.ug/library/mabira-forest ecosystem#:~:text%> [Accessed on 10 September 2023].

158 Facts on Mabira, Environmental Alert (March, 2007).

159 Ibid.

160 Study by researchers from Texas Southern University and Makerere University cited by NTV Uganda, Panorama: Artisanal mining and its contribution to Lake Victoria pollution <https://www.ntv.co.ug/> [Accessed on June 05 2025].

sediment analyses showed maximum concentrations of up to 69.4 mg/kg, with average levels across zones around 17–34 mg/kg, some exceeding the US EPA's ERL (46.7 mg/kg) guideline.[161] These pollutants degrade water quality, harm aquatic life, and impact the livelihoods of communities dependent on the lake.

The fish population is also being greatly affected. It is confirmed that Africa's largest freshwater lake is running out of fish, its biggest economic resource.[162] A 2020 scientific study on micro plastic pollution in the surface water of Lake Victoria conducted on the Ugandan side indicated that micro plastic pollution of aquatic systems is a widely recognised environmental challenge.[163] A 2015 study of Lake Victoria, examining the fish guts of Nile Perch and Tilapia, revealed that micro plastics can be found in at least 20% of the fish,[164] which are important sources of food and income across the East African region. There is also the destruction of critical wildlife habitats due to illegal poaching.

Addressing the pollution of Lake Victoria requires coordinated efforts at various levels including government intervention which is seen through NEMA as of November 2021, licensing more than 160 waste handlers (companies)[165] to collect and sort waste across the country, community awareness and sustainable practices. However, this collection of the waste does not solve or stop the overriding issue and hence the need for ecocide to hold individuals responsible for such acts.

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161 Marriott, A. L., Osano, O. F., Coffey, T. J., Humphrey, O. S., Ongore, C. O., Watts, M. J., & Aura, C. M., Considerations for environmental biogeochemistry and food security for aquaculture around Lake Victoria, Kenya (2023). *Environmental Geochemistry and Health*, *45*(8), 6137 <https://doi.org/10.1007/s10653-023-01585-w> [Accessed on July 05 2025].

162 National Fisheries Resources Research Institute and National Agricultural Research Institution (NARO), Final Report of the Fisheries Catch Assessment Survey conducted in December 2025 on the Uganda Waters of Lake Victoria, 31.

163 Egesa, Nankabirwa, Ocaya, Pabire, Micro plastic pollution in surface water of Lake Victoria (The Science of The Total Environment June 2020). Available at <https://www.researchgate.net/> [Accessed on June 05 2025].

164 Biginagwa, Fares & Mayoma, Bahati & Shashoua, Yvonne & Syberg, Kristian & Khan, Farhan. (2015). First evidence of micro plastics in the African Great Lakes: Recovery from Lake Victoria Nile perch and Nile tilapia. Available at <https://www.researchgate.net/> [Accessed on June 05 2025].

165 The National Environment (Waste Management) Regulations, S.I. No 49/2020.

4.3 OIL DRILLING IN MURCHISON FALLS NATIONAL PARK

In recent years, there have been proposals to explore oil reserves in Murchison Falls National Park, a protected area known for its diverse wildlife and iconic waterfall. Uganda's President, Yoweri Museveni, has endorsed the project in spite of the criticism from environmental and conservation groups, and if it goes ahead, it will be the first oil project within a protected area in East Africa.[166]

The Albertine Rift, which encompasses the park and Lake Albert, the second biggest of Uganda's Great Lakes, is one of the most species-rich areas in the world, housing more than half of Africa's birds, 40 percent of Africa's mammals such as the eastern chimpanzee which is listed as endangered by the International Union for Conservation of Nature, and about 20 percent of its amphibians and plants.[167] It is also home to more threatened and endemic species than any other region on the continent.

Just one spill or leak could have absolutely catastrophic effects on these vital freshwater sources and the millions of people who depend on them. The likelihood of a spill or leak is high, not only resulting from accidental damage or poor maintenance, but also because the pipeline will traverse an active seismic zone[168] that regularly experiences earthquakes. As if this is not bad enough, Total and its partners have opted for the lowest cost option, open-cut trenching,[169] for almost all water crossings, rather than meeting industry best practice. EACOP and the oil extraction projects it will enable will cause considerable physical and economic displacement. Over 100,000 people across Uganda and Tanzania will lose the land they rely on for farming and animal raising, and many will be forcibly removed from their homes.

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166 <https://www.alijazeera.com/> Accessed on 10 September 2023].

167 Ibid.

168 WWF and Civil Society Coalition on Oil and Gas in Uganda (CSCO), Safeguarding people & nature in the East Africa crude oil pipeline project A preliminary environmental and socio-economic threat analysis (July, 2017), 13.

169 For People, <https://www.stopeacop.net/for-people> Accessed 31 July 2025

Hope had arisen that this particular exploration of the park would be halted when *Friends of the Earth France and Others v Total Energies*[170] was filed in France. The case was brought by six French and Ugandan activist groups in 2018, accusing the respondent of not doing all it could to protect people and the local environment during the development of the Tilenga oil project and then EACOP. The NGOs argued the pipeline project failed to adhere to the Duty of Vigilance Act, a 2017 French law that compels larger companies to avoid grave harm to human rights, health, safety and the environment. The Court stated that the plaintiffs had not filed the required formal notice, and thus, declared the case inadmissible. The Court also required in-depth analysis to ascertain if the accusations against the respondent were justified, including an audit of ground operations.

Due to the Court's ruling, the construction of this pipeline is on course which presents significant ecological challenges as it involves drilling over 400 wells – most located in the Murchison Falls Park.[171] The surrounding wilderness is home to hippos, egrets, giraffes and antelopes. The pipeline would then run past through seven forest reserves and two game parks, running alongside Lake Victoria, a source of fresh water for 40 million people.[172] This all presents a strong ecological frailty which, if implanted without adequate safeguards, oil drilling and related activities; could cause habitat destruction, water pollution, and disturbance to wildlife, leading to ecological damage.

4.4 MERCURY CONTAMINATION IN THE OKAME RIVER CATCHMENT

Artisanal gold mining activities in the Okame River catchment have led to significant mercury contamination in local water bodies. Studies have reported

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170 *Friends of the Earth France, Survie, AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA v TotalEnergies.* Cour de cassation (French Supreme Court) decided on 15 December 2021.

171 Barigaba, Suit in France against TotalEnergies on Uganda oil project flops (28 February 2023).

172 French court dismisses NGOs' case against controversial TotalEnergies projects in east Africa <https://www.france24.com/> [Accessed on June 05 2025].

mercury concentrations as high as 0.0191 mg l-1) in the Omanyi River,[173] a tributary of the Okame River, surpassing safe environmental limits and posing serious risks to aquatic life and human health. This contamination primarily results from the use of mercury in gold extraction processes, where it binds with gold particles to form amalgams, which are then heated to separate the gold. The mercury vapour released during this process can settle in nearby water bodies, leading to widespread contamination.

The mercury levels in these rivers are significantly higher than those found in other regions, indicating the severity of the pollution.[174] For instance, the Nankuke and Nabewo Rivers also exhibit high mercury concentrations of 0.0163 mg/L and 0.0158 mg/L, respectively. These elevated mercury levels pose a threat to aquatic ecosystems, as mercury is a potent neurotoxin that can accumulate in the food chain, affecting fish and other aquatic organisms. Moreover, communities relying on these water sources for drinking, fishing, and agriculture are at risk of mercury exposure, which can lead to serious health issues.[175]

The expansion of artisanal gold mining in the Okame River catchment has also led to significant ecosystem degradation. Between 2008 and 2013, the area covered by mining activities increased from 4.5 km^2 to 19.9 km^2, indicating a rapid expansion of mining operations.[176] This expansion has resulted in increased sedimentation in rivers due to soil erosion from mining sites. The elevated sediment concentrations have led to reduced water clarity, altered river flow patterns, and the smothering of aquatic habitats, adversely affecting biodiversity.[177]

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173 Bernard Barasa, Kakembo & Tiller Karl, Characterization of artisanal gold mining activities in the tropics and their impact on sediment loading and stream flow in the Okame River catchment, Eastern Uganda Environ Earth Sci (2016) 1.

174 Ibid.

175 Bronsdon RK, Naden PS, Suspended sediment in the Rivers Tweed and Teviot. (Sci Total Environ 2000) 251:95–113.

176 Ibid n(167).

177 Chakrapani, Factors controlling variations in river. (Current Science 2005) 884.

The cumulative impact of these activities has led to a decline in water quality and the health of aquatic ecosystems, undermining the livelihood of communities dependent on these water resources. These environmental changes highlight the urgent need for sustainable mining practices and effective regulatory measures to mitigate the adverse impacts of artisanal gold mining in the Okame River catchment.

4.5 KINAWATAKA WETLAND, NAKAWA DIVISION, KAMPALA DISTRICT

The Kinawataka Wetland, located in Nakawa Division of Kampala District, has been subjected to significant ecological degradation over the years. A study conducted by Justine Namuyaba in 2021 examined the various causes of this degradation, assessed human activities within and around the wetland, and proposed solutions to address the resulting environmental issues.[178]

Over the years, rapid urbanisation and unchecked infrastructure development have severely encroached upon the wetland, shrinking its size and diminishing its ecological functions. Poor institutional coordination, particularly among the NEMA, Kampala Capital City Authority (KCCA), and private developers,[179] has allowed construction and industrial activities to proceed largely unregulated.

A critical driver of this degradation is the lack of public awareness about the ecological and socio-economic significance of wetlands. Cultivation, informal settlement, and dumping of waste within the wetland have become widespread, further aggravating the problem. Moreover, despite the presence of environmental laws such as the National Environment Act and policies intended to protect wetlands, enforcement remains weak due to limited institutional capacity and political interference.

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178 Namuyaba Rlney Justine, Wetland Degradation In Uganda; The Case Study of Kinawataka, Nakawa Division Kampala District, September 2010.

179 Atimango, Mercy Onen, Analysis of the negative effects of industrial development on wetlands in Kampala city (2023-11-06).

Furthermore, wetlands are disappearing three times faster than forests and are Earth's most threatened ecosystem.[180] These wetlands are under threat from urbanisation, agriculture, and illegal activities such as sand mining and encroachment and steady conversion of wetlands for agricultural use in rural areas.[181] In Uganda, wetlands continue to be degraded; the national area of wetlands declined by 30 percent between 1994 and 2008.[182] Although there was an increase in area under wetlands between 2008 and 2014, this has been a paltry 0.03 percent increase: from 26,307km2 in 2008 to 26,315 km2 in 2014.[183] This serves to show that wetlands in Uganda are under extreme danger and at great risk of completely disappearing.

This is seen in the case of *Amooti Godfrey Nyakana v NEMA,*[184] where the petitioner's house had been constructed in a wetland which was later demolished by NEMA. The Court held that wetlands could not be granted to private individuals/entities because the State holds such natural resources in trust for the citizenry and they must be preserved for future benefit, in this case, the environment. Despite the fact that the Court did protect the wetland in that case, the fact that the petitioner had been issued a lease, obtained planning permission and had begun building a residence in a wetland, this is a ground for serious concern regarding the protection of wetlands in Uganda.

A report by NEMA indicates that the most degraded wetlands in the country include Lake Kyoga where 42 percent of its coverage has been devastated, Lake Edward (34 percent), Lake Victoria (29 percent) and Lake Albert (28 percent).[185] The report also shows that the major threat to wetlands in the Lake Victoria basin is the ever-increasing demand for land for urbanization whose degradation stands

180 <https://www.undp.org/uganda/> [Accessed on 10 September 2023].
181 Ibid.
182 The Uganda Wetlands Atlas Volume II.
183 2014 Report of the Ministry of Water and Environment Report.
184 Constitutional Appeal No.5 of 2011.
185 The 2018-2019 National Environment Management Authority (NEMA) report titled The National State of Environment Report.

at 27 percent.[186] Wetland degradation disrupts the balance of ecosystems, thereby affecting biodiversity and water resources.

These examples not only demonstrate the adverse effects of ecocide in Uganda, including habitat destruction, loss of biodiversity, water pollution and negative impacts on local communities' livelihoods. They also further display the need for ecocide laws because they provide a holistic and preventative approach to environmental protection.

5.0 GENERAL CHALLENGES

While Uganda has made significant progress in environmental protection, prosecuting and preventing ecocide pose unique challenges.

5.1 INADEQUATE LEGISLATION

Uganda currently lacks specific legislation that clearly defines and criminalises ecocide. The absence of comprehensive legal provisions undermines efforts to prosecute and prevent ecocide effectively.

5.2 LIMITED AWARENESS AND UNDERSTANDING OF ECOCIDE

The lack of awareness and understanding among the general public, law enforcement agencies, and judicial bodies poses a significant challenge. Insufficient knowledge about the gravity of ecocide undermines the recognition of its legal implications and the urgency to take action. This was heavily witnessed by the Kasese District October 2018 floods that wreaked havoc on the livestock, crops and human life which resulted into the displacement of 8,000 persons.[187]

Since 2013, the district had been grappling with floods, which were attributed to the increase in rainfall, all arising from the changing climate patterns rapid loss

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186 Ibid.

187 One killed in Kasese floods, <https://reliefweb.int/report/> [Accessed on 10 September 2023].

of forest cover, due to trees being cut down to be used as fuel.[188] The rate of forest cover loss in Uganda stands at 2.6%, one of the highest in the world. According to a survey, more than 80% of Uganda's rural households use firewood for cooking.[189] This high demand for wood fuel coupled with the failure to provide alternative energy saving alternatives exposes the forests to even more degradation thereby making Uganda even more vulnerable to the consequences of climate change.

5.3 WEAK ENFORCEMENT MECHANISMS

The enforcement of environmental laws and regulations in Uganda faces serious challenges. Limited resources, both financial and technical, undermine effective enforcement of the right to a clean and healthy environment, thereby facilitating the continuation of ecocide in Uganda. In the case of *Purohit and Moore v The Gambia,*[190] the African Commission recognised the prevailing poverty that renders African countries incapable of achieving human rights in their fullness; however, it calls upon the African governments to take full advantage of their available resources to ensure that such rights are realised.

5.4 INSTITUTIONAL CAPACITY CONSTRAINTS

Uganda's institutional capacity to address ecocide is another serious challenge. The lack of specialized environmental courts or tribunals hampers the effective prosecution of ecocide cases. In 2021, during the Annual General Meeting of Judicial Officers under the Uganda Judicial Officers Association, Chief Justice Owiny-Dollo had revealed plans to establish a specialised court to handle environmental matters[191] but unfortunately, this has yet to be implemented.

188 Ibid.
189 The 2016/17 Uganda National Household Survey.
190 Communication No. 241/2001, Sixteenth Activity Report.
191 Judiciary to establish specialized court to handle environmental matters, <https://www.independent.co.ug/> [Accessed on 10 September 2023].

6.0 RECOMMENDATIONS

It is imperative to enact dedicated legislation that explicitly recognises ecocide as a crime, defines its elements and establishes criminal liability for offenders. The legislation should also outline clear penalties and sanctions proportionate to the severity of ecocide, ensuring a deterrent effect. A properly structured law on ecocide in Uganda will be the expansion of accountability for environmental damage, theoretically enabling individuals to be prosecuted for harms such as water bodies' damage through oil spills, deforestation, land and oil contamination, and air pollution.

Uganda should reform Section 129 of the Petroleum Act to recognise that in circumstances of wanton ecological harm especially by trans-boundary actors or major industrial polluters, criminal liability must attach.

Enhancing awareness and understanding is crucial to building a solid foundation for effective prosecution and prevention. For instance, under the ACDI/VOCA's Resiliency through Wealth, Agriculture, and Nutrition (RWANU) project, communities in the Karamoja region of Uganda became more aware of the benefits of their ecosystem. Uganda should launch comprehensive public awareness campaigns to educate citizens about ecocide, its consequences and their role in preventing it. Public participation in decision making processes related to environmental protection should be encouraged, ensuring that community concerns and local knowledge are integrated into policies and practices.

Uganda should allocate the available resources to environmental law enforcement, including financial, technological and human resources. There is a need to strengthen enforcement mechanisms by enhancing investigative capacities, providing specialized training to law enforcement agencies, and establishing collaboration and information-sharing mechanisms amongst relevant agencies.

It is vital to establish dedicated environmental courts or tribunals with expertise in handling complex environmental cases. Also, it is important to invest in training programs for judges, prosecutors and law enforcement personnel, which will strengthen the institutional capacity.

7.0 CONCLUSION

The environment is the very foundation that sustains life on Earth, providing essential resources and a habitat for all living beings. It is imperative that we acknowledge this fundamental truth and recognise our shared responsibility to protect and preserve the environment for future generations. The concept of ecocide, defined as the unlawful and wanton acts causing severe and long-term damage to the environment, emphasises the urgent need for legal frameworks that hold individuals and corporations accountable for their actions. By criminalising ecocide, we would not only send a clear message regarding the severity of environmental crimes but also ensure that perpetrators face legal repercussions that reflect the gravity of their actions.

Implementing ecocide laws in Uganda is crucial for addressing the widespread and systemic environmental degradation that has taken place over recent decades. The existing legal structures often fall short, treating environmental violations as mere regulatory offenses rather than the serious crimes they represent. A dedicated focus on ecocide would elevate environmental protection to a matter of public interest, ensuring that those who engage in harmful practices, whether through negligence or malice, are held to the highest standards of accountability. This shift could foster a culture of responsibility and stewardship, encouraging businesses and individuals alike to prioritise sustainable practices and engage in environmental conservation.

Moreover, enacting ecocide laws aligns Uganda with international standards and commitments to environmental protection, reinforcing its obligations under various treaties and conventions. The consequences of environmental destruction

are not only ecological but also social and economic, disproportionately affecting vulnerable communities and future generations.

By taking decisive action against ecocide, Uganda can lead by example on the global stage, showcasing its commitment to safeguarding natural resources and supporting the well-being of its citizens. This legal framework represents not just a protective measure for ecosystems but a commitment to human rights, ensuring that every Ugandan has the right to a clean and healthy environment. In this light, the call to action is clear: it is time to integrate ecocide into Uganda's legal framework and turn the tide in the fight for environmental justice.

This call has gained further legitimacy in light of the recent Advisory Opinion by the ICJ on the obligations of states in respect of climate change.[192] The Court's pronouncement that states have binding legal obligations to prevent environmental harm, including from private actors within their jurisdiction, affirms the normative basis for treating large-scale environmental destruction not merely as a policy failure, but as a breach of international law.

The ICJ's reaffirmation of the human right to a clean, healthy, and sustainable environment, alongside the duty of due diligence and reparation for harm caused, echoes the very objectives of ecocide law. It strengthens Uganda's position in arguing that those who cause irreversible ecological damage whether through oil extraction, deforestation, or pollution must be held accountable under criminal law. Ecocide, therefore, is not just a moral imperative but a legal necessity rooted in evolving global jurisprudence. Uganda must not lag behind this momentum but instead rise to the occasion by formally recognising ecocide as a distinct and punishable crime under its domestic legal framework.

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[192] Advisory Opinion on the Obligations of States in Respect of Climate Change, *Request for Advisory Opinion submitted by the Republic of Vanuatu*, International Court of Justice, General List No. 187 (23 July 2025).

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