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Volume 2 (2022)

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Contents

Foreword

It gives us great pleasure to once more present to you the latest edition of the East Africa Law Society Human Rights and Rule of Law Journal. The Journal continues to distinguish itself as the leading publication on Human Rights and the Rule of law.

In this second edition, the array of issues covered spans from Electoral Processes in Uganda, Structural Interdicts in Social Economic Rights Litigation in Kenya, Compulsory Vaccination in the Era of COVID-19; Medical, Legal and Human Rights Issues Arising, UN General Assembly Resolution on Environmental Rights and its Implications for the East Africa Climate Crisis and even the Progressive Realisation of the Right to Adequate Housing, one of the issues that has stirred up heated debates for more than a decade across the region.

In a deliberate effort to improve the quality of the publication, the regional society has invested much more rigour in the editorial processes and enhanced its aesthetics. The cover is more charming. Our edits have gotten firmer. The journal is generally an amiable product.

As always, we remain committed to the highest standards of excellence, a feat which can only be achieved with the generous support of experts and thought leaders in the thematic areas covered in the edition. To this end, we would love to extend our heart-felt gratitude to all our peer reviewers across the region.

We wish you a happy and enlightening reading of this volume.

Mr. Bernard Oundo,
President,
East Africa Law Society.

Editorial Note

…People crushed by laws, have no hope but to evade power. If the laws are their enemies, they will be enemies to the law; and those who have most to hope and nothing to lose will always be dangerous…

– Edmund Burke

The East Africa Law Society Human Rights and Rule of Law Journal (EALS HRRLJ) is celebrating its first birthday by releasing the Second Volume of this annual publication. In its pursuit of the development of all members of the profession in the region, steering public interest litigation for the common good of all the people of the East Africa region, and promoting the regional integration agenda of the East African Community, the leading Bar Association in East Africa has endeavoured to promote scholarly research in rule of law and human rights. There can be no meaningful integration of the East African Community if governments of the Partner States do not obey the rule of law and do not respect the rights of their citizens. If that happens, citizens would lose hope in their government and a hopeless citizen is a dangerous citizen. Through democratic governance and respect for the inalienable rights of their citizens, these Partner States can reach great heights through development of the East African Community. Citizens would be collaborators, rather than subordinates whose rights and views are not respected. The EAC endeavours to run a people-centred integration agenda and this agenda can only succeed if the rule of law and human rights are respected. This is what the EALS Human Rights and Rule of Law Journal seeks to promote.

The journal provides a forum for practitioners of the Law across the East African Community and beyond to research on and publish on topical issues relating to the rule of law and human rights. Lawyers

can therefore present their findings on these topical issues, analyse laws relating to these issues, and recommend solutions.

This second volume attracted a large number of manuscripts from authors across East Africa. Authors have demonstrated research depth and expertise in the areas they have researched and written their articles on. These manuscripts were subjected to double blind peer review by our experts across East Africa. The papers we are presenting in this Volume are therefore a result of intense peer review from experts and detailed editing by our Editorial Board.

Dr Ruhweza takes issue with the legislative frameworks providing for Youth participation in elections in Uganda. Some of the ills bedevilling the youth electoral system in Uganda include Gender discrimination, low civic competence, socio-cultural prejudices and lack of an appropriate electoral system. He proffers a scathing attack on the electoral college system of youth elections in the country as one that is detached from reality. He recommends that the National Youth Council Act should not only be amended to bring it in tandem with the National Youth Policy and attendant laws, but also to carry out well planned civic education that ensures that youth participation in electoral democracy is enhanced.

Using Mbarara City as their case study during the 2021 general Elections, Charlotte Kabaseke and Speciouza Birungi examine the extent to which the right to vote is protected in Uganda. Although Uganda has been holding elections regularly and that the equal participation of both men and women has been practiced, this was not without challenges. The 2021 General Election in Uganda had its fair share of challenges. One of these challenges was government interference in the electoral process through internet shutdown hence a violation of vital rights relevant to realization of the right to vote for example the right to information and the right to freedom of expression. Further, the government requirement by the journalists to get accreditation for purposes of covering the 2021 elections was illegal and also infringed on the right of citizens to information and the right to practice one's profession. They [resent a raft of recommendations, including voter education on rights and responsibil-

ities during the election process and training of polling assistants and security personnel on their rights and responsibilities before, during and after elections

Dr Andrew Khakula examines the reaffirmation of structural interdicts by the Supreme Court of Kenya in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) Supreme Court Petition No. 3 of 2018* [2019] eKLR. He supports the Supreme Court's affirmation that structural interdicts are an appropriate and effective remedy in socio-economic rights litigation. According to him, the use of structural interdicts respects the position that courts do not make policy and thus should not jump into the arena of the policy makers. Structural interdicts however enable the courts to point the policy maker towards their legal and constitutional obligations without usurping the policy maker's powers. By doing so, courts endorse cooperation and collaboration with other arms of government to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them

Tuhairwe Herman and Rebecca Gomes investigate on the key medical, legal and human rights issues regarding compulsory vaccination for COVID-19 in Uganda. They analyse the legal framework for compulsory vaccination in Uganda, weighing it against constitutional guarantees of human dignity and religious freedom, the two rights that persons who are vaccine hesitant are relying upon to oppose the vaccine mandate. They argue that, whereas forced vaccination is not unconstitutional the world over, the state should focus on enhancing public trust so that individuals willingly get vaccinated. Public trust may be enhanced through information campaigns that are targeted at vaccine hesitant persons and groups.

Dr. Kenneth Mutuma's commentary of the UN General Assembly Resolution on Environmental Rights and its Implications for the East Africa Climate Crisis is timely. The commentary comes at a time when climate change is ravaging the globe and a climate change conference is being held in Egypt. Dr Mutuma therefore welcomes the resolution,

arguing that by recognizing access to a clean, healthy and sustainable environment, as a universal human right, the resolution has far-reaching contributions not only for the climate, but also for the area of human rights in East Africa.

Joyce and Chrispus examine the progressive realisation of the right to adequate housing in Uganda and conclude that it is a "promise in the dark". Despite the existence of adequate legal framework on housing in Uganda, they present data to the effect that forced evictions, inadequate budget financing, lack of security of tenure, and delayed access to justice have been the order of the day. There is, therefore, limited will on the state to fulfill its obligations and often uses "progressive realization" as a defense in the failure to realize the right. They call upon the Government of Uganda to take such measures as reducing taxes on construction materials and regulating of rental prices of the private sector houses to address the housing problem.

Abuya examines the extent to which the Treaty for the Establishment of the East African Community facilitates good governance, democracy and the rule of law. Through an analysis of provisions of the Treaty and activities of the EAC and Partner States, he concludes that these three principles have not been obeyed and they only exist on paper. He presents a raft of recommendations such as repealing the claw-back articles of the Treaty, amending the EAC Treaty, enacting corresponding national laws of Partner States that guarantee mandatory consultation of stakeholders, and establishing common EAC guidelines for monitoring the implementation of good governance, democracy and rule of law.

The production of this journal would not have been a success without the expertise of our peer reviewers across the East Africa region. We particularly remain indebted to them.

To our readers, we hope you enjoy reading the articles in this volume as we retreat to prepare the next volume.

Augustus Mutemi Mbila
Editor- in- Chief

Will of the Youth or Mockery of Democracy? A Critical Analysis of National Youth Elections in Uganda

Dr. Daniel R. Ruhweza*

Abstract

Uganda with 77% of its population under 25 years is one of the countries in the world with the youngest population. Youth engagement in politics is key in shaping and informing an objective understanding of critical issues affecting the needs of communities, acting as a guide that enables the contextualization of policy and legislative controls to meet the needs of a population. However, the Inadequacies around effective domestic legislative frameworks providing for Youth participation in elections is just part of the larger dynamics affecting youth elections in Uganda. Gender discrimination, low civic competence, socio-cultural prejudices, and the seemingly threatening lack of an appropriate electoral system among others. The use of the Electoral college system in youth elections is far detached from the dynamics that inform youth elections and thus only disadvantages the potential of youth elections to influence and shape informed and democratic

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discourse in larger political spaces. This then calls for a rethinking of approaches to youth election practice at various levels in order to harness the potential of youth elective systems.

Keywords: Youth, Participation, Electoral Colleges, Electoral Democracy, Uganda, Youth Councils

1.0. Introduction

According to the UN Youth factsheet, "Youth (are) not represented adequately in formal political institutions and processes such as Parliaments, political parties, elections, and public administrations. The situation is even more difficult for both young women as well as women at mid-level and decision-making/leadership positions."[1] Jorgensen notes that

> '… Young people judge their possibilities for influence on decision making as quite limited. The position of youth in Uganda, as in most African societies, is a rather marginalised one, youth possess little power and authority and are expected to listen to and respect elders. In public debates, youth issues either receive limited coverage (compared to for instance women issues) or a coverage focusing on problems or concerns related to young people's vulnerability.'[2]

The conundrum of youth elections in Uganda is further exacerbated by the use of electoral colleges where only selected youth leaders participate in choosing youth representatives to the Parliament.[3] Statistics from the 2021 and 2016 elections indicate that only about 336 youth

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1 Youth Political Participation, and Decision Making Fact Sheet, prepared by the United Nations Development Programme (UNDP) and the Focal Point on Youth, UN-DESA. Available at https://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-political-participation.pdf. accessed 24th September 2022.

2 International Alert, 'Youth Perspectives On Identity and National Unity in Uganda.'> Available at https://www.international-alert.org/wp-content/uploads/2021/08/Uganda-Youth-Identity-National-Unity-EN-2013.pdf accessed 24th September 2022.

3 Polling Guidelines for Youth Councils/Committees' Elections, 2020; 18th February, 2020 available at https://www.ec.or.ug/info/polling-guidelines-youth-committees-2020

(leaders) participated in choosing youth members of parliament.[4] Ironically, these youth Members of Parliament are mandated to represent the largest constituency in the nation: 7,242,000 youths of which 3,690,000 (51%) are female and 3,550,000 (49%) are male.[5]

The Electoral College system for youth elections in Uganda is marred with a number of legal and practical issues which stifle effective representation and call for immediate intervention. The legal issues associated with this system include inconsistencies in the various laws and policies regarding the definition of the word youth and the electoral commission being the primary arbitrating body for disputes arising out of these elections. On the other hand, practical issues include use of the method of lining up while voting, corruption and other multi-party related issues, involvement of non-elected members in the youth council at the expense of elected officers and many others as will be discussed extensively in this paper.

This paper therefore seeks to analyze the legal regime governing youth representation. The analysis aims at identifying and interpreting gaps within the National Youth Council Act (hereinafter referred to as the NYC Act) with the aim of causing localized conversations about bottlenecks to youth participation in electoral system. It will be a backdrop for developing a position paper containing policy recommendations for legislative improvement of the National Youth Council Act. In so doing, it will support policy makers to influence amendment of the legislative framework governing youth elections.

The paper sets by first interrogating the legislative underpinning of youth elections, questioning whether or not the system has managed to provide a responsive system of electoral governance in youth elections while highlighting the positives and negatives of the current law.

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4 Youth Coalition for Electoral Democracy (YCED), 'Taking Stock of the Youth Gains in the 2017/18 Budget', June 2017. See also CEWARN and others (CCRDA 2022) rep <http://www.ossrea.net/images/COYOQA/Files/Ugandan_Report.pdf> accessed October 4, 2022. This particular report highlights the fact that 80 percent of the population is 30 years and below with 70% of the voting population below 40 years making the youth a major player in fronting political change.

5 Ibid.

The effectiveness of this legislation is also assessed against regional and international standards to identify the general trend and state of youth elections in Uganda.

Drawing from the constitutional framework, the paper also analyzes the roles played by various institutions in the furtherance of an effective youth electoral system. The paper highlights the challenges behind reliance on these institutions and attempts to find the middle ground from which an effective system can be realized. The paper in its concluding phases also sets out recommendations targeted at ensuring the implementation of an effective and responsive electoral system for youth elections in Uganda.

2.0 Definition of Key Terms

2.1. Youth

The term 'Youth' has been defined in various ways. This is due to 'changes with circumstances, especially with the changes in demographic, financial, economic and socio-cultural settings'.[6] The United Nations defined the Youth as 'those persons between the ages of 15 and 24 without prejudice to other definitions by Member States.'[7] However other organisations have had different definitions or categorisations of the term: for example, UN Habitat (Youth Fund) refers to Youth as

[6] <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Dakar/pdf/AfricanYouthCharter.PDF> Also see also >http://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-definition.pdf> accessed December, 12, 2017

[7] The Secretary-General first referred to the current definition of youth in 1981 in his report to the General Assembly on International Youth Year (A/36/215, para. 8 of the annex) and endorsed it in ensuing reports (A/40/256, para. 19 of the annex). See also Secretary-General's Report to the General Assembly, A/36/215, 1981 See also Secretary-General's Report to the General Assembly, A/40/256, 1985. See also General Assembly Resolution, A/RES/50/81, 1995, General Assembly Resolutions, A/RES/56/117, 2002, General Assembly Resolutions, A/RES/62/126, 2008, Commission for Social Development Resolutions, E/2007/26 & E/CN.5/2007/, 2007

between the age of 15 and 32.[8] while the African Youth Charter refers to the youth as between the age of 15 and 35 years[9].

Currently, Section 1(g) of the National Youth Council Act (NYCA) defines a youth as a person between the age of 18 and 30 years. This definition however, is in conflict with the East Africa Youth policy which provides that youth are persons between the age of 15 and 35 years. It should be noted that in Kenya, the youth are those persons between 18 and 35 years; in Burundi and Tanzania, the youth are those between 15 and 35 years while in Rwanda, youth are those between 14 and 35 years. This is in line with the provisions of the East African Treaty to which Uganda is a party.[10]

2.1.1 Youth Participation

Youth participation is concerned with ensuring that young people are actively engaged in decision making processes not only on issues that affect them directly but also on matters of general National concern. Young people make invaluable contributions to communities and are empowered when they participate in these processes.[11] The Uganda National Youth Policy argues that 'effective youth participation is about creating opportunities for the youth to be actively involved in designing, shaping, and influencing policy development and implementation processes.'[12]

The justifications for youth participation include empowerment of a marginalized group, improving on service delivery, the pursuit of

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8 Agenda 21 available at http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=3393 last accessed December, 12, 2017.

9 African Youth Charter available at http://www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf last accessed December, 12, 2017

10 For the avoidance of doubt, the Youth representative of Uganda to the East African Assembly is 35 years old.

11 See generally Youth participation and Engagement Explained available at http://yerp.yacvic.org.au/get-started/involve-young-people/youth-participation-and-engagement-explained last accessed December, 12, 2017.

12 Uganda National Youth Policy 2016

positive (personal and social) youth development to enable them become model citizens and so on. [13]

The term youth participation has also been defined as;

> ...the involving of youth in responsible, challenging action that meets genuine needs, with opportunities for planning and/or decision-making affecting others in an activity whose impact or consequence is extended to others— i.e., outside or beyond the youth participants themselves. Other desirable features of youth participation are provision for critical reflection on the participatory activity and the opportunity for group effort toward a common goal.[14]

It has however been observed that "as there are many types of developmental processes, cultures and unique individuals in the world, participation is not any one phenomenon. There are various definitions of participation.[15] A basic concept of participation however, is that people are free to involve themselves in social and developmental processes and that self-involvement is active, voluntary and informed."[16]

2.1.2 Electoral Democracy

Electoral Democracy has been defined as a form of government where the powers of the sovereign are delegated to a body of men and women, elected periodically. These elected officials exercise these powers for the benefit of the whole nation.[17]

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13 Rys, F "Why Youth Participation? Some Justifications and Critiques of Youth Participation Using New Labour's Youth Policies as a Case Study" (2015) Youth and Policy 71

14 National Commission on Resources for Youth, 'Youth Participation: A Concept Paper. A Report of the National Commission on Resources for Youth to The Department of Health, Education and Welfare, Office of Youth Development. New York, NY: National Commission on Resources for Youth.' (1975).

15 For more details on the various models of Youth Participation, see Marc Jans and Kurt De Backer, 'Youth (-Work) And Social Participation. Elements for A Practical Theory' (*SALTO*, 2002). Brussels: Flemish Youth Council. <https://participationpool.eu/et/resource/youth-work-and-social-participation-elements-for-a-practical-theory/>

16 UNICEF/Commonwealth Youth Programme Participation Toolkits (2006) Book One p7.

17 See generally A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published 1856 available at < https://legal-dictionary.thefreedictionary.com/Electoral+democracy> accessed December, 12, 2017.

3.0 Analysis of Legislation on Youth Elections

This section involves an analysis of legislation that has a direct impact on youth participation in Uganda as an electoral democracy. While there are various international treaties that deal with the youth, [18] they do not generally bind Uganda because it is a dualist country.

Nonetheless, it has been argued that 'even where these International instruments do not constitute legally binding legislation for a country, they play an important role in establishing or informing standards and good practice in relation to youth policy development and implementation at the national level. On the one hand, these documents provide the non-governmental sector with benchmarks to legitimate their advocacy and on the other; their provisions can be transformed into program objectives and concrete interventions.'[19]

3.1 The African Youth Charter

The African Youth Charter was adopted by the Executive Council of the African Union on the 2nd of July 2006 at its 6th Ordinary Session in

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[18] See generally, Braga Youth Action Plan (World Youth Forum) 1998, The Convention on the Elimination of All Forms of Discrimination Against Women 1979., The Convention on the Rights of the Child 1979, Dakar Youth Empowerment Strategy 2001, Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, 1965., The Habitat Agenda and the Istanbul Declaration of the Second United Nations Conference on Human Settlements (Habitat II) 1996, ILO Declaration on Fundamental Principles and Rights at Work 1998, The Resolution concerning youth employment, ILC, 93rd session, Geneva 2005, International Covenant on Civil and Political Rights, 1996; International Covenant on Economic Social and Cultural Rights, 1966., Lisbon Declaration on Youth Policies 1998.,Platform for Action of the Fourth World Conference on Women 1995., Rome Declaration on World Food Security and World Food Summit Plan of Action of the World Food Summit, 1996., Special Session on Social Development (Copenhagen+5), Geneva, 2000., United Nations Guidelines for Further Planning and Follow-Up in the Field of Youth, 1985., United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),1985., Universal Declaration of Human Rights, 1948

[19] Youth policy, "International Youth Sector: Legislation" (*Youth policy org*) <https://www.youthpolicy.org/mappings/internationalyouthsector/legislation/> accessed October 4, 2022

Banjul and entered into force on August 08, 2009.[20] A key aspect in the Charter is the 12th Preambular which provides that –

"NOTING with concern the situation of African youth, many of whom are marginalized from mainstream society through inequalities in income, wealth and power, unemployment and underemployment, infected and affected by the HIV/AIDS pandemic, living in situations of poverty and hunger, experiencing illiteracy and poor quality educational systems, restricted access to health services and to information, exposure to violence including gender violence, engaging in armed conflicts and experiencing various forms of discrimination[21]"

Other paragraphs in the Preamble indicate that the framers of the charter 'considered the role that youth have played in the process of decolonisation, the struggle against apartheid and more recently in its efforts to encourage the development and to promote the democratic processes on the African Continent;'[22] and also reaffirmed that the continuous cultural development of Africa rests with its youth and therefore requires their active and enlightened participation as espoused in the Cultural Charter for Africa.[23]

The aforementioned preambular clearly shows that the framers of the Charter were deeply concerned with addressing the marginalisation of the youth. This is further reinforced by Article 11 of the Charter which provides that every young person shall have the right to participate in all spheres of society. It also obliges States Parties to take specific measures that will promote youth participation in society.[24] It is therefore

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20 African Youth Charter, (adopted 2 July 2002, came into force 8 August 2009).

21 Preamble to the Africa Youth Charter.

22 Ibid.

23 Ibid.

24 This includes that the State shall ; a) Guarantee the participation of youth in parliament and other decision- making bodies in accordance with the prescribed laws; b) Facilitate the creation or strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance; c) Ensure equal access to young men and young women to participate in decision-making and in fulfilling civic duties; d) Give priority to policies and programs including youth advocacy and peer-to-peer programs for marginalized youth, such as out-of-school and out of work youth, to offer them the opportunity and motivation to re-integrate

clear that the African Youth Charter promotes a detailed compulsory obligation for State Parties to create a conducive environment for youth participation in electoral democracy in all levels.

3.2 The 1995 Constitution

The National Objectives and Directive Principles of State Policy in the 1995 Constitution have been held by the Courts of Uganda to be as important as the very Articles of the Constitution.[25] This view on the justifiability of these National objectives is strengthened by the 2005 amendment introducing Article 8A that provides that Uganda shall be governed based on principles of National interest which may be given full force through legislation.[26]Directive 1 states that they shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying and interpreting the constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.'[27]

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into mainstream society; e) Provide access to information such that young people become aware of their rights and of opportunities to participate in decision-making and civic life; f) Institute measures to professionalize youth work and introduce relevant training programs in higher education and other such training institutions; g) Provide technical and financial support to build the institutional capacity of youth organizations; h) Institute policy and programs of youth voluntarism at local, national, regional and international levels as an important form of youth participation and as a means of peer-to-peer training; (i) Provide access to information and services that will empower youth to become aware of their rights and responsibilities, j) Include youth representatives as part of delegations to ordinary sessions and other relevant meetings to broaden channels of communication and enhance the discussion of youth related issues.

25 *Hon Sam Kuteesa & 2 Others Vs Attorney General* [2012] UGCC, Constitutional Reference No 54 of 2011 (UGCC). Mpagi Bahigeine stated, 'the national objectives and directive principles of State policy guide the courts in applying and interpreting the Constitution. The interpretation of the Constitution must be therefore in such a manner that promotes the national objectives and directive principles of State policy.'

26 Christopher Mbazira, 'Enforcement of Economic, Social and Cultural Rights in Uganda. A Brief Overview' Page 15. (*Repository.uwc.ac.za*, 2009) <https://repository.uwc.ac.za/xmlui/handle/10566/4919?show=full>.

27 Directive 1, National Objectives and Directive Principles of State Policy Constitution of the Republic of Uganda, 1995.

In light of the above, Directive VI requires[28] that the State shall ensure gender balance and fair representation of marginalised groups on all constitutional and other bodies.[29] For the avoidance of doubt, the youth are a marginalised group. Marginalization is the process of according less importance to something or someone. It is a societal phenomenon of excluding a minority, sub group, or undesirables by ignoring their needs, desires and expectations[30]. It means depriving a person or group of persons of opportunities for living a respectable and reasonable life as provided in the Constitution. This term has been defined as 'a kind of exclusion or isolation of the young people from the main political, social and economic mainstreams'[31]

a) Power belongs to the People

The 1995 Constitution states that all power belongs to the people of Uganda. It also provides that the people shall exercise their sovereignty in accordance with the provisions of the Constitution. It further states that the people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda.'[32] This provision however seems to be contravened by the requirement for Electoral College voting adopted for voting of members of Parliament for the youth as shall be discussed later in this paper.

b) Composition of Parliament

Additionally, Article 78(1) (c) of the Constitution provides that the Parliament shall consist of such numbers of representatives of the army,

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28 The operative word is 'shall'

29 Directive VI, National Objectives and Directive Principles of State Policy Constitution of the Republic of Uganda, 1995.

30 The Equal Opportunities Act, 2/2007

31 **Hailu, Desta** (Panel Discussion on ''Democracy & the Marginalised Youth: Who are they? Why are they important? 25 July 2012) available a t http://rfmsot.apps01.yorku.ca/glossary-of-terms/marginalization/ accessed October 19, 2022.

32 The Uganda Constitution, 1995 (as amended), Article 1.

youth, workers, persons with disabilities and other groups as parliament may determine. There are over 238 constituency representatives, 130 District Women representatives, 10 Uganda Peoples Defence Forces Representatives, 5 representatives of the Youth, 5 Representatives of persons with Disabilities, 5 Representatives of Workers and 13 Ex-Officio Members.[33]

In essence, despite having the highest population in the nation, the Youth only have five (5) Members of Parliament selected from the five main regions of the country namely North, West, East, Central and the National representative. As noted, these youth Members of Parliament represent the largest constituency in the nation.[34] It is therefore safe to conclude that the youth are marginalized and/or under represented as compared to the other groups mentioned above.

c) The Electoral Commission

The Ugandan constitution establishes the Electoral Commission which consists of the chairperson, deputy chairperson and five members appointed by the President with the approval of Parliament.[35]

Whereas the role of Parliament is well established under the Constitution, the *real politick* of having a Parliament whose majority is composed of mainly the national party in power means that it is very difficult to envisage a situation where the Presidential appointees are not approved. It is also very unlikely that these members of parliament will choose to be seen to resist the Presidential appointees when some of them have hopes of being appointed to various positions as well. More crucially however, the fact that the electoral commission is appointed by someone who also has the powers to remove them as provided for under Article 60 (8) makes it extremely difficult to carry out one's job without fear and favour.

Therefore, should there be a decision that affects the youth that might not be in consonance with the Head of State, it is fair to assume

33 Ibid, Article 78(1) (c).

34 7,242,000 youths of which 3,690,000 (51%) are female and 3,550,000 (49%) are male.

35 The Constitution of Uganda, Article 60

that the members of the Electoral Commission might not want to antagonise the person of the President. It should also be noted that under Article 61 (1) (a), the Electoral commission is mandated to ensure that they hold regular, free and fair elections. However, the decisions of the Supreme Court of Uganda and reports of election observers have shown that on various occasions the Commission has failed to conduct elections that are free or fair.[36] Additionally, the Electoral commission by being the arbitrating body in matters arising from these elections is contradictory to the rule against bias as will be discussed in 4.6.

d) The Right to Vote

Under the Constitution, every citizen of Uganda of eighteen years of age or above has the right to vote.[37] While the said citizen has a duty to register as a voter under Article 59 (2), the State has a compulsory obligation to take all necessary steps to ensure that all citizens qualified to vote, register and exercise this right. This means that the state has to take all the necessary steps to equally ensure that all the youths are given an opportunity to directly vote for their representatives.

However, the fact that the National Youth Act provides for an electoral college system which rules out the direct participation of the majority of youth in the election of their representatives in the Parish, county, sub county and district levels. This can be interpreted as defeating the object and purpose of Article 59 (2). Correspondingly, the Act also deprives youth their right to vote directly through the creation of Electoral Colleges. The result is that only approximately less than one percent of the youth who directly vote for the youth Members of Parliament.[38]

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[36] URN, "2016 Polls Not Free and Fair - Observers" (The Observer - Uganda February 21, 2016) <http://observer.ug/news-headlines/42710-2016-polls-not-free-and-fair-observers> accessed October 4, 2022 team ACME, "Uganda's Hope for Free and Fair Elections Dashed- Ceon-U" (African Centre for Media Excellence February 20, 2016) <https://acme-ug.org/2016/02/20/ugandas-hope-for-free-and-fair-elections-dashed-ceon-u/> accessed October 4, 2022

[37] The Constitution of Uganda, Article 59(1).

[38] According to the past general election of 2021, there are 146 districts in Uganda. These are divided into four regions (East 40 districts, North has 41 districts, West has 38 districts and Central has 27 districts). The electorate of each district is composed of three

3.3 The National Youth Act Cap. 319

The National Youth Act Cap. 319 was enacted on the 30th of April 1993 with the aim of establishing the composition, objects, functions and administration of a National Youth Council. The Act was amended in 2003 by the National Youth Council (Amendment) Act, 2003 which aimed at recomposing the National Youth Council and the District and National Youth Committees.

Another amendment was done in 2010 vide the National Youth Council (Amendment) Act, 2010 which aimed at providing for who would constitute the village youth council, as well as empower the Electoral Commission to designate a time period for registration of prospective voters for the youth council elections as well as to maintain a voter's register at the village and parish level.

3.3.1 Objectives of the Council

The National youth council Act sets out the objectives of the Council to include[39]; organising the youth of Uganda into a unified body, engaging youth in activities that benefit them and the nation, as well as protecting the youth against any kind of manipulation. These objectives are broadly worded and thus prone to abuse. Interpreting actions or omissions that are geared at 'creating a unified body' or testing what amounts to manipulation is extremely difficult especially in the current multiparty dispensation.

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delegates from each sub county of the district, three delegates at district level, two representatives of the Uganda National Students Association (UNSA) plus a youth representative of persons with disabilities. This district with municipalities also brings a total of three delegates. (The three delegates include only the Chairperson, Secretary of Finance and Secretary of Female Affairs.) There are 56 municipalities bringing a total of 168 delegates. There are 146 districts bringing a total of 438 delegates. There are 2183 Sub counties bring a total of 6,549 delegates. The total number of delegates that vote the four regional Youth members of Parliament are 7,155 delegates. It is this electorate that also convenes to vote the National Female Youth Member of Parliament. These delegates who vote directly on behalf of 7,242,000 youth in the nation account for merely 0.098% of the youth of Uganda.

[39] National Youth Council Act (NYC 2010) s.3

Would promoting the interests of a political party (which by its very nature causes division based on opinion) be viewed as frustrating the creation of a unified body? One would also ask if the use of words that appeal to a specific gender or ethnic group amount to manipulation. These and other questions make the world of the interpreter very difficult especially when tasked to find out the intention and purpose of the legislators.

Additionally, the Act provides that the functions of the NYC shall include ;inspiring and promoting a spirit of unity and national consciousness amongst the youth; providing a unified and integrated system through which they may communicate and coordinate their ideas and activities; to provide channels through which economic and social services and amenities may reach the youth in all areas of Uganda; to encourage the youth to consolidate their role in national development in the economic, social cultural and educational fields; to initiate and encourage the formation of youth organisations and to facilitate communication among them; to promote relations between youth organisations in Uganda and international youth organisations and other bodies with similar objects and interests, among others.[40]

The aforementioned functions look impressive and grand. However, there seems to be a huge disconnect between what is happening *de facto* and what should be happening *de jure*. The views from the various focus group discussions revealed that youth never get to see their duly elected representatives when they invite them for youth programs and that youth leaders are locked out of developmental discussions. Thirdly, that consultations are done by youth MPs with their cronies or political party members and that some youths are hounded and locked up in jail for expressing differing opinions.[41]

It can be argued that at the time of passing this Act, the political climate was that of the movement party system which by its nature did not envisage the difference of opinion in the 1995 Constitution which was

40 NYC 2010, s 3(2)(i)-(vii)

41 Comments from consultations in Moroto, Mbuya and Mukono held on 14th, 17th and 21st November 2017.

promulgated shortly thereafter. As such, the wording of these functions limits the influence of youth participation in the National Council. The continued presumption of homogeneity among the youth as inferred from the continued phraseology "unified" or "united" implies a zero-tolerance policy for deferring opinions and views, this in and of itself presents a threat to discourse, a tenet of democracy.[42]

More interestingly, the 2003 and 2010 amendments do not seem to have been promulgated out of wide consultations from the majority of youth groups save from the assumption that consultation was limited to their leaders, who were chosen though the electoral college system.[43] If the majority of the youth had been consulted, it is possible that there would have been more substantial amendments to the Act. This view is premised on the fact that the researchers found a clear disconnect between the views of the leaders and the views of the electorate.

3.3.2 The Hierarchy of Youth Councils

The Act establishes Youth council structures from village to national level with the aim that they should provide channels for youth to engage in the governance and development processes. The hierarchy of youth councils is established as follows –

Under Section 6(1), a village council shall constitute of all youths who reside in the village and who are willing to be members of the village youth council.[44] Sub-sections 6(1) (a) and 6(1) (b) of the Act as

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42 David W. Johnson and Roger T. Johnson, 'Civil Political Discourse in A Democracy: The Contribution of Psychology.' (2000) 6 Peace and Conflict: Journal of Peace Psychology. "the purpose of political discourse include (a) clarifying citizens understanding of the issues, (b) helping citizens reach their best reasoned judgement as to which course of action will solve a problem, (c) increasing citizen participation in the political process and (d) socializing the next generation into the procedures and attitudes they need to be active citizens"

43 Comments from consultations in Moroto, Mbuya and Mukono held on 14th, 17th and 21st November 2017.

44 This amended the original Section 6(1) whose wording was to the effect that every person who has attained the age of 18 years but below the age of thirty years and is a resident of the village was a member with or without their consent.

amended limit membership of the village councils to the citizens of Uganda and bind all youth in the village to the decisions of the said village council. The latter sub-section 1(b) in essence renders the provision (that members will only be those that are willing) nugatory because the Act cannot state that a village council shall only include those that are willing to be party to it but at the same time provide that the decisions made by such council will bind all youth including those that are not part of the council.

The provisions in Section 6 of the Act create a false sense of choice (the law is giving with one hand and taking away with the other) because you either join the village council as a youth or be bound by its decisions anyway. In essence, it removes the freedom of a youth who does not want to be a party to the decisions of a village youth council. This is contrary to article 29(1) (e) of the Constitution which guarantees freedom of association.

In addition, it is also important to recall that due to Uganda's porous borders[45], inefficiencies in the registration process[46] and high rates of corruption[47], it is difficult to completely eliminate the phenomenon of non-citizens obtaining Ugandan National Identifications cards and therefore participating in the elections. As a result, the Electoral Commission makes in accurate voter's registers.

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45 https://www.independent.co.ug/arlpi-asks-government-to-tighten-security-along-porous-borders/ November 8,2020. See also https://reliefweb.int/report/uganda/making-ugandas-porous-borders-safer 26th July, 2021. Both last accessed 27th Feb,2022.

46 Digital Welfare State and Human Rights Project, Initiative for Social and Economic Rights (ISER) and Unwanted Witness (UW) (Initiative for Social and Economic Rights 2021) rep. This report among other things explores the problems with Uganda's National identity registration process which include high rates of errors, highly centralized process and allegations of bribery.

47 Inspectorate of Government, 'Bi- Annual Inspectorate Of Government Performance Report To Parliament July- December 2020' (2020) https://igg.go.ug/media/files/publications/IG_Report_to_Parliament_July_-_December_2020.pdf. The report showed that the office of the IGG investigated and completed a total of 524 complaints in the six months.

Under Subsections 6(1) (ii) to (vii), the law provides for a parish or ward youth council,[48] a sub-county, division or youth council,[49] a county youth council,[50] and a district youth council.[51] From the 2010 Amendment of the NYC Act, the Electoral Commission is now mandated to 'compile, maintain, revise and update a voter's register for the youth council at village and parish level as well as designate a period of registering youth to participate in youth council elections at all levels.[52]

The wording of this amendment seems to suggest that youth should be able to participate in electing their leaders at all the designated levels. However, the practice is different –only youth leaders chosen at the village level are eligible to choose leaders at the parish level and the cycle continues in that manner. This can only mean that either the legislative draftsman got it wrong or the practice is improperly being conducted-a contradiction that needs to be clarified.

However, it is important that the practice of conducting youth elections is aligned with the law by allowing all registered youth to vote for their leaders at all the levels of leadership.

3.3.3 Composition of the National Youth Councils

The NYC Act (as amended) states that the NYC shall consist of[53] – The National Youth Executive Committee which will include the Chairperson of every District youth Council, the Secretary for Female Youth at the District level, the Secretary for Finance at the District level, Eight

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48 Which shall consist of all the members of the village youth committees in the parish or ward.

49 Which shall consist of all members of the parish youth committees in the sub county, division or town.

50 Which shall consist of all the members of the sub county, division or town youth committees in the county.

51 This consists of the chairperson, vice chairperson, secretary, publicity secretary and finance secretary of each county youth committee in the district, and one male representative and one female representative of each sub county youth council in the district elected by the Sub-County youth council. [See Section 6(vi) and (vii)].

52 NYC 2010. s 6A & 6B

53 NYC 2010, s 5(1)

representatives of Non–Governmental Organisations (NGOs) involved in youth activities nominated on regional basis by the National Executive Committee in consultation with the Non– Governmental Organisations Board (as ex officio members); A representative of Youth persons with disabilities, four students' representatives elected by the Uganda National Students Association, the executive secretary of the National Council (as an ex officio member) and Members of Parliament representing the Youth (as ex officio members).

The aforementioned section clearly alienates some elected officers from participating in this very crucial decision-making committee. It therefore goes against the spirit and purpose of international legislation, the National Youth Policy and the Constitution of Uganda. This has also caused disharmony amongst the leaders as expressed in the interactions from the focus group discussions.

3.3.4 Composition of the National Youth Delegates Conference

Under the NYC Act, the National Youth Delegates Conference shall consist of the following[54] –(a) The chairperson of every county youth council; (b) The chairperson of every district youth council; (c) The secretary for women youth at the district level; and (d) Eighteen students elected by the Uganda National Students Association (UNSA).

Similar to the National Executive Committee above, the selection of the representatives to the National Youth Delegates Conference also prevents other members from participating in this crucial decision-making body. It clearly alienates the youth who are not selected by UNSA and limits representation to the categories above. This is contrary to the requirements in the constitution and laws that promote youth participation.

54 NYC 2010, s 7

3.3.5 Composition of the Sub-County, Division, Municipal or Town Council Youth Executive Committee

Under the NYC Act, the Sub-County, Division, Municipal or Town Council Executive Committee shall consist of the Youth Executive Committee, all members of the Parish Youth Committees, two students elected in consultation with the UNSA in the District; one of whom shall be a female, one youth with disability nominated by the organisations of persons with disabilities, the two youth councillors as ex officio members, the Community officer as an ex – officio member and the Executive Secretary as an Ex- Officio member.[55]

As noted above, the law continually privileges some representatives over others at the Sub-County, Division, Municipal or Town Council Executive Committee level. It means that other views are not heard, at this level and yet it is very crucial to ensure that all youth are represented and their voices are heard. By including officers that were not even elected at the lower levels, this section frustrates the very essence of youth participation in electoral democracy.

A model of an electoral system that is largely intolerant of dissenting views and presents itself as an exclusive enterprise in which voting power may or may not be exercised by the youth collectively, is one major failure of this system in particular. Drawing for example, from the composition of youth at the various institutional levels and the mode of selection, it becomes evident that the creation of numerous checks sieves is prone to abuse especially where political ideologies may not properly align with those of the appointing and selection bodies.

3.3.6 Composition of the District Youth Council

The District Youth Council has not been spared of the selective membership. Section 7(5) of the NYC Act (as amended) states that the DYC shall consist of – (a) The District Youth Committee; (b) The Chairperson of every Sub-County, Division, Municipality or Town Council;

[55] NYC 2010, s 7(3)

(c) The Secretary for Women Affairs at the Sub-County, Division, Municipality or Town Council; (d) The Secretary for Finance at the Sub-County, Division, Municipality or Town Council; (e) One representative of Non–Governmental Organisations involved in youths activities in the District to be nominated by the District Youth Council Committee (as an ex officio member); (f) One Youth with disability nominated by organisations of persons with disabilities in the District; (g) The District Officer in charge of Youth Affairs(as an ex officio member); (h) Two student representatives elected by the Uganda National Students Association in the District one of whom shall be female; (i) The two youth councillors on the District local government council (as ex officio members); (j) The executive secretary of the District Secretariat(as an ex officio member).

While the aforementioned officers might have been selected because of practical reasons such as finances and ease of organisation, it cannot be ignored that the voices of the youth – which are the essence for which the Councils were created, end up being stifled when some of their chosen representatives are locked out of the very organs that they are supposed to participate in.

It cannot be over emphasised that by including officers who were not directly elected by the youth like UNSA representatives and excluding those who are elected directly by the youth, the law ends up pursuing purposes contrary to what it was enacted.

3.3.7 Comment on Composition of Youth Councils

The aforementioned compositions have therefore been criticised for locking out many of the youth leaders at this level.[56] Questions have been raised concerning why the officers in Section 5(1) (b), (c), and (d) were selected as opposed to the whole committee at that level. It was also argued that these three officers get to enjoy all the perks and privileges of various meetings at the expense of the other members of the

[56] The Complaints from Mukono Focus Group Discussion were raised by those members who were locked out although those elected officials who were not, supported this provision on the grounds that it was cost effective.

committee. This can only cause disharmony and disunity contrary to the object and purpose of the Act.[57]

It also remains unclear what processes are used to choose the students in Section 5 (1) (g) or the NGO representatives in (e). How are these conducted or what is the selection process for these officers? Are they representative of all the youth groups including the marginalised groups within the youth especially those in remote areas like Karamoja?

Similarly, there seems to be no clear criteria of how the 18 students in Section 7 or the 2 students in Section 7(3) are chosen. Do they represent all shades of opinion amongst the schools? Do they represent the heterogeneous opinions and experiences of the diverse student population of Uganda?[58]

3.4 The Local Government Act 1997 Cap. 243[59]

The Local Government Act was passed *inter alia* to provide for election of local councils and for any other matters connected to the above.[60]

The Composition of the district councils is provided for under Section 10 to include the district chairperson, one councillor directly elected to represent an electoral area of a district; two councillors, one of whom shall be a female youth, representing the youth in the district; two councillors with disabilities, one of whom shall be a female, representing persons with disabilities; two older persons, a male and a female elected in accordance with the National Council for Older Persons Act, 2013; two

57 The object and purpose of any legislation is the aim or goal for which it was enacted.

58 Pending interview with the President of UNSA and the President of the NYC.

59 It is amended by Act 16 of 2015.

60 It was also passed 'to amend, consolidate and streamline the existing law on local governments in line with the 1995 Constitution and to give effect to the decentralisation and devolution of functions, powers and services of Local Governments. The Act set the stage for 'decentralisation at all levels of local governments and was created to ensure good governance and democratic participation in, and control of, decision making by the people'. It was also created to provide for revenue and the political and administrative setup of local governments.

members representing workers, one of whom shall be a female elected in accordance with the Labour Unions Act, 2006.

It is clear from this that in spite of having the highest representation in any chosen district; the youth representation is limited to only two youth councillors. There is a clear privilege given to women who the law requires must form one-third of the council. This seems to be a result of lobbying done by women groups over the years as a reaction to the historical discrimination against them. This is something that youth groups have not been able to do in spite of their numbers.

More problematically however, the youth councillors are merely ex-officio members in these district councils.[61] They have no ways or means of consulting the National Youth Council structures so as to represent the views of the Youth. There is also duplicity of roles since there is a District Youth Council as well as the two youth councillors. The deliberations of the former should ideally be the ones sent to the district instead of having views from two councillors that are often uninformed or supported by the District Youth Council.[62]

Equally important, under Section 118, youth councillors shall be elected by an electoral college consisting of— (a) in case of a district council, (i) all sub-county youth councils and (ii) the district youth executive. (b) in the case of a city council, (i) all division youth councils; and(ii) the city youth executive; (c) in the case of a municipal council— (i) all parish or ward youth councils; and(ii) the municipal youth executive; (d) in the case of a sub county, town or division council—(i) all parish or ward youth councils; and(ii) the sub county, town or division youth executive as the case may be.

The Electoral College system has been heavily criticised for locking out many youths from participating in the youth elections and choosing their leaders[63]. Challenges such as long distances to the polling sta-

[61] Views from Focus Group Discussions held in Moroto, Mbuya and Mukono held on 14th, 17th and 21st November 2017.

[62] Interview with Mukono District Youth Councillor.

[63] Mwenda A, The Independent Uganda, 'Lessons from Youth Elections' (2020) https://www.independent.co.ug/lessons-from-youth-elections/. Accessed on 4 October 2022.

tions, monetary requirements, and language barriers have also made it impossible for the less privileged youth to be represented through this process. The influence of political party activities, especially from dominant ones like the National Resistance Movement (NRM) has privileged party interests over youth interests. At the end of the day, the youth's voice has been silenced or manipulated to service the interests of the political parties as opposed to the object and purpose for which the case for the emancipation of youth was originally made.

In the same vein, there is a prohibition under the Local Government Act for traditional or cultural leaders (as defined in article 246(6) of the Constitution) from being elected as local government councillors.[64] This position seems to be contested by some youth who feel that such leaders do represent interests that need to be addressed. Although contentious, it has been argued that such leaders have the advantage of commanding respect, being influential and creating change without being influenced by politicians or other perks.

Whereas they were locked out of participating in these processes perhaps because of historical reasons, it is important to revisit this provision and analyse whether it remains justifiable in a free and democratic society as provided for in Article 43 of the Constitution.

3.5 The National Youth Policy, 2016

The National Youth Policy (NYP) was passed by the Ministry of Gender, Labour and Social Development in September 2016. The Policy theme is "Unlocking Youth Potential for Sustainable Wealth creation and Development". It is clear from this theme that the Policy aims at ensuring that the youth, who are the majority population in the country, are assisted to acquire wealth. The law therefore should be seen as a tool not a bar to this process.[65]

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64 The Local Government Act, s 116(2)(c)

65 This is premised on the Law and Development Movement which 'was built around the dominant Western development paradigm of the time which gave priority to the role

The objectives of the policy include improving youth accessibility to quality services, enhancing productivity and employability of youth for sustainable livelihood, promoting participation of youth in decision making processes that impact on them and the community at all levels, and promoting effective coordination and programming of youth interventions at all levels. Unfortunately, these objectives are completely different from those of the NYC Act. Ideally, the policy is supposed to inform the law which is not the case here.

The policy was only passed in 2016 amidst a lot of criticism from many youth groups. It is therefore clear that *consensus ad idem* ought to be reached in one way or the other lest the two crucial documents continue to work at cross purposes.

Key in the NYP promotes the concept of good governance, democracy, transparency and accountability. It also promotes the active role of the youth in decision making. However, the current system of electoral colleges curtails this very objective and therefore ought to be revisited. In the words of Prisca Adiaka, former Contestant for Youth Councillor, Moroto Municipality,

> The Electoral College system is not working. Without money, you cannot win... let every eligible youth in the village be a voter. Let's not gazette places of voting but bring the ballots to the people in the villages.[66]

The NYP also provides for youth participation in decision making.[67] It requires that youth should be actively involved in the following –

a) Designing, shaping and influencing policy development and implementation processes. From the onset it is clear that youth ought to be actively involved in these processes so as to ensure

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of the state in the economy and the development of internal markets.' In this movement, the 'basic economic model was one of a regulated market economy in which the state played an active role, not just through various forms of planning and industrial policy but also through state ownership of major industries and utilities.' See. Matsuura Y, The Role of Law in Development Past, Present and Future (Center for Asian Legal Exchange, Graduate School of Law, Nagoya University 2005)

66 Moroto Focus Group Discussion 21.11.2017

67 National Youth Policy (NYP 2016), s 2.6

that their rights are promoted and that their voices are heard. Unfortunately, our interaction with various youth groups revealed that not only are they unaware of the existence of either the Youth policy or even the Act, they were also not involved in the designing or shaping these crucial laws.

This casts doubt unto the assertion made in the policy to the effect that the process of developing it was consultative, participatory and inclusive in terms of the involvement of key stakeholders. The question remains on which 'key stake holders' were consulted if the youth were not.

b) Sharing of inter-generational knowledge and the encouragement of innovation and critical thinking. This point cannot be over emphasised. The policy clearly notes that the 'valuable resources which can contribute to the advancement and quality of development are lost or under-utilized when young men and women are excluded from or insufficiently engaged in formal decision-making processes and institutions.'

In order to achieve wealth, the youth ought to be encouraged to adopt a creative mind – one that helps them think, innovate and build systems. When this is not fostered, and youth are instead conditioned to be beggars instead of creators, they lose their inherent power as noted in Article 1 of the 1995 Constitution. This is because they are unable to objectively make decisions that affect their past, present and future. Therefore, whilst the aforementioned provisions look good on paper, they shall remain grandiose and figments of our imagination unless specific steps are taken to enable the youth achieve these possibilities.

The aforementioned provision should be read in tandem with section 8.3 which notes that 'participation of young people in the democratic socio-economic and political development of a nation promotes ownership in the efforts to improve their well-being and demand for accountability in service delivery.'[68]

[68] NYP 2016, at page 26.

Although the priority of government is to pursue an 'asset-based approach to youth programming because they are a critical resource in solving their own and community challenges, this is contrary to the NYCA whose priorities are to do with unifying the youth and protecting them against any kind of manipulation. It is also noted that the government asset-based approaches have not yet taken off perhaps because the Policy was passed a year ago and government processes are often slow.

Be that as it may, government ought to show seriousness in this matter otherwise it remains a glaring reminder that inaction does hinder youth participation generally, and in electoral democracy in particular.

4.0 Challenges Faced in Youth Elections

Politics in Uganda is like fire, and the youth who are supposed to go through this fire at the forefront are limited. The well-educated youth are unwilling to take part in these elections. Even those who are willing to, have fears due to the challenges that come with these elections as discussed below.

4.1 Direct voting

Respondents were asked whether or not voting for youth representatives should be changed from electoral colleges to direct voting. 48 out of the 81 youths interviewed (representing 59%) believed that selection of parish youth councils, sub county and district youth councils should be done by all youth in their respective areas.[69] 20% of those interviewed believed that not all youth should directly participate in the elections. Thus, only 17 of those interviewed (representing 21%) did not answer the question. The 59% therefore represents an indictment of the Electoral College system and reveals it to be unpopular among the young people.[70]

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[69] Response from Questionnaires distributed in Moroto, Karamoja, Mbuya and Mukono held in November 2017.

[70] ibid

4.1.1 Electoral College and voting for Youth Members of Parliament

In further condemnation of the indirect voting method, 40% of the youth interviewed believed that selection of National Youth Council Executive committee by District Youth Councils only does not promote youth participation while only 34% believed that it did. Youth in Mbuya noted categorically that many of them did not even know who their Member of Parliament for the Central region was.[71]

44% of the youth interviewed felt that election of Youth Members of Parliament by youth councils represents the ideas of majority youth in Uganda. However, a whopping 73% believe that the same elections of youth Members of Parliament and youth councils selected by youth committees are characterised by corruption, bribery, intimidation and vote rigging. Only 7% believed that the process is genuine and corrupt free.[72]

This suggests that many of the youth have little hope in the election process as they see it as corrupt and rigged. This can explain their political apathy at election time. Despite this, a whole 40% of those interviewed asserted that there had been at least one free and fair election of youth councils and youth Members of Parliament by youth committees that they were aware of.[73]

4.1.2 Electoral College Promoting Discrimination

In yet still another assault on the Electoral College system, 44% of the sample is of the view that election of youth Members of Parliament as stated by National Youth Council Act by few youths in youth councils promotes discrimination and violation of the rule of law.[74] Only 26% of those interviewed believed that the current system was not promoting

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71 Response from Questionnaires distributed in Mbuya held in November 2017.

72 Response from Questionnaires distributed in Moroto, Karamoja, Mbuya and Mukono held in November 2017.

73 ibid

74 ibid

discrimination. 46% advocated for all youth voting and selecting youth MPs as a better way of youth participating in electoral democracy.[75]

Some youth leaders noted that during the elections for the Western Youth MPs, those who didn't belong to certain tribes in Western Uganda were profiled and specifically edged out of the competition.[76] However, when asked whether there is need for a constitutional amendment to sort this defect, only 33% believed that there is a need for a constitutional amendment with 28% insisting that there is no need for any change in the Constitution. [77]

It is sufficient to mention that youth who lose in party primaries are not permitted to run for office in the general youth election as independents. This begets discrimination, as evidenced by the ruling National Resistance Movement.

4.1.3 Youth Members of Parliament

49 of the youths interviewed representing 60% of the sample group felt that selection of 5 youth MPs, one from each region, did not represent majority of the youths in Uganda.[78] This underscores the feeling of political marginalisation that pervades many youths in the country. Youths from Karamoja argued that the Youth MPs tended to concentrate on their constituencies of origin with the hope that they will be elected as Members of parliament in the next election season.[79]

They gave examples of how the former youth MP for the East, Evelyn Anite concentrated on the region and in turn got elected. They further noted that the current Youth MP for the Northern Region concentrates only in the Acholi area with the hope of being re-elected in his constituency of origin. They therefore suggested that they ought to be

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75 ibid

76 Opinion by one of the participants given on the condition of anonymity.

77 Response from Focus Group Discussion held in Moroto, Karamoja, Mbuya and Mukono held in November 2017.

78 ibid

79 Response from Focus Group Discussion held in Moroto, held in November 2017.

given their own region as a marginalised group.[80] Others also suggested that each district should have its own member of parliament although this was highly criticised in light of the fact that Uganda has far too many districts to date.

Only 24% believed that the current representation is a proper representation. With over 78% of the population in the country below the age of 30, it is certainly necessary for this representation ratio to be rethought.[81]

4.2 Gender and other forms of discrimination

It cannot be over emphasised that youth participation in electoral processes should be accompanied by attempts to address gender and other forms of discrimination. While the State is applauded for supporting the girl child, the boy child has been left on the way side. Poverty, poor quality education, physical disability, lack of access to resources and many other challenges inform the choice of leader that will be chosen by the youth.

As the most recent elections showed, where youth are able to access wealth especially through their fathers (interestingly, the youth groups mentioned three fathers from the armed forces who were directly involved in helping their sons win the elections), it will continue to be a fallacy to assert that the youth's voices are being heard.[82] The reality is that youth are being manipulated contrary to the provisions of the NYC Act.

This therefore means that corruption plays a huge role in the electoral process. Youths indicated that there is an increase in the exchange of money for votes (some openly admitted to receiving money

[80] Response from Focus Group Discussion held in Moroto, held on 21st November 2017.

[81] ibid

[82] There was a predominant presence of General Tumukunde, Brigadier Rwamirama in the western youth MP elections of 2016. Similarly, one General Oketta was reported to have bankrolled the successful candidature of the Northern Youth MP.

to influence their votes). This means that those who were unable to influence the vote were left disadvantaged.

4.3 Socio-cultural prejudices

Youths from Karamoja expressed the view that they felt marginalised due to socio-cultural prejudices. They argued that the Northern Youth MP concentrates on his district of origin (Gulu) and hardly reaches Karamoja. Karamoja is an area that has been historically marginalised[83] and is only now coming out of chronic poverty. The region has been especially prone to violence and crime by roaming bands of youth. It is therefore critical for the young people in such a region to be part of the civic process in the area.[84]

4.4 Low civic competencies

The policy mentions that low civic competencies are a huge barrier to youth participation in the electoral processes. Our research team noticed that many of the youth consulted did not even know that there was a member of parliament for the youth of their region. Many did not even know that there was a law called the National Youth Council Act.[85] Apart from the leaders (who had access to education and other forms of information), the majority did not know that they were required to participate in these elections.[86]

The youth only got to know about this information way too late in their late 20's and early thirties and this counted for why most of the leaders were in this age bracket.[87] This could also be the reason as to why

[83] T Kakembo, 'Karamoja Will Not Wait for Uganda to Develop' *New Vision* (2017) https://www.newvision.co.ug/news/1447918/karamoja-wait-uganda-develop accessed 4 October 2022.

[84] Response from Focus Group Discussion held in Moroto, in November 2017.

[85] Response from Focus Group Discussion held in Moroto, Karamoja, Mbuya and Mukono held in November 2017.

[86] Ibid.

[87] ibid

there was strong advocacy for the age limit for youth to be in tandem with that of East Africa – 35 years. This lack of information is contrary to Article 41 of the Constitution of Uganda, the Access to Information Act of Uganda and related legislation. This may also explain why there was an amendment to Section 9(7) requiring that a person must submit a statutory declaration or birth certificate to prove his or her age before the commencement of an election.[88]

4.5 The Electoral College system

Electoral College system of voting that began in the 1880s kicked off in Ugandan youth elections in 1993.[89] However, the system has not only suppressed the values and tenets of democracy such as majority rule, but has also violated the principles of a regular, free, fair and transparent election. This is because electoral colleges restrict who can vote and discriminate the financially unstable potential youth who might have good ideology. The Colleges instead tend to promote massive electoral malpractices such as voter bribery, intimidation of voters plus the state-inspired violence.[90]

The use of electoral colleges for voting also lowers youth participation. Youth are under motivated to participate in the main elections where other leaders such as area MPs are being elected because the issues they raise do not particularly concern the youth.[91] During elections, civic engagements and debates take place and a great deal of inadvertent political education and awakening takes place. However, the youth tend to be apathetic as their issues are not being addressed when

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88 There have been many election petitions mainly based on the age of successful candidates.

89 See generally, 'A Brief History of Elections in Uganda 1958-2021' available at https://www.ec.or.ug/info/history-elctions-uganda last accessed 24th September 2022.

90 Yiga S and Tumwin S, 'Youth Elections In Kampala Marred By Chaos' *New Vision* (2020) https://www.newvision.co.ug/news/1524891/youth-elections-kampala-marred-chaos. accessed 4 October 2022.

91 Givetash L, 'Uganda's Youth Are Choosing Peace Hashtags Over Violence As Elections Loom' *Quartz Africa* (2016) https://qz.com/africa/613325/ugandas-youth-are-choosing-peace-hashtags-over-violence-as-elections-looms/. accessed 4 October

it comes to electing the youth representatives because it is at this point that, rather than allow the youth to participate directly in choosing their leaders, the Electoral College system is used. This pushes the youth leadership debates further away from the grass root youth thus making it more abstract and less relatable.

The Electoral College system also runs contrary to the spirit of the Constitution. Article 59(1) of the Constitution provides that every citizen of Uganda of eighteen years of age or above has a right to vote. Article 59(3) enjoins the State to take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote. The Electoral College system violates the principle of each citizen voting directly in an election.

Moreover, the recent amendment found in the new section 8A of the NYC Act which requires voting by lining behind individuals for village, parish, ward, sub-county and town youth councils further undermines the principle. Article 68(1) of the Constitution requires voting by secret ballot at every public election. This is in line with the Universal Declaration of Human Rights (UDHR)[92] as well as the International Covenant on Civil and Political Rights (ICCPR)[93] which implore member states to guarantee free and fair elections by secret ballot or by equivalent free voting procedures.

The new NYC Amendment Act 2015 which introduces this mode of voting however makes reference to Article 68(6) which allows Parliament to pass a law exempting any public election, other than a presidential or parliamentary election, from the requirements of Article 68(1). However, while section 8A is thus rendered unassailable on the grounds of violating Article 68(1), it nonetheless violates the principle behind the provision and behind Article 59 which is the sanctity of the vote.

It is understandable that organizing elections at that lower level by secret ballot might come at considerable cost to the government nonetheless it is undeniable that the use of a method of lining up undermines

92 Universal Declaration of Human Rights, Article 21(3).

93 International Covenant on Civil and Political Rights, Article 25 (b).

democracy at this level. It further suggests that these elections are not to be taken as seriously as those of Members of Parliament yet ironically for the youth, these elections are equally as important as MP elections because they would be lining up behind the people who will subsequently get to vote for their MPs.

Many people have expressed a wish for more youth inclusion and youth participation. Government's disinclination to consider more youth inclusiveness hampers the economic transformation of this country, impedes the government effort for a middle income country, its Vision 2040 and impedes the youth's desires and needs from being handled. The FDC's then-secretary for electoral affairs, Rubaramira Ruranca, filed *Constitutional Petition No. 21 of 2006 [2007]* in order to contest the legitimacy of the constitutionality of the restrictions on young participation. Indeed the Constitutional Court stated that 'the Executive need(s) to initiate an amendment in Parliament of the impugned provisions of these laws to reflect the embraced multiparty system.'[94]

4.6 Impartial and partisan electoral commission

The Electoral Commission is appointed by the President.[95] This severely undermines its claims to credibility and impartiality. This contributes considerably to the cynical attitude adopted by the youth who see it as nothing more than an extension of the ruling party and ready to do their bidding. The oversight of the electoral process by an Electoral Commission (EC) that appears not to be impartial discourages youth from participating when they see no value to their votes. It is therefore no surprising that the requirement for the EC to settle disputes under section 6B will be viewed with suspicion.[96]

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94 Rubaramira Ruranca v Electoral Commission and Anor (Constitutional Petition 21 of 2006) [2007] UGCC 3 (03 April 2007)

95 The Ugandan constitution, Article 60.

96 Kafero S and Nakirigya S, "Uganda: Electoral Commission on the Spot over Impartiality" (allafricaNovember 18, 2015) <https://allafrica.com/stories/201511181179.html> accessed October 4, 2022

It is inconceivable and unacceptable for a body to be a judge in its own case. The Electoral commission cannot organize elections and also be the arbitrating body for cases arising out of those elections. It is a principle of natural justice that no one should be a judge of his own cause (*nemo judex in causa sua*).

The EC has also been criticized for having a voters' register that is not authentic. One of the interviewees noted that a candidate from Kumi had managed to be voted in Bugiri and was on his way to get elected as Finance Secretary of the National Youth Council in the elections held in Fort Portal in 2016.[97] The register therefore needs to be carefully scrutinized to prevent fraudsters from getting into it. Additionally, the EC was criticized for relying on the National Resistance Movement Online (NRMO) youth registers at the Village and Parish level instead of having its own register.[98]

4.7 Finances

The youth also raised the issue of inadequate resources as a hindrance for enabling active participation in the electoral democracy. Worse still, under the 2017/18 budget of Uganda, 'the Agriculture, ICT, Social Development, Trade and tourism industry that would engage more youth altogether, form less than 6% of the total budget.'[99] This therefore means that youth activities as prescribed in the NYP, the Local Government Act (LGA) and the NYCA cannot be adequately carried out without financing.

Be that as it may, the youth have been described as being money minded and inward looking. Frank interviewees confessed that they had been bribed to vote in the last elections and that this obviously had an impact on their participation in electoral democracy. Others noted

97 Interview of youth leader, on condition of anonymity, December 13, 2017.

98 Comments from consultations in Moroto, Mbuya and Mukono held on 14th, 17th and 21st November 2017.

99 Youth Coalition for Electoral Democracy (YCED), 'Taking Stock of the Youth Gains in the 2017/18 Budget', June 2017.

that without money, one is unable to transport to the places where elections will be conducted.[100] Some Youth leaders were also criticised for always prioritising themselves when it came to the Youth Livelihood programs.[101]

Young people frequently believe they lack the resources to participate fully in a political environment that has become more monetized due to financial difficulty. In Uganda, it has grown to be nearly impossible to garner support and votes without funding and a big profile. Some people believe that what matters most now is how well one can buy votes or utilise money to influence elections rather than the merits of ideas or policies. Young people are now less inclined to enter politics, especially in areas with poor incomes and little employment options[102].

4.8 Youth Support Networks

Many of the youth lack support networks and positive role models that can help them to grow in leadership and have a desire to participate. Moreover, support from families also remains limited both in form and substance which limits their potential to explore the benefits of leadership. This coupled with lack of information access on laws, policies and institutional structures affects their participation level, because the skills possessed are not enough to enable them challenge and confront existing power structures and holders.

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100 Comments from consultations in Moroto, Mbuya and Mukono held on 14th, 17th and 21st November 2017.

101 Due to the limited time available for the research, this allegation, made in confidentiality could not be independently verified.

102 Ewoku A, 'Young People Changing Uganda's Political Landscape' https://www.saferworld.org.uk/resources/news-and-analysis/post/964-young-people-changing-ugandaas-political-landscape. accessed 4 October 2022.

5.0 Recommendations

5.1 Involve the youth in amending the law

Amending the National Youth Act needs to involve the youth as prescribed by the current NYP. There is also need for buy-in from various stakeholders to ensure that there is a holistic involvement that covers all loopholes. Democracy does not operate in a vacuum. A healthy youth, whose civic education, food security, educational and health needs have been addressed, will not be easily swayed by corruption as opposed to a poverty riddled youth.

5.2 Involvement of NGOS and Community Based Organizations (CBOS)

Ideally there is a lot of support that NGOs and CBOs can give in enhancing youth participation especially in supporting the Electoral Commission to provide the much-needed civic education. It was also suggested that supervision of youth activities can be done with the expertise and support of these NGOs.[103]

5.3 Provision of Civic Education in learning institutions

It is time to re-introduce civic education in the primary, secondary and tertiary schools and institutions respectively. This means that the National Curriculum Development Centre should be lobbied by all concerned parties, especially NGOs in order to achieve this end. The NGOs and CBOs should target those youth who are not in formal education or formal employment because they also have a stake in their country and are a big voting bloc as the elections in Kyadondo East, where music maestro Robert Kyagulanyi (a.k.a Bobi Wine) was elected.

[103] Moroto Focus Group Discussion held on the 21st of November 2017.

Schools and civil society must work to address the economic and civic limitations that impede their capacity to participate meaningfully in politics. This means economic empowerment, addressing the under-employment and unemployment problem, as well as increasing youth participation in other non-political organizations to acquire the necessary civic skills for political engagement.

The teaching of civic education will partly help to re-orient the youth in being ideologically astute, forward thinking and more patriotic. Civic education of the youth on its own will not address all issues mainly because the country as a whole need be re-oriented. Further still, the leadership at the national and local levels need to be a part of the conversation as well. In the absence of this intervention, no amount of civic education or money will set the youth on the path of participating in electoral democracy with the right mind-set.

5.4 Bring the ballot closer to the people

The interviews and focus group discussions held with the youth representatives revealed that the process of electing youth leaders, which is supposed to be conducted in gazetted areas, is prohibitive for some delegates.[104] Some delegates in the Karamoja region have to travel from across the mountains to access the polling booths.

5.5 Political party sponsorship

Section 9A of the NYCA, states that 'under the multiparty system, nomination of candidates may be made by a political organisation or a political party sponsoring a candidate, or by a candidate, standing for election independent of a political party affiliation.' To date, the majority of youth positions are occupied by the NRMO.[105]

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[104] Meeting with Youth in Moroto Karamoja at Moroto District Headquarters.

[105] Apart from Rukungiri, all District Youth Chairpersons belong to the NRM political party. The leading candidate for the Kyenjojo District Youth Chairperson seat is from

Considering that not all these leaders have been supported by the party, it is possible to argue that these leaders have benefitted from having a party that is in power. It is obvious that the current multi-party dispensation has pitted a very strong NRMO party against other very weak political organisations. While NRMO should not *prima facie* be blamed for this, where the interests of this special interest and marginalised group are concerned, there is need to re-evaluate how the youth council leaders are chosen.

It might be wise to borrow from the way the East African Legislative Assembly EALA) is chosen. Article 50 provides that EALA's members "represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in the Partner state''.[106]In light of the fact that there can never be a consensus of opinions at any given time yet the NYC Act seeks to unite all youth, it might be wise to adopt the methodology of the EALA elections (albeit with necessary modifications). In the absence of this intervention, it will be difficult for the interests of this marginalised group to be realised in spite of the political climate.

5.6 Duplicity and confusion of roles

From the focus group interactions held, it was manifestly clear that a number of youth either did not know or were confused by the various youth roles in the village executive committee, parish executive committee etc.[107] How these roles or youth participation were to be conducted were left to a clique of very few knowledgeable ones or who were reportedly connected to influential adults at the central and local government level.

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the FDC party and he told the researchers that elections have been postponed sine die unless he agrees to stand as an independent. (Focus Group Discussion held in November 2017).

106 EALA (Mandate and Functions of EALA,) at http://www.eala.org/assembly/category/mandate. accessed on November 29, 2017.

107 The Local Government Act, s 46 to 49.

It was manifestly clear that civic education was largely lacking. One of the groups reported that even the Electoral Officers who were supposed to carry out certain elections under Section 6A and 6B of the NYC Act (as amended) didn't know which ones to carry out and had to seek guidance from the headquarters. In such circumstances, it is evident that systems can easily be compromised.

5.7 Do all vote or not?

Under Subsections 6(1) (ii) to (vii), the law provides for a parish or ward youth council,[108] a sub-county, division or youth council,[109] a county youth council,[110] and a district youth council.[111] In the 2010 amendment to the NYC Act, the Electoral Commission is now mandated to 'compile, maintain, revise and update a voter's register for the youth council at village and parish level as well as designate a period of registering youth to participate in a youth council elections at all levels.[112]*(Emphasis mine)*

The wording of this amendment seems to infer that youth should be able to participate in electing their leaders at all the designated levels. However, the practice is different –only youth leaders chosen at the village level are eligible to choose leaders at the parish level and so on. This can only mean that the legislative draftsman either got it wrong or the practice is improperly being conducted. It is important that this is clearly spelt out for all.

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108 Which shall consist of all the members of the village youth committees in the parish or ward.

109 Which shall consist of all members of the parish youth committees in the sub county, division or town.

110 Which shall consist of all the members of the sub county, division or town youth committees in the county.

111 This consists of the chairperson, vice chairperson, secretary, publicity secretary and finance secretary of each county youth committee in the district, and one male representative and one female representative of each sub county youth council in the district elected by the Sub-County youth council. [See Section 6(vi) and vii)].

112 NYC 2010, s 6A and 6B.

587 Awareness raising campaigns and education

Many young people are unaware about youth elections, how they are held, or how they may gain from participating in them. Information about the importance of youth involvement in elections needs to be widely disseminated. To help young people understand the value of electing youth leaders and being elected as youth leaders, efforts to raise awareness should be launched. The villages and districts should serve as the first launch points for this campaign.

5.9 Creation of a youth parliament

One of the key proposals put forward by the youth interviewed was that the number of youth MPs should be increased from the current 5 to a reasonably representative number given the structure of the population generally and youth population in particular.[113] The youth favoured a system where each district is represented by one youth MP. This would match a special interest group like women who have a woman MP for each district under Article 78(1) (b) of the Constitution. Others however favoured a different approach of doing completely away with the Youth MPs and adopting a separate youth parliament altogether that would exclusively deal with youth affairs. These proposals are however patently unrealistic.

The current parliament with 457 MPs is already considered bloated and a considerable financial burden on the nation.[114] Increasing the number of youth MPs to match the number of districts would therefore be unwise. Moreover, it should be noted that youth are beginning to

[113] 7,242,000 youths of which 3,690,000 (51%) are female and 3,550,000 (49%) are male. National Youth Council (national youth council September 23, 2022) <https://www.nyc.org.ug/.> accessed October 4, 2022

[114] Godber W and Zie Gariyo, *Ugandan Taxpayers' Burden: The Financial and Governance Costs of a Bloated Legislature* (Advocates Coalition for Development and Environment 2009).

enter parliament in larger numbers as regular MPs rather than as representatives of a special interest group.[115]

A more realistic proposal would be, either supporting the youth to participate as regular MPs, or increasing the number of Youth MPs from 5 to 10 (including taking up the slots occupied by the Uganda Peoples Defence Forces which is not a marginalised group and whose position in a multiparty democracy no longer seems justifiable). In this regard, a special case would be made for regions like Karamoja that have been long marginalised to have their own Youth MP.

5.10 Introducing direct elections

As noted above, the system of Electoral Colleges is stifling the democratic process. It engenders apathy among the youth even regarding their own leadership as many views it as corrupts and have less interest in politics. The system also goes against the spirit of electoral democracy that permeates the Constitution and is enshrined in Articles 59 and 68. Moreover the use of electoral colleges for youth elections contravenes Article 21 that guarantees equality before the law. Whereas other elections are done by direct voting for leaders, the youth are denied the opportunity to choose their leaders directly. This system should therefore be done away with and direct elections introduced.

6.0 Other recommendations

6.1 Use of the secret ballot

The 2015 amendment that introduced elections by lining up behind individuals for village, parish, ward, sub-county, division and town youth committees does a considerable disservice. First it highlights the marginalisation of youth affairs in the country. While the other elections

[115] Imaka I, "Young Men and Women Taking over Parliament" The Monitor (November 8, 2016) https://allafrica.com/stories/201611090100.html. accessed October 4, 2022

are treated seriously enough to warrant secret ballot, the youth elections are not granted this provision to secure democracy. Second, youth elections are already mired in corruption and perceived rigging. Lining up behind individuals simply buttresses this broken system. Finally, it is also discriminatory contrary to Article 21 of the Constitution. Whereas other MPs are elected directly by secret ballot, when youth are electing the people who will subsequently choose their MPs, they are denied this privilege. Amending the law to make it possible for the National Tally centre that handles Presidential elections can do the same for the Regional Youth Members of Parliament.[116]

6.2 Ensuring independence of the electoral commission

The independence of the Electoral Commission needs to be guaranteed and affirmed. This can only be done by amending the law so as to remove the sitting President from being the appointing authority. This can serve to increase the faith in the electoral process among the young people of Uganda.

We can borrow from best practices like Kenya, whose judges are no longer appointed by the President, but by an independent Judicial Service Commission. The President of Kenya also has very little say on how these members of the JSC are appointed. In so doing, influence peddling by the Head of State or the ruling political party, whether actual or perceived would be avoided.

There should be an independent body like Court to handle disputes and complaints arising from the elections instead of having the same Electoral Commission judge in these matters where in most cases, it's a party.

[116] Whereas this comes at a financial cost, it is important for us to continue thinking critically about addressing this hurdle.

6.3 District youth council instead of youth councillors

The presence of both the District Youth Council and the two youth councillors at the district level means that there is duplicity of roles. This has an impact on the financial purse of the district. In order to create efficiency, it is recommended that the Chairperson of the District Youth Council should sit at the District Council and represent the views gathered from the Youth at the District Youth Council. This however should go in tandem with ensuring that the said District Youth Council is directly elected by all Youth in the District through a Secret ballot.

6.4 Term limits for members of parliament

There was a strong proposal that Members of Parliament should have a term limit in order to enable others to have a chance at representing the Youth and other persons. The Youth noted that representation is a sacrifice and a service but not a lifetime job. They also noted that it is very difficult (though not impossible) for an incumbent to be voted out. They therefore proposed that some level of affirmative action, to encourage youth participation should be given by limiting the number of times a Member of Parliament should offer him or herself to two (2) terms.

7.0 Conclusion

There is a manifest disconnect between the (de jure) intentions of the progenitors of the NYC Act (as expressed in their objectives of the Act) and the (de facto) actual practice to bring those intentions to realisation. This disconnect is partly caused by the fact that subsequent amendments to the law, as well as the passing of others laws, have greatly amended the object and purpose of the NYCA.

For the latter to be observed, there is need to not only amend the law and bring it in tandem with the NYP and attendant laws, but also to carry out well planned civic education that ensures that youth participa-

tion in electoral democracy is enhanced. Therefore, without doubt, the effectiveness of the institutional set-up and efficiency of the Electoral College system leaves a lot to be desired.

A Legal Analysis of the Electoral Process in Uganda During the 2021 General Elections: Challenges and Lessons Learned. A Case Study of Mbarara City

Charlotte Kabaseke* and Speciouza Birungi**

Abstract

It is the right of every citizen to participate in the governance of their countries, through many ways, including the right to vote as exercised through free and fair elections. Elections in Uganda have had a history of irregularities. This is so, notwithstanding the existence of a legal framework that enables a free and fair electoral process. This article seeks to analyse the electoral process from a legal perspective examining the extent to which Uganda conducted its recently concluded elections in accordance with the law. The article further examines the challenges and lessons learned from the elections and makes recommendations on ways of enhancing the electoral process in Uganda.

Key words: Right to Vote, Electoral Process, Law, Uganda

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1.0 Introduction

It is the duty of every democratic government to ensure that the civil and political rights of their citizens, including the right to take part in the affairs of their government either directly or through freely elected representative, are protected and ensured.[1] This includes the right to vote and be voted for.[2] This is in accordance with their international obligations as outlined under the different international, and regional legal instruments.[3] In addition, the right to vote can be realised and exercised through holding regular free and fair elections. Although this enables citizen participation, it can only be achieved through ensuring that other fundamental rights and freedoms are safeguarded.[4] These rights include the right to freedom of expression as well as the right to access to information. It is important to note that the electoral process does not only start and end on the election day but rather involves all other procedures that enable citizens to vote and be voted.[5] These include among others, voter education, ensuring the necessary logistics are available and also the need for governments to ensure that all the necessary measures are in place to ensure that this right of citizens is ensured.[6]

As already highlighted, the electoral process involves a number of processes which enable citizens to vote and be voted for. The *United Nations Committee on Human Rights on the Right to Participate in Public*

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1 Universal Declaration of Human Rights (UDHR) (1948), Article 21.

2 Ibid; article 25 (b), *International Covenant on Civil and Political Rights* (ICCPR) (1966) (article 25 a).

3 Please see the *UDHR (art. 21); ICCPR (article 25 (a); African Charter on Human and People's Rights (ACHPR) (1981) (art. 13 (1); 23 (1) (a); African Union Declaration on the Principles Governing Democratic Elections in Africa (AUDPGDE) (2002); African charter on Democracy, Elections and Governance (2007).*

4 Office of The High Commissioner for Human Rights (OHCHR), *Monitoring Human Rights in the Context of Elections* Manual on Human Rights Monitoring (United Nations 2011) 4.

5 United Nations Committee on Human Rights on the Right to Participate in Public Affairs, *Voting Rights and the Right to Equal Access to Public service* (1996).

6 Ibid.

Affairs, Voting Rights and the Right to Equal Access to Public service (1996)[7] recommended that States must adopt all the necessary means including legislation to ensure that the rights are enjoyed. The committee, in paragraph 1 emphasised that this is an indicator of a democratic government. The right to participation in public affairs through freely chosen representatives by voting or being voted for at periodic elections, should be legally provided for, subject to the necessary restrictions, for example age.[8] In order to achieve this, effective measures have to be in place, for example, voter education and voter registration have to be facilitated.[9] It has, however, been observed that although many citizens turn up at voting day and vote for their chosen representatives, they hardly possess any civic education or voter education. Voters hardly possess knowledge about their right to vote including the reason why they actually need to vote.[10] This has also contributed to many eligible voters staying in their homes or choosing to attend to other business on polling days. Civic education on the other hand would be important in order to educate the masses about the political history of their country, the meaning and relevance of democracy to any given nation and exercising the right to vote as an important aspect of a democratic society, among other aspects.[11] Given this brief introduction therefore, this article seeks to interrogate the extent to which the right to vote is safeguarded in Uganda as a way of ensuring that the citizen's right to participate in their governance.

2.0 The Right to Vote in Uganda

Uganda has so far succeeded in legally providing for the right to vote. The Constitution provides that "All power belongs to the people

7 United Nations Human Rights Committee General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7.

8 ICCPR, Article 25(b).

9 United Nations Human Rights Committee General Comment No. 25 (n7).

10 United Nations, 'Voter and Civic Education' https://www.un.org/womenwatch/osagi/wps/publication/Chapter5.htm, accessed 06th October 2022.

11 Ibid.

who shall exercise their sovereignty in accordance with this constitution."[12] It further provides that, "the people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."[13] This means that Uganda is under legal obligation to ensure that regular elections are organised to enable people to vote and choose their leaders and representatives. Moreover, the Constitution provides for Citizen's "duty to register for electoral and other lawful purposes" and for the right to vote.[14] These provisions give Uganda citizens the right to be registered for voting purposes and for them to exercise their right to vote. These constitutional rights are inviolable. Government should do everything possible to ensure that these rights are respected. Furthermore, Uganda also has in place the *Access to Information Act,*[15] which is aimed at ensuring that Ugandans can access any kind of information except if it possesses a security threat. In place also is the *Local Governments Act*[16] which establishes local governments as well as elections for local governments. The *Electoral Commission Act*[17] establishes the Electoral Commission, the body responsible for ensuring successful electoral processes in Uganda. The *Presidential Elections Act*[18] governs the conduct of presidential elections and the *Parliamentary Elections Act*[19] governs the conduct of Parliamentary elections. Similarly, the *Political Parties and Organisations Act*[20] establishes Political parties and Organisations and enables citizens to form and join the same, whereas the *National Women's Council Act*[21] regulates the elections of national council and local council women's committees. Moreover, the *National*

12 The Constitution of Uganda (1995), Article 1(1).
13 Ibid, article 1(4).
14 Ibid, article 17 (h); article 59.
15 Act 06 of 2005 (Uganda).
16 Cap 243, Laws of Uganda 2000.
17 Cap. 104, Laws of Uganda 2000.
18 Act 16 of 2005.
19 Act 17 of 2005.
20 Act 18 of 2005.
21 Cap. 318 (as amended), 2015

Youth Council Act[22] regulates the elections of youth representatives to the national council. All these laws are to ensure a successful electoral process. These laws are an indicator that Uganda has made effort to ensure that her Citizens' right to participation in their governance is legally safeguarded. As to whether these laws are currently being implemented will be analysed in the fourth section of this article.

Uganda has also largely succeeded in facilitating voter registration through displaying the voter registers for verification by the voters[23] and voter education, although it has not entirely been sufficient especially concerning other elections for counsellor positions for the different electoral colleges like the youth, Persons with Disabilities (PWDs) and the elderly at all levels.[24] Emphasis is placed on the presidential and parliamentary elections but even then, although attempts were made to educate the masses through the media, including television and radios, the information was not sufficient enough especially seeing as much of the voter population in Uganda is largely rural and might not be able to own television sets or radios.[25] In addition, the voter information was scanty and viewers were referred to the Electoral Commission (EC) website which the biggest voter population cannot access either because they cannot afford the internet costs or the internet enabled phones or gadgets.[26] It is therefore recommended that voter education be enhanced by trickling the information down to village or town level lack and preferable physically.

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22 Cap 319 (as amended), Laws of Uganda 2000.

23 Electoral Commission, `EC concludes display of the National Voter`s Register` https://www.ec.or.ug/news/ec-concludes-display-national-voters-register accessed 16th January, 2021.

24 Electoral Commission, `Voter Information on Elections of Special Interest Groups` https://www.ec.or.ug/info/voter-information-elections-special-interest-groups accessed on 20 January, 2021.

25 The Independent, `Uganda registers 13% decline in households with radio sets` https://www.independent.co.ug/uganda-registers-13-decline-in-households-with-radio.sets/#:~:text=According%20to%20the%20survey%20on,17%***20 indicating***%20a%2013.5%25%***20 decline***, accessed on 18th January 2021

26 Frankline Kibuacha, `Mobile Penetration in Uganda` https://www.geopoll.com/blog/mobile-penetration-uganda/#:~:text=The%20State%20of%20Mobile%20Penetration%20in%20Uganda,

The UN Committee[27] further recommends the free choice of representatives and non-discrimination.[28] Uganda has so far achieved this and it has been reflected in the recently concluded elections as held on 14th January 2021 as well as many elections before this one, as held in 2011, 2006 and 2001 where all elections were conducted through secret ballot in accordance with the law.[29] Ugandans are free to vote for any candidate of their choice through adult suffrage.[30] In addition, the election contestants for the presidential seat included a female contestant, an indicator that non-discrimination on the ground of gender is practiced in Uganda.[31] In addition, women participated in the voting process.[32] Moreover, the UN Committee recommends that States parties should have in place an independent electoral authority.[33] This requirement is reiterated in the *African Union Declaration on the Principles Governing Democratic Elections in Africa* (AUDPGDE)[34] which also requires that State parties have in place proper institutions in order to realize the right to vote. Uganda has one in place (Electoral Commission)[35] which is responsible for the electoral process in Uganda and is responsible for ensuring the smooth running of the electoral process in Uganda. The independence of this authority has however been contested by some critics and masses who argue that it has been subject to government interference. The AUDPGDE also requires that voter information be circu-

27 UN Committee (n7), paragraph 15.

28 Ibid, paragraph 16.

29 Electoral Commission, `Voter Education Handbook` Revised Edition (Electoral Commission, Uganda 2019) 2 and 40. https://www.ec.or.ug/sites/default/files/press/VET%20Handbook%202020.pdf

30 The Constitution of Uganda, Article 59.

31 Electoral Commission Gender Strategy, 2019. https://www.ec.or.ug/info/electoral-commission-gender-strategy-2019.

32 Electoral Commission, *The Electoral Commission Report on the 2020/2021 General Elections* (Electoral Commission 2021) https://www.ec.or.ug/sites/default/files/docs/EC%20REPORT%202020_2021.pdf.

33 UN Committee (n 7) Paragraph 20.

34 African Union Declaration on the Principles Governing Democratic Elections in Africa AHG/Decl.1(XXVIII) 2002.

35 The Constitution of the Republic of Uganda, Article 60-68; Electoral Commission Act (Cap 104).

lated accordingly. Although the EC run advertisements and announcements on election guidelines, it has not been entirely sufficient. People were referred to the EC website, yet a large population of Uganda lives in rural areas and are living in poverty and are therefore not well acquainted with internet use or are unable to access or afford internet costs. Although some voter information was relayed through radio and television stations, the rural poor hardly own radios and televisions. This further curtails the right to information of Ugandans in relation to voting. Uganda has taken strides to ensure the realisation of free and fair elections, challenges still abound as observed during the 2021 elections and as will be discussed in the subsequent sections of this paper. Although the AUDPGDE is soft law and non-binding, it was endorsed by the *African Charter on Democracy, Elections and Governance* (ACDEG) (2007) which Uganda signed on the 16th of December 2008. Although Uganda is yet to ratify the Charter for purposes of being legally bound by its provisions, signature is a good step towards ratification because signature of treaties by States is a commitment not to engage in Acts or Omissions which will defeat the object and purpose of the treaty.[36] It is important to note that Uganda applies a dualistic approach to international. In Uganda therefore, in order for a an international or regional instrument to be applicable, it has to be enabled by an Act of Parliament through the process of ratification.[37] Uganda signed and ratified several treaties and other international instruments relevant to the right to vote as will be analysed in the preceding paragraphs.

This article therefore seeks to carry out a critical legal analysis of the extent, to which Uganda has ensured the right of its citizens to participate in their governance through carrying out democratic elections using the recently concluded presidential and parliamentary elections which were conducted on the 14th of January, 2021. The first part contains a brief introduction, the second part discusses the right to vote in Uganda and highlights the best practices which Uganda has adopted

[36] The Vienna Convention on the Law of Treaties (VCLT) 1969, Article 10; 18.

[37] The 1995 Constitution (Uganda), Article 123(2); Ratification of Treaties Act Cap 204 (Laws of Uganda).

in ensuring free and fair elections, the third part analyses the challenges Uganda has had in achieving free and fair elections, the fourth part analyses other illegal practices and irregularities during the electoral process and the fifth part contains the conclusion and recommendations. In achieving the objectives of this paper, the authors employed the doctrinal method of research where different laws that govern the electoral process in Uganda were analysed. Literature on the electoral process was also analysed. This was augmented by the observation method whereby authors conducted field visits to various polling centres on the polling day, noting and recording the legal issues that arose during the polling process. The authors then analysed the issues arising against the legal provisions in relation to electoral processes at the international, regional and national (Ugandan) levels. The authors also gathered information from various television and radio stations as well as newspaper articles noting the issues that were reported, evaluating them against the law. Finally, through interviews, information was gathered from other people including election officials and voters who were at the various polling centres in selected Districts in the Western Uganda region, majorly Mbarara city.

3.0 Analysis of Challenges and Lessons learned during the January 2021 general elections in Uganda

Uganda has managed to hold consistent elections as evidenced during the recently concluded elections (2021) as well as the 2016, 2011 and 2006 elections which are proof that Uganda holds elections regularly.[38] Uganda has therefore fulfilled its obligation under the *African Charter on Human and Peoples' Rights* (ACHPR)[39] which provides that, 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen represent-

[38] See for instance, The Electoral Commission report on the 2015/2016 General Elections https://www.ec.or.ug/docs/Report%20on%20the%202015-2016%20General%20Elections.pdf, accessed on 07th October, 2022.

[39] 1981.

atives in accordance with the provisions of the law' in article 13 (1). By doing this, Uganda fulfilled its mandate under international and regional law, although it has not been without challenges as will be analysed in subsequent paragraphs. Uganda ratified the ACHPR in 1986 and is therefore bound by its provisions. In addition, the *AUDPGDE*, requires states to hold regular elections. These provisions are reiterated in Uganda's Constitution which gives mandate to the Electoral Commission to hold regular free and fair elections.[40] The 2021 election days in Uganda started on the 11th to 13th of January 2021 with the elections of the counsellor representatives, representatives at the municipality/city divisions for the youth, People with Disabilities (PWDs) and the elderly. Although the author only visited the Kakiika Sub County headquarters polling station in Kakiika Division, Mbarara City and Kakyeka stadium (Rwebikoona) polling station in Mbarara City, it was observed that the voter turn up for these elections was very low across the country. Although these elections were specific to certain electoral colleges, the low turn up could indicate that voter education is still not very widely carried out in Uganda. Emphasis is mainly placed on presidential and parliamentary elections. This infringes on the right to vote of all Ugandans as enshrined in *Constitution of Uganda*.[41] The right to vote as elaborated by the *United Nations Committee on Human Rights*[42] while elaborating on the Right to participate in public affairs, voting rights and the Right to equal Access to Public Service, requires that States put in place all the *necessary and effective* measures to ensure that the mentioned rights, including the right to vote enjoyed as this is a key indicator of a democratic government. Effective measures include voter education where voters are supposed to be educated on their right and the need to vote. Voters should also be educated on how and where they can vote from as well as all the necessary requirements necessary for them to vote. This information should not only be in respect to presidential and parliamentary elections but also elections concerning all other electoral colleges.

40 The Constitution of Uganda, 1995, Article 1 (4); 61(a).

41 Ibid, Article 39.

42 United Nations Human Rights Committee General Comment No. 25, (n 7).

In addition, Part III (d) and part V (5) of the *AUDPGDE* provide for the freedom of movement, association and campaign. In order to achieve this, it is required that States put in place all necessary measures to ensure that this is achieved. The Electoral Commission of Uganda is mandated and has always released a campaign schedule for all the presidential contestants including the 2021 elections. Campaigns for the 2021 elections in Uganda were duly carried out although with some restrictions in line with enforcing the COVID-19 Standard Operating Procedures (SOPs). Along the way however, campaigns were halted abruptly and presidential candidates were restricted from campaigning in some districts, hence affecting the outlined rights under the AUDPGDE. This also contravened Section 21 (2) of the *Presidential Elections Act* (2005) which allows candidates to hold campaign meetings in any part of the Country. Section 23 further provides for freedom of expression, equal treatment and access to information by all candidates during the campaign period. The same provision is reiterated in Section 21 (2) of the *Parliamentary Elections Act* (2005). The abrupt halt of campaigns in some districts was contested in the courts of law in the case of *Lukwago Erias v Electoral Commission*[43] in which the Applicant argued that the press statement by the Respondent (dated 26th Dec. 2020) in which the Respondent suspended campaign meetings in some districts of the country infringed on the Applicant's right to freedom of 'association, assembly and interface of electorate and the entire citizenry' which is at the helm of a free and fair election. Whereas court noted that freedom of speech, assembly and association are at the helm, of a democratic system, Court noted that the right to assembly and association is not absolute and can be limited 'where exceptional circumstances demand so and specifically, either where it is prescribed by law or where it is necessary and proportionate to do so or when the limitation pursues a legitimate aim.' Court further pointed out that a limitation to the enjoyment of rights and freedoms has to be measured for validity and the limitation has to be justified within the confines of *article 43 (2) (c) of the Constitution of the Republic of Uganda*. It was the court's view therefore

[43] *Lukwago Erias v Electoral Commission* (Misc. Cause no. 393 of 2020) (Uganda).

that whereas the respondent's press release by the respondent limited the applicant's rights as outlined, the limitation is justifiable, in the face of the COVID-19, in order to ensure public safety among other reasons and also in face of undeniable scientific evidence of the spread of the pandemic in the districts where campaigns were restricted. In addition, the respondent (Electoral Commission) has special powers under *Section 50* of the *Electoral Commission Act* in cases of emergency. The application was therefore dismissed with costs.

Furthermore, the campaigns were marred with intimidation of some of the presidential candidates and their supporters as well in violation of the section 21 of the Presidential Elections Act, 2005 as amended (Uganda).[44] For example, Robert Kyagulanyi and Patrick Oboi Amuriat (presidential candidates) were incarcerated and they missed campaigns for a few days.[45] In addition, some of the supporters of these presidential candidates were sprayed with teargas several times, arrested and detained and some even died.[46] Whereas this was the case, the Police and the Electoral Commission pointed out that these candidates were holding Campaign rallies contrary to the COVID-19 SOPs and guidelines contrary to the *Public Health (Control of COVID-19)*[47] which prohibited mass gatherings as an SOP against the spread of COVID-19 and Section 171 of the *Penal Code Act*[48] which prohibits the spread of harmful disease. Whereas this might have been the case, it is important to note that the guidelines were selectively applied with some of the candidates for example Yoweri Kaguta Tibuhaburwa Museveni (the then incumbent president) being allowed to traverse the nation and hold mass gatherings with their supporters.[49] Furthermore, this is an indicator that the right to freedom of association and campaign for the affected candidates

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44 Electoral Commission, `EC Suspends Campaign Meetings in Specified Districts` https://www.ec.or.ug/news/ec-suspends-campaign-meetings-specified-districts accessed on 19th January, 2021.

45 Ibid.

46 Ibid.

47 Public Health (Control of COVID-19) Regulations S.I.83 of 2020.

48 Cap 120, Laws of Uganda 2000.

49 Electoral Commission (n 44).

(Kaygulanyi and Amuriat) were violated by the police and the electoral commission.

On the 13th of January, 2021, the government of Uganda shut down the internet across the country.[50] This was preceded by the shutdown of social media.[51] The president of Uganda, Yoweri Kaguta Tubuhaburwa Museveni is his national address held on the 12th of January, explained that this was in a bid to prevent interference or manipulation of the general elections.[52] Uganda government's interference with internet connection as well as the disconnection of social media is a violation of *Constitution of the Republic of Uganda*[53] which provides that 'power belongs to the people.' By curtailing their use of social media, the citizens of Uganda were denied the power or liberty to receive any kind of information across any form of media and hence exercising their power to make informed decisions (whether influenced by social media content or not). People should therefore be given the liberty to decide on which leaders they want without any interference. In addition, the switching off of the internet grossly affected various human rights, including the right to freedom of expression, the right to information, the right to education and the right to health among others, as outlined under the various international, regional and national legal provisions as elaborated here under. The *Universal Declaration of Human Rights (UDHR)*[54] provides for people's right to hold opinions, without interference and the right to expression including the right to seek, receive and impart information or ideas of all kinds regardless of frontiers, either orally, in writing or print or *other media of choice* (Social is one such media and it can only be used while the internet is accessible). It is however important to note that the same article provides that this right comes with 'rights and responsibilities' and could be restricted in order to protect the rights of others,

50 This was confirmed by President Yoweri Museveni's national address held on the 12th of January 2021 at 8pm and aired on NTV television (Uganda).

51 New Vision News Paper and The Daily Monitor News Papers, Wednesday 13th January, 2021, page 3.

52 Ibid.

53 The Constitution of Uganda (1995), Article 29.

54 The UDHR (1948), Article 19.

security, public order and behavior such as libel, slander, pornography, incitement etc. cannot be entertained in the in the name of trying to safeguard this right. In the Ugandan context, what should have been done by the Ugandan government is to point out the communications of the people that misuse the internet and the media and rightfully have them punished accordingly, including turning off their internet as opposed to having all Ugandans pay dearly. This is so, especially because the government boasts of having a strong intelligence system.

Article 19 of the 1nternational Covenant on Civil and Political Rights (ICCPR) contains provisions similar to those in the UDHR. It provides for freedom of expression which includes articulation of opinions and ideas without fear of retaliation, censorship or legal sanction regardless the medium used. Uganda acceded to the ICCPR in 1995. Similarly, the *ACHPR*, in article 9 provides that every individual has right to express and disseminate his opinion within the law. A similar provision is enshrined in the *African Charter on Democracy, Elections and Governance (ACDEG) (2007)* in Article 27 (8) and provides that States parties should promote freedom of expression especially in relation to press freedom. Similar provisions are also reflected in the *AUDPGDE*[55] which requires States to ensure freedom of expression of political opinion and access to media (Part V (5)). Turning off the internet therefore breached the right to expression through the media especially since social media could not be accessed. Moreover, the internet shutdown interfered with the right to information as provided for under *article 41* of the *Constitution of the Republic of Uganda* and provides that every citizen has a right to access information from government or any other organ. For example, NBS television live at 9 pm news of 13th January 2021 reported that because of internet interference, they were unable to broadcast elections news from across all the other parts of the country hence denying their viewers the opportunity to get information. This was the same case for their social media platforms like Facebook and twitter. The same was the case for TV West television which could not broadcast election information or the electoral process on the polling day (14th January, 2021) as they could

55 AHG/Decl. 1 (XXXVIII, AUDPGDEA (2002).

not receive any information from their journalists in the field due to the internet shut down. In addition, as already cited above, *article 19* of the *UDHR* provides for the right to seek, receive and impart information or ideas of all kinds regardless of frontiers, either orally, in writing or print or other media of choice. The *ACHPR,* in *article 9* provides for the right of every individual to receive information. The *AUDPGDEA* already cited above requires states parties to safeguard all human and civil liberties, for example, access to information during the electoral process (Part III (d)). By turning off the internet therefore, Ugandans' could not receive any information through social and in some cases through television and radio, hence a violation of their right to exchange information on the electoral process. Ugandans should therefore have been left to receive information in any form and make informed decisions while exercising their right to vote.

Moreover, the internet shutdown interfered with other rights, for example, the right to education of Ugandans as enshrined under *article 30* of the *Constitution of the Republic of Uganda* and as enshrined under various international and regional instruments (*article 26* of the *UDHR, article 17* of the *ACHPR* and *article 13* of the *ICESR.* Institutions of higher learning like the Law Development Centre were holding online classes before the internet was shut down. The classes had to be suspended. Similarly, the right to health as enshrined under *article 12* of the *International Covenant on Economic Social Rights (ICESR)* which is reiterated in *article 16* of the *ACHPR.* It is important to note that although the Ugandan Constitution does not expressly provide for the right to health, it recognizes the Government mandate to provide medical services (*Objective and Directive Principle of State Policy no XX). In article 23 (5) (c), the Constitution*) recognizes the right to every person to access to medical services. Internet is one way in which some people access medical services. Many people in Uganda access their doctors online through medical apps or online communication.[56] By interfering with the internet and social media therefore, their doctors could not be accessed on

[56] This was also reported on Bukkedde Television news live at 10pm on the night of 13th January 2021.

time hence an interference with their right to proper health. Even more serious is the fact that the internet shut down negatively affected the control of and fight against the COVID-19 pandemic especially because people who tested for COVID-19 were unable to receive their results during the internet shutdown period. This is because the results were always relayed through email and therefore people were unable to receive their results. The people whose tests turned out positive therefore, were unable to take the necessary precaution to avoid the spread of the virus so the health of their contacts was in jeopardy.[57]

Important to note also is the fact that no media/press/journalists were available at the polling stations visited and at many other polling stations across the country. Journalists were not allowed to cover the general elections without obtaining accreditation from the Electoral Commission to cover the 2021 general elections.[58] This arose from a directive issued by the Uganda Media Council (UMC) that all journalists needed to be accredited in order for them to be able to cover the 2021 elections.[59] This directive affected the foreign journalists as well. Although the UMC argued that they issued the directive under the *Press and Journalist Act*[60] which gives the UMC mandate to regulate and promote good ethical standards and discipline journalists and to promote, generally, the flow of information. Where this is the case, the UMC seems to have conveniently invoked this provision at a time when the media has documented excesses of police and other state organs. The UMC therefore seemed to be trying to avoid the same, during the electoral period. The *Press and Journalist Act* instead requires the Media

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57 Daily Monitor newspaper, Friday, January 15 2020, page 3, reported that Ugandans who submitted samples for COVID tests are unable to receive test results because results are usually delivered through email (Prof. Ponsiano Kaleebu of Uganda Virus Research Institute).

58 The Electoral Commission Act, s 16; Electoral Commission, https://www.ec.or.ug/election/media-accreditation-20202021; Electoral Commission,

59 Uganda Media Council, 'Guidelines for Media Council Accreditation of Journalists for Coverage of 2021 Elections and other State Events' https://mediacouncil.go.ug/wp-content/uploads/2020/12/Press-Statement-on-accreditation-for-media-coverage-in-Uganda.10.12.2020.doc accessed on 07th October, 2022.

60 Cap 105 Laws of Uganda 2000.

Council to issue practicing certificates to journalists who are enrolled by the Institute of Journalists of Uganda (NIJU) (which has been moribund for about 15 years now hence unable to issue the practicing certificates), leaving the role of the UMC to entering enrolled journalists on the role of journalists and issuing them practicing certificates.[61] The law hence requires no accreditation for local journalists. Although foreign journalists require accreditation (which they already have) they need no further accreditation specially designed to enable them to cover elections.[62] The move by the UMC therefore could be argued to have other ends to achieve other than fishing out quack or fake journalists as they have alleged. This requirement curtailed the freedom of expression of which shall include freedom of press and other media in accordance with *article 29* of the *Constitution of the Republic of Uganda* especially since the press could not gather news, report it and possibly, analyze it. The aggrieved journalists petitioned court for redress and Court ruled in their favour in the case of *Editors Guild Uganda Limited and Centre for Public Interest Law Limited v Attorney General*.[63] The applicants sought court orders to quash the directives of the UMC; to quash the illegal registration and accreditation of journalists by the UMC in order to cover the 2021 elections and other state events the requirement, being irregular; a declaration that failure to constitute, maintain and operationalize the statutory NIJU to have journalists enrolled under the *Press and Journalist Act* is illegal and irregular; a declaration that registration of the journalists by the UMC without an operational NIJU in accordance with the Press and Journalists Act is illegal and irregular. Court ruled in favour of the applicants and stated that registration and accreditation of Journalists (local and international) by the UMC outside the confines of the law for purposes of covering the 2021 elections is illegal, irregular and tantamount to procedural irregularity. Court therefore quashed the directives of the UMC, the illegal registration of the journalists, prohibited the UMC or any other government agents from curtailing journalist

61 The Press and Journalist Act, s 15; 16; 26; 27.

62 Ibid, s 29.

63 *Editors Guild Uganda Limited and Centre for Public Interest Law Limited v Attorney General* Misc. Cause no. 400 of 2020.

from covering the 2021 elections. Although the ruling was delivered in favour of the applicants, it was delivered late on the 18th of January, 2021 after the 2021 general presidential and Parliamentary elections. It will however serve as a precedent for future similar cases. In addition, some local government elections were yet to be held by the time of the ruling for example elections for the District local councilors, municipality chairpersons and councilors, counselors for youth, PWDs and older persons to the district local government councils, chairpersons and councilors for sub county/town/municipal division. It therefore hoped that the ruling will aid the journalists to cover these elections.

Both women and men were involved in the election either as aspirants for various positions or as voters. There was one female aspirant in the presidential race.[64] There were female contestants for the directly elected Member of Parliament seat.[65] Although female numbers were significantly less than the males, it is commendable that females in Uganda have been given an equal footing with men to be involved in politics. There is a need for continued affirmative action in favour of women among other strategies, in order for them to fully participate in the political sphere. Important to note also, is the fact that women turned up in large numbers, to cast their votes.[66] The political involvement of women is important to note especially because Uganda is committed to its international standards on non-discrimination and full participation of women. International, regional and national law prohibits discrimination against women under the article 2 of the *International Covenant on*

64 Presidential Campaign Programme, http://www.ec.or.ug/election/presidential-campaign-programme.

65 For example, there were only two women contestants out the 11 contestants for all the different divisions of Fort portal city; 3 women out of the 28 contestants for all the different divisions of Kasese District; All the 16 contestants were male, for Kyenjojo District, all the 19 contestants were male for Kasese district; 3 females and 25 men for Kabale District; 2 females and 13 males for Sheema District; 1 female out of the 34 contestants for Mbarara City and all the other Division; 1 female out of the 19 contestants for Ntungamo District; 2 females out of the 18 contestants for the Rukungiri District (Nominated candidates for Parliamentary Elections 2021) 18.11.2020, https://www.ec.or.ug/info/nominated-candidates-parliaentary-and-local-government-councils-elections-2021).

66 Ibid.

Civil and Political Rights (*ICCPR),*[67] *article 2, Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW)*[68] *article 18 (3) of the ACHPR,*[69] *the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*[70]*(all of which Uganda is a party to), article 2, 21 and 33 Constitution of Uganda*. In addition, the *Local Government Act (LGA)* (Cap 243, Law of Uganda, 2000) contains similar provisions. Therefore, whereas Uganda has taken steps in ensuring gender equality especially through legislation, a lot more affirmative action and education needs to be done in order to practically realize gender parity in the electoral process. The female numbers are still significantly low, compared with those of the men.[71]

Uganda, in fulfillment of its obligation invited accredited election observers including accredited observers from the AU, amongst many others. Observers were deployed across the country to observe the election process on the polling day, across the country in all the 146 Districts. It can therefore be said that Uganda acted within the legal requirements under Section 16 of the *Electoral Commission Act* and article 19 of the ACDEG which requires African Union State parties to '… inform the Commission of scheduled elections and invite it to send an electoral observer mission and … guarantee conditions of security, free access to information, non-interference, freedom of movement and full cooperation with the electoral observer mission.' In addition, the *Declaration of Principles for International Election Observation (DPIEO)*[72] contains similar provisions.

Although it is commendable that Uganda accredited election observers, the Alliance for Finance and Monitoring (AFM) headquarters were raided over allegations of having a parallel tally centre and some of their members were arrested.[73] Although the AFM may not be a UN observer, the 'non-interference' principle should be applied to all ob-

67 1966.

68 1979.

69 1981.

70 2001.

71 Refer to (n 65) on a sample of the numbers of female contestants.

72 Endorsed by the United Nations Secretariat.

73 The New Vision newspaper, Thursday 14th January, 2021.

servers. This notwithstanding, the head of the European Union (EU) Diplomatic Watch commended Uganda for having had a peaceful election although he too pointed out some anomalies like arrest of some election observers and fighting among supporters of different camps.[74] Similarly, the African Union and East African Community (EAC) observers in their preliminary report commended the Ugandan elections as peaceful, free and fair and also noted the high turn up of women and youth. His Excellency Domitian Ndyizeye, EAC head of mission noted that the polling started late and that COVID 19 SOPs like the wearing of masks and social distancing were not strictly adhered to. In addition, they pointed out many other hiccups, for example the faulty biometric machines and the late commencement of the elections in almost all polling centres across the country.[75] The hiccups notwithstanding, Uganda is commended for fulfilling its mandate of bringing on board election observers. It is hoped that their observations and recommendations will be implemented during the next election.

4. 0 A Legal Analysis of Other Illegal Practices and irregularities during the electoral process

The presidential and parliamentary elections were held on the 14th of January 2021. Various polling centres were visited by the authors and the arising legal issues were monitored. The authors visited 8 polling centres including Kakyeka Stadium South (Rwebikoona) (A-L), including Kakyeka Stadium South (Rwebikoona) (M-Z), Kakyeka Stadium North (Kakyeka) (A-L), Kyapotani polling centre in Kakoba Mbarara, Kakoba Demonstration Primary School polling station and Rwemigyina polling station, Kakiika, all in Mbarara City. Although the authors did not visit all polling stations within and outside Mbarara, information was canvassed through Newspapers, Radio and Television stations and from media agents from other districts in Western Uganda, including but not limited to Mbarara, Kabale, Isingiro, Kanungu, Kabarole,

74 Saturday Monitor newspaper, 16th January, 2021, page 1 and 3.

75 Uganda Broadcasting Corporation (UBC) news at 10pm, Monday 18th January, 2021.

Ntungamo, Kabale, Sheema, Rukungiri and Bushenyi, among others. Many legally related incidents took place as will be analysed. Some of the observed positive legal practices during the election process, including the polling process is the fact that Ugandans were able to cast their votes in accordance with *article 59 (1) of the Constitution of the Republic of Uganda*, on the right to vote. It provides that `every citizen of Uganda of eighteen years of age or above has a right to vote. `

It was observed that the elections were conducted in open spaces in accordance with Section 29 (1) of the *Parliamentary Elections Act* and Section 30 of the *Presidential Elections Act.* The presiding officers also carried out a mini voter education exercise before the commencement of the voting exercise although the people that voted after the education exercise missed the information. In addition, the voters formed one line in order to vote in an authorized manner in accordance with Section 30 (3) of the *Parliamentary Elections Act* and Section 31 (3) of the *Presidential Elections Act.* The elderly and expectant mothers were also given priority to vote in accordance with section 34 of the *Presidential Elections Act and Section 33 of the Parliamentary Elections Act.* Although this was the case, there were observed illegal practices and irregularities, some occasioned by government officials and others by the voters. On the election days, there was delay in arrival of voting materials and hence delayed commencement of the voting process. At the polling stations which were visited by the authors and across the country, electoral materials did not arrive on time.[76] The voting process therefore, did not start on time. Materials arrived at 07:43am and voting started at 8:43am at Kakyeka Stadium South (Rwebikoona) (A-L) and 9:15 am at Kakyeka Stadium South (Rwebikoona) (M-Z). Similarly, at all of the polling centres which were visited, voting did not start on time. Similar incidents were reported by Radio West 100.2[77] emphasising that elections commenced late and election materials arrived late although people were eager to exercise their right to vote even amidst an early morning down pour. This was the same case in Bunyangabu District where most polling centres had not yet opened by

[76] Uganda Broadcasting Corporation (UBC), 8pm news bulletin of 17th January, 2021.

[77] Radio West Lunch Time News at 1pm, 14th January, 2021.

9am and some places in Ntungamo Municipality and Kasengyengye and NTC (L) polling stations in Mbarara District where voting kicked off at 10 am and 9am.[78] The delay in the commencement of the voting process is contrary to the *Parliamentary Elections Act*[79] and the *Presidential Election Act,*[80] which requires voting to commence at 7:00am in the morning. *Section 33* of the *Parliamentary Elections Act and Section 34* of the *Presidential Elections Act* further requires voters to vote without undue delay. Information from all the visited polling centres revealed that polling materials arrived late and that voting commenced late at all the polling centres. This is something government, needs to put to order, through the electoral commission. Some voters arrived before 7 am so that they can voted and proceed to work there after or attend to other things. With this status quo, however, some people had to walk away in order for them to be at work. They were therefore unable to vote. This could tantamount to voter disenfranchisement hence a violation of their right to vote.[81] Although the Presidential and the Parliamentary election days were declared public holidays,[82] some people still have to go to work so they try to use the 7am polling time to their advantage. It is also important to note that the other election days for `non-presidents` and parliamentarians were not declared public holidays so working voters were not able to vote.

In addition, some voters' names were missing from the voters' register at the visited polling centres as well as some other districts likes Kagadi. Although this amounts to voter disenfranchisement, and hence a violation of the right to vote of the affected persons under article 59 of the Constitution, it is important to note that it is the voter's duty to participate in the verification of the voter's register whenever displayed in order to avoid or minimise such anomalies. Whereas voters have rights, they also have responsibilities. For examples, it is the duty of the citizens

78 Daily Monitor Newspaper, Friday 15th January, 2021, page 9 (Uganda).

79 Parliamentary Elections Act (Uganda), s 29.

80 Presidential Elections Act (Uganda), section 30.

81 The Constitution of Uganda, Article 59.

82 Crispus Mugisha, `Election day and day after declared public holidays in Uganda` 13th January, 2021 https://nilepost.co.ug/2021/01/13/election-day-and-day-after-declared-public-holiday-in-uganda/ accessed on 16th January, 2021.

or voters to crosscheck with the voters` register and ensure that their particulars appear on the list and that they have no errors.[83] Otherwise it is also important that they register their complaint with the Electoral Commission representatives at the polling station or at the District/City level and ensure that the issue is rectified, most likely, for the next election. This is because rectifying the issue on polling day may be difficult hence defeating the possibility to vote on that actual day. In addition, although the affected voters have a right to take legal action against the responsible government entity (Electoral Commission), weighing the cost against the benefits of pursuing legal action is vital, keeping in mind the fact that legal action might not enable the aggrieved party to vote during the polls as desired, because the polling will have passed by and it might not alter the result of the election result either. That having been pointed out, nothing in the law hinders the affected persons to follow the necessary due process including petitioning the Electoral Commission and if not satisfied with the decision, the courts of law. It is a general principle of law that the Jurisdiction of court cannot be ousted.[84]

An important observation is that the president addressed the nation shortly before the elections[85] and among others issues, he pointed out that only finger print screening using the biometric machines should be used for voting.[86] The president stated that the Electoral Commission 'should not allow anybody to vote where the thumb print is not used.' This statement was contrary to Section 35 (3) of the *Presidential Elections Act* and Section 34 (3) of the *Parliamentary Elections Act* which provide that as long as a voter's name appears on the voter's register, they are eligible to vote. The president's statement was therefore not in line with the law. Many voters whose names appeared on the voters' register were therefore unable to vote because their finger prints could

83 Electoral Commission, `EC concludes display of the National Voter`s Register` https://www.ec.or.ug/news/ec-concludes-display-national-voters-register accessed 16th January, 2021.

84 *Wandera v Wafula* [2016] UGHCCD 142.

85 NTV television news broadcast at 9pm, on Tuesday 12th January, 2021 (Uganda); New Vision newspaper, Wednesday 13th January, 2021, page 3.

86 Ibid.

not be captured by the biometric machines or because the machines went faulty.[87] The emphasis on the use of biometric machines however was a recommendation in the case of *Amama Mbabazi v Yoweri Kaguta Museveni Electoral Commission and the Attorney General*[88] which recommended that a law be enacted to provide for the use of technology in the conduct and management of Elections. The *Electoral Commission Act* was hence amended to provide for the use of technology, perhaps following this amendment.[89] The EC is mandated to take steps to ensure that there are secure conditions necessary for the conduct of any election under the EC Act.[90] This notwithstanding, the use of the hard copy voter's register has not been done away with legally. The voters' register hence still remains the primary document which determines whether a person can vote or not and polling assistants need to be educated about this. In addition, It is imperative to note that that biometric machines across the country disappointed many voters because the machines were either slow or non-functional and in some cases, voters' finger prints could not be read.[91] This was the case in Katete Central polling station as well as Sheema District. As already highlighted, in some instances, voters were sent away since their finger prints could not be captured. The machines were introduced to 'enhance transparency, avoid multiple voting and curb election fraud' (*Amama Mbabazi v Yoweri Kaguta Museveni and other).* In this case, court was also aware that technology can malfunction and that the use of biometric machines could not have been perfect but court also mentioned that the biometric machines were not the sole determinant of a voter's ability to vote, but the voter's register, which is the sole document for ensuring voting. During the 2016 elections, the biometric machines also malfunctioned. It is important to note that although biometric machines were used in the 2016 presidential elections, there was no law that specifically regulated their use. The enactment of

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87 Uganda Broadcasting Corporation (UBC) live at 8pm news bulletin of 17th January, 2021.

88 *Amama Mbabazi v Yoweri Kaguta Museveni and Another,* Election Petition 1 of 2016.

89 The Electoral Commission Act, Cap. 104 as amended, s 12 (1) (a);(f).

90 Ibid.

91 The Daily Monitor Newspaper, Friday 15th January, 2021, page 4.

a specific law was recommended by the Supreme Court in the case of *Amama Mbabazi* as discussed above to among other reasons minimize electoral malpractices. Following the recommendation therefore, the use of biometric machines was also adopted in the 2020 amendment to the Electoral Commission Act, already cited. From this 2021 election, however, the biometric machines cannot be said to have served the purpose for which they were introduced in the electoral process, as highlighted above. They instead further inconvenienced the voters, notwithstanding the fact that the spirit behind their introduction was positive. Proper training of presiding officers who use the machines, in future elections. The alternative of having to use the voters' register was therefore ideal rather than have the voters being denied the opportunity to vote.

Similarly, some voters were not in possession of voters' cards/slips. Section 34 (1) of the *Parliamentary Elections Act* requires a voter to have a voter's card. A voter may, however, vote if his/her name or photograph appear in the voters' register (Section 34 (3). The same provision is reiterated in the *Presidential Elections Act* (Section 35) and the *Registration of persons Act*.[92] Some voters were therefore sent away for lack of possession of voters' cards, contrary to law. At the Kakyeka Stadium South (Rwebikoona) (A-L), the voter register was not displayed for the first voters hence contravening the cited law. The same was the case at the Katete central polling centre, in Mbarara and Bunyangabu District.[93] Also, the voters register was not made available to be able to track the voter turn up as well as for tallying purposes. As already highlighted, the available biometric machines were slow and in some cases they got faulty hence delaying the voting process or leading to some voters' being sent away. As already highlighted in the preceding paragraphs, this was in breach of the affected persons' right to vote. The Electoral Commission therefore needs to place emphasis on the education and training of their staff/agents and ensure that they are in possession of and have read copies of the electoral laws.

92 Registration of persons Act, section 66 (2) (b).

93 Daily Monitor Newspaper, Friday 15th January, 2021, page 6.

Relatedly, at Rwemigyina polling centre, in Kakiika, Mbarara the names of some voters were missing from the voters' register. It is not certain, however, whether the affected persons were actually voters at that polling station and whether they took part in the voter verification exercise. If, however, they were actual voters of that polling station and they actually took part in the verification exercise, then this amounts to voter disenfranchisement which affects their right to vote under article 59 of the *Constitution* of the Republic of Uganda. Court in the case of *Retired Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni,*[94]at page 25 pointed out that the 'Electoral Commission has a duty to ensure that all citizens who are qualified to vote register and exercise their right to vote and that the entire process of cleaning the register should be fair and transparent and should be preceded by adequate voter education.' Whereas the Electoral Commission displayed the voter's register for verification and ran some announcements for voter's to ensure the verification of their names, as already alluded to in the preceding paragraphs, it cannot be said with certainty that the voter education in this respect was sufficient or that the voters in question actually carried out the verification of their names. In addition, Justice Bart Katureebe (JSC) pointed out in the above case that deletion/ the case of missing voters' names from the register indeed amounted to voter disenfranchisement under Section 19 of the *Electoral Commission Act* which provides for voter registration and provides for the right of voters to vote in the ward or parish where they are registered. He also elaborated the procedure for de-registering voters under Section 25 of the *Electoral Commission Act,* which he concluded, was not duly followed before striking off the names of the affected voters from the register hence the deregistration was illegal. This notwithstanding, he added that given that 90% of the registered voters took part in the exercise, the non-appearance of the affected eligible voters on the register could not have substantially affected the result of the election, even if all their votes were to be transferred to one candidate especially the candidate of the aggrieved parties, in this case, the petitioner. The facts are similar to

[94] *Retired Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni,* Petition no.1 of 2006 (Uganda).

the current situation where some voters did not appear on the register. They represented a small percentage which would not have altered the result of the election. Nonetheless, this is not a ground to support the violation of voters' right to vote by having their names missing on the voter's register whether by some mistake or any other reason.

Although Section 29 (3) of the *Parliamentary Elections Act* and Section 30 of the *Presidential Elections Act* prohibits carrying a bag that can be used for concealment, this was not effected at any of the polling centres visited by the authors. Many voters were carrying back packs and handbags. It was however observed that neither the security personnel nor the polling agents or assistants made any effort to call these voters to order. It was therefore questionable as to whether the security personnel and polling agents received enough training or are in possession of the copies of the law. The challenge, however, is that many voters come straight from home very early in the morning, in order to vote first and go to work straight after casting their votes. Leaving their bags and belongings at home might be difficult. The polling stations too, do not provide any place for the safe custody of voters' belongings on polling day. It is therefore recommended that safe places as well as personnel to guard those belongings be provided and the law be amended to reflect this. This might also be an indicator that voter education as well training of the polling officials is not sufficient and therefore needs to be enhanced. In relation to prohibition of carrying bags to the polling stations, although Section 42 of the *Parliamentary Elections Act* and Section 43 of the *Presidential Elections Act* prohibit the possession of firearms and ammunition at the polling centres, there was no check point or security personnel to ensure this especially as people as well as their bags were not searched. It was free entry and exit at the polling centres and hence security of the voters was compromised. The same recommendation on the education and sensitisation of both the security personnel as well as the polling agents/assistants needs to be carried. Voters also need to be sensitized on their rights and duties during the electoral process.

Other irregularities and illegal practices that were observed include holding gatherings around polling centres contrary to Section 30

of the *Parliamentary Elections Act* and Section 77 (1) (a) of the *Presidential Elections Act*, prohibit gatherings of more than 12 people at the polling stations, and allows voters to stay at least 20 meters within the vicinity of the polling station. In addition, the EC issued a guideline which requires people not to stay around the polling station in order to observe COVID guidelines.[95] Gatherings of more than 12 people were recorded at the Kyapotani polling station in Kakoba Division in Mbarara District where people were heavily crowded around the polling centres. Similarly, voters who had finished voting were crowded around the polling centre and the police and polling agents and assistants were present but did not disperse them. The gatherings were also contrary to the COVID-19 prevention guidelines and Standard Operating Procedures as issued by the World Health Organisation and the Ministry of Health, in respect to social distancing.[96] Similar incidents were reported in Bunyangabu District.[97]

Moreover, campaigning for particular candidates at the polling centres was being carried out contrary to section 81 (1) (a) of the *Parliamentary Elections Act* and Section 77 (1) (b) of the *Presidential Elections Act*. This was, however, done at Kakoba Demonstration Primary school in Kakoba, Mbarara District and Kakyeka Stadium South (Rwebikoona) (A-L). Although security personnel and polling assistants were present, they did not intervene in this situation. Similarly, some voters whom the authors interacted with alleged that they were sent away and that they were prohibited from voting on the ground that voting had been concluded. A similar incident was recorded in Kabura Primary School polling station in Bukanga District.[98] This is tantamount to voter obstruction contrary to Section 67 of the *Presidential Elections Act* and Section 71 of the *Parliamentary Elections Act*. Voter bribery was also observed at Nyakinengo and Ruhinda Sub Counties, Rukungiri District, where 7 people were

[95] Daily Monitor, `Voters fail to follow Covid-19 prevention guidelines` Thursday 14th January, 2021 http://www.monitor.co.ug/uganda/news/national/voters-fail-to-follow-covid-19-prevention-guidelines-3257348 accessed 15th January 2021.

[96] Ibid.

[97] Daily Monitor newspaper, Friday 15th January, 2021, page 4 (Uganda).

[98] Ibid.

arrested while issuing money to voters in favour of one of the aspirants for the Member of Parliament seat. The suspects were arrested and taken to police. The same was the case in Bunyangabu and Kabarole District.[99] This is tantamount to voter bribery contrary to sections 64 of the *Presidential Elections Act* and Section 68 of the *Parliamentary Elections Act.*

All these observed irregularities lay bare the fact that the Uganda government, through its agency, the EC, needs to ensure that enough personnel and/or logistics are available during the electoral process and on the day of elections to monitor such acts and take the necessary action. The Act of issuing money to potential voters is tantamount to bribery contrary to section 64 of the *Presidential Elections Act* and Section 68 of the *Parliamentary Elections Act.* Justice Bart Katureebe in the case of *Rtd. Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni*,[100] however, stated that "in cases of bribery, I think it is not enough for a deponent to say *"people were being bribed at road junctions."* This must be stated with precision as to who gave the money, who received it and the purpose must be to influence their vote. Merely being seen giving money to a person or receiving money from a person cannot per se be evidence of bribery upon which a court can rely.» That «If this court were to accept every allegation of bribery made by politicians against each other in an election in this country without insisting on strict proof thereof, every single election would be annulled and it would encourage losers to simply go out there and swear affidavits that people were bribed at road junctions. Moreover, section 64 of the *Presidential Elections Act*, requires that the bribe is given to a person to influence his vote. The bribe must be to a voter. If money were given to people who are not voters, this would not amount to bribery within the meaning of the Act. Therefore, more particulars must be given in allegations of this nature, and must be proved. In the cited case of Rukungiri District scenario therefore, the alleged money exchanges/bribery acts should be supported by the relevant proof, that they were aimed to compromise voters against a particular candidate.

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99 New Vision newspaper, Thursday 14th January, 2021, page 9 (Uganda).

100 *Rtd. Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni* (Election petition no. 1 of 2006) [2007] UGSC 24.

Election Violence (fighting and beating) was reported in Sheema District between the supporters of the different Parliamentary candidates. Some arrests had been made in connection to the incidents. In addition, it was alleged that the Residential District Commissioner (RDC) of Sheema had pre-ticked ballots. Should this allegation be confirmed to be true after proper police investigations, he can be charged with among other offences, being in possession of election material as an unauthorized person under section 76 (e) of the *Parliamentary Elections Act***.** He would also be tasked to explain how the ballots got illegally ticked should the allegations be confirmed to be true. Justice Kanyeihamba in the case of *Retired Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni*[101] pointed out that, "In my view, the illegalities, malpractices and irregularities (including possession of pre-ticked ballots) reported and proved to the unanimous satisfaction of this court dug too deep in the foundations and legitimacy of the Presidential elections of 2006 and leave no shadow of doubt that that election was fatally flawed and a fresh one ought to be ordered and held… I find that the Presidential election results of 2006 were affected in a substantial manner." In the same judgment however, Justice Bart Katureebe, JSC pointed out that the "there can be no doubt that there were many instances of non-compliance with the law and principles thereof in the conduct of these elections. But on the whole, I am not satisfied by the evidence on record that this non-compliance affected the result of the election substantially." The petition was therefore dismissed. So according to this case, there has to be enough evidence to prove the allegations against the RDC of Sheema and even if evidence is found, the irregularity has to have affected the 2021 elections in substantial manner. In addition, there were allegations that there was a physical fight between the supporters of the two contestants for the MP seat of Mwizi, Rwampara District. The culprits should be charged with the offence of affray under Section 79 the *Penal Code Act (Cap 120).*[102] In addition, during the fight, a kitchen of an individual belonging to one of the camps was set on fire. The culprits

[101] Ibid, Petition no.1 of 2006.

[102] Cap 120 Laws of Uganda 2000.

should be charged with arson under Section 327 of the *Penal Code Act*[103] of Uganda. Some suspects had been suspected by press time (Information obtained from a police officer). Other than a few cited cases of violence, the situation was generally calm in the region.

Other anomalies during the voting included postponement of elections at some polling centres and tampering with ballot boxes. Voting was postponed one of the polling centres. Although this is not an irregularity if done in accordance with the law, voters get disorganized. For example, those who come very far from the polling station may not be able to make it back for voting on another day. Voting did not take place in the Albert region in Hoima, polling due to flooding.[104] This was because the election season took place during the rainy season. *Sections 45 of the Parliamentary Elections Act* provides that the elections can be adjourned to the following day, where they have been interrupted or a complaint may be lodged to the presiding officer who may resolve the issue. The course of action in the current Hoima case was therefore in accordance with the law. At Engari polling station in Kazo, 2 boxes were tampered with. The elections were suspended as well.[105] As already elaborated in the preceding paragraphs, the elections can be postponed where an occurrence takes place that makes it practically impossible to proceed with the elections or where it is safer or reasonable to do so. In addition, all the allegations mentioned must be first proved through proper investigations even if this constituted an inconvenience to the voters.

Moreover, although article 30 (5) of the *Parliamentary Elections Act* and Section 31 of the *Presidential Elections Act* require polling stations to have four tables in place, and although Section 48 (7) of the *Presidential Elections Act* and Section 47 (4) of the *Parliamentary Elections Act* require the presiding officer to empty the contents of the ballot box on the polling table before counting the ballots, there was no table at the Kakyeka Stadium South (Rwebikoona) (A-L). EC officials had no tables or chairs to use in the process. The Local Council 1 chairman had to improvise

103 Ibid.

104 According to the TV West News updates (14th January 2021).

105 Crooze FM news (14th January 2020).

tables and chairs for this purpose. This was the same case at the Kakyeka Stadium South (Rwebikoona) (A-L) in Mbarara District and all the polling stations visited by the authors. The lack of logistics for the Electoral Commission not only contravenes the law cited (including the international legal provisions), it makes the work of the polling assistants and presiding officer difficult especially because the ballots have to be emptied on the ground. This even worse on rainy days and/or where the vote counting goes on into the night. Sometimes the ballots get damaged. In addition, it was observed that vote counting and tallying at many polling stations went on in the night. For example, at the polling stations visited by the authors and also at Kyeruma polling station in Rushozi, Kabwohe, Sheema Municipality. Section 48 (2) of the *Presidential Elections Act* and Section 47 (2) of the *Parliamentary Elections Act,* provide that no votes shall stay uncounted overnight and that where necessary, the presiding officer shall offer light for purposes of counting but having already noted the logistical issues with the EC during this election, the burden to find light might be heavy on the presiding officer as well. It is also important to note that the duty to ensure that the electoral process is successful does not solely lie on the EC. Each government department needs to play its part to ensure that this is realized. Article 66 (1) of the *Constitution of Uganda* provides that "Parliament shall ensure that adequate resources and facilities are provided to the Commission to enable it perform its functions effectively." Budgets must therefore be passed on time and sufficient funds and resources provided to the EC in order for it to ably perform its duties. This position was emphasized by the Justice Bart Katureebe, JSC, in *Rt. Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni.* The logistical challenges cycle has however been observed to repeat itself every election cycle.

Several other irregularities were observed during the electoral process and on the polling day. They include errors on ballot papers. For examples, at the Itazi Bulimanyi polling station, Mwenge North constituency in Kyenjojo District, polling station, where MP candidate photos were not tallying with their election symbols on the ballot paper so voting did not take place. The image of the National Resistance Movement (NRM) candidate switched with the one of the independent candidate.

The elections were suspended indefinitely.[106] At some other polling centres, some of the voters were not issued with ballot papers for presidential candidates. They were only issued with ballot papers for Members of Parliament only. This took place at Mutoozo polling station.[107] There were also reported cases of personation in which some voters arrived at the polling stations and found that their names were already ticked off in the voters' register as having already voted. This happened in Kihuuka cell polling station in Masindi District. This is contrary to section 75 of the *Presidential Elections Act* which provides that anyone who votes as some other person commits the crime of personation and is liable on conviction to imprisonment or to pay a fine. Voter Intimidation and undue influence was also observed in Bazzar ward in Central Division, Fortportal City. This is a crime under section 80 of the *Parliamentary Elections Act* and Section 76 of the *Presidential Elections Act, 2005* which prohibits undue influence over voters especially through threats and intimidation in order to sway them to vote a different candidate from their candidate of choice. Less ballot papers than the voter number was also observed in Kyabakoto village in Ntooma parish, Bwijangi Sub County.[108] This is tantamount to voter disenfranchisement as well as a violation of their right to vote under article 59 of the *Ugandan Constitution* and the already cited ICCPR, the UDHR and the AUDPGDEA. In addition, in Rushenyi Ntungamo, a ballot box was stolen on the polling day (14th January, 2021). The elections were postponed to 15th January, 2021. This too is an acceptable legal step as outlined in Section 45 of the *Parliamentary Elections Act* and Section 46 of the *Presidential Elections Act* which provide that polling may be postponed to the following day in instances where it has been interrupted by different circumstances. The New Vision newspaper reported the same incident that occurred in Ntungamo.

There was non-compliance with COVID-19 prevention guidelines across all the polling centres visited by the authors and across the coun-

106 Daily Monitor newspaper, Friday 15th January, 2021, page 12.

107 Ibid.

108 New Vision newspaper, Thursday 14th January, 2021) page 9.

try.[109] This was in violation of the electoral commission guidelines on COVID prevention during the electoral process. It was further reported that voters in some places like Sheema argued that COVID-19 was non-existent in their villages and is only in cities (as per a voter in Rutooma polling station in Sheema District.[110] The case was similar in Rukungiri Districts where there was no washing of hands nor social distancing at some polling centres like Nyakagyene sub county headquarters, Kasorozo primary school, Kagorogoro, Kahoko primary school in Rujumbura constituency and Rukungiri main stadium A and B polling centres.[111] In addition, this conduct was also in violation of Section 171 of the *Penal Code Act*[112] which prohibits 'doing a negligent act likely to spread infectious disease.

The irregularities as presented bring to light the fact that the government of Uganda through its agent, the Electoral Commission still has a lot to do in order to realize the right of their citizens to participate in the governance of their country. This among many other avenues should be realized through the right to vote and the right to vote is realized through ensuring that the electoral process is adequate as highlighted in the preceding paragraphs of this article. The irregularities in the electoral process as highlighted however leave questions as to the adequacy of the electoral process. For example, whether presiding officers were handed the Electoral Laws as outlined in Section 6 of the *Presidential Elections Act* and the *Parliamentary Elections Act* and if they were, whether they read and understood them or whether they were adequately trained. One cannot help but wonder what the role of police is at the polling centres since most, if not all the anomalies passed unnoticed by the police or while police and the presiding officers were looking on. Therefore, voter education on all electoral positions needs to be equally enhanced in order for voters to be able to fully enjoy this right. Justice Bart Katureebe (JSC) in the already cited case of *Rtd. Col. Dr. Kiiza*

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109 Daily Monitor newspaper, Friday 15th January, 2021, page 3 (Uganda).

110 Ibid.

111 Ibid.

112 Cap. 120, Laws of Uganda, 2000.

Besigye pointed out that some of the irregularities during the 2006 elections were as a result of lack of voter education. He stated that, "There is evidence that some of the problems and malpractices that had occurred at some polling stations were due to a lack of voter education." It is therefore important that timely and efficient voter education be carried out toward every election and sufficient resources be availed to ensure this (Article 66 of the *Constitution of Uganda)*. In addition, it is important that proper planning be carried out in order to avoid irregularities like less ballot papers than the voters at a polling station.

The electoral irregularities were quite a number as observed and analysed above. The Supreme Court in *Amama Mbabazi v Yoweri Kaguta Museveni, Electoral Commission and Attorney General* quoted the case of *Nana Addo Dankwa Akofuo-Addo and 2 Others v John Dramani*[113] where court pointed out that it is not enough that a petitioner proves that there was non-compliance with the law hence an irregularity, there must be proof that such non - compliance with the law affected the validity of the election. This view of court is reflected in Section 59 (6) (a) of the *Presidential Elections Act*. The same was the position of Justice Bart Katureebe Bart (JSC) in *Rtd. Col. Dr. Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni,* already cited above. He stated that '**...** The question as to the impact of these malpractices on the result of the election would, in my view depend on the extent, i.e. the number of polling stations, the number of voters involved, whether any interventions were made by the electoral officials and police. Although these incidents were found to have occurred, evidence shows they were in a few polling stations, compared to the total number of polling stations in the districts concerned, and some were arrested in time.' Kanyeihamba JSC in the same case, however, disagreed with this position when he stated that it is absurd that court will arrive at a finding that an election was marred with irregularities yet rule that they were not substantial enough to alter the validity of an election. That a finding that the law was contravened by the existence of irregularities should be enough to annul an election.

[113] *Nana Addo Dankwa Akofuo-Addo and 2 Others v John Dramani*, Presidential Election Petition Writ no. JI/06/2013.

Bottom line, the courts of law are open to any aggrieved party to lodge their electoral process complaint, for determination as provided for under the *Constitution of the Republic of Uganda (article 104)*. Similarly, the *Presidential Elections Act (2005)* in *Section 59 (1)* provides that 'any aggrieved candidate may petition the Supreme Court for an order that a candidate declared elected as president was not validly elected.' The *Presidential Elections (Election Petition) Rules* provide for the procedure for the filing of the petition.

To buttress the findings of the above analysis of the electoral process, the African Union and East African Community (EAC) observers in their preliminary report commended the Ugandan elections as peaceful, free and fair and also noted the high turn up of women and youth.[114] His Excellency Domitian Ndyizeye, EAC head of mission noted that the polling started late and that COVID 19 SOPs like the wearing of masks and social distancing were not strictly adhered to. In addition, they pointed out that many other hiccups, for example the faulty biometric machines and the late commencement of the elections in almost all polling centres across the country.[115]

5.0 Conclusion and Recommendations

This article set out to conduct a legal analysis of the electoral process in Uganda, using the 2021 general elections as a case study with specific focus on Mbarara city. More specifically, the paper analysed the extent to which Uganda has realized the right of its citizens to participate in the government of their country especially through the right to vote. The paper concluded that in line with her international obligations, Uganda has been holding elections regularly and that the equal participation of both men and women has been practiced. It was further observed and concluded that campaigns were carried out although

[114] East African Community, `Election Observation Mission – Uganda General Elections` Preliminary Statement, Arusha Tanzania, 18th January 2021 https://www.eac.iint/press-releases/1925-eac-election-observation-mission-urges-electoral-commission-of-uganda-to-register-all-eligible-voters-in-future accessed 18th January, 2021.

[115] Uganda Broadcasting Corporation news bulletin at 10pm, the 18th of January 2021.

with some challenges as highlighted in the article. In addition, Uganda accredited election observers who observed the elections in all districts across the country and mini voter education was conducted by the different presiding officers of the polling centres that were visited. Further, the elderly, the expectant mothers and the sickly persons were given first priority to vote at the polling centres that were visited. In addition, the electoral process in Uganda is governed by a designated entity, the Electoral Commission. Although these positive steps as taken by the government of Uganda are commendable, the electoral process came with some challenges, which included but are not limited to government interference in the electoral process through internet shutdown hence a violation of vital rights relevant to realization of the right to vote for example the right to information and the right to freedom of expression. In addition, as highlighted in the article, the government requirement by the journalists to get accreditation for purposes of covering the 2021 was illegal and also infringed on the right to citizens to information and the right to practice one's profession. In addition, although the introduction of the biometrical machines in the voting process was very good especially in the age of technological advancement, they generally slowed down the electoral process and malfunctioned and in some cases voters were unable to vote as discussed in this article. The government of Uganda therefore needs to train election assistants on technology use and also agree and enforce a uniform alternative across the country in case technology disappoints. Voter education on rights and responsibilities during the election process needs to be strengthened as this will among others, aid voters in ensuring that they respond to the call to verify the appearance of their names on the voters' register. Training of polling assistants and security personnel on their rights and responsibilities before, during and after elections as well as provision for logistics for example tables, chairs, umbrellas, among others, during budgeting. Seats should be provided for the elderly, the sick and expectant, nursing or mothers with little children as wait in line for their turn to vote. In order for citizens to be able to participate in their governance and especially through exercising their voting rights, so many factors play a part in the realisation of this, as discussed in this article.

Reaffirming the place of Structural Interdicts in Social Economic Rights Litigation in Kenya: An Analysis of the Supreme Court of Kenya's Decision in the Mitubell Case

Dr. Andrew B. Khakula*

Abstract

A structural interdict is a remedy in terms of which the court orders an organ of State to perform its constitutional obligations and to report to the court on its progress in doing so.[1] In other words, the court plays a supervisory role in ensuring State compliance with its order. The Mitubell Cases involved forcible eviction of the dwellers of an informal settlement known as Mitumba village near Wilson Airport in Nairobi Kenya. The victims of the forced eviction filed a petition in the constitutional court alleging a violation of their socio-economic rights under Article 43 of the Constitution of Kenya. The decision of the constitutional court triggered an appeal to the Court of Appeal and finally an appeal to the Supreme Court of Kenya.

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1 See the description provided in Trengrove, W, 'Judicial Remedies for violations of socio-economic rights' (1999) 1 Social Rights Law Review 1 (1999), 8-10.

The Court of Appeal, in the Mitubell Case, impeached structural interdicts on the grounds that the concept of a partial judgment or interim judgment, after hearing of the parties, was unknown to the Kenyan law. This position was widely seen as a reversal of the gains Kenya had made in the enforcement of socio-economic rights because it denied courts the ability to fashion creative remedies that will give life to rights, provided for in Article 43 of the Constitution of Kenya, 2010. These rights include the right to food, housing, clean water and sanitation, health and social security.

In January 2021, the Supreme Court of Kenya endorsed the use of structural interdicts in Kenya as an appropriate and effective remedy in socio-economic rights litigation. This Article reviews the decision of the Supreme Court in this regard and highlights on the implications of the judgment in as far as the future of socio-economic rights litigation in Kenya is concerned.

1.0 Introduction

By dint of Article 43 of the Constitution of Kenya, 2010, socio-economic rights enjoy protection and are subject to judicial enforcement.[1] Article 23 of the Constitution lists various reliefs that the courts are empowered to grant.[2] Since the list is not exhaustive, courts are required to be creative and fashion remedies that are appropriate and effective as well as practical while being cautious not to encroach into the arena of other arms of government. The Supreme Court of Kenya's decision delivered on 11th January 2021 in an appeal[3] (*Mitubell Case III*) against the Court of Appeal's decision in *Kenya Airports Authority v Mitubell Welfare Society and 2 Others*,[4](*Mitubell Case II*) clarifies this argument and validates a structural interdict as one such relief.

Although there is no clear and formal definition of a structural interdict,[5] briefly, it is a remedy in terms of which a court orders an organ of state to perform its constitutional obligations and to report to the court on its progress in doing so.[6] In other words, the court plays a supervisory role in ensuring state compliance with its order.

The structural interdict is particularly useful and appropriate when it comes to enforcing state compliance in socio-economic rights cases. Firstly, since the state is obliged to report to the court on its progress in implementing the orders of the court, the structural interdict is particularly suitable for the enforcement of duties which are ongoing, for instance where the court has directed the state to provide alternative

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1 The Constitution of Kenya, 2010, Art 43.

2 Constitution of Kenya. 2010, Art 23.

3 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) Supreme Court Petition No. 3 of 2018* [2019] eKLR.

4 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others Civil Appeal No. 218 of 2014* [2016] eKLR.

5 In *Thozamile Eric Magidimisi v The Premier of the Eastern Cape Case Number 2180/04* Froneman J at para 29 stated: "Whatever the proper legal pigeon hole may be for this kind of order, it has been sanctioned in appropriate cases by the Constitutional Court." Mr Trengrove, for the applicant, referred to it as a "mandamus with a wrinkle"

6 See the description provided by Trengrove, *Economic and Social Rights LawReview* (1999) at 8-10.

housing to squatters before evicting them. A structural interdict becomes quite appropriate and efficient in this context because the court can devise a time framework within which the state must comply.[7]

Secondly, structural interdicts are also appropriate when the conduct of the state results in a breach of fundamental rights and affects a group of people as opposed to one or two individuals. In granting a structural interdict in *Kiliko v Minister of Home Affairs and Others,*[8] Van Reenen J stated:

> "…as the manner in which the Department discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings, but also fails to adhere to the values embodied in the Constitution, I incline to the view that the instant case is an appropriate one for the granting of a structural interdict."

Wesson asserts that if the court were to exercise supervisory jurisdiction in socio-economic rights cases (such as in *Grootboom*[9] and *TAC*[10]) by asking the state to report back to it at a later stage with an outline of the measures that it regards appropriate, that would then be evaluated by the court, it would be able to ensure that such judgments are given their full effect.[11] He, however, clarifies that supervisory jurisdiction should not be regarded as an unwarranted assertion of authority on the part of the judiciary, but establishes a relationship of collaboration

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7 In *Thozamile Eric Magidimisi v The Premier of the Eastern Cape Case Number 2180/04* at para 39 Froneman J ordered that the Department of Social Development and the Premier comply with the order within a specific time frame. In *SatroseAyuma and Others v The Registered Trustees Kenya Railways Staff Retirement Benefit Scheme and 3 others* [2013] eKLR, the court also directed the state file within 90 days of the judgment an affidavit in court detailing out existing or planned state policies and Legal Framework on Forced Evictions and Demolitions in Kenya and that within 21 days of the judgment, a meeting be by the Managing Trustees of Kenya Railways Staff Retirement Benefit Scheme together with the petitioners where a programme of eviction of the petitioners shall be designed; that the agreed programme shall be filed in court within 60 days of the judgment and that each party shall have liberty to apply.

8 *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) 127 at para 32.

9 *The Grootboom Case* 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC).

10 *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* (CCT9/02) [2002] ZACC 16.

11 Wesson M 'Grootboom and Beyond Reassessing the Socio-economic jurisprudence of the South African Constitutional Court' (2004) *SAJHR* 307.

between the state and the judiciary in terms of which branch of government brings its particular skills to bear on the problems of realizing socio-economic rights.[12]

According to Currie de Waal, the elements of structural interdicts include the following: (i) a declaration identifying how a sphere of government has violated an individual or groups constitutional right / failed to comply with its constitutional obligations; (ii) court mandates that the violator must comply with its constitutional mandate; (iii) the violator is ordered to prepare and submit a comprehensive report under oath describing in detail the action plan for remedying the challenged violations. Usually the report would give the violator an opportunity to choose how it intends to comply with the constitutional rights in question as opposed to the court itself developing on dictating a solution; (iv) the court evaluates the proposed plan: whether it remedies the violations or brings the violation into compliance with its constitutional obligations; and (v) final order by the court if it approves the plans.

In the case of *Pretoria City Council v Walker,*[13] the court held that litigants seeking either declaratory or mandatory order to vindicate a Constitutional right could also obtain a court order that the sphere of government in question takes appropriate action as soon as possible to eliminate the violation of rights and report back to the court in question.

In the recent case of *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly (the Nkandla Judgment)*,[14] the South African Constitutional Court used a structural interdict. It directed the National Treasury to determine reasonable costs of measures implemented by the Department of Public Works at President Zuma's Nkandla's homestead that did not relate to security features. The National Treasury was then required to report back to the court within 60 days and the president had to personally pay the amount determined by the National Treasury within 45 days of the Court's signification of its approval of the report.

12 Ibid.

13 (CCT8/97) [1998] ZACC 1.

14 CCT 143/15: CCT 171/15 [2016] ZACC1.

The Supreme Court confirmed that even though structural interdicts are not listed among the remedies for violation of fundamental rights in Article 23(3) of the Constitution of Kenya 2010,[15] structural interdicts can be used by Kenyan courts in the enforcement of socio-economic rights.The findings of the Court of Appeal in the *Mitubell Case II* ousting the use of structural interdicts in socio-economic rights litigation was therefore set aside. The Court of Appeal had ominously stated:

> "… The concept of a partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law. A court of law in delivering its judgment must determine the rights and liberties of parties… Delivery of a judgment marks an end to the jurisdiction competence of the court."[16]

In an earlier publication, I argued that the Court of Appeal's decision in the *Mitubell Case II* reversed the gains that Kenya had made in the enforcement of socio-economic rights,mainly because socio-economic rights litigation requires a court to employ the use of innovative remedies such as structural interdicts to ensure compliance of its judgments.[17] Secondly, the Court of Appeal seemed to contradict itself by denying the applicability of structural interdicts in Kenyan law yet at the same time stating that the courts can use structural interdicts save that the order has to be precise and specific to avoid vagueness and hence breach of the doctrine of separation of powers.[18]

Judicial enforcement of socio-economic rights presents unique challenges in judicial decision-making. The major concerns normally relate

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15 Article 23(3) provides; In any proceedings brought under Article 22, a court may grant appropriate relief, including—
(*a*) a declaration of rights;
(*b*) an injunction;
(*c*) a conservatory order;
(*d*) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(*e*) an order for compensation; and
(*f*) an order of judicial review.

16 n 16, para 71.

17 Khakula A.B 'Embracing Structural Interdicts in The Enforcement of Socio-Economic Rights in Kenya: Analysis of The Court of Appeal Decision in The Mitubell Case' *(2018) 2 Jkuat Law Journal ,* 179.

18 Khakula, n 18.

to the application of the doctrine of separation of powers,[19] where the main contentions usually revolve around whether it is proper for courts to make decisions that may have an impact on resource allocation, as well as whether they possess the necessary skills to evaluate policy choices made by the legislative or executive branches of government. In deed the Court of Appeal in *Mitubell Case II* expressed its concern in the following words;-

> In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement.[20]

The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature hence the need to pay due regard to the doctrine of separation of powers in the enforcement of socio-economic rights litigation.

Therefore, I argued that the Court of Appeal in the *Mitubell Case II* had failed to clearly pronounce itself regarding the place of post-judgment supervision by courts in socio-economic rights cases in Kenya. More so, that it was likely that the much-needed clarity would emerge as Kenyan courts continue to make findings on socio-economic rights cases.[21] This argument was akin to an 'oracle's pronouncement' because the Supreme Court of Kenya's decision in the *Mitubel Case III* indeed offered the much-needed clarity on the applicability or use of structural interdicts in socio-economic rights litigation in Kenya.

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19 M Ebadolachi, 'Using structural interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic & Social Rights in South Africa' (2008) 83, *New York University Law Review,* 1567.

20 Para 100.

21 Khakula A.B 'Embracing Structural Interdicts in The Enforcement of Socio-Economic Rights in Kenya: Analysis of The Court of Appeal Decision in The Mitubell Case' *Jkuat Law Journal, 2 (2018)* 182.

This article's main focus is on the Supreme Court of Kenya's decision in the *Mitubel III* case which validated the use of a structural interdict as a remedy for socio-economic rights violations in Kenya. However, the article gives a summary of other important issues that were addressed by the Supreme court, such as the place of international law in the hierarchy of norms in Kenya, the meaning of 'general rules of international law' as provided for in Article 2(5) of the 2010 Constitution and the interpretation of the 'right to housing' in the Kenyan context.

2.0 Dissecting the High Court and Court of Appeal decisions in *Mitubell Case I* and *Mitubell Case II*

2.1 A Summary of the Mitubell Case I Before the High Court

The *Mitubell Case I* primarily involved the interpretation of the right to property under Article 40, and the right to accessible and adequate housing and reasonable standards of sanitation under Article 43(1)(b) of the 2010 Constitution. The Petitioners, Mitubell Society, residents of an informal settlement near Wilson Airport in Nairobi, were given a seven days' notice to vacate a parcel of land that they had occupied for more than 19 years. Their homes were subsequently demolished as part of a process of forcible eviction.

The land in question was registered in the name of the Kenya Airports Authority, and therefore, it was the Court's finding that the Petitioners did not have any rights over the land under Article 40 of the Constitution. The main question that the Court had to grapple with was whether the evictions and demolitions that took place amounted to a violation of the Petitioners' Constitutional rights.

The Court held that failure to give the Petitioners adequate notice to enable the Petitioners relocate and provide alternative shelter before being evicted violated their Constitutional rights. The Court referred to the United Nations (UN) Guidelines on Forced Evictions as enunciated by the United Nations High Commissioner for the Human Rights in

General Comment 7.[22] The Court was of the opinion that since Kenya did not have legislation to govern evictions, it was bound to follow the UN Guidelines on evictions by dint of Article 2(5) and (6) of the Constitution and the fact that Kenya has ratified the International Covenant on Economic Social and Cultural Rights.[23]Article 2(5) and (6) of the Constitution of Kenya makes provides that any international treaty ratified by Kenya and general rules of international law are part of the law of Kenya hence the argument that Kenya is a monist State. This argument was addressed by the Supreme Court in the Mitubell III decision and will be discussed later in this paper.

Demolishing the Petitioners' informal settlement after giving them a seven day notice without providing alternative shelter was, therefore, found to amount not only to a violation of their rights under Article 21(1) and (2)[24] and Article 43 of the Constitution. The Court found that it also violated the Constitution itself and the obligations it imposes on the State and also the national values and principles of governance set out in Article 10 which includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.[25]

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22 The UN Guidelines provide that during forced evictions, there should be an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; especially where groups of people are involved, government officials or their representatives to be present during an eviction; all persons carrying out the eviction to be properly identified; evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; provision of legal remedies; and provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

23 Para 40 of the judgment.

24 Article 21(1) provides; it is a fundamental duty of the state and every organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Article 21(2) provides, "The state shall take legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43".

25 Page 12 para 54.

The Court found that the State had an obligation to protect the petitioners' existing homes rudimentary as they were, while doing what it could to the extent of its available resources, to ensure their progressive access to adequate housing. Even if the Petitioners had no right to the land, their houses could not be arbitrarily demolished without providing them with alternative accommodation. The State has an obligation to observe, respect, protect, promote and fulfil the petitioners' right to adequate housing and the actions by the respondents were unlawful and unconstitutional which violated these obligations.[26]

The High Court made several orders which gave raise to post-judgment supervision or a structural interdict:[27]These included an order that the Respondents do provide, by way of affidavit, within 60 days of today, the current state of policies and programs on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.

The court also directed the Respondents do furnish copies of such policies and programmes to the Petitioners, other relevant state agencies, Pamoja Trust (and such other civil society organizations as the Petitioners and the Respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioner's grievances) to analyse and comment on the policies and programs provided by the Respondents.

Finally, the court ordered the Respondents do engage with the Petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identify an appropriate resolution to the petitioner's grievances following their eviction from Mitumba Village."

An analysis of the aforementioned orders shows that the court respected the doctrine of separation of powers and the political question doctrine by giving deference to the relevant arms of government that create policy. The court was alive to the fact that courts are ill equipped

[26] Page 12 para 57.

[27] Para 45.

to make policy decisions as such decisions are constitutionally committed to other arms of government such as the executive and legislature. The court allowed the Petitioners and the Respondents to go engage with the relevant arms of government and other stakeholders to craft a solution that would be adopted by the court. The wisdom behind employing structural interdicts in the enforcement of socio-economic rights is that the court is able to assess the reasonableness of the policy maker's decision vis a vis constitutional provisions without getting into the arena of the policy maker.

2.2 A Summary of the Mitubell Case II Before the Court of Appeal

The Appellants cited 18 grounds of appeal in their Memorandum of Appeal. The grounds relevant to this paper were that the court wrongly delegated itsjudicial functions and powers to Pamoja Trust, other unnamed state agencies and civil society organizations and by directing that the parties should engage with those third partiesin identifying appropriate remedies and that the court made findings and issued orders not sought or contemplated by law.

The Court of Appeal began by affirming its commitment to the realisation and justiciability and enforcement of socio-economic rights. The Court stated that, to afford socio-economic rights, less judicial protection and enforcement is erroneous because, in their very nature, socio-economic rights are crucial to a state's development ; they cannot be mere 'aspirations' and must be afforded the protection they rightly deserve.[28] What followed, however, did not reflect this commitment to the realisation, justiciability and enforcement of socio-economic rights.

The Court of Appeal took cognizance of the fact that jurisdictions like India, South Africa and Canada exercise post-judgment supervision. However, they reasoned that Article 23(3) of the 2010 Constitution, which permits the High Court to grant appropriate relief, should not be construed to be a provision that permits the High Court to borrow legislation from other countries and through judicial interpretation and

[28] Para 34.

embed them into the laws of Kenya. Further, that Article 23(3) is not a legislative instrument for the courts.[29] It is to be noted that the said article allows courts to be creative in crafting appropriate relief on a case-by-case basis. The Court argued that under the political question doctrine, a court has no jurisdiction to make orders to policy formulation or give guidelines on who should participate in the formulation of policy.[30]

The Court of Appeal made a finding that the High Court abdicated its judicial function by interpreting Article 23(3) of the Constitution which requires it to grant appropriate relief to a Petitioner, as the basis for ordering the parties to explore and report back to the Court on progress towards resolving the Petitioner's grievances. In this regard, the Court of Appeal stated that:

> A judgment brings to an end the jurisdiction of the court that delivers the same. In our considered view, the concept of a partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law. A court of law in delivering its judgment must determine the rights and liberties of parties. Save for the limited exceptions provided for in law, delivery of judgment marks an end to litigation and marks an end to the jurisdictional competence of the court.[31]

However, this was not accurate because the High Court made a declaration that the State had violated the Petitioner's rights by forcefully evicting them from their homes, thus effectively determining the dispute between the parties in the matter. The post-judgment supervisory order was only meant to allow the violator to remedy the violation under the watchful eye of the Court which, drawing from the experience of comparative jurisdictions like South Africa, is an acceptable way of enforcing socio-economic rights.[32]

The Court also noted the classical view that the role of the Legislature is to make laws and policy and that the Executive is to implement those laws and policies. The role of the Judiciary is to interpret the policies and laws as enacted and approved by the Legislature and

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29 Para 112.

30 Ibid.

31 Para 71.

32 This will be discussed in detail later in this paper.

Executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature.[33]

Notably, the Court of Appeal seemed to be 'breathing hot and cold' at the same time. The Court made a clear finding that there is no place for post-judgment supervision in Kenya's legal framework.[34] It then contradicted itself by arguing that post-judgment supervisory orders can be used by courts on a case-by-case basis only if they are properly crafted to avoid vagueness so that the Court is not seen to be engaging in policy formulation or give guidelines on who should participate in formulation of government policy.[35] The court forgot that the role of the 'reasonableness test' in socio-economic rights cases which involves the court interrogating the policies and programmes that the state has put in place in an effort to realize socio-economic rights.[36]

The reasonableness test as an interpretative tool for the enforcement of socio-economic rights has been adopted by the SACC as a standard scrutiny for the positive obligations arising from entrenched Socio-economic rights.[37] In the *Grootboom case*,[38] the court held that measures

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33 *Madison v Marbury*5 U.S. (1 Cranch) 137 (1803).

34 Para 98.

35 Para 112.

36 In the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) the South African Constitutional court stated that reasonable programme or policy aimed at realising socio-economic rights must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. Each sphere of government must accept responsibility for the implementation of particular parts of a comprehensive and well co-ordinated programme.

37 D Bilchitz, *Poverty and Fundamental Rights;* The justification and enforcement of socio-economic rights (2007) 142; D Brand 'The Proceduralisation of South African jurisprudence or What are socio-economic rights for?' in H. Botha, A Van der Walt (eds.), *Rights and Democracy in a Transformative Constitution* (2003) 33, at 39; C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence [2006] 123 South African Law Journal 264 at 265 cited in Orago above 255. For a more detailed discussion major components of the reasonableness approach see Liebenberg S 'The Implementation of Socio-Economic Rights' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed, Juta & Company 2009) at 33-34.

38 ***Irene Grootboom and Others v The Government of the Republic of South Africa and***

aimed at the realisation of socio-economic rights must be reasonable, coherent, well-coordinated and comprehensive.[39] It was further emphasized that the court was not bound to inquire whether more desirable or favourable measures could have been adopted by the government or whether public money could have been better spent as the State had a wide variety of options to choose from in implementing its obligations under the Constitution.[40]

In the case of *LindweMazibuko and others vs City of Johannesburg and others*[41]which involved the right to access water under section 27 of the SAC, the SACC employed the reasonableness test where the reasonableness of the city's policy regarding water was questioned. The court noted that a reasonableness challenge requires the government to explain the choices it has made by providing the information it has considered and the process it followed to determine its policy.[42]

It is arguable that Article 20(5) entrenches the reasonableness test into the Kenyan Constitutional framework.[43] Article 20 (5) of the Constitution of Kenya provides for principles that would guide a court or tribunal in instances where the State claims that it does not have resources to implement Socio-economic rights. The principles entail the following; that It is the responsibility of the State to show that resources are not available. Secondly, in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances including the vulnerability of particular groups of individuals. Finally, that the court or tribunal or other authority may not interfere with the decision of a State organ concerning the allocation of available resources, solely

Others[2001] (1) SA 46.

39 Paragraphs 21 & 34.

40 Paragraph 41.

41 [2009] ZACC 28*;* Similarly in *Johnson MatatobaNokotyana and others vs Eturheleni Metropolitan Municipality and other* [2009] ZACC 33 the court declined to make a finding on the reasonableness of the municipality's new policy as the policy had fundamentally changed on appeal.

42 Para. 71

43 n 43, 255.

on the basis that it would have reached a different conclusion. In other words, courts should accord deference to the political institutions in relation to the choice of policies and programmes aimed at the realisation of Socio-economic rights.[44]

Mitubel Welfare Society challenged the decision of the court of Appeal before the Supreme Court.

3.0 An Analysis of the Mitubell Case III before the Supreme Court

3.1 The Appellant's Case in the Supreme Court

In the appeal before the Supreme Court, Mitubell Welfare Society cited eight broad grounds of appeal. The ground that forms the subject of this article was that 'the learned judges had erred in law and fact in unjustifiably interfering with the High Court's discretionary grant of structural interdicts as the most appropriate relief under Article 23 of the Constitution of Kenya 2010'.They argued that under Article 23(3) of the Constitution of Kenya, the High Court has the discretion to issue a host of appropriate remedies including structural interdicts in socio-economic rights litigation.[45]

At the Supreme Court, the Appellants argued that besides structural interdicts being employed in other comparative jurisdictions such as South Africa,[46] the Supreme Court itself had also previously applied the same remedy in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others (Digital Migration Case)*,[47] and

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[44] N W Orago 'Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution' (2013) LL.D Thesis University of Western Cape 112 available at <*http://etd.uwc.ac.za/bitstream/handle/11394/2174/Orago_LLD_2013.pdf?sequence=1*> accessed on 8th July 2020.

[45] *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) Supreme Court Petition No. 3 of 2018 [2019] eKLR* para 79.

[46] *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

[47] *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others, Petition No 14, 14A, 14B and 14C, 2014* [2014] eKLR.

Francis Karioko Muruatetu Another v Republic (Muruatetu Case).[48]In both these cases, the court directed the relevant parties to craft a solution and report back to court after a specific period. They faulted the Court of Appeal's rejection of structural interdicts on grounds that it was a violation of the principle of *stare decisis* since the Supreme Court had already created binding precedents on structural interdicts.[49] The Appellants also argued the *functus officio* doctrine is not applicable whenever a court makes a structural remedial order.

The functus officio doctrine has been defined as 'one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter'.[50] The Appellant's argument was that a structural interdict being a partial judgment, violates the principal of finality in the exercise of judicial powers by inviting the court to continue making further orders in a matter where it has made a final pronouncement in the name of a judgment.

3.2 The 1st Respondent's Submissions (Kenya Airports Authority)

The first Respondent in the appeal, Kenya Airports Authority (KAA), on the other hand, argued that structural interdicts are not applicable in all cases, citing jurisdictions such as Canada where the courts have rejected the remedy on grounds that a court becomes *functus officio* once it delivers a judgment. They argued that structural interdicts can only be issued where the Executive branch of government is shown to be intransigent or incompetent or where there is evidence that declaratory orders may not be of assistance on account of past conduct

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48 *Francis KariokoMuruatetu Another v. Republic Petition No 15 & 16 of 2015,* [2017] eKLR; See also *Republic v. Council of Legal Education & Another Ex-Parte Mount Kenya University, Misc. App 16 of 2016* and *Daniel Ngetich& 2 Others v. The Attorney General & 3 Others Petition No. 329 of 2014;* [2016] eKLR.

49 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) Supreme Court Petition No. 3 of 2018* [2019] eKLR para 79.

50 *ICEA Lion General Insurance Co. Ltd v Julius NyagaChomba* [2020] eKLR para 12.

of the government. KAA also conceded that structural interdicts could also be applicable where all attempts and efforts at persuasion and assistance to the State had been made and failed. KAA further argued that in instances where the order given is not ambiguous, but clear and specific as to what is required of both parties, a structural interdict can be applicable.[51]

The High Court's decision was further faulted on the grounds that it was vague and had failed to articulate the normative parameters and guidelines for the participating parties and had not specified the persons to which the desired resolution of the dispute applied. It was further argued that the supervisory order issued by the High Court was neither effective nor appropriate as it could not have benefited the Appellant in any way. It buttressed its argument by referring to the South African Constitutional Court's decision of *Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (pty) Ltd*.[52]In this case, the Constitutional Court held that a constitutional relief must be effective and appropriate, and these qualities are demonstrated by a reasonable prospect of it being successfully implemented and practically complied with.[53]

3.3 Submissions by *Amicus Curiae* (Initiative for Strategic Litigation in Africa)

According to the *amicus curiae*, the Initiative for Strategic Litigation in Africa, both international and regional practice shows that structural interdicts have been used as appropriate remedies for human rights violations.[54] In this context, the African Court on Human and Peoples' Rights (African Court) has used structural interdicts as an appropriate remedy in the case of *The African Commission on Human and Peoples*

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51 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) Supreme Court Petition No. 3 of 2018* [2019] eKLR para 87.

52 2012 2 BCLR ISO (C.C).

53 Para 86.

54 Para 108.

Rights vs Republic of Kenya.[55]In this case, the African Court ordered Kenya to take all appropriate measures within reasonable time frame to remedy specific human rights violations and report to it on measures taken within 6 months.[56]

The *amicus* further noted that the Inter American human rights system had also used structural interdicts in enforcing human rights,[57]and argued that the guaranteed effective remedies in the European human rights system also meant that structural interdicts could be one of the remedies guaranteed by the European system.[58]

Concurring with the Appellants, *the amicus* also drew the Court's attention to a number of decisions from comparative jurisdictions including South Africa and Colombia to demonstrate that structural interdicts were increasingly being resorted to by courts in human rights cases.[59] From Colombia, the *amicus* cited *Decision T-760*, where the Court compelled the government authorities to modify regulations that cause structural problems in the system in relation to 22 specific cases.[60] The *Amicus* submitted that this judgment that was significant in granting orders that were geared towards public policy reforms had been fully implemented.[61]

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55 Application No. 006 of 2012.

56 Para 108.

57 Paras109 and 110.

58 n 58.

59 n 58; The cases cited included *Government of the Republic of South Africa & Others v Grootboom & Others 2* 2000(3) BUR 277(C); *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders* NICRO) 2004 (5) BCLR 455 (CC); *Sibiya and Others v The Director of Public Prosecutions; Johannesburg High Court & Others* 2005 (8) BCLR 812 (CC); and *All-Pay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency & Others* [2014] ZACC 12.

60 In Colombia, 'the Constitutional Court has the authority to hear actions of tutela ('protection writ,' a flexible jurisdictional action designed to protect fundamental rights), chosen by the Court from the decisions of all the judges of the Republic. Annually, the court reviews hundreds of tutela cases (which represent only a small fraction of the total number of cases decided by the system). A large number of these turn on the right to health. Judgment T-760 of 2008 collects 22 tutelas in total relating to systemic problems in the health system, most of which addressed issues that repeatedly had been decided by the Constitutional Court'.<https://www.escr-net.org/caselaw/2009/decision-t-760-2008> accessed on 8th July 2022.

61 Para 111.

With regards to the Kenyan situation, the *amicus* submitted that Article 23(3) of the Constitution gives courts wide powers to fashion appropriate remedies on case-by-case basis, thus a court of law does not become *fanctus officio* after it delivers a judgment in the form of a structural interdicts. The *amicus* also cited local decisions such as the *Digital Migration case* and the *Daniel Ngetich& 2 Others v The Attorney General & 3 Others*[62]to demonstrate, that the 2010 Constitution does not limit the court to the reliefs listed in Article 23(3) in cases involving enforcement of the Bill of Rights.

In a nutshell, the *amicus* submitted that emerging jurisprudence from international and regional human rights bodies demonstrated the expanding resort to structural interdicts as an appropriate and effective relief in human rights cases.

3.4 The Findings of the Supreme Court in Regard to Structural Interdicts

In its decision, the Supreme Court stated that the use of the word "including'' in Article 23(3) of the Constitution of Kenya meant that the list of remedies the Article provides are not exhaustive.[63]By interpretation, this means that the courts have the discretion to craft any remedy in a case involving the enforcement of the Bill of Rights as long as the remedy is certain, predictable and capable of being enforced. The Supreme Court referred to its own decisions in the *Digital Migration Case* and the *Muruatetu Case* where it had effectively issued structural interdicts.[64]

In the *Digital Migration Case*, the Supreme Court of Kenya ordered the Communications Authority of Kenya to do certain activities in exercise of its statutory power as a regulator of the media industry and report back to the Court within 90 days. In the *Muruatetu Case*,it ordered

62 *Daniel Ngetich& 2 Others v. The Attorney General & 3 Others Petition No. 329 of 2014;* [2016] eKLR.

63 Para 118.

64 Para 119.

the Attorney General, the Director of Public Prosecutions and other relevant agencies to file before the Court a report on re-hearing and sentencing of cases similar to the Petitioners' in *Mitubell Case III*, within 12 months from the date of the judgment.[65]

The Supreme Court was therefore, categorical that the Court of Appeal in *Mitubell II* simply disregarded the Supreme Court's position concerning interim reliefs by declaring that the concept of a partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law.[66]The flaw in the Supreme Court's argument is that while it delivered the decision in the *Muruatetu Case* on 14th December 2017, the Court of Appeal delivered the *Mitubell II* decision on 1st July2016. Therefore, the *Muruatetu* decision having been delivered later could not have been taken into consideration by the court of Appeal in *Mitubell II*.

While acknowledging the place of the *functus officio* doctrine, the Supreme Court held that the doctrine has to give way, albeit on case-by-case basis. This is because subjecting Article 23 of the 2010 Constitution to the limitations of Order 21 of the Civil procedure Act, which is the embodiment of the *fuctus officio doctrine*, would stifle the development of court sanctioned enforcement of human rights as envisaged in the Bill of Rights.[67]

The Supreme Court emphasised that courts have powers to issue interim reliefs, structural interdicts, supervising orders and any other orders in cases involving enforcement of rights under the Constitution. This is as long as the orders are specific, appropriate clear, effective and directed at the parties to the suit or any other agency vested with a legal mandate to enforce the order.[68]

Recognising the importance of the separation of powers and the political question doctrines in Kenya's constitutional architecture and design, the Supreme Court also cautioned that issuing of such orders must be realistic and avoid the temptation of judicial overreach especial-

65 Paras 118 and 119.

66 Para 120.

67 Para 121.

68 Para 122.

ly in the matters of policy. The orders should not be couched in general terms, nor should they be addressed to third parties who do not have constitutional or statutory mandates to enforce them. Where necessary, a court of law may indicate that orders issued are interim in nature and that the final judgment shall await the outcome of certain actions.[69]

Ultimately, the Supreme Court found that a structural interdict in the circumstances of the case was not an appropriate remedy because it would not have had any remedial benefit to the Petitioners. The Supreme Court instead opined that since the Petitioners had already been evicted and their houses substantially destroyed, the effective remedy would have been orders for compensation. The Supreme Court, therefore, directed that the case be remitted to the High Court for appropriate reliefs to be crafted and granted.[70]

4.0 Beyond the Structural Interdict Question: Other Key Findings in the Supreme Court Decision.

4.1 The Place of International Law in the Hierarchy of Norms in the Constitution of Kenya

This is a key question which Kenyan legal scholars and practitioners have grapped over in recent years since the promulgation of the 2010 Constitution. The Supreme Court shed light on the applicability of international law in Kenya by dint of the provisions of Article 2(5) and (6) of the 2010 Constitution. This is significant because Kenyan courts had hitherto issued conflicting jurisprudence in this regard. Some courts held that international law was superior to statute law/ legislations,[71] while others held that in the event that there is a conflict between statute law and international law, statute law should prevail.[72]

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69 Para 122.

70 Para 156.

71 See *In Re The Matter of Zipporah Wambui Mathara [2010] eKLR* and *David Njoroge Macharia –Vs- Republic [2011] eKLR*.

72 See *Beatrice Wanjiku & Another v The Attorney-General & Another [2012] eKLR*.

The Supreme Court cited the *Paquete Habana Case*[73]issued by the United States Supreme Court to give meaning to the expression "shall form part of the law of Kenya" as provided in Article 2 (5) and (6) of the Constitution of Kenya 2010.[74] According to the Supreme Court, the expression "shall form part of the law of Kenya" means that domestic courts of law, in determining a dispute before them, have to take cognizance of international law, to the extent that the same is relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement.[75]

In that sense, Article 2 (5) and (6) embraces both international custom and treaty law and is both outward, and inward looking. The Article is outward looking in that, it commits Kenya the State, to conduct its international relations in accordance with its obligations under international law.[76] It is inward looking in that, it requires Kenyan courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with the Constitution, local statutes, or a final judicial pronouncement.[77] Kenyan courts can therefore to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision.[78]

In regard to whether Article 2(5) and (6) transforms Kenya from a dualist to a monist State, the Supreme Court was of the opinion that this debate 'is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are *Non-Self Executing,* which means that, they cannot be directly applicable in the legal systems of States parties, without further legislative and administrative action.'[79]

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73 *Supreme Court of the United States, 1900 20 S. Ct. 290.*

74 Para 128.

75 Para 130.

76 Para 131.

77 Para 132.

78 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate;* Supreme Court Advisory Opinion No. 2 of 2012, [2012] eKLR).

79 Para 134.

This is particularly accurate for Kenya given the provisions of the Treaty Making and Ratification Act[80] which make it mandatory for the government to seek the National Assembly's approval before ratifying an international treaty.[81]By implication, it is unlikely that Kenya can ratify an international treaty that conflicts with its domestic law. It is therefore submitted that in terms of 'hierarchy of norms' under Article 2 of the 2010 Constitution, international law and statute law are on the same level.

4.2 The Meaning of 'General Rules of International Law'

The Supreme Court also clarified the meaning of the words "general rules of international law" as used in Article 2(5) of the 2010 Constitution. The Court of Appeal had faulted the High Court's use of the UN Guidelines on Forced Evictions on grounds that the said words 'general rules of international law' refer to peremptory norms of international law or *jus cogens* and not all rules of international law.[82] The court of Appeal therefore argued that the said UN Guidelines were not binding on Kenya as they do not qualify to be *jus cogens* or peremptory norms of international law.

While the Supreme Court agreed with the court of Appeal that the UN Guidelines were not peremptory norms or *jus cogens* and therefore not binding to Kenya, it stated that the High court was right when it used the Guidelines as an interpretive aid in breathing life into Article 43 of the Constitution of Kenya[83]thereby providing guidelines on how the State ought to carry out forced evictions. The Court stated that the words "general rules of international law" used in Article 2 (5) of the Constitution refer to 'customary international norms and peremptory norms or *jus cogens*'.[84]

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80 Act No. 45 of 2012.

81 Sections 8 and 9 of the Act.

82 Para 116.

83 Para 143.

84 Para 140.

It appears as though the Court of Appeal's understanding of *jus cogens* included customary international law while the Supreme Court looked at *just cogens* and customary international law as two different sources of international law. The Supreme Court adopted a 'broader definition' of the term 'general rules of international law' rather than the narrow approach taken by the Court of Appeal.

4.3 The Right to Housing

The Supreme Court delineated the contours of 'the right to housing' in the Kenyan context. The Court noted that the accrual of the right to housing under Article 43 of the 2010 Constitution is not dependent on the principle of progressive realisation. The right accrues to every individual or family, by virtue of being a citizen of this country. It is an entitlement guaranteed by the Constitution under the Bill of rights.[85]

This interpretation of the right to housing precludes the government from erecting the defence of 'lack of resources'. The interpretation also takes into account that the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, they will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.[86] Progressive realisation has been interpreted as having in place a policy that demonstrates the steps that are being taken by the government both in the short term and long term towards the gradual realisation of rights with priority being given to the most vulnerable sections of society.[87]

In order to preserve the 'minimum core' in the right to housing, the Supreme Court was of the view that an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants. The Court however employed a different standard when it

[85] Para 149.

[86] Para 149.

[87] *Mitu-bell Welfare Society v Attorney General &2 others*[2013]eKLR para 53.

came to public land. It stated that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same.[88] The right to housing over public land therefore crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under Article 60 (1) (a) of the Constitution.[89]

5.0 Significance of this Decision to Socio-Economic Rights Litigation in Kenya

Mitubell III is the first socio-economic rights case instituted under the 2010 Constitution to get to the Supreme Court of Kenya.[90] It clarified the various legal controversial issues around the realization and enforcement of the socio-economic rights in Kenya. One such issue is the use of structural interdicts as an effective remedy in socio-economic rights litigation. In the *Mitubell Case II*, the contention was not only that the courts would become *functus officio* after delivery of their judgment, but also that the use of structural interdict seemed to plunge the court into the realm of policy formulation contrary to the political question doctrine. The political question doctrine propounds that courts will not adjudicate certain controversies as their resolution is better handled by the Executive or the Legislature, as the case may be, which are the political arms of government.[91]

Whilst, structural interdicts hold the potential to effectively remedy systemic socio-economic rights violations, the remedy has the po-

88 Para 151.

89 Para 152.

90 Initiative for strategic litigation in Africa, 'Mitu-Bell Welfare Society appeal case is fertile ground for the development of the right to remedy' http://www.the-isla.org/press-release-wej-mitu-bell-may-2020/ accessed on 8/3/2021.

91 Jared P. Cole, 'The Political Question Doctrine: Justiciaility and the Seperation of Powers' (2014) Congressional Research Service cited in Eboso B.W 'Judicialization of politics under the constitution of Kenya 2010' (University of Nairobi LLM Thesis, 2014) 9.

tential to negate the separation of powers doctrine by blurring the lines between judicial, executive, administrative and legislative functions, while overburdening the courts with supervisory functions.

Despite these potential dangers, the Supreme Court of Kenya has sanctioned the restrictive use of the political question doctrine in socio-economic rights litigation because the nature of socio-economic rights obligate the State to take specific deliberate actions of a policy nature towards the realisation of rights. This way the Judiciary effectively acts as a check on the exercise of power by the Executive and the Legislature.[92]This consequently prevents abuse of power and ensures an increase in transparency and accountability in the government.[93]

Article 23(3) of the Constitution directs the courts to come up with an appropriate relief where it is established that there has been a violation of a right.[94] The Supreme Court opined that as the Appellants had already been evicted, the relief they ought to have sought from the Court was one of compensation.[95] The Court, therefore, interpreted the words 'appropriate relief' in Article 23(3) to mean the most effective relief available to the Petitioners.[96]The wordings of Article 23 and the interpretation adopted by the Supreme Court gives the courts leeway to craft creative and effective remedies to address socio-economic rights violation.

Unlike the narrow interpretation adopted by the Court of Appeal, the Supreme Court favoured a generous approach to interpreting the Constitution whose effect is to propel the growth of the enforcement of socio-economic rights. Recently, the High Court employed the use of a structural interdict in *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others*, where the petitioners challenged the decision

92 Eboso B.W 'Judicialization of politics under the constitution of Kenya 2010' (University of Nairobi LLM Thesis, 2014) 80.

93 n 93 81.

94 Constitution of Kenya 2010, Art.23(3)

95 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) Supreme Court Petition No. 3 of 2018 [2019] eKLR* para 155.

96 n 96.

by the government to allow flights from China following the outbreak of COVID-19 arguing that such measures threatened the constitutional right to life.[97]

The Respondents in the *Law Society of Kenya* casec ontended that necessary measures were in place to avert any incidents of disease outbreak and spread, but the Court employed a structural interdict to compel them to present to the Court a plan of action detailing the appropriate responses towards the management and control of the outbreak of COVID-19.[98]It is arguable that post-judgment supervision as shown in the above case affords the courts opportunity to ensure that enforcement of the Bill of Rights through litigation is not an exercise in futility.

Article 10 of the 2010 Constitution lists human rights as one of the national values and principles of governance. Article 259(1) of the Constitution requires that the Constitution be interpreted in a manner that promotes its purpose, values and principles while also advancing human rights. Similarly, Article 20(4) provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. The decision by the Supreme Court therefore espouses a generous and value-based interpretation of the Constitution.

6.0 Conclusion

The endorsement of the use of structural interdicts by the Supreme Court in the *Mitubell Case III* has a positive effect on the enforcement of socio-economic rights as the *Mitubell Case II* had cast dark clouds over the enforcement of these rights in Kenya. The use of structural interdicts respects the position that courts do not make policy and thus should not jump into the arena of the policy maker. Structural interdicts how-

[97] *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd. (Interested Party)* (2020) eKLR.

[98] n 98 above.

ever enable the courts to point the policy maker towards their legal and constitutional obligations without usurping the policy maker's powers. While doing so, the court and the parties in a case essentially work in'a cooperative or collaborative effort to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them'.[99]

Comparative jurisprudence shows that structural interdicts are one of the most effective ways of enforcing socio-economic rights.[100] The *Mitubell III* decision allows Kenya to join the rank of other progressive jurisdictions in the enforcement of socio-economic rights by embracing structural interdicts.

The decision is also an indication that the Supreme Court of Kenya is increasing asserting its constitutional role as the custodian and protector of socio-economic rights. It is however, essential that the courts in employing structural interdicts ought to be cautious and be wary of about the potential temptation of usurping the powers of the other arms of the government.

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[99] *People's Union for Democratic Rights &Ors v Union of India &Ors*1983 SCR (1) 456,(cited with approval in *Central Bank of Kenya & another v Okiya OmtatahOkoiti& 6 others* [2018] eKLR).

[100] *Government of the Republic of South Africa & Others v Grootboom & Others 2* 2000(3) BUR 277(C); *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders* NICRO) 2004 (5) BCLR 455 (CC); *Sibiya and Others v The Director of Public Prosecutions; Johannesburg High Court & Others* 2005 (8) BCLR 812 (CC); and *All-Pay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency & Others* [2014] ZACC 12 and Decision T-760 of 2008 from Colombia.

Compulsory Vaccination in the Era of COVID-19; Medical, Legal and Human Rights Issues Arising

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Abstract

This article discusses the key medical, legal and human rights issues regarding compulsory vaccination for COVID-19. It discusses the existing interventions in response to COVID-19 and indicates why vaccination is the most appropriate.

The article highlights the existing legal framework for compulsory vaccination in Uganda, weighing it against constitutional guarantees of human dignity and religious freedom, the two rights that persons who are vaccine hesitant are relying upon to oppose the vaccine mandate.

The article finds that the constitutional right to human dignity offers protection to an individual from forced vaccination through the notion that an individual should not be subjected to any form of medical treatment they don't agree to. In regards to religious freedom, the article finds that a person's religious beliefs cannot be overruled for the sake of forcefully

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vaccinating them. However, to strike a balance between individual rights and community interests, the State may obstruct the individual from fully participating in day-to-day activities.

The article reviews precedents from other jurisdictions all of which point to the fact that compulsory vaccination is lawful, where it is undertaken within the acceptable parameters.

The article concludes by showing that vaccine mandates are not unconstitutional. The recommendation however is that the state should focus on enhancing public trust so that individuals willingly get vaccinated. Public trust may be enhanced through information campaigns that are targeted at vaccine hesitant persons and groups. The state should also ensure that vaccines are safe and effective before they are rolled out to the population, lest they stir up hesitancy.

1.0 Introduction

The spread of the novel Corona virus across the world upended almost every aspect of human life as it was known. Uganda recorded its first case in March 2020 and has since recorded over 160,000 cases with 3500 fatalities.[1] The contagion, which was declared a pandemic by the World Health Organisation has traversed the nation with shocking speed, scale and severity. The Ministry of Health has had to adopt its responses from the initial "prevention" strategy, to "limiting spread" through the enforcement of stay-at-home orders (lockdowns), closure of educational institutions and banning of public gatherings.[2] With irregular fluctuations in the cases being reported, low access to vaccines and the need to rebuild the economy which was affected by the lockdowns,

[1] "Home - COVID-19 | Ministry of Health" *Ministry of Health* available at <https://www.health.go.ug/covid/> (last accessed 17 March 2022). These recorded cases are not an accurate reflection of the prevalence since the testing has not been on a large scale

[2] "Update On The COVID-19 Response and Vaccination in The Country - Ministry of Health | Government of Uganda" *Ministry of Health* available at <https://www.health.go.ug/cause/update-on-the-covid-19-response-and-vaccination-in-the-country/> (last accessed 31 October 2021)

the government's response has focused on prevention of the spread of the disease and limiting its severity in case of infection.

Across the world, in almost all countries, there has been a semblance of the return to normalcy where vaccination against COVID19 is a continuing success. Mass vaccination is recommended as an effective public health strategy in combatting communicable diseases,[3] COVID-19 inclusive. Uganda, and Africa as a whole has not taken significant strides in vaccination against COVID19, primarily because of hurdles to access[4] and hesitancy from the population even where vaccines are available. Much of the hesitancy is clothed in the language of human rights, and are primarily built around, personal autonomy, freedom of conscience and religious freedom. Officials of the Government of Uganda, including the Head of State have made various statements which imply that in the near future, there will be vaccine mandates as part of the nationwide response to COVID-19.[5]

This creates a dilemma in that, herd immunity[6] is impossible to achieve without mass vaccination of all eligible persons. Yet even in such times, there is need to give cognisance to fundamental human rights to ensure that they are always respected, promoted and upheld.

This article highlights the key human rights issues regarding compulsory vaccination for COVID-19. It will discuss the public health rationale for mass (and where possible compulsory) vaccination of all eligible persons. The article will then assess whether any human rights are at risk of violation with such an approach and how to then strike a balance.

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3 Organisation for Economic Co-operation and Development (OECD) "Enhancing Public Trust in COVID-19 Vaccination: The Role of Governments" 2021 available at <https://www.oecd.org/coronavirus/policy-responses/enhancing-public-trust-in-covid-19-vaccination-the-role-of-governments-eae0ec5a/#back-endnotea0z2> (last accessed 22 October 2021)

4 Jan Lagman, "Vaccine Nationalism: A Predicament in Ending The COVID-19 Pandemic" (2021) 43 *Journal of Public Health* at 375–376

5 T Abet, "Officials Call for Mandatory Taking of Covid-19 Vaccines" *Daily Monitor* available at <https://www.monitor.co.ug/uganda/news/national/officials-call-for-mandatory-taking-of-covid-19-vaccines-3367652> (last accessed 16 October 2021)

6 "Herd Immunity" *WebMD* available at <https://www.webmd.com/lung/what-is-herd-immunity> (last accessed 24 October 2021)

2.0 Rationale for Vaccination as a Public Health response

Throughout 2020, wherever the Corona virus spread across the world, clinicians had to repurpose already available treatments for off-label use in the treatment of COVID-19.[7] There was no known effective treatment for the virus but there was interest in already existing vaccines that prevent bacterial or viral respiratory diseases.[8] Given the nature of COVID19, an airborne and highly infectious disease leading to an erratic rise in infections, speed and scale are important factors in mitigating its spread.[9] For the mitigation to be effective however, chains of transmission have to be broken as fast as possible through screening and containment of those suspected to be infected. Screening is undertaken with devices such as thermometers that detect high body temperatures which is linked to a fever, one of the effects of COVID-19 in the human body.[10] To contain the spread, it is necessary to trace and isolate those infected with the disease so as to stop its spread in the population. Where it is no longer possible to stop its spread, efforts are then geared towards slowing the spread and mitigating the effects of the disease on the health system.[11]

In addition, healthcare should be readily available to cater for the needs of those infected with the contagion. This is done to effectively manage the outbreak so that it does not become an epidemic and thus overwhelm health services in the country. In the case of COVID19, mitigation is also intended to provide time to develop treatments and vac-

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7 Sultana J and others, "Potential Effects of Vaccinations On the Prevention of COVID-19: Rationale, Clinical Evidence, Risks, And Public Health Considerations" (2020) 19 Expert Review of Vaccines 919-936

8 Chumakov K and others, "Can Existing Live Vaccines Prevent COVID-19?" (2020) 368 *Science* 1187

9 P Cirillo and N Taleb, "Tail Risk of Contagious Diseases" (2020) 16 *Nature Physics* 606–613.

10 "Fever Screening - Intellisec | Durban, Johannesburg, Cape Town" *IntelliSEC* available at <https://intellisec.co.za/fever-screening/> (last accessed 22 October 2021)

11 C Nast, "What It Means to Contain and Mitigate the Coronavirus" *The New Yorker* <https://www.newyorker.com/news/news-desk/what-it-means-to-contain-and-mitigate-the-coronavirus> (last accessed 11 October 2021)

cines, considering that the strain ravishing the world was unknown[12]. As was noted in the reputable medical journal *The Lancet,*

> "A key issue for epidemiologists is helping policy makers decide the main objectives of mitigation—e.g. minimising morbidity and associated mortality, avoiding an epidemic peak that overwhelms health-care services, keeping the effects on the economy within manageable levels, and flattening the epidemic curve to wait for vaccine development and manufacture on scale and antiviral drug therapies." [13]

Non-pharmaceutical interventions such as self-quarantine, hand hygiene and the wearing of face masks were encouraged, at a personal level. At community level, measures aimed at physical distancing such as the closure of schools and the cancellation of public gatherings were also instituted to limit the spread of COVID-19[14].

However, these strategies are reactionary and interim stratagems, which cannot be relied upon as long-term strategies to eradicate an airborne infectious disease. Mass vaccination is one time tested effective strategy in eradicating infectious diseases.[15] A vaccine is a biological preparation that offers acquired immunity to a specific infectious disease.[16] This occurs by triggering lymphocytes that bear receptors specific for the given disease-causing microorganism, its toxins or one of its surface proteins.[17] Even prior to the outbreak of COVID-19, vaccines were considered one of the most effective medical interventions given their cumulative impact on the health and well-being of entire populations.

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12 Anderson R and others, "How Will Country-Based Mitigation Measures Influence the Course of the COVID-19 Epidemic?" (2020) 395 *The Lancet* 931

13 *Ibid.*

14 While millions across the world are confined to their homes, offices and businesses are shut, and economies are on the verge of collapse, there are some countries that have not followed others in locking down their residents, for example, Sweden, whose main tactic was not about that (herd-immunity), but one to slow the spread of infection. South Korea, which followed the strategy of aggressive testing, contact tracing and isolation and the nation ofTurkmenistan.

15 Schuchat A, "Human Vaccines and their Importance to Public Health" (2011) 5 *Procedia in Vaccinology* 120

16 Guimarães L and others, "Vaccines, Adjuvants and Autoimmunity" (2015) 100 *Pharmacological Research*, 190-209

17 *Ibid.*

Across the globe, prior to the development and use of human vaccines, few individuals survived childhood without experiencing various diseases such as mumps, measles, whooping cough, chickenpox and rubella. Additionally, thousands of children bore the brunt or succumbed to diseases such as bacterial meningitis, diphtheria, or poliomyelitis. In Uganda, vaccines have been effective in controlling and eliminating life threatening infectious diseases thus averting 2 to 3 million deaths per year.[18] Vaccination may thus be considered as a cost-effective health investment that is accessible by vulnerable and hard to reach populations across Uganda.

Viewed through a human rights perspective, vaccination is therefore a proven route, by the state to ensure to realisation of the right to health for its citizens. The right has been declared to exist in Uganda, even though the right is not expressly provided for in the Constitution.[19] The Constitution mandates the state to promote the social well-being of the people and in particular to ensure that all Ugandans enjoy rights and opportunities and access to health services.[20] The state is also obliged to to ensure the provision of basic medical services to the population.[21] Given the interdependence, indivisibility and interrelationship of human rights, the right to health may also be inferred from Article 22 of the Constitution which guarantees the right to life. By protecting the population from infectious communicable diseases through vaccination, the State will be guaranteeing the right to life. The Human Rights Committee has opined that

> "The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. In this connection, the Committee considers that it would

[18] Bbaale E, "Factors Influencing Childhood Immunization in Uganda" (2013) 31 Journal of Health, Population and Nutrition.

[19] *Centre for Health, Human Rights and Development (CEHURD) v Attorney General Constitutional Petition Number 16 of 2011* (Constitutional Court)

[20] National Objective and Directive Principle of State Policy (NODPSP) XIV of the Constitution.

[21] NODPSP XX.

> be desirable for states parties to take all possible measures …to increase life expectancy, especially in adopting measures to eliminate…epidemics"[22]

In matters where the right to life has been the subject of litigation, it has been given expansive interpretation so as to guarantee wholesome protection to the individual[23] The right to life is therefore not just about being alive; it is concerned with the quality of life that the individual lives. It is upon the state to ensure that its citizens realise the right to life. Article 45 of the Constitution has an all-inclusive provision which stipulates that the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in the Constitution shall not be regarded as excluding others not specifically mentioned. Upon this basis, the right to life may be deduced from other international and regional instruments. Article 25 of the Universal Declaration of Human Rights[24] provides that everyone has the right to a standard of living adequate for the health of himself and of his family. Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees the right of everyone to the highest attainable standard of physical and mental health. The Convention outlines the steps to be taken by state parties to achieve full realization of the right, which include the prevention, treatment and control of epidemic, occupational and other diseases.[25] As with other human rights, the state has the duty to respect, protect and fulfil the right to health. The obligation to fulfil mandates states to "take positive measures that enable and

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22 See UN Human Rights Committee (HRC), CCPR General Comment 6, art 6 (Right to Life), 30 April 1982, para 5http://www.refworld.org/docid/45388400a.html (accessed 18 October 2022).

23 See *Salvatori Abuki v Attorney General Constitutional Petition 2/1997*; *Francis Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 2 SCR 516*; *Paschim Banga Khet Samity v State of West Bengal (1996) 4 SCC 37*

24 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 19 October 2022] The norms of the Universal Declaration of Human Rights are part of customary international law with direct application to Uganda. See Ben Twinomugisha, *Fundamentals of Health Law In Uganda* (Pretoria University Law Press 20 (2015

25 International Covenant on Economic Social and Cultural Rights, Article 12(2)(c)

assist individuals and communities to enjoy the right to health."[26] The state is also mandated to undertake actions that create, maintain and restore the health of the population.[27] Thus, vaccination to control the spread of COVID-19 is a fulfilment, by the state of its duties to ensure that citizens realise the right to health.

3.0 Vaccine hesitancy

There can be no doubt therefore that COVID-19 vaccination is a crucial prevention measure to help end the COVID-19 pandemic. There is however a low uptake of vaccines, especially in the global South. Despite efforts to ensure that vaccines are rolled out to various populations across the globe, some people have been hesitant to receive them.

Vaccine hesitancy is not a new phenomenon. When the first vaccine against smallpox was created in 1796, it was viewed as a miraculous answer to an ailment that was killing millions across the globe. But it was not long before the vaccine was opposed and inoculation had to be made mandatory by the Vaccination Act 1813[28]. The legislation only served to increase vaccine hesitancy with anti-vaccine leagues formed to demonstrate on the streets against a practice that was viewed as invasive. The hesitancy to vaccine was clothed in the language of religious, health or individual rights concerns and led to an amendment of the law in 1898 to provide for a 'conscientious objection' to receiving a vaccine.

In Uganda, vaccine hesitancy is as a result of various factors. When the COVID-19 outbreak was announced in Uganda, the initial response was nationalistic, with the whole nation rallying around the government in its efforts. There was not much opposition to a lockdown instituted by the President to stop the spread of the virus. Citizens, at the urging of the government collected funds that were supposed to be

[26] Committee on ESCR General Comment 14: 'The Right to the Highest Standard of Health (Article 12)' HRI/GEN/1/Rev 9 (Vol I) (2000), Paragraph 36

[27] *Ibid*.

[28] Twelfth Congress, Session 1.1. CH. 36, 86, 37. 1813.

used to bolster the nation's crippled health system so that there would be an effective response once there was community spread of the virus. There were also donations in kind, especially from the business community. With time however, disillusionment set about within the public because of allegations of embezzlement in the collection and disbursement of the funds.[29]

The vaccine hesitancy in Uganda is clothed in the language of human rights. Those protesting vaccines and especially vaccine mandates have argued that forced vaccination is illegal and tantamount to violation of the rights to human dignity, privacy and health.[30] Court action has been threatened against the state and employers who force their staff to receive vaccines.[31] Although there is no official policy on vaccine mandates, different government officials have called for COVID-vaccine mandates,[32] while some employers, especially local governments and private institutions have made vaccination a requirement for their workers. Whereas no case has been filed challenging compulsory vaccination, as at the time of writing, it appears inevitable, given the vocal nature of protests against compulsory vaccination.

4.0 What is compulsory vaccination?

A vaccination system in which the enforcement of a responsibility to vaccinate is ultimately imposed by the compulsory administration of vaccines amounts to 'compulsory vaccination'. In line with acceptable

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29 "Top Ugandan Officials Arrested in COVID-19 Purchasing Scandal" *VOA* available at <https://www.voanews.com/a/science-health_coronavirus-outbreak_top-ugandan-officials-arrested-covid-19-purchasing-scandal/6187278.html> (last accessed 31 October 2021)

30 Anthony Wesaka, "Don't Force Employees to Take Covid Jabs – Kabuleta" *Daily Monitor*, available at <https://www.monitor.co.ug/uganda/news/national/don-t-force-employees-to-take-covid-jabs-kabuleta-3421408> last accessed 4 October 2021.

31 *Ibid*.

32 Tonny Abet, 'Officials Call for Mandatory Taking of Covid-19 Vaccines' (*Daily Monitor*, 2021) <https://www.monitor.co.ug/uganda/news/national/officials-call-for-mandatory-taking-of-covid-19-vaccines-3367652> accessed 16 October 2021.

public health strategies, usually, states opt for indirect latent forms of enforcement which carry negative consequences where a person refuses to vaccinate but do not include forcefully administering inoculations. Such indirect means, mean the associating of one's vaccination status to the enjoyment of communal services such as attending schools, employment or social events such as being allowed entrance to malls. In light of the fact that medical treatment should only be administered with the free and informed consent of the recipient or legal guardian, it is apposite to define a vaccination system that dictates negative consequences as a result of refusing to inoculate as "compulsory vaccination". This is because these consequences are, and are intended to influence an individual's decision to get vaccinated.

One might argue that informed consent is the usage and law of medical personnel to obtain a patient's consent before embarking on a medical procedure. The fundamental principle that justifies the need for informed consent is respect for the autonomy of persons. By obtaining a patient's informed consent—or informed refusal—to undergo a course of treatment, we respect that person's right to determine the course of his or her life. While in unusual circumstances, such as dire emergencies, competing moral principles can override the need to obtain informed consent, the burden of proof generally falls on those who argue for suspension of respect for autonomy.

While informed consent plays an important and positive role in clinical medicine, there are arguably times when rigid insistence on informed consent may be inappropriate. For example, Data has been made available that demonstrates the vaccines to be mandated have been found to be safe in the populations for whom the vaccine is to be made mandatory. The vaccine is an effective means of achieving the country's public health goal. For instance, there is evidence that the vaccine is efficacious in preventing serious infection, death and/or transmission.[33] Covid-19 vaccines are also key in preventing hospitalization

[33] Lawrence O. Gostin, JD, O'Neill, Mandating COVID-19 Vaccines, Institute for National and Global Health Law, Georgetown University Law Center, 600 New Jersey Ave NW, Washington, DC 20001

and protecting the capacity of the acute health care system. There is sufficient evidence that the vaccine is efficacious in reducing hospitalization.[34] Yet in spite of the full disclosure that vaccine manufactures have offered, segments of the population Ugandan (continue to) mistrust the COVID-19 Vaccine.[35]

Choices have consequences. In particular, some personal choices have the potential to harm others. When one person's choice might harm others, it can be ethical for that choice to be limited. We must consider whether one person going unvaccinated today is likely to cause harm to other people. Nearly all people interact and come into physical contact with others on a daily basis, and a person with COVID-19 can infect several others even before showing symptoms. The risk of one person harming many others, even inadvertently, provides adequate justification for limiting the choice to go unvaccinated during a pandemic.

While mitigation strategies—masking, social distancing, hand washing—are effective in slowing the spread of COVID-19, such measures carry their own harms and are much less appealing as long-term strategies. Only vaccines are capable of halting viral transmission to the degree of stopping COVID-19 from continuing as a pandemic-level threat. Herd immunity for COVID-19 will only occur through vaccination, if it occurs at all.

The choice of too many individuals to go unvaccinated has already resulted in the worsening of the pandemic and the mutation of the COVID-19 virus itself. While the COVID-19 vaccines have been shown to be safe and effective for the vast majority of people who have gotten them, there are still some people who cannot get vaccinated or who have responded poorly to vaccination, including those who are immunocompromised and children for whom COVID-19 vaccines are yet to be approved. There is nothing tyrannical about mandating vaccination

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34 Ibid

35 Uganda to destroy 400,000 Covid 19 vaccines, By Rédaction Africa news, available at https://www.google.com/amp/s/www.africanews.com/amp/2022/01/14/uganda-to-destroy-400-000-covid-vaccines/Uganda to destroy 400,000 Covid 19 vaccines, accessed on the 14th of January 2022.

for everyone who can safely take the vaccine to allow those who cannot get vaccinated to live without fear of catching COVID. Allowing some people the choice to remain unvaccinated severely limits mobility and threatens the safety of other people, which makes the availability of that choice both unfair and dangerous for those who are especially vulnerable and who may not have other options to protect themselves."36

5.0 Existing Legal Framework for Compulsory Vaccination

Vaccination in Uganda is primarily governed by the Immunisation Act.[37] There have been recent attempts to strengthen laws on compulsory vaccination through an amendment to the colonial era Public Health Act. Clause 39(1)(a) of the Public Health Amendment Bill 2021 stipulated that "a local government council shall where instructed by the minister issue a notice posted in public place in the local government, requesting all persons within the local government, specified in the notice, to undergo inspection and vaccination as the case may be". The Bill had stipulated a fine of UgX 4,000,000 (Four Million shillings) or imprisonment for six months where a person objected to vaccination. The clauses were however deleted and the Bill was passed into law without any provision for vaccine mandates.

The Immunisation Act thus remains the principal legislation where vaccine mandates may be derived from. It was enacted to *inter alia* provide for compulsory immunisation of children, women of reproductive age and other target groups against immunisable diseases.[38] The Act defines immunisation as the process whereby a person is made immune or resistant to an infectious disease, typically by the administration of a vaccine,[39] while a 'vaccine" means any preparation intended to produce immunity to a disease by stimulating the production of antibodies.[40]

36 Ministry of Health, (n 1)

37 Act No.7 of 2017,

38 Long title to the Immunisation Act

39 Immunisation Act 2017, s 2

40 *Ibid.*

Vaccine mandates are not a new idea or an afterthought of the COVID-19 vaccines. Part II of the statute provides for compulsory vaccination. S.3 of the Immunisation Act makes it mandatory for parents to ensure that children in the age bracket of one day to five years are immunised against the following immunisable diseases, that is, Tuberculosis, Whooping Cough, Tetanus, Hepatitis B, Haemophilus, Influenza, Polio, Measles, Pneumococcal and any other immunisable disease that may emerge.[41] The compulsory immunisation may be waived only on medical grounds.[42] School authorities may refuse to admit children who are not immunized to schools.[43] S.5(1) of the Act also makes it mandatory for every female from age of eighteen years to forty-nine years to ensure that she is fully immunised against tetanus. A parent of a girl child from the age of fifteen years to seventeen years shall ensure that the child is appropriately immunised against tetanus.[44] S.6 of the Immunisation Act makes it mandatory for parents of children from the age of ten years to twelve years are immunised against human papillomavirus.

A person who contravenes these provisions commits an offence and is liable, on conviction, to a fine not exceeding twelve currency points or imprisonment not exceeding six months or to both.[45]

S.10 of the Immunisation Act stipulates that

"The Minister shall, by statutory instrument order the administration of vaccines in the following extraordinary cases

(a) where a person has not been vaccinated in accordance with the Second Schedule to this Act,

(b) in case of an epidemic,

(c) When there is danger of entry of transmissible diseases into the country,

(d) upon detection of a new infectious agent or an infectious agent deemed controlled or eradicated has re-appeared, or

41 See also the Second Schedule to the Act which lists the diseases

42 Immunisation Act 2017, s 3(2)

43 Immunisation Act 2017, s 4

44 Immunisation Act 2017, s 5(2)

45 A currency note is currently valued at UgX 20,000. See First Schedule to the Immunisation Act

(e) whenever so required, pursuant to applicable international practices."[46]

This gives the Minister a wide discretion in determining when to set up vaccine mandates as and when the listed scenarios arise.

COVID-19 fits within the framework of S.10 Immunisation Act; at the global level, COVID-19 has been declared a pandemic, it is currently transmissible in Uganda and it is highly infectious. The Minister of Health has the discretion to make vaccination against it mandatory, within the framework of the Immunisation Act, by a statutory instrument. The existence of this framework also implies that vaccines cannot be mandated outside this context.

6.0 Is the existing framework unconstitutional?

The mere existence of a legal framework does not mean it is above error. Cognisant of the fact that Parliament may enact erroneous laws or that some laws from a bygone era may still be on the statute books, Article 2 of the Constitution sets a standard by stipulating that all laws and customs have to be in conformity with the *grund norm.* This in turn fortifies the constitutional presumption, which provides that all legislation is presumed constitutional unless and until such legislation is challenged in the appropriate court. Any law that is inconsistent with the Constitution is to the extent of the inconsistency null and void. In a domestic perspective, it is the Constitution that guarantees the fundamental rights which opponents of compulsory vaccination are relying upon to oppose the idea. Opponents of compulsory vaccination argue that it violates the rights to human dignity and religion. These rights are discussed herein.

[46] Immunisation Act 2017, s 10

6.1. The right to human dignity

Human rights guarantees in the Constitution have to be respected, upheld and promoted by all organs and agencies of Government and by all persons.[47] No state agency or individual person is exempted from this obligation in regards to individual human rights.[48] There are no exceptions or derogations allowed with regard to this provision, rendering it a pivotal one. This means that even as the government faces a pandemic that is highly transmissible and highly infectious, its responses should not be a derogation from fundamental human rights.

Article 24 guarantees the right to human dignity and the protection from inhuman treatment. It stipulates that no person should be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. This right is non-derogable and as such under no circumstances can a person be subject to inhumane treatment. It is arguable that the provision was enacted against the background of Uganda's recent turbulent political history, where such treatment was meted out by state agents as a tool for obtaining information, punishment, intimidation and coercion *inter alia.*[49] Whereas they may have had such intentions in mind, a constitution is a living document which is supposed to have relevance to future generations, not just the one that was present when it was enacted. In fact, this very provision was relied upon to declare corporal punishment as unconstitutional.[50] Since the provision invariably seeks to protect a person's body from any unwelcome violation, it is arguable that it protects the individual from being a recipient of unwelcome medical treatment, including vaccination. Unlike other human rights whose enjoyment can be limited in the public interest or

47 The Constitution of Uganda, Article 20(1)

48 In *Uganda Law Society vs. Attorney General of Uganda Constitutional Petition, No. 18 of 2005,* the state had argued that the Courts martial were not bound by certain provisions of the Constitution because they are special courts. This argument was rejected by the Constitutional Court which emphasized that all state organs and agencies have the duty to respect, uphold and promote fundamental human rights.

49 Odoki BJ, *The Search for a National Consensus: The Making of the 1995 Uganda Constitution* (Fountain Publishers 2005)

50 *Simon Kyamanywa vs Uganda Constitutional Reference No 10 of 2000*

to protect the rights of others,[51] the right to freedom from torture, cruel, degrading or inhuman treatment allows no derogation.[52]

In recognition of this, modern medical practice has shifted from a paternalistic approach, where the doctor knew best what was necessary for his or her patients' health and set the course of treatment, to a patient-centred attitude built on the concept of consent. Medical treatment is now premised on the informed consent of the patient. The notion of patients' autonomy is a manifestation of liberalism's broader respect for individual autonomy and self-determination. As John Stuart Mill noted in "On Liberty":

> "Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are the greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."

It is now a cardinal principle of medical law and ethics that, before administering any form of treatment to a patient, a medical professional should get the patient's consent.[53] It is the patient and not the doctor who has the final say as to whether any form of treatment should be given. In *Re T* (*Adult: Refusal of Treatment)* Lord Donaldson MR emphasised the right of a patient's self-determination when he stated that

> "An adult patient who ... suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered...This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent."

In Heart of England NHS Trust v JB[54] Court noted that:

> "…anyone capable of making decisions has an absolute right to accept or refuse medical treatment, regardless of the wisdom or consequences of the decision. The decision does not have to be justified to anyone. In the absence of consent any invasion of the body will be a criminal assault. The fact that the intervention is well-meaning or therapeutic makes no difference."

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51 The Constitution of Uganda, Article 43

52 Ibid, Article 44

53 See *Re B (Consent to Treatment: Capacity)* (2002] EW HC 429,

54 [2014] EWHC 342

This principle of autonomy has significantly shaped medical law. At its core is the notion that the individual has the right to determine what medical treatment he or she receives. Commentators have actually argued that it is the primary medical principle.[55] To respect the individual's autonomy is to be cognizant of the fact that a person has the right to hold views, make decisions and take actions based on personal tenets and beliefs. It is not proper for a medical professional to impose treatment upon a patient without getting his or her consent. As Beauchamp and Childress note

> "To respect autonomous agents is to acknowledge their right to hold views, to make choices, and to take actions based on personal values and beliefs. Such respect involves respectful action, not merely a respectful attitude ... Respect, in this account, involves acknowledging the value and decision-making rights of persons and enabling them to act autonomously, whereas disrespect for autonomy involves attitudes and actions that ignore, insult, demean, or are inattentive to others' rights of autonomous action."

The principle of autonomy and self-determination means that doctors responsible for a patient's care "must give effect to his wishes, even though they do not consider it to be in his best interests to do so."[56] The patient's right of self-determination further extends to decisions that "may entail risks as serious as death"[57] Even where the reasons for refusing medical treatment are considered irrational by the doctor, the patient's wishes should be respected.[58]

For the treatment to be effective and within the boundaries set by the law, the individual has to consent to it. Like every other general principle, the notion of autonomy has exceptions. First, simply because a patient wants a certain treatment does not mean that he or she has a right to it. A medical professional is at liberty to refuse to administer

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55 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (7th ed, 2012, Oxford University Press) at 103

56 *Airedale NHS Trust vs. Bland [1993] AC 789*

57 *Malette vs Shulman (1990) 67 DLR (4th) 321*

58 *In Malette vs Shulman (1990) 67 DLR (4th) 321*, Court noted that "…people must have the right to make choices [concerning their medical care] that accord with their own values regardless of how unwise or foolish those choices may appear to others".

treatment, no matter how keenly the individual is requesting for it.[59] Patients cannot force medical professionals to provide treatment that they do not want to provide.[60] Secondly, in cases where autonomy is at variance with community goals and duties owed to others, it is questionable whether autonomy will prevail, the rationale being that it is necessary to stop an individual who is determined to do something that interferes with the community's healthcare.

Moreover, there could be valid reasons for a person to refuse vaccination. The World Health Organisation has advised that caution be taken where a person has a compromised immune system, is lactating or pregnant, has a history of severe allergies especially to vaccines or is severely frail.[61] Such individuals should not be subjected to vaccine mandate since they may be adversely affected. Opponents of mandatory vaccination have also argued that if vaccines are made compulsory, it will be a slippery slope where the state continually infringes on individual liberties. They argue that once vaccines are mandated, the state will have leeway to infringe on all liberties. There have been concerns that if vaccine mandates are allowed, the next step that the State will take will be more destructive, such as forced sterilisation. This is a strawman argument for where forced sterilisation has occurred in the past, it has had no connection to vaccines. In addition, forced sterilisation is now not practiced anywhere in the world and is in fact frowned upon.

The traditional conception of autonomy endorses the idea of an isolated patient deciding for himself or herself what is in his or her best interests, while in fact we live lives based on symbiotic relationships. It is pertinent to recognize that, for most individuals, the question should not simply be "What is best for me?", but rather, "Considering the duties that I owe to those who are in relationships with me, and the duties owed to me by others, what is the most apposite course of action?" This is in recognition of the fact that even the individual lives are part of

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59 Re] (A Minor) (Wardship: Medical Treatment) [1990] 3 All ER 930.

60 *An NHS Tmst v L* [2013] EWHC 4313 (Fam); *Re C (A Minm)* [1998] Lloyd's Rep Med l.

61 "COVID-19 Vaccines Advice" *World Health Organisation* available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-vaccines/advice> (last accessed 27 October 2021)

a community which may be affected by his or her "autonomous decisions". Thus, whereas a person cannot be forcefully jabbed, he or she may be denied certain communal services, such as education. It is for this reason that the Immunisation Act allows authorities to deny education to children who are not yet immunised and creates penal offences for those who violate these provisions but does not allow the state to forcefully inoculate individuals.

6.2. Religious exemptions

All across the globe, one of the most common objections for vaccinations is religious belief. Many individuals have argued that vaccines go against their sincerely held beliefs and would therefore seek exemptions from inoculation.[62] It is therefore important to examine the issue of religious exemptions and vaccine mandates.

According to National Objective III (ii) every effort shall be made to integrate all the peoples of Uganda while at the same time recognising the existence of their religious diversity. The Constitution also requires that all persons are given equal treatment, notwithstanding their religious views. Article 21(1) of the Constitution stipulates that all persons are equal before and under the law in all spheres of life and are entitled to equal protection under the law. As such, no person should be discriminated against on grounds of religion.[63] Discrimination is defined as giving different treatment to a person attributable only or mainly to their respective description by creed or religion. [64] In a nation like Uganda where no state religion exists,[65]all religions are treated equal and none is given preference over the other.[66]

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62 G Pelčić and others, "Religious Exception for Vaccination or Religious Excuses for Avoiding Vaccination" (2016) 57 *Croatian Medical Journal* at 516-521

63 The Constitution of Uganda, Article 21(2)

64 Ibid, Article 21(3)

65 Ibid, Article 7

66 *In McFarlane v Relate Avon Ltd [2010] EWCA Civ 880*, Laws LJ noted that "The precepts of any one religion . . . cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other."

Upon this foundation of equality, every individual is entitled to freedom of thought, conscience and belief.[67] "Thought" refers to intangible internal processes such as the making of a decision, or the development of an intention or an opinion. For as long as this internal process has not yet manifested, it is protected by freedom of thought. As and when they are shared, they are then protected by freedom of expression or religion. "Conscience" is more than just a thought; it is one that guides an individual as to what is right or wrong. Whenever a person considers what is "bad", "evil", "right" or "wrong" in a situation that is a decision of conscience. Freedom of conscience allows the individual to develop their own personal conscience without interference and act in line with the conscience. Conscience may but not necessarily be influenced by religion[68].

Closely related is the freedom to practise any religion and manifest such practice which includes the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with the Constitution.[69] Religious freedom is a core need for many individuals. It allows the individual to live and practice their beliefs freely. Religion also shapes many day-to-day aspects of each person's life. The Constitution allows each person to believe whatever it is they desire to do so. There are no caveats in this regard. The law does not protect only the "mainstream" religions but all manner of religious belief. However, when manifesting any of these religious beliefs, whether mainstream or not, the qualification is that it has to be in a manner consistent with the Constitution.[70] This is rather understandable; while holding any belief does not affect other member of society, manifesting the beliefs should be done while giving due cognizance of the rights/interests of other members of society. As such, where an individual of

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67 The Constitution of Uganda, Article 29(1).

68 Lucien J. Dhooge, The Equivalence of Religion and Conscience, 31 Notre Dame J.L. Ethics & Pub. Pol'y 253 (2017). Available at: https://scholarship.law.nd.edu/ndjlepp/vol31/iss2/1

69 The Constitution of Uganda, Article 29(1)(e)

70 *Ibid.*

sound mind refuses medical treatment (or vaccination) on the basis of religious belief, their wishes are to be respected. A concern however arises where the individual who is refusing medical treatment is placing the rest of the community at the risk of an infectious disease.

The Supreme Court had occasion to make a pronouncement on religious rights and public interest, albeit in the context of education. In *Sharon Dimanche v Makerere University,*[71] the appellants were Seventh Day Adventist students of Makerere University, which is a public university. They challenged in court, the University's decision to conduct lectures and exams on Saturday, (Sabbath) a day that they believed should have no activity. Having found difficulty in attending lectures and sitting exams on the Sabbath, they sought a declaration from the court that the university policy of scheduling lectures, mandatory tests and examinations on the Sabbath Day was inconsistent with and in contravention of the right to religious freedom. The Supreme Court, while dismissing the petition noted that the University was a secular one and had a duty to accommodate all religious beliefs. It therefore could not offer preferential treatment to one religion. By implication, the court subjected the religious freedom to public interest.

One of the key issues that the Dimanche decision discussed relevant to compulsory vaccination is the soundness of religious beliefs. The appellants, who were students had objected to classes and exams on Saturday on the grounds that the Sabbath is a holy day, meant for rest. This view had been challenged on theological basis in the Constitutional Court with one of the judges ruling that

> "Attending a lecture or doing an examination involves listening, thinking, reading and writing. Are members of the Seventh Day Adventist Church prohibited from listening, thinking, reading or writing on the Sabbath? If their objection for doing this on Sabbath is based on the fact that it will interfere with their worship on Saturday, they should note that the doing of any other good on Sabbath, like the treatment of a sick person or rescuing a distressed person or animal as recommended by Jesus would equally interfere with worship. In my humble opinion, this tends to show that for a good cause, a Christian is permitted to do some good work or to work out of necessity on Sabbath. Attending a lecture or

[71] Supreme Court Constitutional Appeal No 2 of 2004

> sitting an examination once in a while on Sabbath could fall within the accepted exceptions to the Sabbath commandment."[72]

In the Supreme Court, this *ratio decidendi* was rejected with the Court emphasising that sincerity of belief is not an arena for the courts to descend into. It is not for the Courts to assess whether a religious belief is reasonable or sincere because essentially, religion is a matter of personal belief. Whether or not a religious belief is "correct" is an individual matter.[73] Similar thinking had been earlier on expressed by the Canadian Supreme Court in *R vs Big Drug Mart Ltd,* [74]which stated that:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."[75]

The religious belief of an individual should not be questioned simply because it is different from mainstream ones or that it is illogical and lacks theological basis. In regards to COVID-19 vaccination therefore, if by virtue of a religious belief a person does not wish to receive a vaccine, the state should not overrule this belief and forcefully inoculate the person. The state cannot determine which religious belief is legitimate or sound but it has the authority to determine how a public health emergency will be responded to.

This nonetheless raises concerns regarding how such an individual, who is frustrating public health efforts geared towards herd immunity should relate with the community. As already indicated, Article 43(1)

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72 See decision of *Twinomujuni JA in Sharon Dimanche vs Makerere University Constitutional Cause No 1 of 2003*

73 In *Sharon Dimanche vs Makerere University Supreme Court Constitutional Appeal No 2 of 2004*, Katureebe JSC emphasised that "Court cannot tell the appellants what they should believe. It is what they believe that is important"

74 [1985] 1 S.C.R. 295

75 (1985) 18 DLR (4th) 321

of the Constitution reinforces this by stating that in the enjoyment of the rights and freedoms, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. That means that whereas an individual has the right to freedom of religion, conscience and belief, the enjoyment/practice of that religion is always subject to the public interest.

Cognisant of this need to balance individual and community interests, the framers of Uganda's Constitution included Article 43 as a general limitation on enjoyment of human rights. It provides that in the enjoyment of the rights and freedoms, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. The individual is free to exercise any fundamental rights and freedoms, so long as they do not affect the rights of others and the public interest. As such, whereas the individual may, in refusing to vaccinate be exercising his or her right to privacy, health and conscience, this enjoyment may be limited where it is at variance with the rights of others or the public interest. In the context of COVID-19, by refusing to vaccinate, a person places the rights to health (and life) of others at risk, since he or she is at a higher risk of spreading the virus within the community. It is pertinent to highlight, at this point, that Article 43 does not give the state *carte blanche* to determine who should enjoy their rights, and who shouldn't. The heading indicates that it is a "limitation on enjoyment". The state therefore does not take the right away from the person since fundamental human rights are inherent and not granted by the State.[76] It implies that the state may limit how one is enjoying their individual rights. So the individual retains their right, but how they enjoy it is limited.

The Supreme Court had occasion to interpret and offer guidance in regards to Article 43 of the Constitution. In *Charles Onyango Obbo & Andrew Mujuni Mwenda vs Attorney General,*[77] the Court had to determine whether a colonial era law which penalised the "publication of

[76] The Constitution of Uganda, Article 20

[77] Constitutional Appeal No 2 of 2002

false news" was constitutional.[78] The appellants argued that the law was an impediment to freedom of speech while the state contended that the law was a limitation on the enjoyment of fundamental right within the framework of Article 43 of the Constitution. The Supreme Court noted that:

> "The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudices" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution."

In the context of vaccination, the State therefore may not force someone who, based on his or her religious rights refuses to take a jab. Protecting the health of the community is in the public interest, and *prima facie* grants the State authority to limit religious freedom. But as noted in the *Onyango Obbo*[79] decision, any actions by the state in this regard should not lead to further violation of human rights. Forcing a person to receive a vaccine would be a violation of the individual's private right to religious freedom. Any measures taken by the State in the public interest should also be cognisant of the individual's rights. To resolve this, the State may obstruct a person from fully participating in the day to day activities of the community such as education, concerts and accessing certain public services. The individual therefore retains his or her individual rights (hinged on bodily autonomy) but is estopped from endangering the public as he or she does so.

Cognisant of the fact that indeed the state may misuse this limitation of rights, and abuse these rights, Article 43 of the Constitution

78 Penal Code Act, Cap 120 Laws of Uganda, s 50

79 Constitutional Appeal No 2 of 2002, (n 77)

places a caveat on the limitation. It provides that public interest does not permit any limitation of the enjoyment of the rights and freedoms beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in the Constitution.

As the Supreme Court noted in *Charles Onyango Obbo & Andrew Mujuni Mwenda vs Attorney General,*[80]thus:

> "It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.

Clearly, the state has no carte-blanche to do as it wishes under the guise of limiting rights. In each scenario that arises, the courts will be called upon to determine whether the actions of the state are within the acceptable parameters.

The limitation of the enjoyment of the right to religious freedom

7.0 Precedents from other jurisdictions

Precedent from other jurisdictions has always emphasized this; that is, that one may hold whatever religious beliefs they desire to hold, but public interest may always override the manifestation of these beliefs. With specific regard to vaccination, courts have always held that one cannot rely on religious beliefs to opt out of vaccine mandates, con-

[80] Ibid

sidering that the mandates are issued in public interest. In *Workman v. Mingo County Board of Education*[81], the appellant Jennifer Workman filed an action alleging that state officials violated her constitutional rights to religious freedom when they refused to admit her daughter into public school without immunisations as required by law. The United States Court of Appeals held that a law which required all school children to be vaccinated, with no exemption for religious reasons, was constitutional and within the authority of the state. The Court opined that claims of religious freedom should always yield to the compelling social interest of combatting the spread of communicable diseases through mandatory immunization programs. The Court reasoned that the right to practice religion freely did not include the liberty to expose the community or the child to communicable diseases or the latter to ill health or disease. As such, the law mandating vaccination did not infringe the right to an individual to exercise their religion.

While a religious belief may be sincere and honest in protesting against vaccine mandates, the interests of the public will prevail in ensuring that the public is kept safe. No doubt, in a society like Uganda where majority claim to profess one religion or another, religious belief is a very fundamental issue. One of the most pivotal principles of liberty is that the freedom of an individual should not justify causing injury of other persons. Those who refuse to vaccinate, with no medical basis often place the rest of the society at risk, especially where a disease like COVID19 is highly contagious and infectious.

In India, when the State of Meghalaya made it mandatory for shopkeepers, vendors, local taxi drivers and others to get themselves vaccinated before they could be allowed to resume their businesses, the order was successfully challenged in the High Court of Meghalaya in *Registrar General High Court of Meghalaya v. State of Meghalaya.*[82] The Court was cognisant of the need for mass vaccination to overcome the global pandemic, but noted that vaccination by force, or when it is made mandatory by adopting coercive methods:

81 419 F. App'x 348

82 PIL No.6/2021

> "…vitiates the very fundamental purpose of the welfare attached to it. It impinges on the fundamental right(s) as such, especially when it affects the right to means of livelihood which makes it possible for a person to live."

The court was cognisant of the fact that the enjoyment of individual rights may be restricted in the interest of the general public, but held that in this case, mandatory vaccines affect the individual's liberty more significantly than they would affect public interest. To the court, the balance had to be struck in favour of the individual, who needed to maintain autonomy over his or her body.

It should be noted that the court relied on two decisions before coming to this conclusion. The first was an American decision in *Schloendroff vs Society of New York Hospitals,*[83] where Justice Cardozo had noted that "every human being of adult years and sound mind has a right to determine what shall be done with their body". This decision however, is distinguishable from the scenario at hand for there was no need to balance individual and public interests. In the *Schloendroff case,* the plaintiff was admitted to a hospital to treat a stomach disorder. Weeks into her stay in the hospital, the physician diagnosed a fibroid tumour and recommended surgery which she adamantly declined to consent to. The doctors nonetheless proceeded to conduct the surgery and remove the tumour. Dissatisfied with the surgery, she sued the hospital. It was on this basis that the court ruled that the human body is inviolable. This was a personal matter that did not affect public health. The Court also relied on the English decision in *Airedale NHS Trust vs Bland*.[84] The *Airedale case* was more complex, but also involved decision making for an individual patient. The respondent Arthur Bland had been injured in the Hillsborough disaster.[85] He suffered brain damage and medical opinion was unanimous that he would never recover despite being preserved on life support for close to two years. There was no sign of improvement or evidence that he would. The hospital, with the consent of the parents,

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83 (1914) 211 NY 125

84 1993 AC 789

85 "Hillsborough Disaster – Wikipedia" available at <https://en.wikipedia.org/wiki/Hillsborough_disaster> (last accessed 27 October 2021)

thus sought the permission of the Court to switch off the life support. The court permitted the hospital to switch off the life support, noting that it was not in the patient's best interests to indefinitely prolong his life, with no hope of recovery. The case therefore was not an assessment of public and private interests with regard to human rights.

It was upon the citing of these cases that the High Court of Meghalaya noted that

> "…thus, coercive element of vaccination has, since the early phases of the initiation of vaccination as a preventive measure against several diseases, have been time and again not only discouraged but also consistently ruled against by the Courts for over more than a century"

Considering that the two cases cited by the court are clearly distinguishable, it is therefore questionable whether the *Registrar General High Court of Meghalaya v State of Meghalaya*[86] was rightly decided. In its comments in *obiter,* the Court was spot on when it stated that the state should sensitise citizens about vaccines so that they make informed decisions, rather than coercing them.

The decision is also thought-provoking, given the existing Constitutional framework in India. Article 21 of the Indian Constitution guarantees the right to life. While interpreting the right to life, the Supreme Court of India has held that this right to life includes the right to lead a healthy life and mandates the State to commit to defending the right to life of every individual.[87] The Indian Supreme Court has also held that the right to maintenance and improvement of public health is included in the right to live with human dignity which enshrined under Article 21 of the Constitution.[88] The Court was cognisant of the fact that a healthy body is the foundation of all human activities and as such, maintenance and improvement of public health is indispensable to the community's existence. Considering therefore that public health experts generally agree that mass vaccination is perhaps the most viable long term solution to the COVID-19 pandemic, the decision by the High

[86] PIL No.6/2021

[87] *National Human Rights Commission vs. State of Arunachal Pradesh 1996 AIR 1234*

[88] *Vincent Panikurlangara vs. Union of India 1987 AIR 990*

Court of Meghalaya to declare vaccine mandates as unconstitutional was rather startling.

In the United States, decades old precedent seems to swing in favour of vaccine mandates. At the onset of the twentieth century, Boston experienced a smallpox outbreak. To curb its spread, the Cambridge Board of Health, relying on power granted to it under Massachusetts imposed a vaccine mandate. Henning Jacobsen refused to comply and was one of the six individuals prosecuted for refusing to comply with the mandate. Despite the fact that the medical community considered the vaccine to be medically safe, Jacobsen objected and appealed the matter to the US Supreme Court.[89] In the Supreme Court, his legal team argued that vaccination was dangerous, that the vaccine mandate was "arbitrary" and "oppressive" thus in violation of his constitutional rights to due process. They also argued that the vaccine mandate was "hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best" and enforcement of the same was "nothing short of an assault upon [Jacobson's] person." The Supreme Court rejected these arguments and instead upheld the vaccine mandate. The Court acknowledged that whereas there are instances where an individual "rightfully dispute the authority of any human government ... to interfere with the exercise of [his own] will" the matter at hand was one of public interest, public health and public welfare. The Court was also emphatic that:

> "the liberty secured by the Constitution of the United States ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[90]

Fourteen years later, the US Supreme Court had to determine the constitutionality of vaccination requirements for school children. *In Zucht v. King,*[91] the petitioners argued that city ordinances which stopped unvaccinated children from attending school were unconstitutional. The Supreme Court relied greatly on the precedent in *Jacobsen*

89 197 U.S. 11 25 S. Ct. 358

90 *Ibid.*

91 260 U.S. 174 (1922)

to uphold that it was within the power of given state bodies to provide for compulsory vaccination and that a Government may, consistently with the Constitution, delegate to an authority to determine under what conditions health regulations shall become operative "for the protection of public health"[92]

Where those opposed to vaccine mandates have sought protection under religious liberties, the US courts have held that religious freedom does not eclipse the role of the state to prevent the spread of disease, and as such, the free exercise of religion should be subject to the states' interest in protecting public health.

8.0 Conclusion

The general principle is that a patient's consent is essential prior to any form of treatment. Where a patient does not consent, any form of physical interference amounts to the tort of trespass to the person. Such interference may actually attract criminal liability on grounds of assault occasioning actual bodily harm or grievous bodily harm. However, where public interest necessitates so, the courts may order for mandatory vaccines for the good of the society as a whole.

The use of compulsory measures to enforce public health is problematic. Compulsory measures actually raise vaccine hesitancy. Instead, authorities should enhance public trust so that individuals willingly vaccinate. The success of vaccination efforts will be influenced by the extent to which individuals have faith in the safety of vaccines. The state should demonstrate competence and reliability so as to gain public confidence. This should be done through customised information that targets vaccine hesitant sections of the population. More often than not, persons who are wary about vaccination have been fed the wrong information. Issuing edicts that make it compulsory for them to receive the vaccine only feeds into that apprehensiveness. The better approach is to raise awareness through targeted messages that respond to the queries

[92] I*bid* See also *Kirkpatrick v. Eighth Judicial Court 118 Nevada 233*

and fears in an informative and respectful way. Considering that some religious beliefs are the basis for vaccine hesitancy, religious leaders should be involved in the preparation and dissemination of messages about inoculation.

Should the State however insist on forcefully vaccinating those who do not wish to do so, they have recourse in the courts of law through strategic litigation. Article 50(1) of the Constitution of Uganda stipulates that any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation. Such litigation to protect human rights will hold government accountable in regards to its protection of individual rights. A person who is threatened with forced vaccination that goes against their right to dignity or religion may seek protection from the courts of law. Whereas no case has been filed in the Courts of law at the time of writing, the courts remain open, by virtue of Article 50 of the Constitution to hear those who seek remedies. Strategic litigation is a pertinent remedy to concretise the balance between individual rights and public interest in regards to compulsory vaccination.

The State should also ensure that vaccines meet a high evidentiary threshold for safety. As indicated in the discussion of this article, part of the reason there was vaccine hesitancy was because the population queried the fast rate at which vaccines had been developed. Concerns about the safety of the vaccine should not be brushed aside in favour of sanctions. Instead, the State should conduct independent tests to verify safety and efficacy. The results should be made available to the public should the vaccines pass the threshold for safety.

Before imposing a vaccine mandate, the State should ensure that it has an adequate supply that is reliable, reasonable and freely accessible to the public. If this is not done, the mandate would be a burden to those who can't afford it, and thus be a double jeopardy.

UN General Assembly Resolution on Environmental Rights and its Implications for the East Africa Climate Crisis

Kenneth Wyne Mutuma, PhD*

Abstract

In recent decades, climate change has become one of humanity's greatest challenges. Its effects have been felt across the globe, including in East Africa. The region has been marked by increasingly extreme weather events resulting in floods, droughts, melting of glaciers, and one of the worst food shortages in the last 70 years. These cumulative effects have been dubbed as the 'climate crisis.' The crisis has in turn threatened several fundamental rights including the right to life, health, sanitation, food and food security. Owing to occurrences such as these all over the world, the United Nations General Assembly (UNGA) in 2022 adopted a resolution recognizing access to a clean, healthy and sustainable environment, as a universal human

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right. This commentary explores why this resolution has far-reaching contributions not only for the climate, but also for the area of human rights in East Africa.

Key words: climate crisis, climate change, East Africa, UN General Assembly, environmental rights, human rights

1.0 The Climate Crisis in East Africa

'Climate crisis' is a term that has been used by scientists and climate activists to describe all the devastating effects that have resulted from climate change.[1] Due to the accelerating nature in which these effects have been experienced, the term 'crisis' has been used to inspire urgency in implementing action plans that would combat the problem. The cause of the crisis has been linked to global emissions of greenhouse gases (GHGs) such as carbon dioxide (CO2).[2] North America and Asia are the largest contributors, with each accounting for 29% of the global emissions.[3] In comparison, East Africa has a collective contribution of 0.34%.[4] However, the region is disproportionately affected by the crisis. A report by the World Meteorological Organization (WMO) in 2021 revealed that Africa's sub-regions are warming faster in the last 30 years, "…than the global average temperature over land and ocean combined."[5] This phenomenon has occasioned disastrous effects within the region.

Some of these effects include high rainfall lasting as long as eleven hours resulting in floods in areas such as the Rift Valley in Kenya,

1 William J Ripple and others, 'World Scientists' Warning of a Climate Emergency' (2020) 70 BioScience 8.

2 'Climate Change 2022 Mitigation of Climate Change' (Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 2022) 2.

3 'Infographic: What Is Sub-Saharan Africa's Contribution to Global CO2 Emissions?' <https://www.energyforgrowth.org/blog/infographic-what-is-sub-saharan-africas-contribution-to-global-co2-emissions/> accessed 12 August 2022.

4 ibid

5 'State of the Climate in Africa 2020' (World Meteorological Organization 2021) 7.

South Sudan, and Eastern Uganda; [6] melting of glaciers namely Mount Kenya, the Rwenzori, and Kilimanjaro with the threat of complete depletion by 2040; as well as rise in sea levels.[7] Conversely, the region is experiencing its worst drought period as a result of almost five failed rainy seasons.[8] The dire drought situation has resulted in acute water and food shortages. Approximately 50-51 million people in East Africa in 2022 will be faced with acute food insecurity, marking it as one of the worst food crisis of the last 70 years.[9] The extreme drought prompted the United Nations Children's Fund (UNICEF) to issue a call to action.[10] Additionally concerning is the potential of the crisis in weakening the local markets on account of the heavy reliance by East African countries on rain-fed agriculture.[11]

2.0 A Resolution for Human Rights

On the 28th of July 2022, UNGA unanimously adopted a resolution recognizing access to a clean, healthy and sustainable environment as a universal human right.[12] The resolution encourages states and stakeholders to ensure access to safe water, adequate sanitation, food security and a safe climate. [13] It noted that climate change is one of 3 (three) major

6 'Floods, Landslide Kill Over 20, Scores Missing in Eastern Uganda' (allAfrica.com, 1 August 2022) <https://allafrica.com/view/group/main/main/id/00082933.html> accessed 18 August 2022.

7 Lisa Schlein, 'Africa Warming More, Faster Than Other World Regions' (VOA) <https://www.voanews.com/a/africa-warming-more-faster-than-other-world-regions/6277177.html> accessed 16 August 2022.

8 'Regional Call to Action - Horn of Africa Drought Crisis: Climate Change Is Here Now, July 2022' <https://reliefweb.int/report/somalia/regional-call-action-horn-africa-drought-crisis-climate-change-here-now-july-2022> accessed 12 August 2022.

9 'IGAD Regional Focus of the Global Report on Food Crises' (Intergovernmental Authority on Development 2022).

10 Ibid (n8)

11 'The Impact of Climate Change on Africa's Economies - Foreign Policy Research Institute' <https://www.fpri.org/article/2021/10/the-impact-of-climate-change-on-africas-economies/> accessed 18 August 2022.

12 UNGA Resolution A/76/L.75 (adopted 28 July 2022).

13 'Right to a Healthy Environment: Good Practices' (UN Special Rapporteur on Human Rights and the Environment 2020) 25.

environmental threats facing humanity; the other two are pollution and biodiversity loss.[14]

The resolution by UNGA is a triumph for human rights as it is for the climate. Indeed, climate change has been described as one of the single greatest threats to the enjoyment of our generation's fundamental rights.[15] The crisis not only affects our environmental rights, but also impacts our lives, health, food, water and sanitation. The right to life has received universal recognition as a fundamental human right. [16] In Kenya and Uganda, the right is enshrined in their Constitutions.[17] However, tens of thousands of people in East Africa die every year from climate change- related floods, droughts, water-borne diseases, famine, and heatwaves.[18] The crisis also impacts human health in multiple ways. In addition to being the direct cause of many deaths, it also increases the chances of malnutrition and infectious vector-borne diseases.[19] Dengue fever, which is the most transmittable vector-borne disease has been reported in Tanzania and Kenya.[20] Furthermore, frequent floods, water scarcity and rise in sea levels lead to water contamination which in turn affects the quality of water.[21]

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14 IISD's SDG Knowledge Hub, 'UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment | News | SDG Knowledge Hub | IISD' <https://sdg.iisd.org:443/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/> accessed 27 August 2022.

15 'Climate Change and Human Rights' (United Nations Environment Programme 2015) VI.

16 Universal Declaration of Human Rights 1948 art. 3.

17 The Constitution of Kenya 2010 art. 26 and Constitution of the Republic of Uganda 1995 art. 22 respectively.

18 Christabel Ligami, 'East Africa: Climate Change Causing Deaths in EA' *The East African* (Nairobi, 7 December 2015) <https://allafrica.com/stories/201512072093.html> accessed 19 August 2022.

19 'Climate Change and Human Rights' (n 13) 8.

20 Marycelin Baba, Jandouwe Villinger and Daniel K Masiga, 'Repetitive Dengue Outbreaks in East Africa: A Proposed Phased Mitigation Approach May Reduce Its Impact' (2016) 26 Reviews in Medical Virology 183.

21 'Climate Change Threatens Access to Water and Sanitation, Warn UNECE & WHO/Europe, Urging Reinforced Measures under Protocol to Boost Resilience - World | ReliefWeb' <https://reliefweb.int/report/world/climate-change-threatens-access-water-and-sanitation-warn-unece-whoeurope-urging-reinforced-measures-under-protocol-boost-resilience> accessed 19 August 2022.

These challenges demonstrate that by combating climate crisis, East Africa will address some of its human rights concerns. Despite not being legally binding, the resolution sets out an open framework to demand prompt action by governments. It aims to embolden states worldwide, including those in East Africa to intensify ongoing efforts before it is too late.

3.0 A Collaborative Response

The East African region has taken a number of steps to address the climate crisis. For instance, they have developed a Climate Change Policy for the East African Community (EAC). This Policy aims to enhance collective resilience to the crisis' adverse effects and promote sustainability in socio-economic development. [22] To ensure the implementation of the policy, the EAC has also developed the Climate Change Master Plan and the Climate Change Strategy. TEAC also collaborates with Southern African Countries on a Joint Adaptation Programme for Climate Change. [23] The Programme, which is an initiative by African, Caribbean and Pacific (ACP) Group of States, seeks to review and update the current climate change framework. In addition, many countries have signed international agreements such as UNFCCC, Kyoto Protocol and the Paris Agreement, which seek to reduce GHG emissions to a safer level.[24]

Still, ongoing efforts have not been able to tackle the climate crisis effectively. On this basis, an Inter-Ministerial Conference on Migration, Environment and Climate Change was held at Kampala, in July of 2022. The Conference which was attended by heads of state and ministers from East Africa, was aimed at developing a unified approach in response to climate change. The need for urgency in response was reaffirmed at the

[22] East African Community Climate Change Policy 7.

[23] 'The Programme on Climate Change Adaptation and Mitigation in Eastern and Southern Africa'.

[24] See United Nations Framework Convention on Climate Change art 2, Kyoto Protocol art 2, Paris Agreement art 4.

Conference. In his address, Uganda's President Yoweri Museveni stated unequivocally that, "…*we cannot afford to take no action...*"[25]

4.0 Conclusion

The climate crisis has led to a number of challenges in East Africa. These include threats to our climate and our fundamental rights. The region has already developed frameworks for dealing with the crisis, but the effects of climate change continue to increase in frequency and intensity. The resolution by UNGA in 2022 presents an additional opportunity for the region to strengthen its response, not only for the climate but for the full realization of rights in East Africa. Ultimately, this means establishing a powerful regional environmental governance structure that works towards a sustainable future.

[25] 'We cannot afford to take no action against climate change, says H.E Museveni' <https://www.mofa.go.ug/data/dnews/851/we%20cannot%20afford%20to%20take%20no%20action%20against%20climate%20change,%20says%20H.E%20Museveni.html> accessed 18 August 2022.

The Proggressive Realisation of the Right to Adequate Housing in Uganda: A Promise in the Dark

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Abstract

The right to housing is one of the most fundamental human rights among the Social and Economic rights. It is entrenched in national, regional, and international law instruments. Despite the existing robust legal framework on the right to housing, the available data shows that there is a wide chasm between reality and theory in the realization of the right in Uganda, it has been bedeviled with forced evictions, inadequate budget financing, lack of security of tenure, delayed access to justice among others. Despite all these events, there is limited will on the state to fulfill its obligations and often uses "progressive realization" as a defense in the failure to realize the right.

This paper, therefore, analyses the right to adequate housing through the lenses of progressive realization, it argues that although the government postulates this defense, it has barely done enough to see to the fruition of the right amongst the obligations outrightly pointed out in legislation. The paper thus gives a brief synopsis of the right and outrightly points out the failures but also explores recommendations for the realization of the right.

Keywords: progressive realization, Economic, Social and Cultural Rights; Adequate Housing; Security of Land Tenure; Favorable; Inadequate Financing; Forced Evictions; Access to Justice.

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1.0 Introduction to the Right to Adequate Housing

The Right to housing is by far the most integrated of the socio-economic rights. It is related and linked to the rights to health, privacy, property, family, children, education, water, and sanitation.[1] It forms an indispensable part of ensuring human dignity. It is essential for normal healthy living as it fulfills deep-seated psychological needs for privacy and personal space; physical needs for security and protection from inclement weather; and social needs for basic gathering points where important relationships are forged and nurtured.[2] It cannot go without saying the indivisible nature of human rights makes it also a basis for the enjoyment of civil and political rights such as the right to life. The right to life imposes on the state a duty to take special measures of protection towards persons in vulnerable situations whose lives have been placed at risk such as children, especially those in street situations[3], The state is thus obliged to take appropriate measures to address the general conditions in society that may give rise to direct threats to the enjoyment of the right which includes homelessness[4]. Furthermore, the CESCR[5] elucidates that for the right to housing to be fully realized, the full enjoyment of other rights such as freedom of expression, freedom of association, the freedom of residence, and the right to participate in public decision-making are indispensable. Thus, the indivisibility of human rights makes the right to housing a core right in the realizing of other rights. This, therefore, means "Adequate housing" ceases to mean just the four walls of a room and a roof over one's head[6] but also a means to realization other human rights.

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1 Onoria H, 'Guaranteeing the Right to Adequate Housing and Shelter in Uganda: The case of Women and People with Disabilities' (May 2006) Working Paper No.6 HURIPEC, P.1

2 Circle of Rights, Economic, Social and Cultural Rights Activism: A training Resource. Module 13, The Right to Adequate Housing. hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module13.htm

3 UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35.

4 Ibid para 26

5 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

6 Ibid

However, despite global recognition of the importance of housing to human welfare and survival, Uganda has a fair share of housing inadequacies given that her housing situation is characterized by inadequate housing in terms of quality and quantity in both rural and urban areas, with the current statistics from Uganda National Housing Policy indicating that the housing deficit stands at 2.4 million housing units, out of which 210,000 units are in urban areas and 1.395 million units in rural areas[7], and an estimated 900,000 units are substandard and in need of replacement or upgrading.[8] With the ever-growing population, 2022 will present an additional need of 3 million units[9]. The issue of forced evictions happening across the nation, and lack of security of tenure reflect on the general housing situation, even being further exacerbated by the COVID-19 situation.

1.1 A Brief Synopsis of the Legal Framework on the Right to Housing

The right to adequate housing has its foundation in the Universal Declaration of Human Rights (UDHR)[10] in which the economic social and cultural rights were first given universal recognition. The UDHR provides a right to everyone to have an adequate standard of living in regards to health, food hosing, and medical care[11] . In an attempt to foster the implementation and enforcement of the human rights recognized in the UDHR, two international covenants were passed. These are; the International Covenant on Civil and Political Rights (ICCPR)[12] and the International Convention on Economic, Social, and Cultural Rights (ICESCR).[13] The key theme in these covenants underscores the need for

7 Ministry of Finance: National Budget frame work Paper FY2021/22-2025/26 https://budget.go.ug/sites/default/files/National%20Budget%20docs/National%20Budget%20Framework%20Paper%20FY%202021-22.pdf

8 ibid

9 The Uganda National Housing Policy ,2016

10 D Barak-Erez and Aeyal M Gross, Exploring Social Rights: Between Theory and Practice, (Hart Publishing 2007)

11 Universal Declaration of Human Rights (UDHR), Article 25

12 United Nations General Assembly Resolution 217A(III)

13 Ibid 2200A(XXI)

people to live with human dignity. The right to adequate housing is provided for under Article 11(1) of the ICESCR which states; "State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including [….] housing, and to the continuous improvement of living conditions." Housing is thus a key component of the right to an adequate standard of living[14]. Thus, this right is considered indispensable in procuring a life of human dignity or achieving the benchmark that is envisaged in the UDHR. Indeed, it has been argued that the right to adequate housing is important in ensuring human dignity as shelter is crucial in making life meaningful to the indigent.

Further, the inclusion of this right in several other instruments underscores its importance. Similar provisions on the right to adequate housing are contained in the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[15], the Convention on the Elimination of Discrimination Against Women (CEDAW)[16], the Convention on the Rights of the Child (UNCRC)[17], the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)[18], and the International Convention Relating to the Status of Refugees (1951 Refugee Convention)[19].

Regionally, the African Charter on Human and Peoples' Rights makes no specific mention of the right to adequate housing. However, other provisions such as ones on the right to life (Article 4) and the right to physical and mental health (Article 16) arguably provide a basis for the assertion of the right to housing. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[20] (SERAC Case), the African Commission on Human and Peoples Rights was of the view that although housing and shelter are not specifically provided for in the

14 UDHR, (n 7)

15 ICERD, Article 5 (e) iii

16 CEDAW, Article 14.2

17 UNCRC, Articles 16 (1); 27(1)(2)

18 Apartheid Convention, Article 43 (1)

19 1951 Refugee Convention, Article 21

20 (2001) AHRLR 60 (ACHPR) 2001

African Charter on Human and Peoples' Rights (African Charter), it could be read into the Charter because the right to property, the right to an attainable state of physical health, and the right to the protection accorded to the family under Articles 14, 16 and 18, respectively, "forbids wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected."[21]

In Uganda, the right to adequate housing is not been provided for expressly in the Constitution but it is unequivocally cited in the National Objectives of State Policy (NODSP) Objective XIV (b) which states; "All Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits"[22]. This is bolstered by Article 8A of the Constitution which provides that Uganda shall be governed based on the principles of national interest and common good enshrined in the national objectives and directives of state policy." This in essence gives the much-needed justiciability to the right as it has not been out rightly provided for in the bill of rights.[23] In the same spirit, Article 20(2) imposes a duty on all government organs, agencies, and persons to respect, promote and uphold the rights and freedoms of all individuals and groups.

For the right to adequate housing to be fully realized, it must lie within the following framework provided for under General Comment No. 4.[24]

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21 Ibid

22 The 1995 Constitution of the Republic of Uganda, Objectice XIV (b) National Objectives and Directives of State Policy.

23 Mbazira C, "Uganda's Hybrid Constitutional Protection of Economic, Social and Cultural Rights" in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives (Cambridge University Press 2016)

24 CESCR General comment No 4, (n 5) on the Right to adequate housing< https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/INT_CESCR_GEC_4759_E.doc > Accessed on the 3rd /07/2021

a. *Legal Security of Tenure:* This simply implies that persons ought to have a certain degree of security that guarantees legal protection against forced eviction, harassment, and other threats. And thus, state parties ought to consequently take immediate measures and steps aimed at conferring legal security of tenure upon those households lacking such protection. Such steps should be taken in genuine consultation with affected persons and groups. In Uganda, tenure could take any of the various forms listed in Article 237 (3) of the Constitution and Section 3 of the Land Act (as amended).

b. *Availability of Services*: Under the right to adequate housing, persons should have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage, and emergency services.

c. *Affordability*: This in essence means that housing facilities should be affordable to all persons regardless of their socio-economic status so that they do not threaten any person's attainment of other life basic needs. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increments. In societies where natural materials constitute the main sources of building materials for housing, steps should be taken by States to ensure the availability of such resources.

d. *Habitability*: Adequate housing must be habitable. In other words, it must provide the inhabitants with adequate space and protect them from cold, dampness, heat, rain, wind, or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must also be guaranteed.

e. *Accessibility*: Accessibility means that it should be within reach for vulnerable or disadvantaged groups like the elderly, chil-

dren, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other vulnerable groups should be given some degree of priority consideration in the housing sphere. Both housing law and policy should fully take into account the special housing, needs of these groups.

f. *Location*: Adequate housing must be in a location that allows access to employment options, health care services, schools, child care centers, and other social facilities. Housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

g. *Cultural Adequacy*: The way houses are constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of the housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate, are also ensured.

These tenets reveal some of the elements associated with the right to adequate housing. They also show the many areas which must be fully considered by States with obligations to satisfy the housing rights of their population. State party obligations concerning these obligations are set out threefold; the duty to respect human rights which is a negative obligation and requires the state and all persons to refrain from interfering with the enjoyment of the right to housing; the duty to promote, a positive role which requires the government to create an enabling environment for the realization of the right to housing inclusive of legislative, administrative, judicial and financial advancement of the right; and the duty to protect which is also positive and necessitates the state to shield the right to housing from acts of violation by third par-

ties[25]. This bolsters the obligation imposed by the CESCR under Article 2[26] which is to the effect that while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned and such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[27]

2.0 Concept of Progressive Realization and the case for Uganda

Progressive realization has its origins in international law under the UDHR and the ICESCR[28] which provide that socio-economic rights are subject to progressive realization. However, while there is no similar provision in the African Charter on Human and Peoples' Rights, the same can be found in decisions of the African Commission on Human and Peoples' Rights which has through cases and guidelines recognized the principle of progressive realization[29].

The ICESCR defines the concept of progressive realization under General Comment No 3 as follows;[30]

> Each State Party to the present Covenant undertakes to take steps, […] especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means […][31]

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25 General Comment No. 3, The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990. < https://www.refworld.org/pdfid/4538838e10.pdf >Accessed on the 4th /07/2021

26 International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2

27 General Comment No 3 (n 25) Para 2& 4

28 ICESCR, (n 26)

29 *Purohit and Anor v Gambia* (communication no. 241/2001) [2003] achpr 49; (29 may 2003); Guidelines on Economic, Social and Cultural Rights

30 Ibid 21

31 Ibid

However, a state is required to move as expeditiously and effectively as possible towards meeting this goal.[32] The concept of progressive realization thus constitutes a recognition of the fact that full realization of all economic, social, and cultural rights will generally not be able to be achieved in a short period of time, however, this does not mean that they should not be recognized.[33]

Central to the aspect of progressive realization is States parties' obligations relating to certain economic, social, and cultural rights as set out in three of the nine core international human rights treaties. The essence of the concept of progressive realization can be described in the obligations;

(a) to undertake all appropriate measures towards the implementation, or full realization of economic, social, and cultural rights, and

(b) to do so to the maximum extent of their available resources,[34]

c) international assistance.

The Limburg Principles on the Implementation of the ICESCR[35] state that progressive realization cannot be interpreted under any circumstance to imply the right by states to defer indefinitely efforts to ensure full realization. States are required to begin immediately to take steps to fulfill their obligations under the Covenant.[36] *The Maastricht Guidelines* provide that the burden is on the state to show that it is making measurable progress towards the full realization of socio-economic rights. The state cannot use 'progressive realization' as a pretext for non-compliance nor justify derogations or limitations of rights on different social, religious, and cultural backgrounds.[37]

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32 General Comment No 3, (n 25) para 9

33 General Comment No 4, (n 5)

34 ICESCR (n 26), Article 2

35 Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights.

36 Limburg Principles, Para 21.

37 Maastricht Guidelines on the Violation of economic, social and Cultural Rights. Para 8.

Also, In the Matter of the Principle of Gender Representation in the National Assembly and Senate[38]; the Supreme Court opined:

> *"We believe, that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal-a human rights goal which, by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural, and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action."*[39]

Further, in the *Center for Health Human Rights and Development (CEHURD) & 3 others V Attorney General (CEHURD case),*[40] progressive realization was explained by the Supreme Court of Uganda to mean that states must implement a reasonable and measurable plan with set achievable benchmarks and time frames to for the enjoyment overtime of economic and social-cultural rights within the resources available to the state party. The court also noted that unimplemented policies and strategies in Uganda cannot be said to be expeditious and effective steps towards the progressive realization of the right to health

In *the Government of the Republic of South Africa and Others v Grootboom and Others,* [41] it was held that the term progressive realization means that the right could not be realized immediately. That it however means that the state must take steps to achieve the goal of the Constitution, which is that 'the basic needs of all in our society be effectively met'.

Progressive realization thus recognizes the fact that the full realization of socio-economic rights would not generally be achieved in a short period of time. The obligation imposed on states, therefore, is to move as expeditiously and effectively as possible towards full realization.

The Court[42] further elucidated that progressive realization means that "accessibility should be progressively facilitated: legal, administra-

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38 Advisory Opinions Application 2 of 2012 eKLR para. 53

39 Ibid

40 Constitutional Petition No 16 of 2011

41 2001 (1) SA 46 (CC)

42 Ibid

tive, operational and financial hurdles should be examined and, where possible, lowered over time". Also, the right must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

In *The President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery (Pty)*[43] concerning the right to adequate housing, it was noted that '[t]he progressive realization of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital.

Progressive realization can be broken down into four typologies; Maximum available resources, prohibition of retrogressive measures, immediate obligations, and non- discrimination.

i) Maximum available resources

'Available resources' is one of the central aspects of progressive realization. It means the use of resources both within a state and those available through international assistance and cooperation.[44] The resources in this instance are not only finances but also other forms of resources such as human, technology, and information resources.[45] This doctrine thus affords the State a margin of appreciation in the use of her resources for the realization of economic and social rights. It requires the State to prioritize the use of its resources for the realization of economic and social rights (prioritization of social spending) to meet the urgent needs of poor, vulnerable, and marginalized groups and communities[46]. The CESCR emphasizes that even where the available resources are demonstrably inadequate, the obligation remains for a state to strive to en-

43 2005 (8) BCLR 786 (CC).

44 General comment 3 para 13 (n 25); Limburg Principles Para 26 (n 35).

45 Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources" to the Realizing Economic, Social, and Cultural Rights' (1994) 16(4) Human Rights Quarterly 693-714, 695-697.

46 The East African Centre for Human Rights, A compendium on economic and social rights cases under the Constitution of Kenya 2010 (Nairobi: EACHR, 2015), 6

sure the widest possible enjoyment of the relevant rights under the prevailing circumstances.[47] The CESCR added that even in times of severe resource constraints, vulnerable members of society must be protected by the adoption of relatively low-cost programs.[48] The CESCR further states that "the obligations to monitor the extent of the realization, or more especially of the non-realization of economic, social and cultural rights, and to devise strategies and programs for their promotion, are not in any way eliminated as a result of resource constraints".[49] And thus resource constraints cannot justify inaction.

In *Mitubell welfare society V Kenya ports Authority,*[50] the Court clarified that every individual is always entitled to the right to housing and that, the principles of progressive realization put the burden on the government not fulfilling its obligation to prove that it lacks the resources to fulfill the right.

ii) Retrogression

The obligation of progressive realization means that it is a caveat against the government in talking any retrogressive step is a violation of a state's obligation to progressively realize socio-economic rights. The CESCR has been vocal in its general comments against retrogressive measures and has set stringent conditions for such retrogressive steps to be acceptable. It has affirmed that deliberate retrogressive measures must be fully justified concerning the totality of the Covenant rights and in the context of the maximum use of available resources.[51] *Lilian*[52] avers

47 CESCR (n 5) Para 11

48 Chenwi, Lilian, Monitoring the Progressive Realisation of Socio-economic Rights Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court. Community Law Centre, University of the Western Cape Research paper written for Studies in Poverty and Inequality Institute, 2010:5

49 CESCR General comment (n 5) Para 12

50 Supreme Court Petition 2 of 2018

51 CESCR General Comment No. 3, (n 25) para. 9;

52 Chenwi, Lilian, Monitoring the Progressive Realisation of Socio-economic Rights Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court. Community Law Centre, University of the

that some of these could be tax measures or fiscal reforms that tend to marginalize the disadvantaged. *Liebenberg*[53]on the other hand explains that retrogressive measures by states may be justifiable where, for example, a state can show that the retrogressive measures are necessary to achieve equity in the realization of the right or a more sustainable basis for the adequate realization of the rights. She however cautions that where retrogressive measures result in depriving marginalized and vulnerable groups of access to basic social services, weighty justifications should be required.

iii) Immediate obligations

Although the CESCR has recognized the progressive realization of social-economic rights, it has also explained the need to have certain obligations realized immediately and termed that, the "immediate obligations". General Comment No. 3 provides that there are certain elements in social and economic rights that do fall under the ambits of progressive realization but need to be fulfilled immediately and unequivocally. In General Comment No. 3, the CESCR clarified that the obligation to take steps is not qualified or limited by other considerations and hence,[54] not subject to progressive realization. States, therefore, have an immediate obligation to take steps following a measurable plan of action towards the realization of socio-economic rights.[55]

In regards to adequate housing, States must make every possible effort, within their available resources, to realize the right to adequate housing and to take steps in that direction without delay. Notwithstanding resource constraints, some obligations have an immediate effect, such as the undertaking to guarantee the right to adequate housing in an equal and non-discriminatory manner, to develop specific legislation

Western Cape Research paper written for Studies in Poverty and Inequality Institute, 2010.

53 Sarah Liebenberg, Socio-economic Rights: Adjudication under a Transformative Constitution (Pretoria: Juta and Company Ltd, 2010), 190

54 General comment No 3 (n 25) Para 5

55 Ibid

and plans of action, to prevent forced evictions, or to guarantee a certain degree of security of tenure.[56] There is also an obligation to provide legal security of tenure that includes legal protection against forced evictions, harassment, and threats.[57] The obligation to effectively monitor the housing situation in the state concerned.[58] The obligation to refrain from forced evictions to progressive achievement based on the availability of resources will rarely be relevant regarding this obligation.[59]

iv) Non-discrimination

Furthermore, concerning vulnerable and disadvantaged groups, the progressive realization of the rights of these groups requires that states do more than abstain from taking measures that might have a negative impact on the enjoyment of their rights. The obligation of the state is to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalized groups. And in this case, positive action includes specially tailored measures or additional resource allocation for these groups.[60]

In the *Federation of Women Lawyers Kenya and Others v The Attorney General and Others,*[61] the court stated that it is important to understand the basics which are that the rights contained in the Bill of Rights are interrelated and mutually supportive. The specific constitutional rights must not be seen in isolation but must be understood in their textual settings and their social and historical context.

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56 General Comment No 4, (n 5)

57 General Comment No 4, (n 5) Para 8(a)

58 Ibid Para 13

59 Ibid, Para 8

60 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, para 9.

61 High Court Petition No 102 f 2011

2.1 The Case for Uganda through the lenses of Progressive Realization

From the foregoing discussion, the right to housing is thus one of the most fundamental rights to the very being of a person. Even when Uganda has ratified the various international conventions which by virtue of Article 287 of the Constitution have that force of law in Uganda, Uganda is yet to fully and adequately realize this right and the same can even be seen through; *forced evictions, weak land tenure systems, regressive tax policies, hindrances on access to justice* among others which are a clear testament of the existence and inadequacy of housing and rights related therewith.

2.1.1 Forced evictions

Forced evictions are defined as the permanent or temporary removal against the 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 that are compliant with international human rights law.[62]Although the obligation to protect people from forced evictions is of immediate effect and requires States to prevent third parties from interfering with the enjoyment of human rights, including any rights jeopardized by forced evictions. Uganda has been marred with forced evictions which are majorly attributed to a weak policy and legal framework on evictions despite the provisions under international law that oblige Uganda to put stringent regulations on evictions.

In the case of *James Muhindo & 3 others V Attorney General*,[63] the High Court of Uganda found the Ugandan Government's failure to enact a comprehensive legal framework and procedure protecting those facing eviction to be a breach of their rights to life, dignity, and property under Articles 22, 24, 26, 27, and 45 of the 1995 Constitution of Uganda,

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62 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22

63 Miscellaneous Cause No 127 of 2016

also The African Commission in the *SERAC* case stated that; "Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments".

Also, in the case of *Port Elizabeth Municipality vs Various Occupiers*,[64] the court stated;

> "It does not matter that the Applicants do not hold title to the suit premises and even if they had been occupying shanties, the 1st Respondent was duty-bound to respect their right to adequate housing as well as their right to dignity. Wherever and whenever evictions occur, they are extremely traumatic. They cause physical, psychological, and emotional distress and they entail losses of means of economic sustenance and increase impoverishment. In this case, I must therefore agree with the Petitioners that their eviction from the suit premises without a plan for their resettlement would increase levels of homelessness and this Court must strive to uphold the rights of the Petitioners and especially the right to be treated with dignity. Individuals should therefore not be evicted from their homes nor have their homes demolished by public or private parties *without judicial oversight.* Such protection should include providing for *adequate procedural safeguards*."

In this context, the state needs to adopt specific legislation or measures, some from the United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement to ensure that private actors such as landlords, property developers, landowners, and various types of business enterprises are compliant with human rights. States should for instance adopt legislation regulating the housing, rental, and land markets, such as tenancy laws that protect tenants' due process, prevent discrimination, and ensure human rights compliant procedures if evictions are unavoidable[65] and also provide for effective and meaningful consultation and adequate compensation and also take into consideration the jurisprudence in practice to effectively come up with eviction laws.

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64 (2005)1 (SA) 217 (CC)55

65 UN Habitat-Forced Evictions Fact Sheet No. 25/Rev.1-2014

2.1.2 Inadequate resource allocation

The right to housing is also affected by inadequate resource allocation in the form of inadequate budget financing. The ICESCR under the obligation to fulfill requires state parties to adopt reasonable legislative, administrative, budgetary, judicial, promotional, and other measures within its available resources to achieve the progressive realization of socio-economic rights.[66] However, Uganda has had chronic inadequate budget allocations to the housing department. This is evidenced by the CESCR in its concluding observations on Uganda where it noted the insufficient budgetary allocations to key sectors such as housing as one of the key factors in the failure to realize the right to housing.[67] In the Financial Year 2021/22, the housing sub-program was allocated Ugx 1.3bn, way below the required Ugx 1,762.88bn under NDP III for the FY2021/22, indicating a funding gap of Ugx 1,761.58bn and thus tremendously affecting the implementation of several key housing activities that are aimed at actualizing the NDP III objectives and agenda.[68] Meanwhile, in the Financial Year 2022/23, housing has been bundled together with sustainable urbanization and together, allocated a measly 344.2 billion Shillings.

This budgetary allocation is neither considerate of the inflation levels nor the rapidly increasing population levels. There is, therefore, a need to increase budgetary allocations to the housing sector to curb this issue.

2.1.3 Lack of adequate security of tenure for informal settlements

Much as Uganda has different land regimes, which is a positive aspect, this has however been underscored by a lack of security for tenure for the rapidly growing urban poor population, majorly escalated by poverty which pushes people to seek employment in urban areas which

66 General Comment 3 (n 25)

67 CESCR, Concluding Observations on the Initial Report of Uganda, UN doc. E/C.12/UGA/CO/1,19th June 2015.

68 National Budget Framework paper FY 2021/2022-FY2025/26; Ministry of Finance, Planning and economic Development.

have led to the growth of informal settlements, sometimes referred to as slums which provide accommodation for almost 60% of urban dwellers[69] who in essence lack legal ownership of the land on which the informal settlements are located. This undermines the right to housing making persons vulnerable to forced evictions, harassment, and other threats. The *Mitubell* case[70] elucidated that every individual has the right to housing, even if they do not own land. It found that individuals are protected by the right to housing under the Constitution and international law and that when the government fails to provide housing to all, it must protect those who live in informal settlements like the petitioners at Wilson Airport. Article 20[71] enjoins the state with the duty to fulfill, observe and protect human rights. This, therefore, calls for the state to find an appropriate tenure system for such dwellers to enable them to have the security of tenure on the land.

2.1.4 Regressive tax measures

The government of Uganda amended the Income Tax Act to impose a levy on rental income, targeted at redressing the perceived under-declaration of income by landlords. This in essence is a fiscal reform that is regressive in nature, since it explicitly affects the rights of the vulnerable and marginalized as the tax would raise the cost of housing for the indigent, this underscores the fact that one of the major obligations under the CESCR is the prohibition of any regressive measures, fiscal policies such as tax included[72] which is an immediate obligation and does not need to be progressively realized. It is against this backdrop that the government ought to align its fiscal policies in the housing sector to be progressive and not regressive.

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69 Ministry of Housing policy ,2016

70 Initiative for Social and Economic Rights: Meaningful Access to Justice for Economic and Social Rights (2019)

71 The Constitution of Uganda, 1995

72 Chenwi, Lilian, Monitoring the Progressive Realisation of Socio-economic Rights Lessons (n 52)

2.1.5 Delayed and frustrating access to justice perspective

The Constitution does not explicitly provide for the right to adequate housing. This is problematic since the National Objectives are not automatically justiciable. Besides, the heavily rigid procedural formalities, strict evidential rules, and operational principles hamper their expeditions. A report by the Initiative for Social and Economic rights[73] shows that on average, it takes the Supreme Court an average of 758 days and the Court of Appeal an average of 1205 days to dispose of appeals and constitutional matters in the Court of Appeal. In 2017/18, the High Court took an average time of 549 (days) to dispose of cases. This, in essence, culminates in delayed justice, and in most cases, the status quo of the right could change during the subsistence of the court case.

3.0 Conclusion

The Right to Adequate Housing is one of the most fundamental human rights. Uganda is both internationally and nationally obliged to fully or at least progressively realize this right. However, the right is only provided for in the National Objectives and as such, there is a need for reasonable legislative and other measures (such as policies and programs) if anything is to be achieved. Of paramount importance is ensuring the allocation of appropriate financial and human resources for the same. Measures like reducing taxes on construction materials and regulating of rental prices of the private sector houses would go a long way in addressing the housing problem. There is an urgent need to allocate an adequate budget to housing to provide affordable and adequate housing for all Ugandans. The Government can also facilitate easy and increased access to affordable credit, grow the primary mortgage market and reduce the funding cost of residential mortgages. These and more are some of the ways through which the housing deficit in Uganda can be addressed and the Right to Adequate Housing finally and fully realized.

[73] Initiative for Social and Economic Rights, Meaningful Access to Justice for Economic and Social Rights, September 2019

Examining the EAC Treaty on Facilitation of Good Governance, Democracy and Rule of Law

Abuya, O. Kennedy*

Abstract

The article seeks to examine the intractable issues within the East African Community (EAC) Treaty and the body of laws governing the bloc, particularly the constrains on the functioning of good governance, democracy and rule of law. The article begins by recognizing the significance of these principles to the prosperity of the Regional Economic Community (REC). The discussion attributes such importance to the deliberate encoding of the fundamental and operational principles within the EAC Treaty framework. The article discerns key subjects of concern that encompass decision-making processes, representation of different interest groups, implementation, and fidelity to the EAC law. The outcome proposes a raft of recommendations. They include repealing the claw-back articles of the Treaty, amending the EAC Treaty and enacting corresponding national laws of Partner States that guarantee mandatory consultation of stakeholders. Another recommendation is, to establish common EAC guidelines for monitoring the implementation of good governance, democracy and rule of law. Finally, the article suggests various ways in which the EAC systems, processes, procedures and practices can be improved. They include strengthening the capacity of the EAC organs and institutions as well as improving their coordination mechanisms.

Key Words: Regional Economic Community, Good Governance, Democracy, Rule of Law, East African Community, EAC Treaty, EAC Partner States.

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1.0 Introduction

The central theme in regional integration theory is to address common challenges and create unified prosperity for the participating States.[1] This is because Regional Economic Communities (RECs) in their very nature are where members opt to act as a bloc on matters affecting them.[2] They unify by ceding certain attributes of their sovereignty and adopting common rules and procedures. The participating States commit to harmonize practices among themselves and in dealing with the rest of the world.[3] Thus, certain aspects such as instilling good governance, democratic ideals, and rule of law become prerequisites. It is through these safeguards that members are capable of implementing the programs as envisaged in the constitutive regional accords. Otherwise, it would be an uphill task to realize the gains amidst existence of lawlessness, on the face of monocracy or where citizens are left on the backstage of the regional integration.

Consequently, the desire for an all-inclusive regional arrangement has been a longstanding objective of many RECs, especially in Africa.[4] There has been the quest for a continent-wide integration agenda. However, a number of drawbacks still exist within the sub-regional groupings, which impose practical hurdles. RECs fail to live up to the same guiding principles that ought to steer their prosperity. For instance, poor governance and political crisis continue to bite even with the existence of regional laws that are established to foster

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1 Abuya, O.K, 2021, Jurisdiction of the EACJ in interstate Dispute Settlement: Case of Kenya-Tanzania Disputes, LLM Dissertation, University of Dar es Salaam, School of Law, p.8.

2 Akwara, A.F., Udaw, J.E. and Akwara, N.F., 2021. The Role Of Regional Economic And Political Groups In The Globalization Process: A Case Study of The Economic Community Of West African States (ecowas)(1982-2002). *escet journal of educational research and policy studies*, *1*(1), pp.321-339.

3 Voeten, E., *3 Regional Judicial Institutions and Economic Cooperation: Lessons for Asia? In Integrating Regions,* Stanford: Stanford University Press, 2020, p. 59, at pp. 58-77.

4 Tavares, R. and Tang, V., 2011. Regional economic integration in Africa: impediments to progress?. *South African Journal of International Affairs*, *18*(2), pp.217-233.

good practices.[5] African countries are also grappling with challenges of electoral democracy, and representation disparities across their governance; lack of good governance and democracy, poor leadership and mismanagement of institutions.[6] Therefore, enactment and effective enforcement of the regional laws that demand member States to shun these flaws is very significant. It is something that most of the African RECs now require like never before.

The East African Community (EAC) is not immune to the similar needs. The edicts of the EAC Treaty provides a number of goals. Besides the definite economic objective of the bloc, there are numerous principles prescribed to aid in the achievement of the integration agenda. They include the principle of good governance, democracy and rule of law. It is evident that the drafters of the EAC Treaty were determined to cure the ills that befell the Community during the early attempts of integration.[7] As it is referenced, the initial East African Cooperation collapsed like a rubble in 1977. Lack of common ideals among the then member States was one of the causes. To avoid a similar quagmire, it was necessary to introduce these principles in the EAC Treaty of 1999.[8] The Community is cognizant of the fact that without them, the quest for achieving long term goals, like the ultimate political federation, may not be feasible. However, the practice within the EAC and among the Partner States paint a grim picture of compliance to the principle of good governance, democracy and rule of law as discussed below.

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5 Jiboku, P.A. and Okeke-Uzodike, U., 2016. Regional Economic Integration and the Governance Challenge in Africa: Missing Links in the African Peer Review Mechanism. *Africa Development*, *41*(2), pp.47-70.

6 *Ibid*.

7 Kamanga, K.C., 2016. An Enquiry into the Achievements and Challenges of East African Regional Integration. *The African Review: A Journal of African Politics, Development and International Affairs*, pp.51-74.

8 *Ibid*.

2.0 Discussions on Good Governance with Regards to RECs and the EAC

The nature of governance system is significant in managing the affairs of any society. It signifies the manner in which power is exercised by governments in the management and distribution of social and economic resources.[9] Governance also means the exercise of economic, political and administrative authority to manage the affairs of a given society at all levels.[10] Good governance symbolizes the role of governments in relation to the above.[11] Some of the indicators include participatory, transparent, accountable, effective and equitable management as well as distribution of public resources.[12] Other parameters are the inclusion of the private sector and civil society in facilitating political and social interaction and mobilizing different groups to participate in economic, social and political activities.[13]

Meanwhile, the debate around good governance in the context of Regional Economic Communities (RECs) continues to attract the attention of many scholars.[14] Traditionally, governance has been associated with the exercise of powers by the national public authority and political institutions within the nation-states.[15] However, there is an emerging paradigm shift. The RECs now create supranational public authorities and transnational non-governmental actors that work together to promote governance norms at a regional level.[16] That inculcation of good

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9 Ilufoye, S.O., 2010. Democracy and good governance: Nigeriaâ€™ s dilemma. *African journal of political science and international relations*, *4*(6), p. 202, at pp.201-208.

10 Governance for Sustainable Human Development, A UNDP policy paper UNDP 1997,p 2-3

11 Holzer Marc & Kim Byong-Joon (ed.), Building Good Governance: Reforms in Seoul, (National Center for Public Productivity, 2002), Preface.

12 *Ibid*.

13 Abdellatif, A.M., 2003, May. Good governance and its relationship to democracy and economic development. In *Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul* (Vol. 20, No. May, p. 31).

14 Thakur, R. and Van Langenhove, L., 2007. Enhancing global governance through regional integration. In *Regionalisation and Global Governance*, pp. 33-58.

15 *Ibid*.

16 *Ibid*.

governance at the helm of regional integration is susceptible to both risks and opportunities in equal measure. Scholars opine that the regional governance has led to a crisis in power balance and legitimacy.[17] This is because regional integration is often negotiated by States, which may widen the interaction between the resultant institutions and the citizens. The subsequent discussions of the EAC Treaty and the practices of governance explicates the aforementioned dynamics.

2.1 Precarity of the EAC Organs and Institutions

The EAC Treaty establishes organs that are charged with various functions.[18] The key organs are the summit, the legislative arm, the judicial arm, the secretariat and the sectoral coordination committees. There are other institutions of the Community that undertake their functions to complement the organs.[19] They include the East African Community Competition Authority (EACA); East African Health Research Commission (EAHRC); East African Kiswahili Commission; East African Science and Technology Commission (EASTECO); East African Development bank; Inter-University Council for East Africa (IUCEA); Lake Victoria Basin Commission (LVBC), among others that may be established from time to time.[20] In practice, the Community has developed a framework where the institutions are distributed across Partner States to attain the balance and the ideals of shared resources. For instance, EACA is hosted in Tanzania, EAHRC in Burundi, EASTECO in Rwanda, IUCEA in Uganda, and Lake Basin in Kenya, among others.

However, some recent disquiet among the Partner States over hosting the Institutions created by the EAC Monetary Union Protocol raises eye brows. The implementation of the Monetary Union requires establishment of the East African Monetary Institute (EAMI) and subse-

17 Thakur, R. and Van Langenhove, L., 2007. Enhancing global governance through regional integration. In *Regionalisation and Global Governance*, pp. 33-58.

18 Article 9 (4) of the EAC Treaty 1999.

19 Article 9 (3) of the EAC Treaty 1999.

20 Article 9 (2) of the EAC Treaty 1999.

quently East African Central Bank.[21] The verification missions in respect of the applications to host the East African Monetary Institute (EAMI) conducted in 2022 found Tanzania most suitable, followed by Uganda and Burundi.[22] The aforementioned outcome was fiercely contested by other Partner States. Particularly, South Sudan cited non-compliance to the principle of equity.[23] If so, then the EAC undermined a principle intertwined with good governance, democracy, the rule of law as provided in the EAC Treaty.[24]

The EAC Treaty outlines the fact that the Community was established to foster a prosperous, competitive, secure, stable and politically united region.[25] The main objective is to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people.[26] From the aforementioned, it is perceptible that the benefit to the people takes the center stage within the EAC integration. The EAC Treaty further provides a framework through which such benefits can be realized equally across different groups of people. For instance, the Treaty stipulates that the appointment of staff and composition of the organs and institutions of the Community shall take into account gender balance.[27] Moreover, the Treaty provides for equitable distribution of benefits, which means proportionate distribution of benefits and resources.[28]

However, there has been an issue with fair representation of nationals of the Partner States at the EAC organs and institutions. There have been reported disputes over the distribution of jobs in the organs

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21 Articles 20 & 21 of the EAC Monetary Union Protocol

22 Report on verification Missions in respect of the Applications to host the East African Monetary Institute (EAMI), conducted between 7th-20th March 2022.

23 *The Citizen*, Partner states bicker over who will host the East African central bank, available at < https://www.thecitizen.co.tz/tanzania/news/east-africa-news/partner-states-bicker-over-who-will-host-the-east-african-central-bank-3897002> accessed on 4th November 2022.

24 Article 3 (3) (b) of the EAC Treaty 1999.

25 Preamble of the EAC Treaty 1999.

26 *Id*. Article 5(1).

27 *Id*. Article 9 (5).

28 *Id*. Article 1 of the EAC Treaty 1999.

of the EAC. The disquiet over the ratios became bare during the hiring of EALA clerk, deputy, among other staff in July 2020.[29] The allegation was that the Secretariat failed to comply with the Staff Rules and Regulations of 2006, that require representation of staff from each Partner State for the positions.[30] The foregoing exposed mistrust with the manner in which the EAC complies to the obligation of proportionate distribution of job opportunities among the Partner States.

In addition, the EAC legal framework not only consists of the Treaty but also protocols concluded by the Partner States. Each protocol spells out its objectives, scope and any institutional framework needed to spur the integration agenda.[31] In the same design, there are other specialized bodies that are or may be established under the provisions of the EAC Protocols. The ones already operationalized include the Trade Remedies committee under Article 24 (2) (a) of the EAC Customs Union Protocol. Nevertheless, the aforementioned institution is cited to create a likely overlap, which could hamper the functioning of the East African Court of Justice (EACJ).[32] As the principal judicial organ, the EACJ is charged with ensuring adherence to law in the interpretation and application of and compliance with the Treaty.[33] Therefore, establishing another institution with quasi-judicial powers creates parallel governance structures, which may impede their coordination and functioning.[34]

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29 *The East African*, Mistrust, cries of unfairness as states fall out over EAC job vacancies, available at https://www.theeastafrican.co.ke/tea/news/east-africa/mistrust-cries-of-unfairness-states-fall-out-eac-job-vacancies-3586696 accessed on 4th November 2021.

30 *Ibid.*

31 Binda, E.M., 2017. The Legal Framework of the eac. In *East African Community Law*, p. 109 at pp. 103-118).

32 *Ibid.*

33 Article 23 of the EAC Treaty 1999.

34 *Ibid.*

2.2 Assessing the EAC Treaty and Practices in Relation to Good Governance

The practice of good governance in relation to the EAC Treaty can be measured through the involvement of different interest groups and stakeholders. Their level of involvement in the decision-making processes or availability of forum through which they are able to channel their views on matters affecting the bloc.[35] However, the EAC Treaty model portrays it as an intergovernmental organization spearheaded by the Partner States. The limitation of the citizens in determining the formation and expansion of the Community are evident.[36] The EAC Treaty does not provide avenues through which citizens may take part in the admission of new members. The Treaty stipulates that The Partner States may, upon such terms and in such manner as they may determine, together negotiate with any foreign country the granting of membership to, or association of that country with, the Community or its participation in any of the activities of the Community.[37]

In fact, availing a forum for consultations with the private sector, civil society organisations, or other interest groups is at the discretion of the organs of the Community.[38] For instance, the Protocol on the Decision Making by the Council of Ministers gives the organ the power to grant an observer status to non-governmental organizations or civil society organizations.[39] The EAC resorted to the foregoing procedure because the Treaty does not explicitly indicate how involvement of citizens, private sector and civil society organizations should be achieved. It is, therefore, not obligatory to invite the aforementioned stakeholder on issues like admission of new members. The foregoing could be lead-

35 Abdellatif, A.M., 2003, May. Good governance and its relationship to democracy and economic development. In *Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul* (Vol. 20, No. May, p. 31).

36 Protas, P. and Romward, T., 2018. Reflections on 'People Centered Principle'in the East African Community: The Current Legal Controversy. *The Eastern African Law Review*, *42*(2), pp.1-16.

37 Article 3 (2) of the EAC Treaty 1999.

38 Article 127 (4) of the EAC Treaty 1999.

39 Article 2 (2) of the Protocol on the Decision Making by the Council of the EAC [2001].

ing to low private sector and civil society engagement in the affairs of the Community. It is likely to hamper transparency and accountability, which are key elements of good governance.

The EAC treaty itself does not specify the exact form of public consultation required for its amendments. It is a position that had been confirmed through an application made to the EACJ by East African Law Society in 2008. The application challenged sporadic amendments of the EAC Treaty at the whims of the summit without any form of consultation with stakeholders.[40] The court averred that there is no express or implied requirement within the EAC Treaty for the Partner States to carry out any consultations. Meaning, failure to carry out wide consultations on the proposals for the amendments to the Treaty does not constitute an infringement of the Treaty per se.[41]

There has been a sustained call to create space for wider stakeholder engagement in making key decisions of the Community. This is demonstrated from the attempts that have been made to operationalize the Political Federation of the Community, which is the ultimate goal of the EAC. It is the fourth intergration pillar after the Customs Union, Common Market and Monetary Union.[42] The task force given the responsibility to develop a roadmap to that effect alludes that consultation of all stakeholders are to be considered.[43] It is purported that the views of civil society, political leaders, local authorities, private sector, academia and opinion leaders would be taken to account while drafting the constitution. The EAC Treaty confers the Summit of the Heads of State, as the supreme organ of the EAC, to initiate the process towards the establishment of Political Federation by directing the council of Min-

40 *East African Law Society and Others v Attorney General of the Republic of Kenya and Others* (Ref. No. 3 of 2007) [2008] EACJ 1 (September 2008).

41 Philip Kasaija, The State of Constitutionalism in East Africa: The Role of the East African Community (EAC)-2007 In Constitutionalism in East Africa Ed by Wanza Kioko, Kampala Foundation Publishers, pp. 16–17.

42 Article 5(2) of the EAC Treaty 1999.

43 East African Community Secretariat, Communique, Arusha, Tanzania, 23rd April, 2021.

isters to undertake the process.[44] Still, there are existing gaps on account of a lack of a scope of consultation and mechanisms to ascertain whether the threshold is met.

2.3 Appraisal of the EAC Interventions to Peace and Security Matters

The governance issues, from the EAC region perspective, are demonstrated by the perennial security challenges within some EAC Partner States. For instance, the volatile security situation that gripped Burundi even after joining the EAC, and the similar situation in South Sudan, are indicators of the weak role of the EAC in promoting good governance. Peace and Security are intertwined with governance.[45] Good governance increases the ability of a state to meet the range of both internal and external security needs.[46] Therefore, unrelenting insecurity within a Partner State, among others, portrays a missing link to the principles of good governance. Democratic republic of Congo (DRC), the new entrance to the bloc, faces the same challenges. There have been attempts by the EAC to intervene through negotiations by the heads of the State. [47] In addition, the Community opted for military intervention.[48] Meanwhile, there seems to be some underlying bottlenecks in terms of the EAC-wide approaches.

In respect to the above, good governance encompasses defined roles and responsibilities of organs or institutions in undertaking their mandates. However, a keen look at the coordination mechanics for prevention, management and resolution of conflicts under the EAC framework indicates unclear mandates. Two instruments are germane to the above. They are the East African Community Conflict Management Act

44 Article 123 of the EAC Treaty 1999.

45 Bagoyoko, N. and Gibert, M.V., 2009. The linkage between security, governance and development: the European Union in Africa. The Journal of Development Studies, 45(5), pp.789-814.

46 *Ibid*.

47 DRC Nairobi Peace Talks, led by the former Kenyan President, HE Uhuru Kenyatta.

48 Agreement for deployment of the EAC Standby force, signed at the East African Community Headquarters, Arusha, Tanzania, 9th September, 2022.

(2012) and the EAC Protocol on Peace and Security of 2013. These instruments provide for a wider structure through which peace and security concerns are to be addressed. The East African Community Conflict Management Act (2012) refers to a Panel of Eminent Persons as the implementing organ that is charged with prevention, management and resolution of conflicts.[49] The Panel is permanent with a security of tenure of three years, and should have a corresponding directorate at the Secretariat and be functional at all times.[50] However, the recent appointments indicate that the Community seems to have relegated the Panel to an *ad hoc* body. This is in relation to the appointment of the Kenyan former President, which was undertaken within the framework of a panel of eminent of persons, to spearhead the discussions in resolving the internal conflict in DRC. The aforementioned appointment did not list the rest of the members from each of the Partner State as the Community Conflict Management Act stipulates.[51] The synergy of bringing together Panel representatives from each Partner cannot be overemphasized. It should be the true essence of the regional approach.

Likewise, the objective of the Protocol on Peace and Security is to promote peace, security and stability within the EAC region.[52] Nevertheless, the significance of the Protocol is overshadowed by lack of substantive implementation structures. The institutional arrangement for the implementation of the Protocol as provided under Article 15 is obscure.[53] It is at the determination of the EAC Council, but its scope of work *vis a vis* that of the Panel of Eminent Persons is undefined.[54] The EAC and its highest governing body is cognizant of these existing structures within the Peace and Security Protocol and Conflict Management Act. However, there is little effort to make them effectively operational or be coordinated to offer complementary support to the interventions

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49 Section 4 (2), East African Community Conflict Management Act (2012).

50 *Ibid*.

51 *Id*, Section 6 (1).

52 Article 3 of the EAC Protocol on Peace and Security 2013.

53 Article 15 of the EAC Protocol on Peace and Security.

54 Munene, R.W., 2021. An analysis of the efficacy of the EAC protocol on peace and security a case for institutional reforms, p. 19.

decided by the Summit. This, in turn, weakens the ability of the Community to holistically tackle the security challenges or bring long lasting solution to the affected Partner States.

2.4 Corruption as a Threat to Good Governance and Regional Development

The discourse about good governance within the EAC is not complete without a reflection of the EAC Partner State practices. This can be viewed through accountability, transparency, ethics and integrity in public institutions. One of the key areas is the manner in which the Partner States combat vices that threaten these tenets, such as corruption.[55] Runaway corruption is a threat to good governance in the sense that it impairs integrity by illegally acquiring or marshalling public resources.[56]

All the EAC Partner States have adopted various pieces of anti-corruption legislation. Most of them have taken significant steps to implement the laws; Rwanda Law N° 54/2018 of 13/08/2018 on fighting against corruption, Uganda Anti-Corruption Act (2009), Tanzania`s Prevention and Combating of Corruption Act (2007), and so on. In other Partner States, like Kenya, the measures are embedded within the Constitution. For example, Article 233(1) of the Constitution of Kenya, 2010 creates a Public Service Commission with the responsibility of among others, ensuring high standards of professional ethics, efficient, effective and economic use of resources and accountability. However, it is cited that corruption still remains a significant challenge.[57]

Literature reveals that there is a rampant and worrisome institutionalized nature of corruption in the form of networks and norms,

[55] Ganahl, J.P., 2014. *Corruption, good governance, and the African state: A critical analysis of the political-economic foundations of corruption in sub-Saharan Africa* (Vol. 2) Universitätsverlag Potsdam.

[56] Franz, E., 2012. Toa Kitu Kidogo: Corruption in East Africa.

[57] Klopp, J.M., Trimble, M. and Wiseman, E., 2022. Corruption, gender, and small-scale cross-border trade in East Africa: A review. *Development Policy Review*, p.e12610.

bribes and harassment.[58]The Corruption Perceptions Index (CPI) Report of 2021 shows that some of the EAC Partner States, like South Sudan, recorded among the highest corruption levels in the Sub Saharan Africa.[59] Other Partner States like Kenya and Uganda are not sitting well on the list either.[60] These high corruption levels and the gaps could be due to lack of common EAC approach that may be replicated by the Partner States as benchmark for sustained fight against corruption. It is in view of the fact that the current East African Community (EAC) Protocol on Preventing and Combatting Corruption is only in draft form. The East African Community Integrity and Anti-Corruption Bill, 2019 has similarly not seen the light of the day since its introduction to the regional assembly.

3.0 Nexus Between Good Governance, Democracy and Rule of Law

Good governance practices are hinged on democracy and the rule of law.[61] In other words, there is unequivocal nexus between good governance, democracy and rule of law. Good governance, as discussed earlier, is about an effective and efficient structures that provide optimal support to the citizens. It combines democracy, peoples` social welfare and the existing of rule of law. Good governance promotes democracy through adherence to collectively binding rules and policies over which the people exercise control, where members of the group enjoy effective equal rights to take part in decision-making directly or through representation.[62]

58 *Ibid*.

59 Transparency international, Corruption Perceptions Index (CPI) Report of 2021

60 *Ibid*.

61 Orayo, J.A. and Mose, G.N., 2016. A comparative study on contribution of governance on economic growth countries in the East African Community, pg. 90.

62 Beetham, D. 1992, Liberal Democracy and the Limits of Democratization,' Political Studies special issue, vol.40, p.40.

Therefore, both good governance and democracy are underpinned by a political system that guarantees civil and political liberties and ensures participation of people and accountability of decision makers.[63] Specifically, one of the indicators of democracy is the government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system.[64] The other aspect of a democratic ideal is the concept of pluralism; the existence of space through which everyone can express their thoughts or be heard. Consequently, the prospect of a successful democracy at the regional level like the EAC is an extension of social trust and civic engagement from the Partner States to the region.[65]

Likewise, rule of law is measured through, among other things, the adherence to institutions and procedures by everyone including the government as well as protection of individuals from arbitrariness.[66] The rule of law helps bring out conceptual thinking about law and the reality. The parameters include meaningful access to justice or availability of legal redress for any action deemed unlawful.[67] Thus, the fundamental and operational principles of the EAC Treaty commands adherence to the principles of accountability, transparency, social justice, equal opportunities, gender equality.[68] Under the EAC Treaty, the nexus between good governance, democracy and rule of law is affirmed by the design of Article 6 (d) and 7 (2) of Treaty that binds the three together. Therefore, it is imperative to examine the complementing aspects of democracy and rule of law to the achievement of the EAC objectives and the prevailing practice as discussed hereunder.

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63 Abdellatif, A.M., 2003, May. Good governance and its relationship to democracy and economic development. In *Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul* (Vol. 20, No. May, p. 31).

64 Olatunji, F.O., 2013. Democracy and the challenge of the rules of law in developing Democratic society. *Beytulhikme An International Journal of Philosophy, 3*(2), p. 68, at pp.67-79.

65 Steffek, J. 2003, The Legitimation of International Governance: A Discourse Approach, 9 EUR. J. Int'l Rel. 249, p. 256.

66 The International Commission of Jurists held in Lagos in 1961.

67 Whitford, W.C., 2000. Rule of Law. *Wis. L. Rev.*, p.723.

68 Article 6 (d) of the EAC Treaty 1999.

3.1 Past and Present EAC Snapshots of Adherence to the Principle of Democracy

Parliament is a key institution of democracy. It plays an important role in terms of legislation, oversight and representation.[69] Their representational role includes ensuring that citizens and other stakeholders have a voice at the national and regional levels. Accordingly, the conjecture between the political and the legal theory within the context is that people must participate in identifying their representative. However, that is not the case as the appointment of the members to the East African Legislative Assembly (EALA) has all along been contentious. The practice and laws enacted by Partner States to govern appointment of persons to EALA have attracted some backlash in the past.

For example, an application was brought to prevent nine Kenyan members 'elected' to the East African Legislative Assembly from taking office in 2006. The allegation, which was later upheld by the EACJ, was that the Kenyan Act of parliament, the EAC Treaty (Elections of Members of the Assembly Rules) 2001, and the procedure of electing Kenyan members to EALA were in violation of the EAC Treaty. The Applicants stated that the said members were directly nominated instead of being voted for, thus the question before the EACJ was whether nomination by political party could be said to be an "election" of the said members.[70] The Court concluded that the nomination of Kenyan members did not constitute an 'election' as envisaged in art 6 (d) of the EAC Treaty.

In the above case, the EACJ avowed that ordinarily a reference to a democratic election of persons to political office is understood to mean election by voting.[71] A few years later, Uganda was ordered by the EACJ to amend Rule 13(1) and (2) of Appendix B of the 2012 Rules of Procedure of election for EALA Members to bring it into conformity

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69 Economic Commission of Africa (ECA) (2012).

70 *Anyang' Nyong'o & others v Attorney General of Kenya &* others (Ref. No.1 of 2006) [2006] EACJ.

71 *Ibid.*

with Article 50(1) of the EAC Treaty, prior to the next EALA elections.[72] Article 50 (1) of the EAC Treaty requires election of members to EALA while the said rules provided for consensus by the political parties and other members of parliament. The above are indications of the past non-adherence to the democratic ideals as stipulated by the Treaty.

Moreover, the present trends from some Partner States demonstrate existence of underlying concerns on whether there is political will to advance democracy as envisaged by the EAC Treaty. For instance, the 2021 World Freedom country report indicates that Uganda`s credibility in terms of democracy has deteriorated over time due to the imposed dominance of the same party and president since 1986.[73] Uganda scores very low in terms of political rights and civil liberties with an aggregate of less than 40%.[74] The report cites Uganda`s existential use of security forces to curtail freedom and suppress opposition voices as well as for general political repression.[75] The foregoing is a reflection of the challenges to democracy even at the level of Partner States. This is the backdrop of the EAC Treaty dictates on respect for democratic space as a fundamental principle as well as an operational principle that governs the practical achievement of the EAC objectives.[76] Thus, non-adherence to the principle of democracy at any level within the EAC remains a threat to the progress of the Community.

3.2 Effects of the EAC Elections Observation and Evaluation Missions

The EAC developed additional instruments to consolidate democracy, rule of law, respect for human rights and fundamental freedoms.[77] They are also intended to guide the achievement of the relational EAC

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72 *Anita v Attorney General of Uganda & others*, Ref No. 6 of 2012, EACJ.

73 Uganda: Freedom in the World 2021 Country Report, available at <https://freedomhouse.org/country/uganda/freedom-world/2021> accessed on 5th November 2022.

74 *Ibid*.

75 *Ibid*.

76 Article 6 (b) & 7 (2) of the EAC Treaty 1999.

77 Article 123 of the EAC Treaty 1999.

objective, which requires members of the Community to adhere to the universality acceptable principles of good governance, democracy, the rule of law, among others.[78] The guidelines create an emphasis that credible elections are essential for democratic governance as well as peace and political stability. It is further stated within the same guidelines that democratic elections represent the free expression of the will of the people, which serves as the basis for legitimacy and authority of the government.[79]

The EAC Principles for Elections Observation and Evaluation tend to establish two Missions. The first is the EAC Election Observation Mission (EOM),the Election Observation Group, and the code of conduct of the observers.[80] Its role includes determination of whether the electoral environment is conducive to democratic elections and may make recommendations for reform or improvement, among others. The other is the Election Evaluation Mission (EEM), which assesses specific aspect of electoral process. Unlike the EAC Election Observation Mission that operates only during the election process, the EEM can be deployed at any time during the election cycle; in the pre-electoral, electoral or post-electoral period.[81]

The EAC Election Observation Mission has been deployed for election observation in a number of Partner States. The mission was deployed in the 2017 Kenyan General Election. However, the EAC Observation Mission and other international observer groups were highly criticized for not reporting irregularities that occurred during the elections.[82] They were accused of failing to spot glaring instances of electoral fraud and violence.[83] The concerns were presumably confirmed after-

78 Article 3 (3) of the EAC Treaty 1999.

79 The EAC Secretariat, Principles for Election Observation and Evaluation of 2012, p. 3.

80 *Id*, p. 2.

81 The EAC Secretariat, EAC Principles for Election Observation and Evaluation of 2012, p. 2.

82 Henry, R., 2017. Guardians of Peaceful Elections? Revisiting the Role of International Election Observers in East Africa. *The African Review: A Journal of African Politics, Development and International Affairs*, pp.83-111.

83 *Ibid*.

wards when the Kenyan Apex court nullified the presidential elections.[84] The foregoing potentially portrayed the EAC Observation Mission as having inconsequential impact to the election processes. Hence, it weakened the perception of citizens on its role of promoting peaceful, transparent, and credible election. Nonetheless, there has been a substantial improvement in the manner in which the EAC Election Observation Mission operates. It is evident from the recent observation mission reports.

The influence drawn from the last two EAC Observation Mission reports is that they were able to provide an outlook of non-adherence to the democratic ideals by the Partner States. They also went ahead to provide solutions to some of the challenges identified. However, the implementation of these recommendations is another area of discussion. According to the EAC Principles for Election Observation and Evaluation, the reports of the EAC Election Observation Mission is submitted to the EAC Secretary General.[85] It is, therefore, upon the Secretary General to deploy strategies of engaging with the concerned Partner State for implementation. This is a fault line as there should be dedicated mechanisms to keep track of the Missions` outcomes.

For instance, there should be an enforcement mechanism beyond reliance on political will of the Partner States. It may include judicial intervention through the EACJ on the account that the Partner States are under obligation to adhere to the principles of democracy. The EAC framework is desirable because the election related disputes still present common problems within the domestic justice systems.[86] Where such cases have been reported, it is alleged that national courts become ineffectual and timid in matters of elections.[87] The courts are majorly deferential to the executive power and often shy away from adjudging

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84 *Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others [2017]* KLR-SCK Petition No. 1 of 2017.

85 EAC Secretariat, Principles for Election Observation and Evaluation of 2012, p. 19.

86 East Africa Law Society, 2017, Management and Dispute Resolution of Elections in East Africa, p. 3-4.

87 *Ibid*

non-compliance to the principles of democracy even when illegalities are rife.[88]

3.3 Elusive Fidelity to the EAC Treaty: The Rule of Law Question

Fidelity to the rule of law principles and to the body of the EAC law is disconcerting at the level of the Community. One of the areas is, in the appointment of judges of the EACJ. The process has remained contentious with a number of concerns being raised about lack of transparency. The summit wields an absolute power in doing so, and it is often undertaken without advertisement nor subjected to a competitive process.

In practice, the appointment of the judges to the EAC principal judicial organ is known after the summit sitting where the communique is shared to the public afterwards. Although there have been attempts to challenge the process, there has never been any significant difference in the appointment approaches.[89] In the same vein, the leadership rotation at the EAC secretariat raises questions of gender consideration. Over two decades since the inception of the Community in 1999, there has never been a female Secretary General. That cannot be equated to any lack of interest or qualification, but a probable reluctance to do so. It is something that blots the EAC role in promoting gender equality.

Another shortcoming relates to giving force to the EAC Treaty principles. The EAC has not taken extra steps to operationalize protocols that give full meaning to good governance, democracy and rule of law. By mere fact of their mentions in the Treaty is not adequate. This is in reference to the debates surrounding the extension of the EACJ jurisdiction on human rights matters, which lacks substantive protocol in place. It potentially hampers the contribution of the court in amplifying adherence to the rule of law. For instance, the EACJ judgement that failure to extend its jurisdiction constitutes a breach of Treaty has nev-

88 *Ibid*.

89 EACJ Reference 1 of 2019, alleged improper nomination of a Judge of the East African Court of Justice (EACJ).

er been implemented.[90] It validates the opinion that the Partner States seemingly feel that their sovereignty would be constrained perhaps by the presence of another layer of rules above them.[91]

As a result, the EAC law remains inferior to the national laws, except on implementation of the Treaty.[92] Therefore, the principles under the EAC Treaty or the rules developed by the EACJ out of its progressive approach endure to yield outright legitimacy among Partner States. In fact, the precedence of the EACJ strictly applies to interpretation and application of the Treaty.[93] This is different from other advanced RECs like the EU where the primacy or supremacy of the regional laws over national laws is well outlined. The EU law is premised on the idea that where it conflicts with EU member State national law, the EU law takes precedence.[94] It does not limit it to the aspects of the EU Treaties, but remains superior over national laws once incorporated and applicable within the national jurisdictions.[95] This ensures that citizens are uniformly protected by an EU law across all EU territories, except on matters of social policy and taxation.[96]

4.0 Conclusion and Recommendations

The EAC is making significant progress in its integration agenda. There are numerous recorded milestones that have been achieved. The future is even more promising, to say the least, with the bloc registering new membership such as the DRC, and other neighboring states

90 Sitenda Sebalu v Secretary General of the EAC, Ref 1 of 2010.

91 Esty, D.C., 2005. Good Governance at the Supernational Scale: Globalizing Adminsitrative Law. Yale lj, 115, p.1508.

92 Article 8 (4) of the EAC Treaty 1999.

93 Article 33 (29 of the EAC Treaty 1999.

94 Van Gend en Loos v Nederlandse Administratie der Belastingen Case 26/62

95 Consolidated version of the Treaty on the Functioning of the European Union - DECLARATIONS annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Declaration on primacy (17).

96 Costa v ENEL, EUCJ, Case 6/64.

requesting to join.[97] Pre-adherence to the fundamental and operational principles as discussed are part of the conditions that are required for the aspiring State to demonstrate prior to the admission into the EAC. There is no doubt that the EAC is an important arrangement for the people of the region. The realization of a large regional economic bloc bears great economic prospects and geopolitical significance. Already, the achievement of the EAC in terms trade promotion through market enlargement and enabling movement of goods, capital, market and services is laudable. However, there are challenges that need to be keenly looked into, particularly on adherence to the principles of good governance, democracy and the rule of law.

The recurring insecurity within some of the EAC Partner States demonstrates such concerns. It exhibits challenges of national governance issues as well as weak regional coordination framework. It is attributed to overlaps, lack of clear roles and responsibilities of the established organs. More specifically, some of the institutions created by various instruments such as the EAC Protocols and EALA Acts are not optimally operating due to not being established in an actual sense, resource constraints, and lack of political goodwill to make them fully functional. For instance, the Community should re-evaluate its approaches to addressing issues of Peace, Security and the interventions thereof. The Panel of Eminent Persons and its corresponding Directorate at the EAC Secretariat needs to made fully functional as provided under East African Community Conflict Management Act (2012). This will enable them undertake the mandate of continuously assessing security issues, utilizing early warning mechanisms, engaging with warring parties, and providing peace negotiation avenues at all times.

Good governance at the level of the Partner States is impeded by not only non-compliance to the principle as envisaged by the EAC Treaty, but also laxity to implement domestic laws. As a result, vices like corruption continue to bite hard and are threatening the regional development in equal measure. Therefore, the article recommends fast track-

[97] Democratic Republic of Congo (DRC) admitted in 2021, and the Republic of Somalia has already submitted the intention to join the bloc.

ing the conclusion of the EAC instruments that can supplement Partner States in the fight against corruption and for strengthening their good governance practices in general. The instruments include, the East African Community (EAC) Protocol on Preventing and Combatting Corruption, The East African Community Integrity and Anti-Corruption Bill of 2019, and other available relational instruments like the EAC Protocol on Peace and Security. The latter exists but with no clearly defined implementing body. Thus, the EAC Council of Ministers needs to review their role of establishing the Protocol`s implementation structure, define its scope and funding mechanisms.

Furthermore, the essence of good governance, democratic ideals and the rule of law, is inhibited by some Treaty clauses that tend to reverse or take away the same warranties. In other words, the Treaty provides the rights and privileges on one hand while taking or limiting the same on the other hand. Such a situation renders the provisions inoperative and incapable of creating the desired impact. An example is the recognition of the people centered principle, yet the same people do not directly participate in the appointment of the high-ranking officials of the EAC organs. They equally do not have to be consulted, as a mandatory prerequisite, in key decision-making processes. The above justifies a need for proper legal reforms at the level of the EAC. For instance, amending the EAC Treaty in order to eliminate the existing claw-back clauses. The Treaty should clearly prescribe the different levels of participation.

The corresponding pieces of Partner States' legislations do not guarantee citizen participation in appointment of EALA members. These laws should be reviewed and subsequently aligned once the treaty is amended in order provide incentives for better democratic representation. The outcome will strengthen the connection between EALA representatives and the interests of the constituents. On the same vein, there should be an open and transparent appointment of high-ranking officials to the EAC organs alongside putting modalities through the EAC law. Collectively, there should be some legal requirement that commands balanced representation in all organs of the EAC. Consider-

ations must be made in terms of private sector, civil society and engage women, youth, PWDs and other interest groups to that regard.

Alongside the above, there is a need to conduct an overarching institutional analysis to delineate which EAC organs or institutions tasked with primary roles and responsibilities of overseeing implementation of the fundamental and operational principles. It will facilitate identification of the gaps within the organs and institutions of the Community. The outcome should guide the improvement of systems, processes, procedures and practices. It will lead to possible capacity development in the areas of strengthening the implementation of programs related to good governance, democracy and rule of law. These approaches can explicate the EAC as an ultimate people-centered regional bloc. It will enable the Community to achieve the status of an inclusive organization that draws ownership from the "base of the pyramid to the top."

Finally, the complex nature of the identified challenges demonstrates that the EAC requires a set of operative tools to address systemic violations of any EAC principles and related values. Therefore, the EAC must come up with common instruments for monitoring implementation of good governance, democracy and rule of law principles at the Community level and across Partner States. Some of these indicators have already been discussed. They include but not limited to the level of citizen participation in the Community affairs, representations, respect for the EAC procedures and institutions by all, including those serving within its organs. The common standards will help in undertaking uniform assessment and reporting the level of compliance by each Partner State and the Community. The report can then be shared with various stakeholders such as citizens, CSOs, the media, development partners, which will ignite more advocacy in case of non-compliance. These reforms will boost the economic trajectory and the success of the EAC integration in general.

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