



Human Rights Network-Uganda

REVIEWING CHAPTER FOUR OF THE 1995 CONSTITUTION

**TOWARDS THE PROGRESSIVE REFORM OF HUMAN
RIGHTS AND DEMOCRATIC FREEDOMS IN UGANDA**

February, 2013

REVIEWING CHAPTER FOUR OF THE 1995 CONSTITUTION

**Towards the Progressive Reform of Human
Rights and Democratic Freedoms in Uganda**

Study presented to the Human Rights Network—Uganda

J. Oloka-Onyango

©**HURINET-U**

February, 2013

Acknowledgement

Our profound appreciation goes to all those who made it possible for the analysis of the selected provisions that hinder the full realization of fundamental rights and freedoms envisioned in the 1995 Constitution of Uganda. In a special way we would like to extend our gratitude to our development partners for the generous financial support towards this project and making the publication of this analysis possible.

Also thanked are the HURINET-U editorial team (Mr. Ndifuna Mohammed, the Chief Executive Officer; Stephen Odong, Programs Manager; Patrick Tumwine, Advocacy Research and Information Officer, and Achaloi Jennipher (Law Reform Project officer), as well as to the entire legal team of HURINET-U for editing and reviewing the report before publication.

We acknowledge and appreciate the efforts made by Prof. J. Oloka-Onyango of School of Law Makerere University for his technical and legal expertise in the analysis as Lead Consultant, and of Kenneth Seguya as Research Assistant.

Table of Contents

Acknowledgement.....	ii
Acronyms	vi
Foreword	1
1.0 Introduction	2
2.0 Specific Human Rights Concerns.....	6
2.1 Equality and Freedom from Discrimination (Art.21).....	6
2.2 Protection of the Right to Life (Art.22)	8
2.3 Human Dignity and Protection from Inhuman Treatment (Art.24)	17
2.4 Slavery, Servitude and Forced Labour (Art.25)	19
2.5 Deprivation of Property (Art.26)	21
2.6 The Right to Privacy (Art.27).....	23
2.7 Fair Hearing (Art.28)	25
2.8 Freedom of Expression, Conscience, Religion, Assembly and Association, and Movement (Art.29).....	28
2.9 The Right to Education (Art.30)	33
2.10 Family Rights (Art.31)	35
2.11 Affirmative Action (Art.32)	36
2.12 Women (Art.33).....	37
2.13 Children (Art.34).....	38

2.14	Persons with Disabilities (Art.35)	39
2.15	Minorities (Art.36)	40
2.16	Cultural Rights (Art.37)	40
2.17	Civic Rights and Activities (Art.38)	41
2.18	Healthy Environment (Art.39)	42
2.19	Economic Rights (Art.40)	42
2.20	Access to Information (Art.41)	43
2.21	Fair Treatment in Administrative Decisions (Art.42)	45
2.22	General Limitation (Art.43)	46
2.23	Derogation (Art.44)	47
2.24	Additional Rights (Art.45)	48
2.25	State of Emergency (Arts.46-49)	49
2.26	Enforcement (Art.50)	50
2.27	Uganda Human Rights Commission (Arts.51-58)	51
3.0	The Case of Economic, Social and Cultural Rights	53
4.0	The National Objectives and Directive Principles of State Policy	56
5.0	Articles 1, 2, 3, 4 and 8A.....	57
6.0	Other Relevant Provisions	59

6.1	Chapter V (Representation of the People)	59
6.2	Chapter VI (The Legislature).....	66
6.3	Chapter VII (The Executive).....	68
6.4	Chapter VIII (The Judiciary).....	70
6.5	Chapter XII (Defense and National Security).....	72
6.6	Chapter XIII (Inspectorate of Government).....	73
6.7	Chapter XIV (Leadership Code of Conduct).....	75
7.0	Towards the enhanced enforcement and protection of Human Rights	76
	Conclusion: Amend, Restore or Repeal?	78

List of Tables

Table 1: Composition of SADC Electoral Management Bodies

Table 2: Tenure of Inspectors of Government (Before the 1995 Constitution)

Table 3: Tenure of Inspectors of Government (After 1995)

Table 4: Summary recommendations on the Bill of Rights and related provisions

Acronyms

AHB	Anti-Homosexuality Bill, 2009
CEHURD	Centre for Health Human Rights and Development
CEI	Independent Electoral Commission (Democratic Republic of Congo)
CENI	Commission Electorate Nationale Independente (Madagascar)
CNE	National Electoral Commission (Angola/Mozambique)
DVA	Domestic Violence Act, 2010
EBC	Elections and Boundaries Commissions (Swaziland)
ECN	Electoral Commission of Namibia
ECZ	Electoral Commission of Zambia
EOC	Equal Opportunities Commission
ESC	Electoral Supervisory Commission (Mauritius)
FCM	Field Court Martial
FGM	Female Genital Mutilation
FHRI	Foundation for Human Rights Initiative
FIDA	Uganda Association of Women Lawyers
HURINET-U	Human Rights Network-Uganda
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEBC	Independent Electoral and Boundaries Commission (Kenya)
IEC	Independent Electoral Commission (Botswana/Lesotho/South Africa)
LAW-U	Law & Advocacy for Women in Uganda
LGBTI	Lesbian Gay Bisexual Transgender Intersex
MEC	Malawi Electoral Commission
NEC	National Electoral Commission (Tanzania)
NEMA	National Environmental Management Authority
OSIEA	Open Society Initiative for Eastern Africa
PLWHA	People Living with HIV/AIDS
POMB	Public Order Management Bill
PPA	Power Purchase Agreement
PPTA	Prevention and Prohibition of Torture Act, 2012
PWDs	Persons with Disabilities
RDCs	Resident District Commissioners
SADC	Southern African Development Community
UPE	Universal Primary Education
ZEC	Zanzibar Electoral Commission/Zimbabwe Electoral Commission

Foreword

Uganda has had a history of conflicts and human rights violations right from colonial times where extensive measures of oppression were used to suppress discontent and deny Ugandans their fundamental human rights. At independence, there was hope for change, with the independence constitution providing for basic human rights. The independence Constitution was however overthrown with the removal from power of the first government in 1966, replaced with the 'Pigeon-Hole' Constitution of 1966 and later by the 1967 Constitution. Both these instruments had serious limitations with respect to human rights. Given this turbulent history, a new constitutional order was proposed by the Odoki Commission of 1989 to 1993.

The present Constitution of Uganda that was promulgated by the Constituent Assembly in October 1995 aimed at avoiding the mistakes of the earlier constitutions. It was designed to forge a way forward for Uganda and to ensure the promotion of democracy in the country. It is now over 16 years since the Constitution of Uganda was promulgated. However, human rights abuses and the undermining of key institutions of governance and accountability continue. Whereas the 1995 Constitution was praised as an all inclusive and watertight document, in 2005 it was amended in several material particulars. Among the most important was the removal of term limits provided for by Article 105. Since that time, there have been several other developments of a constitutional nature necessitating a serious analysis of the Bill of Rights and related provisions of the document. This was done in order to assess the extent to which the provisions of the Constitution actually promote human rights and the rule of law. It is also necessary to review the extent to which the State and state agencies have been able to put in place the necessary institutions and systems that would ensure effective implementation of the instrument.

The analysis of Chapter Four of the 1995 Constitution specifically highlights the key human rights concerns that Ugandans have today. It also focuses on the administrative and accountability provisions of the instrument. I have no doubt that the key human rights, transparency and accountability concerns in the Constitution and the recommendations for improvement of the Constitution based on best practices in other regions of the world will provide invaluable insights into the protection and promotion of democracy and the rule of law in Uganda. The analysis also provides recommendations for improvement with a summary at the end of the study which points out those provisions that ought to be repealed, amended or restored. I have no doubt that such recommendations will benefit human rights advocates, Government institutions, political leaders, administrators and Civil Society Organisations working on the improved protection and promotion of human rights in the country.



Mohammed Ndifuna

Chief Executive Officer

Human Rights Network Uganda (HURINET -U)

1.0 Introduction

It is slightly over seventeen (17) years since the adoption of the 1995 Constitution on October 08, 1995. Since that time, Uganda has witnessed several important constitutional developments that represent a serious attempt to come to grips with the new dispensation introduced. They also reflect the protracted struggle to mark a distinction from the highly disputed and conflict-ridden period between independence and the mid-1980s. And nowhere have the struggles over the improved respect for constitutionalism been more acute than with respect to the observation and protection of fundamental human rights and freedoms. While initially greeted with considerable hope, the 1995 Constitution seems to have fallen short of many of the expectations that greeted its promulgation. This is particularly the case with respect to the human rights provisions of the instrument which are the main focus of this analysis. In sum, the study deals with the central question of whether the existing human rights provisions in the 1995 Constitution are adequate to fully protect the citizens of Uganda. Or is there a need for review and revision? Are there alternatives to a complete overhaul?

In light of the significant developments that have taken place over the life of the 1995 Constitution, what follows in Part 2 is a general overview of the place of human rights therein. This consists of a detailed analysis of the specific provisions in the Bill of Rights enshrined in Chapter Four, accompanied by an analysis of the strengths and shortcomings of each right guaranteed, and recommendations for reform where applicable. This section also examines the administrative and accountability provisions that relate to human rights enforcement, including the provisions on general limitations (Article 43); derogation (Article 44); additional rights (Article 45); state of emergency (Article 46-49), enforcement (Article 50) and the operation of the Uganda Human Rights Commission (UHRC). The study moves on in Part 3 with a critical survey of the issue of economic, social and cultural rights, which were largely left out of the Bill. Part 4 examines the National Objectives and Directive Principles of State Policy. Of main concern is whether in their current form these principles provide support to the enhanced protection and enforcement of human rights or detract from them. Part 5 considers articles 1, 2, 3, 4 and 8A, which are unique and foundational provisions having relevance to the enforcement of human rights, ranging from the clause on peoples' power to that on dissemination of the Constitution. In Part 6 of the study I look at those provisions of the Constitution that deal with the right to vote and the chapters on the three arms of government, i.e. the Legislature, Executive and the Judiciary, while Part 7 offers some recommendations on what needs to be done in order to improve the respect for fundamental human rights and freedoms. The study concludes by pointing out those provisions which are adequate as opposed to those that require reform or repeal.

1.0 Revisiting Chapter Four of the 1995 Constitution

1.1 A General Overview

In many respects, the 1995 Constitution represents a radically different vision for the place of human rights within the governance arena than any of its predecessors. Neither the 1962 nor 1967 constitutions placed much premium on human rights. Each devoted a mere 13 sections to the protection of substantive rights such as the freedoms of conscience and movement. While the 1962 Constitution is notable for mentioning the term ‘sex’ in the general category of protections covered, neither document could be referred to as being either overly sensitive or unduly concerned about the rights of women or other minorities. Indeed, the 1967 Constitution even introduced additional restrictions to the exercise of human rights, further minimizing the protections afforded by the earlier (1962) instrument. Both instruments were terse and modest in their reference to human rights. To crown it all, the institutional mechanisms created by our earlier constitutions were minimalist and ultimately proved ineffective in the face of the massive and persistent violations that afflicted the country throughout the period in which they were in force.

By way of contrast, the 1995 Constitution has been described as a human rights document in that it is suffused with human rights principles at every turn.¹ Starting with the Preamble, followed by the National Objectives and Directive Principles of State Policy, through to the chapter on representation (Chapter Five) and in the provisions on the various organs and instrumentalities of government, the 1995 Constitution takes care to make reference to fundamental human rights and freedoms at every opportunity. Chapter Four—the Bill of Rights of the Constitution—covers over 20 substantive human rights and freedoms, and a host of procedural protections designed to improve their efficacy, such as articles 43, 47 and 50. Several new rights—such as the right to education (Article 30), the right to a clean and healthy environment (Article 39) and the right of access to information (Article 41)—represented the inclusion of new rights that received only scant attention in previous instruments and which were also of fairly recent vintage even on the international scene. In this respect, the 1995 Constitution was

“By way of contrast, the 1995 Constitution has been described as a human rights document in that it is suffused with human rights principles at every turn.”

¹ See Benjamin J. Odoki (2005), *THE SEARCH FOR A NATIONAL CONSENSUS: THE MAKING OF THE 1995 UGANDA CONSTITUTION*, Fountain Publishers, Kampala, at 292-293.

well in touch with the developments in human rights that were afoot in the world at the time, as well as providing a glimpse into the future. Given the history of human rights violations that had plagued Uganda up to the time of its promulgation, the 1995 Constitution paid special attention to ensuring fairness in administrative decisions (Article 42), the issue of limitations on rights, and the right to vote (Article 59).

The above is not to be taken to say that the 1995 Constitution was free of any problems. Despite the long concern among Ugandans about their economic welfare, the instrument is ambivalent on economic, social and cultural rights. Thus, only one article (40) is devoted to the rights of workers, and even then, in a very general manner. Tensions were apparent between some articles such as that on affirmative action (32) and the rights of women (33) on the one hand, and the right to culture (37) on the other. Most problematically, the 1995 Constitution continued the ban on effective political activity by opposition parties by placing several restrictions on their operation through the infamous Article 269, while at the same time retaining the monolithic and dictatorial movement political system *via* a host of articles (69 to 74) which purported to clothe the new system in legitimacy. Perhaps what can be described as the low-point in the history of the instrument came in 2005 with the amendment to Article 105(2) that had provided for a two-term limit on the tenure of the President. By this self-serving act, virtually all the gains made in governance, constitutionalism and the respect for human rights since 1986 were unceremoniously obliterated.²

Since coming into force, the experience of human rights under the 1995 Constitution has been a mixed one. Initial attempts to challenge human rights violations were often met by a Judiciary that appeared either too reluctant or too steeped in the old and out-dated methods of adjudication to seriously consider the substantive rights that were brought to it for protection.³ This was despite the introduction of Article 126(2), which decreed that substantive justice needed to be executed without ‘...undue regard to technicalities.’ Instead, technicalities such as defective affidavits, late filings and unsigned petitions were regarded as sufficient to dismiss a petition on preliminary grounds, even when the issue at stake concerned threats to fundamental human rights and freedoms.⁴ The most significant turning point in this regard came with the Constitutional Court decision in the case of *Major General David Tinyefuza v. Attorney General*,⁵ which relied on the famous case of *Uganda*

2 Writing just before the amendment of Article 105(2) on term limits, Benson Tusasiirwe observed, ‘The 1995 Constitution was supposed to be different. It was supposed to derive its strength from the system of checks and balances. In addition, it was supposed to stand the test of time. In 2000, it was amended merely to override the ramifications of a court decision. Now we are proposed (sic!) to amend the Constitution yet again, to cater for what are clearly the narrow interests of (a) limited group of persons. In this one blow, the founders of the NRM “revolution” or what remains of them, will have wiped out an edifice that took nine years (from 1986 to 1995) to build. Worse still, they will have buried, perhaps forever, the hopes of a desperate nation.’ Benson Tusasiirwe, ‘Political Succession in Uganda: Threats and Opportunities,’ in Chris Maina Peter & Fritz Kopsieker (eds), *Political Succession in East Africa: In Search for a Limited Leadership*, Kituo cha Katiba & Friedrich Ebert Stiftung, Nairobi, 2006.

3 See Siri Gloppen, Emmanuel Kasimbazi & Alexander Kibandama, ‘The Evolving Role of the Courts in the Political Transition Process,’ (Research Notes), Chr. Michelsen Institute/Makerere University, January 2006, at 14-15.

4 Thus, in *Dr. James Rwanyarare & Anor. v. Attorney General*, Con. Pet. No.11/97, the court declared the petition time barred, stating that Article 126(2) had not done away with the requirement for compliance with the rules of procedure in litigations of a constitutional nature. Also see *Charles Onyango Obbo & Andrew Mujuni Mwenda v. Attorney General*, Const. Pet. No.15 of 1997.

5 See judgment of Justice Manyindo at 13, in Constitutional Petition No. 1 of 1996.

*v. Commissioner of Prisons, ex parte Matovu*⁶ to assert that preliminary or technical matters should not be the basis on which courts make a decision on matters that involve a substantive constitutional or human rights claim, although the case also reinforced some of the more negative approaches to procedural issues.⁷ This opened the way for a much more robust engagement with the human rights provisions of the Constitution, with the Supreme and Constitutional courts both making a significant contribution to the jurisprudence in this area. Indeed, since that time, several landmark decisions on a wide variety of rights and freedoms have been given by courts of varying stature in the hierarchy of the Judiciary.

The institutional mechanisms that are in place to ensure that human rights are respected—courts, commissions and inspectorates or auditing bodies of different kinds—have also been important elements in the struggle to ensure that human rights are given the full respect and enforcement that is necessary. In this respect the 1995 Constitution introduced a rather unfortunate dichotomy between the question of enforcement and that of interpretation of the Constitution. The power of constitutional interpretation—given to the Constitutional Court via Article 137—has often been misconstrued with the question of enforcement of rights. As the Court stated in *Re Sheik Abdul Sekimpi*,⁸ there is an important difference between the two: “However much a party may request, he cannot have referred (to the Constitutional Court) a matter that does not involve interpretation of the Constitution.” Indeed, in the case of *Simon Kyamanywa v. The Attorney General*, the Supreme Court was both candid and critical, accusing the Constitutional Court of abdicating its primary duty of interpretation.

However, it is the substantive rights protected that are key in pushing the different state actors and society at large to become more attuned and sensitive to the underlying goals to which those rights are devoted, namely enhancing individual human freedoms and securing a more enlightened and democratic social order. Hence it is necessary to critically review the specific rights which are in the Constitution and to assess the extent to which they achieve these twin goals. This is the main objective of this section of the study. It begins with an article-by-article review of the substantive rights enshrined in the 1995 Constitution, outlining the basic elements thereof and highlighting—where available—the response of the courts to petitions

“Principles of non-discrimination, equal treatment and the importance of ensuring equality of opportunity for all persons also need to be vigorously pursued by the state and other stakeholders.”

6 [1966] EA 514.

7 See Mohamed Mbabazi, ‘The Interpretation and Application of Article 126(2)(e) of the 1995 Constitution of Uganda: Desecration or Consecration?’ *East African Journal of Peace & Human Rights*, 7/1, (2001) at 101-135.

8 Constitutional Reference No. 7 of 1998.

which have sought to challenge instances where those rights have been under infringement. This overview also summarizes the strengths and weaknesses of each article and makes recommendations for implementation and/or reform where deemed necessary.

2.0 Specific Human Rights Concerns

2.1 Equality and Freedom from Discrimination (Art.21)

Article 21 provides that all persons are equal before and under the law in all spheres and shall enjoy equal protection of the law, and is a right that lies at the foundation of International Human Rights Law.⁹ The article not only categorically bars any form of discrimination on the basis of sex, race, color, ethnic origin, tribe, creed or religion, political opinion or disability, etc., it also empowers Parliament to make such laws as are necessary to redress the imbalances in society, be they social, economic, or otherwise. A number of policies and some laws have been made as a result of Article 21, including the policy of adding 1.5 points to female students on joining public universities, affirmative action for various minorities, marginalized or vulnerable groups in politics and ensuring regional, ethnic and religious balance in public appointments.

While similar provisions on equality and non-discrimination existed in Uganda's previous constitutions, Article 21 is considerably more extensive in coverage, outlining the grounds of non-discrimination and giving concise definition to the term 'discriminate.' The enactment of this provision is derived from general human rights law, which is motivated by the need to redress the imbalances in society especially with regard to the cultural, social and economic forces that impinge on the ability of all human beings to enjoy a life free from discrimination. Indeed, the provision could be said to provide the foundation for the entire Bill of Rights in Chapter 4. It is thus not surprising that Article 21 has been the subject of serious consideration by the courts of law and been upheld on several matters submitted to the Judiciary for adjudication since 1995. Hence, the case of *Law and Advocacy for Women (Uganda) v. Attorney General*,¹⁰ challenged the constitutionality of sections 2 (n) (i) & (ii), 14, 15, 26, 23, 27, 29, 43, and 44 of the Succession Act, and sections criminalizing adultery in the Penal Code Act, respectively. The petitioners argued that the said sections discriminated against women as opposed to their male counterparts and that accordingly, they contravened among others, Article 21 of the Constitution. The Constitutional Court held that all the contested sections were inconsistent with the Constitution and were therefore null and void under Article 2(2) of the 1995 Constitution.¹¹

Strengths and weaknesses of Article 21

- ✿ Article 21 is of crucial importance to the overall protection of human rights, because it unequivocally affirms the equality of all persons regardless of social status, political affiliation or religious or ideological belief.

⁹ Article 21(1) of the 1995 Constitution of the Republic of Uganda.

¹⁰ Constitutional petitions No.6 of 2005 and No.03 of 2006.

¹¹ Jamil Mujuzi, "The Constitutional Court of Uganda and Women's Right to Equality: the 'Adultery Judgment,'" *East African Journal of Peace & Human Rights* 16(2): 474-492 (2010).

- ✿ The provision is also very clear on what amounts to discrimination and the forms which such discrimination can possibly take making it fairly easy for the Courts to interpret and enforce its provisions.
- ✿ Article 21 also supplements Article 2(2) which provides for the doctrine of constitutional supremacy and stipulates that all laws, policies and cultural values are to be judged by Courts with regard to their constitutionality. Those which do not meet the standard are declared null and void.
- ✿ Article 21 goes some distance in addressing the issue of inequality and consequently is an important tool in the creation of a balanced, just and equal society.

However, stemming from the state's failure to promote public awareness of the Constitution in several languages,¹²

- ✿ The provision remains largely unknown to the greater population. As a result, inequalities have continued to be perpetrated at both the private and in the public spheres. Such inequality is particularly based on gender, representing the resilience of patriarchal forms of governance and social interaction even in the face of fairly progressive constitutional enactments.¹³ This also explains the very negative reaction of the general public to the decision of the Constitutional Court declaring the Penal Code offence of adultery unconstitutional.¹⁴ It also explains the renewed controversy over the Marriage and Divorce Bill which is currently under debate in Parliament. In particular, Persons with Disabilities (PWDs), people living with HIV/AIDS (PLWHA) and sexual minorities continue to face serious limitations in terms of the recognition and enforcement of the right to equality. Indeed, developments relating to the Anti-homosexuality bill (AHB) pose a serious threat to the rights of sexual minorities to equality and non-discrimination.¹⁵ Finally, it is not always the case that struggles for equality achieve the desired result. In the famous FIDA case women's rights activists sought a declaration that the Divorce Act was unconstitutional because it provided disparate treatment of men and women in terms of the grounds of divorce. While the Act was indeed found to be discriminatory, instead of outlawing the fault principle, the Constitutional Court declared that it should be applied equally to both women and men!

Recommendations for the improved implementation of Article 21:

- ✿ As the bedrock of the Bill of Rights, it is quite clear that there is a need for much increased public awareness about this provision. Such awareness needs to commence at a much earlier stage than is presently the case and hence should be integrated into the lower school curricula

¹² Article 4 of the Constitution, mandates the State to promote public awareness of the Constitution.

¹³ Kafumbe argues that the Constitution should do away with legal pluralism i.e. Customary Law running alongside statute law, and eventually prohibit polygamy. See Anthony Luyirika Kafumbe, 'New Perspectives on Women's Rights to Property in Marriage, Upon Divorce, and During Widowhood in Uganda,' *East African Journal of Peace & Human Rights*, 16/2, (2010), 338-360 at 358.

¹⁴ For a commentary on this issue, see Jamil Ddamulira Mujuzi, 'The Constitutional Court of Uganda and Women's Right to Equality: The "Adultery Judgment",' *East African Journal of Peace & Human Rights*, 16/2, (2011) at 474-492.

¹⁵ See letter of the Equal Rights Trust to President Yoweri Kaguta Museveni, dated December 09, 2009, accessed at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20Uganda%20Anti%20Homosexuality%20Bill%20Opinion.pdf>

of both public and private schools. Simplified and local language versions of the Bill of Rights should be widely disseminated.

- ✿ Principles of non-discrimination, equal treatment and the importance of ensuring equality of opportunity for all persons also need to be vigorously pursued by the state and other stakeholders.
- ✿ Since the modes of discrimination vary over time, there is a need for flexibility of approach in applying the article to ensure that new forms of discrimination are given adequate attention.
- ✿ Discrimination on the grounds of sexual orientation and gender identity has become the latest of issues that raise questions regarding the implementation of the equality provision of the Bill of Rights, particularly in the wake of the tabling of the Anti-homosexuality bill.¹⁶ Guidance on the matter should be taken from the 2006 *Yogyakarta Principles on Sexual Orientation and Gender Identity*.¹⁷
- ✿ Enforceable laws on equality need to be enacted in a bid to fully operationalize the article. This includes laws on equal opportunity in employment, access to education and public service to mention only a handful.
- ✿ The role of the Equal Opportunities Commission (EOC) is of crucial importance in implementing the provision, both in identifying the loopholes in existing legislation which does not adequately meet the standard of the Constitution, as well as in providing additional protections to those who have been the victim of discrimination and unequal treatment, plus recommending penalties for those who may violate the law in this respect. In this respect, there is a need to resolve the long-outstanding petition challenging provisions of the law which established the EOC.¹⁸

2.2 Protection of the Right to Life (Art.22)

Clause 1 of Article 22 prohibits any person from intentionally depriving the other of their Right to Life, except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence recognized under the laws of Uganda. It also provides that such conviction and sentence must have been confirmed by the highest appellate court. Article 22(2) also bars any person from terminating the life of an unborn child, except as may be authorized by law. From a close reading of this provision, it is clear that the Right to Life in Uganda is not absolute, since it is explicitly subjected to the death penalty, which is the only exception under which a person's right to life can be lawfully disregarded. However, it is clear that the framers of the Constitution had the clear intention of preserving a person's life, and that it should be disregarded only in very special circumstances and having thoroughly met the qualification required therein.

16 On this issue, see 'Minority Report by Members of the Sectoral Committee on Legal and Parliamentary Affairs on the Anti-Homosexuality Bill, 2009,' November 2012.

17 Adopted in 2006, the Yogyakarta Principles (YP) are regarded as the most comprehensive set of international principles relating to sexual orientation and gender identity. Accessed at: <http://www.yogyakartaprinciples.org/> (on December 28, 2011).

18 The case of *Adrian Jjuuko v. The Attorney General*, Constitutional Petition No.1 of 2009 has challenged S.15(d) of the Equal Opportunities Act, No. of 2007, which seeks to prevent the Commission from entertaining cases involving sexual and other controversial minorities. Unfortunately, nearly four years after it was filed, the case remains undecided.

Needless to say, there has been some contention over the constitutionality of the death penalty, brought to the fore in the case of *Suzan Kigula & 416 Ors v. The Attorney General*.¹⁹ In that case, the petitioners challenged the constitutionality of among others, sections 98 and 99 of the Trial and Indictment Act. Section 98 essentially removed the discretion from the Courts in making inquiries while sentencing a convict to death. In essence, this provision rendered the death sentence mandatory, and thus violated Articles 21, 28 (fair hearing), 44(c) (non-derogation), and 24 (torture, cruel, inhuman or degrading treatment or punishment) of the Constitution. The petitioners also argued that S.98 amounted to an intrusion by the legislature into the realm of the Judiciary because the impugned section compelled the court to impose the sentence of death merely because the law directs it to do so. **The petitioners argued that this provision threatened the Court's discretionary powers, the Court's independence enshrined in Article 128 of the Constitution, and that it violated Articles 21, 24, 28, and 44(c).**

With regard to S.99 of TIA, the petitioners argued that because it prescribed hanging as a legal method of implementing the death penalty, it in effect contravened Article 24, since this mode of punishment involved cruel, inhuman and degrading treatment. Justice Okello found S. 98 of TIA to be in contravention of articles 21, 22 (1), 24, 28, 44(a) and 44(c) of the Constitution, and accordingly unconstitutional. On the constitutionality of S.99, the court in the first place found the death sentence to be constitutional, as an exception to the Right to life. They asserted that the section was constitutional because it merely operationalized Article 22 (1). Court rationalized this proposition while stating that punishment by its nature had to inflict some pain and unpleasantness, physically or mentally in order to achieve its objectives, and that implementing the death sentence by hanging could not be held to be cruel or inhuman and degrading. The court not only distinguished but also discounted the South African case of *The State v. Makwanyane*²⁰ and the Tanzanian case of *Mbushu & Anor. v. R.*,²¹ which were cited by counsel for the petitioners as authorities for the abolition of the death penalty. The court declared them irrelevant since they were not decided in countries whose constitutions did not qualify the right to life, in the same way as Article 22.

With due respect to the Court, the position adopted equating punishment with pain and unpleasantness (mental or physical) was mistaken. Indeed, if the Court had examined the situation in other jurisdictions such as the USA and in international fora such as the Human Rights Committee, it would have found that there has been a shift from using rudimentary, painful, cruel and unpleasant modes of enforcing the death sentence such as hanging.²² The impact of the ruling was to leave a contradictory situation which declared mandatory death sentence unconstitutional and the 'death row' phenomenon cruel, inhuman and degrading, but left the death penalty still applicable.²³

19 Constitutional Petition No. 6 of 2003.

20 (1995) 1 LRC 269.

21 (1995) 1 LRC 216.

22 See the arguments about the case in Henry Onoria, 'Major Decisions on Fundamental Rights and Freedoms in Uganda, 2008–2009,' in *East African Journal of Peace & Human Rights*, 17/1, (2011) at 274-276.

23 See Jamil Ddamulira Mujuzi, 'How Should the Most Evil of Law Breakers be Punished? The Death Penalty versus Life Imprisonment in Uganda, 1993–2009,' *East African Journal of Peace & Human Rights*, 17/2, (2011) at 443-447.

It should remain the goal of human rights activists to struggle for the complete abolition of the death penalty.²⁴ Indeed, if we were to conduct a comprehensive analysis of the 1995 Constitution as a whole, the inevitable conclusion that must be made is that the death penalty is unconstitutional. In the words of Apollo Makubuya,

[A]rticle 22(1) allowing for the death penalty infringes upon the right to life. Secondly, the reading of Articles 24 and 44 shows that any form of cruel, inhuman and degrading punishment and treatment is prohibited by the Constitution. The opening line of article 44 directly implies its supremacy over anything else written in the Constitution. It clearly shows that the right of an individual not to be subjected to any form of torture, cruel, degrading or inhuman punishment is paramount and cannot under any circumstance be compromised, any other provision to the contrary notwithstanding.²⁵

The death sentence was also of concern in both the case of *Uganda Law Society v. Attorney General*²⁶ and that of *Jackson Karugaba v. Attorney General*.²⁷ The two petitions were filed in contestation of the trial by Field Court Martial (FCM) and subsequent execution of soldiers which took place in Kotido. The petitioners argued that the executions were in violation of the rights guaranteed under articles 22 and 28 of the Constitution. In the process, numerous questions arose for resolution before court including: (i) whether the FCM was a competent court; (ii) whether the FCM had to comply with the procedures of ordinary court sessions, and (iii) whether the conditions in the Karamoja disarmament mission where such as to necessitate the constitution of the FCM and not any other court. The Constitutional Court found that the FCM was a court of competent jurisdiction and therefore in compliance with Article 22(1) on the right to life. However, the court stated that the FCM was a special court which could not be bogged down by appeal procedures like other courts, and that in such a case, the convicts' right of appeal to the highest appellate court was impracticable. In fact, the Court stated that Article 22(1) did not apply to the FCM in its entirety since the circumstances under which it was to operate seemed not to be those contemplated by the framers in enacting Article 22(1). Fortunately, the case was overturned by the Supreme Court, which confirmed that the FCM was a subordinate court and thus subject to the overall supervision of the civilian judiciary.²⁸

Recent attempts to widen the scope of Article 22 have been met with some resistance. In the *Centre for Health Human Rights and Development (CEHURD) & 3 Ors. v. Attorney General*,²⁹ the petitioners sought declarations, *inter alia*, that the State had failed to honor the right to the highest attainable standard of health enshrined in international instruments to which Uganda is party. That failure resulted in high child and maternal mortality rates. The petitioners argued that the state was therefore in violation of among others, Article 22 of the Constitution.

24 See Apollo N. Makubuya, 'The Constitutionality of the Death Penalty in Uganda: A Critical Inquiry,' in *East African Journal of Peace & Human Rights*, 6/2, (2000) at 222-253.

25 Ibid., at 246.

26 Constitutional Petition No. 2 of 2002.

27 Constitutional Petition No.8 of 2005.

28 See Mulira, *op.cit.*, at 162-163.

29 Constitutional Petition No. 16 of 2011.

Unfortunately, the court did not take the opportunity offered by this case to chart new ground. Citing Justice Kanyeihamba's decision in the earlier *Tinyefuza* case, the Constitutional Court declined to make the declaration on the grounds that it was a political question solely within the province of the Executive to decide, and that it would amount to a violation of the separation of powers doctrine for the court to intervene.

The *CEHURD* case is significant for two reasons. First, it sought to expand the right to life provisions of the Constitution, and secondly, it invoked the argument that the National Objectives and Directive Principles of State Policy were binding. While unsuccessful on both counts, the case exposed the limitations inherent in the current formulation of these principles in the 1995 Constitution.

While Article 22(2) has not received much critical attention in the courts of law, it is the cause of major concern because of the issue it relates to, i.e. the question of abortion. Indeed, in a submission to the Human Rights Council during Uganda's Peer Review process in March, 2011, the Center for Reproductive Rights and the Uganda Association of Women Lawyers (FIDA), pointed out that Uganda's abortion law and policies are "...characterized by restrictiveness and a lack of clarity. Its constitution states that "[n]o person has the right to terminate the life of an unborn child except as may be authorized by law while abortion is a felony in the Penal Code and criminalized except to save the life of the pregnant woman."³⁰ The submission also points out that the National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights, detail an expanded scope of circumstances permitting legal abortion, such as sexual violence and incest, and outline comprehensive abortion and post-abortion care standards.

The fact is that there is low awareness among doctors and other trained providers of the guidelines, while some of them are reluctant to provide abortions in fear of attracting penal sanctions. As a consequence, the majority of women resort to unsafe abortions, which have a significant impact on maternal mortality and thus on the right to life of pregnant women. In light of this fact, Christopher Mbazira argues that there is an urgent need for an open and candid discussion of the problem of unsafe abortions.³¹

"[n]o person has the right to terminate the life of an unborn child except as may be authorized by law while abortion is a felony in the Penal Code and criminalized except to save the life of the pregnant woman".

30 Submission of the Center for Reproductive Rights and the Uganda Association of Women Lawyers regarding Uganda's compliance with its international obligations in the area of women's reproductive and sexual health rights, at the Universal Periodic Review of Uganda, March 14, 2011 at 3, accessed at: <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/JS11-JointSubmission11-eng.pdf>.

31 Christopher Mbazira (2011), *In Legal and Human Rights Lenses: Unsafe Abortions and the Law in Uganda*, unpublished study commissioned by the Uganda Association of Women Lawyers (FIDA).

While his focus is on the enjoyment of the right to the highest attainable state of physical and mental health in general, and the right to reproductive health in particular, there are clear links in this issue to the broader right to life.

Strengths, weaknesses and recommendations for implementation

Article 22(1): The Death Penalty

Even though questions have arisen as to whether Article 22 constitutionalizes the death penalty or merely recognizes its existence, the provision is primarily credited for clearly guaranteeing a person's right to life except as stated therein. Providing a definite guarantee for the right to life is a necessary preventative to unaccounted killings, and confirms the sanctity of human life. The article is also unambiguous in the exceptions which it provides to the Right to life, which minimizes extra-judicial executions. Nevertheless, it is appropriate for the debate over the efficacy of the death penalty to be reopened. *Kigula's* case clearly reduced its application, with the general view being that the most that a court can now sentence a convicted person to is life imprisonment irrespective of the gravity of the offence with which they have been charged. The anomaly remains with the military courts, which can still apparently issue death sentences, a fact compounded by the continued assertion by the UPDF that these courts are not subject to oversight by the civilian judiciary.

The above facts being the case, there is a need for an explicit stipulation in the Constitution which outlaws the death penalty in all circumstances. Such an amendment will remove the current ambiguity and also set the stage for Uganda to join the rising number of countries which have expressly abolished the penalty. Indeed, by promulgating the 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the international community has expressly signified its goal as being the abolition of the death penalty. As at January 08, 2013, 75 states had ratified the instrument.³²

Article 22(2): The Question of Abortion

As noted above, the constitutional provision on the termination of the life of an unborn child (abortion) is rather ambiguous because it subjects it to authorization 'by law.' However, both the law and the policy on the matter of abortion remain vague and scattered in various provisions of the legal regime, especially the Penal Code. That being so it is necessary to revert to the phrasing of Article 22(2) and discuss the possibility of amending the same to make it more explicit. Of course, this would not be without controversy, and as Mbazira notes, given the nature of Ugandan society, abortion on demand is highly unlikely to be adopted as a constitutional principle.³³ Perhaps the explicit exceptions that could be included in the provision would be incest and rape as well as the preservation of the life of the mother. What is nevertheless clear is that the existing provision restricts the application of human rights rather than expanding them.

³² See Status of the Protocol, accessed at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en

³³ Mbazira (2011), *op.cit.*, at 54.

Personal Liberty (Art. 23)

This article guarantees the right to personal liberty and the security of the individual generally. Article 23 has often been related to the right to free movement under Article 29(2), while some scholars have even construed Article 23 as part of the guarantees under the Criminal justice system (outlined mainly in Article 28), because of its substantive rights to personal liberty, and the procedural as well as remedial guarantees that it gives. Most importantly, Article 23 assumes that the rights to Personal liberty are natural (inherent) and as such, the state and its agencies, or any other authority or person must desist from interfering with that liberty except in the exceptional circumstances stipulated by the article. Clauses (a-h) of Article 23(1) clearly describe these exceptions, namely; where the restraint is in execution of a sentence or an order of court, for purposes of bringing a person before court, upon reasonable suspicion that a person restrained has committed or is about to commit an offence, for the purposes of preventing the spread of an infectious/contagious disease, for purposes of the welfare or education of a child (18 years and below), in respect of a person who is reasonably suspected to be of unsound mind or addicted to drugs, for purposes of preventing unlawful entry of a person into Uganda, or as may be authorized by law in any other circumstance similar to the cases specified in the article.

Articles 23 (2), (3) and (4) stipulate that a person restrained under this provision shall be detained in a place authorized by law, and consequently informed in a language he/she understands about the reason for his/her detention and his/her right to a lawyer of his or her choice. The last of these has proven problematic, both on account of the knowledge of the right as well as of the availability and affordability of a lawyer for the purpose, particularly within the criminal justice system. As Mayambala points out State briefs—lawyers paid by the State to represent indigent accused persons—only cover persons accused of capital offences, and even then those who require such services far exceed available lawyers.³⁴

A detained person should be presented in Court in not more than 48 hours from the time of arrest in accordance with Article 23(4). Unsurprisingly—given the nature of the current government’s disrespect for pluralist politics—Article 23(4) has been observed much more in the breach, although this may in part be due to the manner in which the provision is phrased. As Isaac Bakayana points out,

Although Article 23(4) ... provides that a suspect should be produced before a court of law within 48 hours, the law creates a six months period within which a person charged with a capital offence can ‘legally’ be held in custody even when they are presumed innocent. The discretion under Article 23(6)(a) (concerning application for bail—JOO) has not been sufficient to remedy the abuse that has been occasioned to presumably innocent suspects.³⁵

34 R. Kakungulu Mayambala, ‘Legal Representation in Uganda from 1995 to 2005: Aiming High and Falling Short?’ *East African Journal of Peace & Human Rights*, 15/2, (2009) at 492.

35 Isaac Bakayana, ‘The State of Constitutionalism in Uganda—2007,’ in Wanza Kioko (ed.), *CONSTITUTIONALISM IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS IN 2007*, Fountain, Kampala, at 28.

The problem with the provision is twofold. First, a person can be arrested on a trumped-up capital offence, formally charged before a court of law and remanded for the minimum six months.³⁶ The mandatory court production within the stipulated 48 hours can be perfunctory (a mere reading of the charges): “In addition, it does not require the police or prosecutors to produce some *prima facie* proof to justify his detention.”³⁷

Under Article 23(5), (6) and (7), a next of kin, a personal doctor and a lawyer of the detainee must be informed of the detention as soon as possible and they should be allowed reasonable access to that person. Where a person has been restrained in respect of a criminal offence, such a person can apply to court to be released on bail. Also, such a person if unlawfully restrained shall be entitled to compensation from his or her detainer. Clauses 8 and 9 of Article 23 stipulate that the time spent in lawful custody by a person in respect of an offence before the completion of the trial has to be taken into consideration in imposing the term of imprisonment, and that the right to an order of habeas corpus shall neither be inviolable nor suspended.

What emerges from all the above is that the main purpose of Article 23 is to regulate the conduct of those persons who are in constant touch with the individual and who are most likely to violate his/her personal liberties if not checked. Such persons include the police, army, prisons service, intelligence service, and to some extent, the courts. Article 23 secures the physical protection of individuals and avoids the likely disappearance of individuals to unknown detention facilities. The intention of clauses 2 and 5 is to prohibit facilities such as ‘safe houses’ which are ungazetted places of detention where access is restricted and the possibility of abuse is high. Clauses 2 and 5 are a new innovation of the 1995 Constitution having not existed in the previous constitutional dispensations. Article 23(3) which requires that a detainee must be informed in the language they understand of the reason for their detention was upheld in *Christopher Sajjabi Nsereko v. A.G.*,³⁸ in which the commissioners of the Uganda Human Rights Commission held that by refusing to tell the applicant the reasons for his arrest at the time of arrest, his detainers had clearly violated Article 23(3) of the Constitution. Consequently, Uganda Shillings 2 million were awarded to the complainant as general damages for the violation of the right to personal liberty.

On the right to bail under Article 23(6), it should be stated from the outset that the right is premised on the presumption of innocence as guaranteed under Article 28(3) (a), which is to the effect that the individual should be allowed to regain his or her personal liberty while attending trial.³⁹ This reflects a cardinal principle of Natural Justice and Criminal Law, which is that such person is merely suspected of a crime and remains so until a final conviction has been secured from the courts of law. Courts have accordingly stated that even though they are enjoined with the discretion to grant bail on such conditions as they deem reasonable, the conditions for the grant of bail should be

³⁶ Ibid., at 28.

³⁷ Ibid., at 29.

³⁸ Uganda Human Rights Commission Complaint No.112 of 1999.

³⁹ See John Mugalula, ‘A Critical Analysis of the Law Relating to Bail in Contemporary Uganda,’ *East African Journal of Peace & Human Rights*, 15/2, (2009) at 370.

reasonable and not punitive in order not to render the grant illusory.⁴⁰ This position was well espoused by Lady Justice Solome Bossa in *Onyango Obbo & Anor v. Attorney General*,⁴¹ in which the magistrate's court allowed a cash bail for the applicants but set it at what was then the staggering amount of Uganda Shillings 2,000,000/= (two million) for each of the accused persons. On appeal, Justice Bossa considered this amount too high and accordingly substituted it with Uganda Shillings 200,000/= for each accused person. In *Kemgemuzi v. UG*,⁴² the court stated that the right to the grant of bail was a constitutional right secured under Article 23(6) and that the individual in certain circumstances was entitled to an automatic grant of the order of bail where he/she had spent either 120 or 360 days on remand. In the case of *Joseph Lusse v. Uganda*,⁴³ the accused was charged with treason and subsequently spent 365 days on remand. On application for the grant of bail, Tabaro J., held that since the applicant had spent more than 365 days in custody, he was automatically entitled to the grant of bail under Article 23(6)(c).

As Mugalula notes, the right to bail in Uganda is today 'under siege' because, 'The executing arm of the Government mandated to ensure that the rights under the Constitution are enforced is the same organ violating the rights, implying that the rights are not worth the document they are written on'. Despite this, the courts have held that the right to bail applies even to military courts. In *Attorney General v. Joseph Tumushabe*,⁴⁴ the Supreme Court stated that irrespective of the provisions of the UPDF Act concerning bail, it was mandatory for the detainees to be released having been in custody for more than 120 days awaiting trial in accordance with Article 23(6) of the Constitution.⁴⁵ In contrast to the general view that bail was an automatic right of an accused person, the court stated that it was necessary to consider whether such release is likely to prejudice the pending trial, meaning that the court has the discretion to grant or reject the application.⁴⁶ The view that bail is subject to certain conditions applied in the discretion of the court

As Mugalula notes, the right to bail in Uganda is today 'under siege' because, 'The executing arm of the Government mandated to ensure that the rights under the Constitution are enforced is the same organ violating the rights, implying that the rights are not worth the document they are written on'.

* Mugalula, op.cit., at 388.

40 For a general discussion, see J. Oloka-Onyango, 'Criminal Justice, the Courts and Human Rights in Contemporary Uganda: A Perspective Analysis,' *Makerere Law Journal*, 1/1 (2006): 38-45.

41 Criminal Miscellaneous Application No. 1 of 1997.

42 Criminal Case No. 1442 of 1998.

43 Criminal Miscellaneous Application No. 73 of 1997.

44 Const. App. No.3 of 2005

45 Mulira, op.cit., 163-164.

46 Ibid., at 163-164.

was reiterated in the case of *Uganda v. Dr. Kizza Besigye & Ors.*⁴⁷ and again in *Foundation for Human Rights Initiative (FHRI) v. The Attorney General*.⁴⁸

Strengths, weaknesses and Recommendations for improvement.

- ✿ Article 23 confirms the right to bail which is to be granted by court on application and on such conditions as the courts deems reasonable.
- ✿ The article has been an important element in the minimization of the violation of personal liberties, especially where the cause of the detention and arrest is not political in nature.
- ✿ The article also guarantees the individual some recourse to justice and clearly ensures that the right to personal liberty is not only inherent but also constitutional.
- ✿ However, the article is somewhat ambiguous, and is neither exhaustive nor elaborate in nature.
- ✿ The article does not state in clear terms what exact conditions the court may look to in reaching the decision, so as to give an insight on what 'reasonable' conditions may entail.
- ✿ The requirement of not more than 48 hours of detention before being presented to the court has in practice been argued to be impracticable in some cases and as such, widely violated.
- ✿ Violation of this provision has also been justified by the limited number of courts and judicial officers, a fact that has inevitably led to the back log of cases that has particularly afflicted the magistrate's courts.

In light of the problems recounted above, there is a clear need to revisit some of the basic tenets of Article 23.

- ✿ First, the article needs to be amended to clearly state the conditions taken into consideration for the granting of bail, while not removing the discretion in the courts on whether or not it should be granted. The 2010 Constitution of Kenya provides for bail, 'on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.'⁴⁹
- ✿ Ugandan law on bail is found in various legislations such as the Magistrates Courts Act Cap 116, Police Act, Trial and Indictment Act etc, most of which pre-dates the 1995 Constitution. Sometimes such laws are in conflict, rendering the state of law in this area uncertain and thus requiring review.
- ✿ There is a need to consider enactment of a Bail Code, which could also look to comparative jurisprudence to determine what would best work in the case of Uganda.⁵⁰

⁴⁷ Const. Ref. No.20 of 2005.

⁴⁸ Const. Pet. No. 20/2006.

⁴⁹ See Article 49(2), 2010 Constitution of Kenya.

⁵⁰ Mugalula, *op.cit.*, at 396.

- ❁ Secondly, there is a need for a discussion of what would be a more logical and reasonable time limit during which a detainee must be produced in court, taking into account the practical and peculiar Ugandan setting. Of course there is debate that the period of detention needs to be reduced. The question is whether that would be realistic. The larger problem is the impunity with which the security forces violate this provision, it being common—particularly in cases of a political nature—for the detention to be well in excess of the stipulated 48 hours, implying much more than a simple absence of capacity and reflecting the question of whether there is the necessary political will to obey the law.

2.3 Human Dignity and Protection from Inhuman Treatment (Art.24)

Article 24 states that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. The prohibitions listed in this article are designed to ensure that an individual is protected from torture or cruel and inhuman treatment. Torture connotes acts directed against the physical integrity of the individual whereas cruel, inhuman and degrading treatment refers to any conduct that causes unnecessary suffering and shame on the dignity of the person. It should be noted from the very outset that the provisions of Article 24 are absolute pursuant to Article 44(a) and cannot be derogated from notwithstanding anything in the Constitution. What is cruel or inhuman treatment is dependent on particular conduct and circumstances, and therefore the provisions of this article have been cited in a wide range of cases. Hence in the case of *Salvatori Abuki v. Attorney General*,⁵¹ court found that exclusion or banishment orders depriving a convict from access to ancestral land amounted to cruel and inhuman treatment and was therefore unconstitutional. Cases have also found that poor prisons conditions are inhuman, especially where there is deprivation of food and water. In the case of *Kasha Jacqueline, David Kato Kisuule & Onziema Patience v. Rolling Stone Ltd. & Giles Muhame*,⁵²—which involved the Rolling Stone newspaper ‘outing’ several persons alleged to be homosexual—Justice Musoke-Kibuka stated:

Upon that objective test, court would easily conclude that by publishing the identities of the applicants and exposing their homes coupled with the explicit call to hang them because “they are after our kids” the respondents extracted the applicants from the other members of the community who are regarded as worthy, in equal measure of human dignity and who ought to be treated as worthy of dignity and respect. Clearly the call to hang gays in dozens tends to tremendously threaten their human dignity. Death is the ultimate end of all that is known worldly to be good. If a person is only worthy of death and arbitrarily (*sic!*), then that person’s human dignity is placed at the lowest ebb. It is threatened to be abused or infringed.⁵³

⁵¹ Constitutional Case No. 1/1997.

⁵² Miscellaneous Cause No.163 of 2010, unreported.

⁵³ *Ibid.*, at 8-9.

Article 24 was cited in *Suzan Kigula's* case where the petitioners argued that the death penalty was inhuman, cruel and degrading, where the judges stated that punishment by its nature must inflict some pain and unpleasantness, physically or mentally to achieve its objective, and that therefore on the proper interpretation of Art. 22(1), articles 24 and 44(a) were not intended to apply to the death sentence. However, and with due respect to the learned judges, such an assertion is not quite accurate given the precise wording of Article 44 with regard to non-derogable human rights.

With regard to the phenomenon of corporal punishment, the precedent in Uganda has been set by the celebrated case of *Simon Kyamanywa v. Uganda*,⁵⁴ which arose from the Court of Appeal decision to substitute Kyamanywa's conviction for aggravated robbery with simple robbery, and impose six strokes of the cane as part of the punishment under S.274A of the Penal Code Act.⁵⁵ Kyamanywa therefore sought declarations that corporal punishment was a form of torture, cruel, inhuman and degrading treatment or punishment, and that the decision sentencing him to the same, was in direct conflict with the Constitution. The Supreme Court remitted the matter of the constitutionality of S.274A to the Constitutional Court, which found that corporal punishment was indeed unconstitutional and that it amounted to cruel, inhuman and degrading treatment or punishment. The Court also declared S. 274 A of the Penal Code Act (as amended by Act 1 of 1966) and any orders made under it unconstitutional. Court also declined to admit the state's argument that there was a distinction between the unreasonable administration of corporal punishment and disciplined or supervised punishment and that in light of S. 108 of the Trial on Indictment decree (now S. 109 of the Trial on Indictment Act) that regulated the administration of corporal punishment, the six strokes of the cane were in line with the law.

The issue pertaining to the legality of corporal punishment in schools came under review in the case of *Emmanuel Mpondi v. Nganwa High School*.⁵⁶ The complainant student was punished for entering the staffroom without permission and contended that such punishment was in violation of articles 24 and 44(a) the 1995 Constitution. The presiding commissioners concluded that the act of punishment had been arbitrary, excessive and outside the ordinary and normal or accepted form of punishment normally meted out in school establishments and consequently awarded Uganda Shillings 2,000,000/= having considered the magnitude of the punishment.⁵⁷

Although viewed as a deterrent one, the decision has been criticized because it tends to suggest that there is a given admissible level and mode of application of corporal punishment. In light of the *Kyamanywa* case, which was decided after *Mpondi* however, a given level of supervised corporal punishment was ruled inadmissible.

⁵⁴ Constitutional Reference No. 10/2000.

⁵⁵ Also see the case of *Sewankambo & 2 Ors. v. Uganda*, Criminal App. No. 14/2000 (unreported).

⁵⁶ UHRC Complaint No. 210 of 1998.

⁵⁷ See also Lillian Tibatemwa-Ekirikubinza, 'Understanding Children's Rights: The Case of Corporal Punishment in Rural Uganda,' *East African Journal of Peace & Human Rights*, 9/1, (2003) at 138-140.

Strengths, weaknesses and recommendations for improvement.

- ✿ Article 24 is crucial in as far as it prohibits the violation of people's freedom from torture, cruel, inhuman and degrading treatment. The recent enactment of the Prevention and Prohibition of Torture Act (PPTA) greatly solidifies the constitutional provision on the vice, especially given that it extends the ambit of concern to non-state actors alongside the usual culprits who come from within the government.
- ✿ The Uganda Human Rights Commission has also played a prominent role in highlighting the widespread practice of torture among government agencies, and in seeking to punish the perpetrators thereof.
- ✿ A critical issue is the phenomenon of domestic violence, which has been argued to constitute torture. The passing of the Domestic Violence Act (DVA)⁵⁸ will help in this regard.
- ✿ At the end of the day however, more effort needs to be put into ensuring that the government takes steps to sanction the practice and to bring to account those engaged in it.
- ✿ The burden is also on the civil society actors who were very prominent in pushing for the PPTA and the DVA to not only disseminate information about these laws, but also to pro-actively ensure that they are effectively enforced.

With regard to the issue of corporal punishment, despite the landmark cases which have been decided on the issue, the practice remains in place.

- ✿ As with the case of torture, the persistence of the practice requires that civil society actors take the corporal punishment bull by the horns and increase vigilance as well as information dissemination. Links in this regard need to be forged with organizations such as Raising Voices in order to consider how a human rights perspective can be brought to bear on the issue.

2.4 Slavery, Servitude and Forced Labour (Art.25)

Article 25 secures the individual's freedom from slavery or servitude under clause 1 and forced labour under clause 2. It should be noted that the provisions of Article 25(1) and (2) are absolute given the explicit provisions of Article 44(b). Under Article 25[3] however, the bounds of the forced labour are defined. In essence, clause 3 is to the effect that not all forms of forced labour are prohibited for the purpose of Art 25, for instance, labour required in consequence of a sentence of a court, labour by a lawfully detained person that is reasonably necessary in the interest of hygiene or for the maintenance of the place at which that person is detained, labour required when the country is at war or a state of emergency, labour required from a member of the armed forces as part of his/her duties or in case of a person who has conscientious objections to service as a member of the military, or air force or any labour that is reasonably required as part of reasonable and normal communal or other civic obligation.

⁵⁸ Act No.5 of 2010.

Article 25 was at issue in the case of *Attorney General v. Major General David Tinyefuza*.⁵⁹ The appeal by the Attorney General followed the Constitutional Court's decision in favor of the claim by Tinyefuza that he was under threat of being compelled to a situation of forced labour.⁶⁰ Major General Tinyefuza who was a senior Presidential advisor on military matters, sought to resign from the UPDF. However, his resignation was rejected by the then state minister of defense, Amama Mbabazi. Tinyefuza thus petitioned the Constitutional Court, contending that the minister's refusal of his resignation in effect amounted to a violation of his freedom from slavery, servitude and forced labour guaranteed under Article 25 of the Constitution. The court held *inter alia*, that Regulation 28 of the NRA [Conditions of Service] [Officers] Regulations, 1993 was inapplicable to the petitioner as he was no longer a member of the armed forces, having been appointed to the Presidency. The rationale for this decision was that army service required full time attention. By appointing him Presidential advisor, the President had by implication terminated his service in the military. The Attorney General appealed to the Supreme Court, which was tasked to among others, decide whether the minister's letter rejecting Tinyefuza's resignation and advising him to resign in accordance with the procedure under Regulation 28 was a violation of his freedom guaranteed under Article 25. The majority of the Supreme Court justices found that he was still a member of the armed services, notwithstanding his appointment, inactivity and non-deployment in military operations. The court therefore found that the minister's letter was merely a piece of advice and did not violate any of his rights as contended. In fact, Kanyeihamba JSC, on his part remarked:

For an officer to resign or to leave the armed forces, the officer cannot do so at will or without the formalities and procedures as prescribed by law then complied with it certainly would be a matter of great danger to the national security, if it were to ever to be held by any one in authority that members or officers of the UPDF could resign or be removed at will and any how outside the law.

Strengths, Weaknesses and Recommendations for improvement.

Despite the constitutionalization of the prohibition of slavery, servitude and forced labour, concerns remain over many of the practices that are in place in industry and in domestic households, requiring that this provision be unpackaged.

- ⚙ Slavery and forced labour in their traditional forms are non-existent, but there are many modern-day forms of slavery and similar practices that continue to persist and which have largely escaped the scrutiny or attention of both state agencies and civil society actors.
- ⚙ Although forced labour *per se* may not exist, there are situations in which individuals are compelled to work under conditions in which the value and conditions of their labour fails to meet the threshold of acceptable conduct. These include the conditions of casual labourers in the plantation and manufacturing industries; workers in retail and domestic workers (so-called

⁵⁹ Const. App. No.1 of 1997.

⁶⁰ See *Major General David Tinyefuza v. Attorney General* (Const. Pet. No.1 of 1996).

‘houseboys’ and ‘maids’). These categories of workers are not organized into unions. Many operate in conditions that offend the provisions of Article 25, and very little action has been taken in order to address the situation. Civil society actors are especially quiet about these practices, and yet they represent a significant portion of the labour force in the country.

- ✿ Article 25 needs to be reviewed so that all the modern forms of forced labour are clearly captured.

2.5 Deprivation of Property (Art.26)

Article 26 guarantees people’s rights to own property either individually or in community with others. The provision also bars any compulsory deprivation of property or any interest or right over property, except in specific stated circumstances stated therein, namely: a) Where taking of the possession or acquisitions is necessary for public use, order, safety, or health. However, under Article 26(2) (b), in order for the compulsory taking of possession or acquisition to be made, it must be made under the law, with provision for the prompt payment of fair and adequate compensation prior to the taking of possession or acquisition, and also provide for the right of access to a court of law by any person who has an interest or right over property. In fact, the Land Acquisition Act [Cap 226] which is the principal law that governs such matters seems to pass the above constitutional test in so far as it provides for compensation under Section 5(4) and the right of appeal to the High Court under Section 13 of the said Act.

On the question of what amounts to ‘property,’ courts have stated that the term connotes both tangible and intangible items which a person owns or has a right in.⁶¹ In the famous cases of *Shah v. Uganda*⁶² and *Edward Frederick Ssempebwa v Attorney General*,⁶³ the courts stated *inter alia* that a judgment debt amounted to property in terms of the provisions of the 1967 Constitution in force at the time and such a judgment holder could not be validly deprived of the same unless the Constitution had been complied with.

Post-1995 decisions have clearly exemplified the provisions of Article 26. For instance, in the case of *Julius Okot v. Attorney General*,⁶⁴ in which the Army occupied the complainant’s land in Northern Uganda and established a military detach thereon. The tribunal stated that whereas the occupation was in the interest of public defense, safety and order under Article 26(2)(a) of the 1995 Constitution, such deprivation without fulfillment of Article 26(2)(b)(i) was unlawful, since the government had declined to promptly pay fair and adequate compensation prior to the acquisition of the land. The occupation therefore amounted to trespass.

61 Also see John Mugambwa, ‘Article 26(2) of the 1995 Constitution of Uganda and the Protection of Private Property,’ *East African Journal of Peace & Human Rights*, 4/1, (1997) at 71-74.

62 [1969] E.A 261.

63 Constitutional Case No 1/87.

64 Complaint No. UHRC/G/ 149/2000.

Article 26 has continued to be vigorously asserted by the courts even with regard to hotly contested areas such as the Government Proceedings Act,⁶⁵ which prohibits orders such as injunctions made against the government. Prior to enactment of the 1995 Constitution it was routinely asserted that such orders could not be issued against the government. For instance, in the case of *Attorney General v. Silver Spring Hotel Ltd.*,⁶⁶ the Supreme Court stated that an injunction whether temporary or permanent could not lie against the government, the rationale being that the government machinery should not be brought to a halt and embarrassment merely to satisfy private interests.

However, the courts shifted position in the aftermath of enactment of the 1995 Constitution. Hence in the case of *Osotraco [U] Limited v. Attorney General*,⁶⁷ where Ministry of Information employees had occupied and refused to vacate the plaintiff company's property at Mbuya Hill, orders were sought for the eviction from the property and a permanent injunction from occupation against the defendants from the suit premises. The court found that the plaintiff company was the registered proprietor of the property. On the issue of whether court could make an order of vacant possession against the government, Court stated that Section 15 of the Government Proceedings Act⁶⁸ prohibited court from making any order for the recovery of land or property, and instead enjoined it to make a declaratory order that the complainant was entitled to such property. The Court found that this provision ran counter to the spirit of the 1995 Constitution, because such a ruling would have deprived the successful party of the most appropriate remedy namely, recovery of his or her land. Court noted that since Section 15 of the Government Proceedings Act had been rooted in the non-immutability of state powers and immunities, Article 126 of the 1995 Constitution enjoined the courts to administer justice in the name of the people. Egonda-Ntende. J., pointed out that,

If government is in wrongful occupation of property, substantive justice demands that it be ordered to vacate. A declaratory order leaves a successful party at the mercy of government functionaries as to when he is to enjoy the fruits of successful action against government, for the declaratory order cannot be enforced.

On appeal, the state's contention was that the learned judge erred in interpreting the constitution, a duty that was reserved for the Constitutional Court only under Article 137. In the lead judgment of the court, Justice Mpagi Bahigeine upheld the lower court's decision, stating that the learned judge had not interpreted the constitution but was merely bringing the Government Proceedings Act into conformity with the 1995 Constitution under Article 273.

65 Cap 77 of the 2000 Laws of Uganda.

66 SCCA No.1 of 1989.

67 HCCS/380/1996.

68 Now Section 14 (1)(b).

Strength, Weaknesses and Recommendations for improvement.

- ✿ Article 26 guarantees the rights of the individual with regard to the ownership of property, and reflects a radical departure from the ancient point of view where property belonged to the Crown (the State) and the masses merely had access to it.
- ✿ However, the article needs to be amended so that the terminologies ‘public interest,’ ‘public safety,’ and ‘public order’ are clearly defined in order to show when they arise in order to prevent the disguised unlawful deprivation of property rights.
- ✿ Practical and realistic endeavors should be made in the amendment to ensure that the prompt, fair and adequate compensation stated in Article 26(2)(b) is in fact actualized in practice. One of the main problems afflicting Uganda today is the domestic arrears that the government owes to those who have claims against it, whether as a result of contractual obligations, or court declarations in favour of individuals and corporate entities.

There are also many outstanding issues with regard to the current spate of housing and land evictions, wherein property rights enshrined in Article 26 are simply ignored. Many of these are taking place in the oil and resource rich parts of the country, which on account of their distance and marginal status in the political economy are ignored or treated with disdain. Unfortunately, while the area of land evictions has become highly politicized and of increasing concern to the general public, the absence of human rights actors in this area is striking.

2.6 The Right to Privacy (Art.27)

Among the rights that have long been held to be central to the dignity and well-being of the individual is the right to privacy, which covers the privacy of the physical body as well as of the home, correspondence and communication of the individual.⁶⁹ Article 27 secures an individual’s right to privacy of person, home and other property, and thus bars any form of unlawful search of the home, property, and individual’s person. The article also makes unlawful entry into a person’s premises and interference with the privacy of a person’s home, communication or other property, illegal. In the Canadian case of *King v. Therens*,⁷⁰ the police entered and searched the accused’s house without a search warrant, and the Canadian Supreme Court found that since the Police did so without reasonable cause or a search warrant, they had violated the accused’s constitutional right to privacy. The court also found that taking the accused’s finger prints amounted to an act of violation of his right to privacy.

69 R. Kakungulu Mayambala, ‘Examining the Nexus Between ICTs and Human Rights in Uganda: A Survey of Key Issues,’ *East African Journal of Peace & Human Rights*, 16/1, (2010) at 4.

70 1986] LRC [Const] 455.

Unfortunately, the right has been the subject of numerous violations of a serious nature in Uganda, whether on grounds related to the enforcement of national security, the fight against terrorism, or treason or in the prevention of illegal immigration.⁷¹ Despite the frequency of violation, there are few cases in which individuals have challenged the authorities over their actions. Interestingly, the two cases of note both involved Lesbian Gay Bisexual Transgender Intersex (LGBTI) activists. In *Victor Juliet Mukasa & Yvonne Oyo v. Attorney General*,⁷² the Police entered the petitioner's premises without a search warrant, searched them, pilfered their property and even undressed them. This act was held to be unlawful and a clear violation of Article 27 of the 1995 Constitution, in addition to violating several provisions of International Law cited by the judge.⁷³ The High Court gave the applicant an award of Uganda Shillings 3,000,000/= (Three million shillings) for the violation of Article 27(2) related to the confiscation and damage done to his property by over-zealous Local Council officials.⁷⁴

In the *Rolling Stone* case brought by three prominent LGBTI activists, the court stated,

With regard to the right of privacy of the home and person under Article 27 of the Constitution, court has no doubt, again using the objective test, that the exposure, of the identities of the persons and homes of the applicants for the purposes of fighting gayism and the activities of gays, as can easily be seen from the general outlook of the impugned publication, threaten the rights of the applicants to privacy of the person and their homes. They are entitled to that right.⁷⁵

By way of conclusion it should also be noted that the protections envisaged in Article 27 extend to areas of communication such as the tapping of phone-calls, intercepting mails and the illegal accessing of bank statements. However, the Anti-Terrorism Act (especially sections 18 and 19) and the recent enactment of the Interception of Communications Act seriously challenge and undermine the provisions of the article.⁷⁶

Significantly missing from the protections in Article 27 is the right not to have information relating to family or private affairs unnecessarily required or revealed, a problem that has reached significant proportions in present-day Uganda.⁷⁷ Related to this is the public parading of criminal suspects revealing their identities in both the print and broadcast media. This article needs to be strengthened so that its violation is clearly barred under any circumstances.

71 Ibid., at 6. See also R. Kakungulu Mayambala, *Data Protection and National Security: Analyzing the Rights to Privacy in Correspondence and Communication in Uganda*, HURIPEC Working Paper No.25 of 2009

72 HC Misc. Cause No.24/06.

73 For a critical commentary on the case see Busingye Kabumba, 'The Mukasa Judgment and Gay Rights in Uganda,' *East African Journal of Peace & Human Rights*, 15/1, (2009) at 218-224.

74 The case is more famous for the fact that the applicant is a well-known LGBTI activist and the raid on his house was undertaken because of opposition to his advocacy of the rights of sexual minorities.

75 *Rolling Stone* case, *op.cit.*, at 9.

76 Kakungulu, *op.cit.*, at 28-30.

77 Cf. Article 31(d) of the 2010 Constitution of Kenya.

2.7 Fair Hearing (Art.28)

Article 28(1) secures the individual's rights to a fair and speedy trial, and also provides that such trial shall be heard publicly by an impartial court or tribunal established by law. This means that all trials must be heard in open court allowing everyone to witness the hearing, although court reserves the right to have the proceedings *in camera* where the matter touches on sensitive matters of national security or issues of morals whose disclosure is not in the public interest and may compromise national security or that of the litigants. Court trials are meant to be public simply because the courts have to be open to the people while doing their work since they carry out their duties in line with Article 126(1) on the exercise of judicial power.

The requirement not to delay justice (ensuring a speedy trial) needs to be balanced against the other core elements involved in the dispensation of justice. For instance, in the Kotido Field Court Martial executions, court rejected the state's argument that the trial and execution of the accused soldiers within less than 3 hours of conclusion of the tribunal's hearings was geared at achieving a speedy trial as required by Article 28 of the Constitution, stating that the trial was too speedy to enable thorough investigations to be carried out on the matter, resulting in a miscarriage of justice.

At the other end of the spectrum, trials in many of the courts of law in Uganda still take an inordinately long period of time, on account of several factors.⁷⁸ The most recent delays in the Supreme and Constitutional courts are due to retirements and delayed replacements, leading to a backlog of cases and unjustified delay in the delivery of justice.

The requirement that the proceedings must be before an impartial court/tribunal are indispensable to the realization of a fair trial. This was manifested in the case of *Prof. Isaac Newton Ojok v. Uganda*.⁷⁹ Justice Kanyehimba was also asked to step down from the Tinyefuza case, but refused to do so. From the above therefore, it can be seen that where there is the slightest likelihood of bias, such a trial is wholly said to be impartial.

Article 28(3) secures the accused's rights and provides safeguards against abuse through the presumption of innocence, under which a person is presumed innocent until proven to be guilty or until such person pleads guilty.⁸⁰ The presumption of innocence is the most important principle relating to criminal proceedings with Article 28(3)(a) re-affirming the principle enunciated in the case of *Woolmington v. DPP*,⁸¹ where the Court of Appeal of England stated that no matter what the charge, the principle that the prosecution must prove the guilt of the prisoner is part and parcel of the Common Law of England and no attempt to whittle it down can be entertained. This principle has been cited with approval in several criminal trials in Uganda, although inconsistently applied.⁸²

78 For a discussion of the phenomenon at the Uganda Human Rights Commission, see Isaac Bakayana, 'From Protection to Violation: Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission, HURIPEC Working Paper No.2 (November 2006).

79 Criminal Appeal No. 333 of 1991.

80 *Her Majesty the Queen v. Oakes* (1986) SCR 103.

81 (1935) AC 642.

82 See for example, *Akena P'Jok v. Uganda*, Criminal Appeal No.4 of 1987 (CA). See also Egonda-Ntende at 200-201. See also R. Kakungulu Mayambala, *Guilty Before Trial: Presumption of Innocence and the Public Parading of Criminal Suspects in*

However, the Constitution has a claw-back clause under Article 28(4) to the effect that nothing done under the authority of any law shall be held to be inconsistent with among others, Article 28(3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts. This is what is known as the reverse-onus clause, and it has a long history in Common Law countries.⁸³

The reverse-onus clause raises various constitutional issues, particularly in light of Article 44(c) which declares the right to a fair hearing non-derogable ‘notwithstanding anything in the Constitution.’ It follows therefore that Article 28 (3)(a) would prevail over Article 28(4)(a) if the right to be presumed innocent is taken as a fundamental aspect of the right to a fair hearing. At a minimum, there is a need to revisit the issue. In the words of Egonda-Ntende:

Article 44 of the Constitution prohibits derogation from the right to a fair trial. In order to reconcile article 28(4)(a), that permits derogation from the presumption of innocence, by allowing the imposition of a burden on the accused to prove certain facts, the meaning to be attached to “certain facts,” will be crucial. If proof of “certain facts” amounts to a shift of the burden of proof from the prosecution to the accused to prove that he did not commit the offence or any of the elements of the offence in question this could well breach the accused’s rights to be presumed innocent and to a fair trial.⁸⁴

The extent to which Article 28(3) has been tested by our courts is unclear. Nevertheless, it raises an important issue for consideration, especially in light of the promulgation of laws on terrorism, treason and the like which liberally employ reverse-onus clauses.⁸⁵

Under Article 28(3)(b), the accused has the right to be informed in the language he or she understands of the nature of the offence preferred against him or her. The case of *Andrea v. R*,⁸⁶ involved a Mozambican who only understood Portuguese and his native language. The trial was conducted in English and he appealed to the-then East African Court of Appeal arguing that he had not understood the proceedings and therefore had not been fairly heard by the court in reaching its conviction. The court held that this amounted to a violation of the accused’s right to an interpreter during trial.

Article 28(3)(e) entitles the accused to legal representation, a provision that is closely related to Article 28(3)(c) which guarantees the accused adequate time and facilities for the preparation of his/her defense.⁸⁷ In *Muyimba & Ors. v. Uganda*⁸⁸ the trial was to be heard in Masaka and the accused’s lawyer who was in Kampala was informed about this on the morning of the day of the trial and thus

Uganda, HURIPEC Working Paper No.32 (December 2011).

83 See Frederick Egonda-Ntende, ‘Presumption of Innocence and the Reverse Onus Clause: Does the 1995 Uganda Constitution Establish a New Standard?’ *East African Journal of Peace & Human Rights* 9/2 at 194-201 (2003).

84 *Ibid.*, at 212.

85 See, for example Section 28 of the Penal Code Act on terrorism and Section 364 on bouncing cheques. Also see Grace Patrick Tumwine-Mukubwa, ‘Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa,’ in J. Oloka-Onyango (2001), *Constitutionalism in Africa: Creating Opportunities, Facing Challenges*, Fountain, Kampala, at 290-292.

86 (1970) EA 26.

87 See *supra*.

88 (1969) EA 433.

could not make it to court in time. When the accused requested an adjournment, the Magistrate declined the request and proceeded with the trial, an action held to have been a violation of the accused's right to legal representation. In the case of *Kataryeba Zackary v. Uganda*,⁸⁹ the right to adequate time and facilities of one's legal defense under Article 28(3)(i) was construed to involve the right to seek an adjournment. In the instant case, the accused's lawyer had withdrawn from the case. When the accused sought an adjournment to obtain the services of another lawyer, the Magistrate refused to grant the adjournment. On appeal, the High Court held that the refusal to grant the adjournment amounted to a violation of the right to legal representation.

Article 28(5) states that a person shall not be tried in their absence unless the person so conducts him or herself as to render the continuance of the procedure in the presence of such person impracticable. In Uganda, this principle was tested in the case of *Esau Namanda & Ors v. Uganda*.⁹⁰ Five accused were charged with intermeddling with the property of the deceased person. At the trial, only one of them was produced in Court and when charges were read to him, he pleaded guilty. This plea was taken by Court to be a plea for all the 5. The remaining 4 accused appealed the conviction and sentence. On appeal, the High Court held that in convicting the other 4 appellants on the plea of guilty of one of the accused in their absence amounted to a violation of the right of the individual to be tried in his presence.

Clause 6 provides for the right of the accused to a copy of the proceedings of the trial. Clause 7 bars any trial for an offence which did not constitute an offence at such time when it was committed. This is meant to ensure that acts done lawfully at the time when they were still lawful are not retrospectively criminalized, otherwise known as the principle of legality. Clause 8 states that no person shall be imprisoned for a criminal offence that is more severe in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed. Clause 9 States that no person shall be punished twice for the same offence (double jeopardy). Clause 10 states that no person shall be tried for a criminal offence if the person shows that he/she has been pardoned in respect of that offence. Clause 11 States that where a person is being tried for a criminal offence, neither that person nor his/her spouse shall be compelled to testify.⁹¹

Clause 12 states that no person should be convicted of a criminal offence unless that offence has been defined and the penalty prescribed by law. The only exception is contempt of Court. On this point, the Zimbabwean case of *Mark Chavunduka & Anor v. Minister for Home Affairs*,⁹² held that the law on false news was so vague as to be construed clearly in regard to which particular words/conduct constituted the offence. In Uganda, the *Salvatori Abuki*⁹³ case also reflected this principle. The petitioner in this case argued that the Witchcraft Act under which a person convicted of witchcraft was sought to be banished from the community in which they had lived for years, did

89 (1996) HCB 36.

90 (1991)

91 See *Rex v. Amkeyo*

92 Case No. 36/2000.

93 *Op.cit.*, note 50.

not define in clear terms the type of conduct that was prescribed as criminal. The learned judges declared the act unconstitutional.

Strengths, weaknesses and Recommendations for improvement.

As the bedrock of the Criminal Justice System, Article 28 contains numerous protections to the accused person so that the ends of justice are realized by the trial.

All in all, the protections provided in this article are fairly comprehensive and reflect international best practice.

The issue of reverse-onus clauses, represented by the tension between Article 28(3) (a) and Article 28(4) (a) needs to be resolved. In light of Article 44(c) which makes the right to a fair trial non-derogable, reverse onus clauses which overturn the presumption of innocence are patently unconstitutional.

Given that there have been several penal amendments over the years which have effectively shifted the presumption of guilt onto the accused person, it is necessary for the matter to be addressed in a fashion that gives primacy to the overall objectives of Article 44(c) which is to ensure that under no circumstances is the right to a fair trial compromised.

2.8 Freedom of Expression, Conscience, Religion, Assembly and Association, and Movement (Art.29)

Article 29(1) secures every person's freedom of speech and expression, freedom of thought, conscience and belief, freedom to practice any religion and manifest such practice; freedom to assemble and to demonstrate together with others peacefully and unarmed, and the freedom of association. Article 29(2) states that every Ugandan shall have the right to move freely throughout Uganda and to reside and settle in any part of the country, to enter, leave and return to Uganda, and the right to a passport or other travel documents. Unlike Article 29(1) which secures rights and freedoms for every person regardless of citizenship, Article 29(2) suggests that the right to free movement within the country can only be claimed by Ugandan citizens, a limitation explicable in terms of national security and the regulation and control of foreign presence in the country.

The human rights enshrined in Article 29 in many respects go to the core of modern governance and the liberty of the individual. Each of them raises separate but related aspects of the same question: *to what degree are individuals free to pursue those goals that they feel most adequately give expression to their innate beliefs and legitimate interests?* In the following analysis we consider each of the separate elements of this very crucial part of the Bill of Rights in the protection of human rights.

Conscience

There are not many cases on the issue of conscience, but it is clear that the provision was designed to allow people to freely conduct themselves in a manner that gives expression to their principles and to their sense of what they believe to be morally right or wrong. Interestingly, it is a case decided by

a Magistrate that best exemplifies the protections envisaged by the provision. In May 2000 John Kyeyune—in what is popularly described as the ‘Movement poster’ case—was charged before the Magistrate’s court in Lugazi with tearing a poster of the Movement bus (symbol of the NRM), under offences created by the Referendum Act. The magistrate held that Kyeyune was only exercising his freedom of conscience under Article 29(1)(b) of the 1995 Constitution and dismissed the charge.

Expression

The history of freedom of speech and expression—which includes the right to disseminate views and opinions—has not been a happy one in Uganda. At stake has been the extent to which free expression is protected especially in relation to matters of a criminal nature, with political overtones such as sedition, criminal defamation and incitement. Arising from the foregoing, the question before the courts has always been whether the restrictions set up in the laws against sedition, publishing false news, and administrative measures such as censorship, the banning and closure of newspapers and radio stations, are permissible as limitations under Article 43(2), a provision that we will turn to subsequently. Thus, in *Charles Onyango Obbo and Andrew Mwenda v. Attorney General*,⁹⁴ the two journalists were charged with publication of false news contrary to section 50 of the Penal Code Act. The petitioners contended that section 50 was inconsistent with among others Articles 29(1) (a) and (b), 40(2) and 43(2) (c) of the 1995 Constitution. The case was lost in the Constitutional Court, with only Justice Twinomujuni in a powerful dissent agreeing with the petitioners. On appeal to the Supreme Court, Justice Mulenga stated that the protection of guaranteed rights is the primary objective of the Constitution and that the limitation of their enjoyment is an exception to their protection and is therefore a secondary objective. Court therefore concluded that section 50 of the Penal Code Act was inconsistent with Article 29(1) (a) and thus void. The *Onyango Obbo* case represented a significant landmark in the struggle for the improved respect of press freedoms, although it had wider implications for constitutional interpretation and for the question of what limitations were acceptable to the exercise of human rights.⁹⁵ Following on from the standard set in that case by the Supreme Court, subsequent decisions on press freedoms in particular, and on free expression in general have generally been progressive and supportive.⁹⁶

But the decisions of the courts of law may be the only bright spot in this whole story. Journalists have been continually harassed, intimidated, and detained on flimsy charges and criminally tried on cases intended to scare them off the task at hand. Indeed, the NRM government scoops the prize in terms of the number of media personalities it has brought criminal charges against. Ironically, very few cases actually go to trial, demonstrating that the main intent of the state is to harass and disorient members of the press. Also, panelists on radio talk shows have been stopped from participating in them, or sanctioned for remarks made while the popular *Ebimeeza* (live phone-in shows) have even been taken off the air. To crown it all, new legislation on the Media will have

94 Constitutional Appeal No. 2/2002.

95 See G.P. Tumwine-Mukubwa, ‘Opening the Floodgates of the Jurisprudence of Free Expression,’ in *East African Journal of Peace & Human Rights*, 11/1, (2005) at 21-66.

96 See for example, *Uganda v. Frank Nyakairu & 2 Ors.* Criminal Case No. 1600/202 (MC

It should not however go without mention that in the enjoyment of one's right to belief/religion, one must not violate another person's

the effect of tightening the noose around the necks of robust journalism in the country.⁹⁷

Religion

The freedom to belong to a particular religion and manifest such faith should not be subject to compulsion or restriction. In the Canadian case of *Big Drug Mart*,⁹⁸ the Canadian Parliament passed the Lord's Day Act which prohibited any person from carrying out trade and business on Sundays. The petitioners challenged the constitutionality of the Act, arguing that the prohibition and restriction of work on a Sunday in effect amounted to a violation of the right to religion. The Canadian Supreme Court stated that the Act compelled observance of the day of rest/worship upon all members of the Canadian society and was therefore unconstitutional.

It should not however go without mention that in the enjoyment of one's right to belief/religion, one must not violate another person's constitutionally guaranteed rights. In *Re An infant*,⁹⁹ Jehovah's Witness parents of a three year old boy, refused to allow a blood transfusion that was crucial for the maintenance of the son's life, arguing that the idea was against their religious beliefs. The hospital management petitioned court for a declaration that this was a violation of the child's right to life. Court held that the right to exercise one's religion and manifest one's religious belief is not absolute and that the parents' right to practice their religion did not extend to impairing the life and health of their child.

In Uganda, the right to religion has also been subject to litigation in the famous case of *Sharon Dimanche and 2 others v. Makerere University Council*.¹⁰⁰ The petitioners sought a declaration from the Constitutional Court that the University's policy of conducting compulsory lectures, tests and examinations on Saturdays contravened their rights as Seventh Day Adventist students to practice their faith as guaranteed under Article 29(1)(c). The court held that the very essence of the right to practice one's religious beliefs by implication means to practice it without compulsion and discrimination. Court further stated that the freedom to practice one's religion is not absolute and that in any case, the petitioner's rights had to be exercised bearing in mind

⁹⁷ The proposed legislation is the Press and Journalists (Amendment) Bill; see Jackie Tumusiime, 'The Annual State of Constitutionalism in Uganda 2010: Achievements, Challenges and Prospects,' in Morris Odhiambo (ed.), *CONSTITUTIONALISM IN EAST AFRICA*, 2009, Fountain, Kampala, at 155-158.

⁹⁸ [1985] 1 SCR 295 (24 April 1985) (Supreme Court of Canada).

⁹⁹ (1996) CHLRD 429.

¹⁰⁰ Constitutional Cause No.1/2003 (CC). See also Henry Onoria, 'Major Decisions on Fundamental Rights and Freedoms in Uganda in 2003,' in *East African Journal of Peace & Human Rights*, 11/1, (2011) at 151-153.

the secular character of Uganda as a state and the public nature of the respondent University.

Assembly and Association

Under the multiparty political dispensation in place since 2005, few human rights and freedoms have been more the subject of infringement than the freedom to assemble, oppose, demonstrate and associate for causes in which one believes. Particular damage has been done by the police and other security forces in either thwarting or disrupting assemblies of opposition political actors or of those who the State considers to be working contrary to the dominant political authority. For the ten years preceding the transition to a multiparty political system, opposition political actors were the target of all manner of intimidation, molestation and repression. Nevertheless, the courts have been quite clear in upholding the rights of assembly and association. The case of *Dr. Paul Semwogerere and 5 others v. AG*,¹⁰¹ well exemplified the position of the Judiciary on the freedom of assembly and association even during the Movement period of governance. In that case, sections 18 and 19 of the Political Party's Act were challenged as being in violation of among others Article 29(1)(d) of the Constitution. Finding for the petitioners, Justice Mpagi-Bahigeine stated that the ultimate impact of the sections being challenged was to render political parties non-functional and in the process to violate the essential freedoms of assembly and association.

In the later case of *Muwanga-Kivumbi v. The Attorney General*,¹⁰² the Constitutional Court declared Section 32(2) of the Police Act unconstitutional. The provision gave the Inspector General of Police the power to prohibit assemblies and processions if he/she was of the view that it was likely to cause a 'breach of the peace.' While this judgment should have settled the issue, the Police continue to act as if they still have the power to sanction assemblies and processions.¹⁰³ Attempts by the Human Rights Commission to find a compromise by way of designing acceptable regulations to govern such actions have fallen by the wayside. Instead, the government resorted to introducing the highly contentious Public Order and Management Bill (POMB), which is still awaiting final deliberation and passing in Parliament.¹⁰⁴ The net effect of the Bill would be to curtail further the provisions on free

"Particular damage has been done by the police and other security forces in either thwarting or disrupting assemblies of opposition political actors or of those who the State considers to be working contrary to the dominant political authority".

¹⁰¹ (Constitutional Petition 5/2002).

¹⁰² Const. Pet. No.9 of 2005.

¹⁰³ See further Peter Mulira, 'Constitutional Development in Uganda,' in Khoti Kamanga (ed.), *Constitutionalism in East Africa: Progress, Challenges and Prospects* in 2008, Fountain, Kampala, at 152-154.

¹⁰⁴ Human Rights Watch, 'Draft Public Order Bill Would Violate Human Rights,' May 11, 2011, accessed at: <http://www.hrw.org/news/2012/05/11/uganda-draft-public-order-law-would-violate-rights>

assembly and association and reinstate the discretionary power in the Police that the courts have already declared unconstitutional. Indeed, if the Bill were to come into force it would run fowl of Article 92 of the Constitution that prohibits the passing of legislation that reverses a decision of a court of law.

Movement [Art.29(2)]

Basically, this provision guarantees the right to move and freely reside in any part of the country to citizens. It covers the freedom to travel, reside and settle, to enter leave and return and the right to a passport or other travel document. Although only tested in court with regard to banishment for alleged engagement in witchcraft,¹⁰⁵ the provision has come under some pressure in the discussion about the 'ring-fencing' of political positions for only those who are indigenous to the area. The right to a passport has also been tested with regard to the case of citizens of Banyarwanda origin who have been denied passports on account of claims that they are non-citizens or refugees. It is also questionable as to whether restricting the provisions of clause 2 to only Ugandans conforms to International Law. This arises particularly with respect to the case of refugees, and the policy of confining them to Refugee settlements or camps.

Strengths, Weaknesses and Recommendations for improvement.

- ✿ The manner in which Article 29 is couched covers the most critical elements of an individual's freedoms of conscience, expression, religion and assembly, while it also secures the right of movement to all Ugandans.
- ✿ Nevertheless, there has been particular contention over the exercise of these rights, whether by the print and broadcast media or by politicians on both sides of the political divide, or by journalists and other commentators.
- ✿ The courts have been fairly consistent in upholding these rights and have developed a significant jurisprudence that provides strong precedent for their protection.

Indeed, the provisions as currently enshrined in the Constitution adequately protect these rights. However:

- ✿ The institutional mechanisms established to enhance the rights to free expression often violate them. In particular the Media and Broadcasting councils have issued a series of decisions that clearly run counter to the letter and the spirit of the provisions.¹⁰⁶

¹⁰⁵ *Abuki's case* (op.cit., note 51).

¹⁰⁶ For example the Media Council banning of the play, *The Vagina Monologues*, and the recent more recent threats against John Ssegawa's *State of the Nation*. See F. W. Juuko, 'To Ban or Not to Ban?: A Critique of the Media Council Ruling,' *East African Journal of Peace & Human Rights*, 11/1, (2005) at 172-181, and Henry Odimbe Ojambo, *Reflections on Freedom of Expression in Uganda's Fledgling Democracy: Sedition, "Pornography" and Hate Speech*, HURIPEC Working Paper No.18 (February 2008).

- ✿ Critics of government policies are often harassed and intimidated, while radio stations and newspapers are threatened with all manner of sanction by the state authorities.¹⁰⁷
- ✿ What is most disturbing is that even where the courts have declared certain provisions of the law (especially the Penal Code) unconstitutional, state authorities such as the Police and the intelligence services continue to operate as if the provision is still law.
- ✿ It is also true that some laws continue to infringe on these rights, but have yet to be challenged in the courts. Hence, there is a need for a comprehensive audit of all the legislation that still offends the rights and freedoms protected by these articles.

Finally, the article needs to be reviewed to deal with the situation of refugees. Quite clearly, the phenomenon of confining them to camps violates International Law and needs to be reconciled with the constitutional provision that confers freedom of movement only on citizens.

- ✿ In the amendment, refugees need to be allowed free movement and not be automatically interred in camps, even when there are no serious justifications for doing so.
- ✿ Regulations on the movement of refugees can be put in place in order to meet the concerns of security that might be at play, but it is unacceptable to treat them as if they are less human than citizens.

*some cases
have registered
setbacks, such
as the case
of Mifumi
v. Attorney
General, which
unsuccessfully
challenged
the practice of
bridewealth*

2.9 The Right to Education (Art.30)

Article 30 stipulates that all persons have a right to education, a right which is new to Ugandan Constitutional Law. In other jurisdictions where it has been recognized, the right to education is considered to be crucial, the deprivation of which has been related to deprivation of the right to life. In *Krishnan v. State of Andhra Pradesh*,¹⁰⁸ the Indian Supreme Court stated that the right to education must be seen as part and parcel of the right to life since its very purpose is that it tends to lend dignity to an individual. The right is buttressed by Article 34(2), which provides for the right of a child to basic education.

¹⁰⁷ See Medard Lubega, 'Freedom of Expression in Two East African Countries: Comparing Uganda and Tanzania,' *East African Journal of Peace & Human Rights*, 12/1, (2010) at 146.

¹⁰⁸ [1993] AIR 2178; [1993] SCR (1) 594

The right to education is enforceable against the state and the parents of the individual child. This right seems to be strictly meant for children (under the age of 18 years) and does not seem to concern itself with the quality of the education itself. In *Dimanche*, the Court noted among other points that the right to education is not absolute and that it is not synonymous with Makerere University. Court noted that if the petitioners were feeling inconvenienced by the University policy of holding examinations on the Sabbath, they had a choice of other institutions to choose from which best suited their religious beliefs and affiliation. It therefore follows from the foregoing that the right is not absolute and it only seems to benefit children. Further, the level of education that binds the state/parents seems to be basic education as stated in Article 34(2).

Strengths, Weaknesses and recommendations for improvement.

The provision of a right to education represents a milestone in Ugandan constitutional law, although the article is couched in very broad terms, it does not clearly show the age limit of the beneficiaries, who is responsible, the quality of the education that should be given, and what level the right is enforceable at.

Although largely upheld as a correct decision, the reasoning in *Dimanche* did not reflect a full comprehension of the nature of the right at stake.

Given that the right to education is only one of a small handful of economic, social and cultural rights, it would be opportune to use it as the foundation on which a jurisprudence of the rights in this area can be built. Particularly relevant would be the development of a 'core-contents' approach to the right that would assist in ensuring that the right is given full realization. In this respect, International Law has developed a 4-part structure through which it approaches economic, social and cultural rights, and Fons Coomans has applied that formula to the Right to Education.¹⁰⁹ Known as the '4-As' structure, it focuses on availability; accessibility; acceptability and adaptability. Coomans summarizes these as follows:

- a. Availability:** functioning educational institutions and programs have to be available in sufficient numbers in a country, through a public educational system and allowing private parties to establish non-public schools;
- b. Accessibility:** educational institutions and programs have to be accessible to everyone, without discrimination on any ground, also including physical and economic accessibility;
- c. Acceptability:** the form and substance of education, including curricula and teaching methods, has to be relevant, culturally appropriate and of good quality and in accordance with the best interests of the child; this includes a safe and healthy school environment, and

¹⁰⁹ Fons Coomans, 'Identifying the Key Elements of the Right to Education: A Focus on Its Core Content,' accessed at: <http://www.crin.org/docs/Coomans-CoreContent-Right%20to%20EducationCRC.pdf>

- d. Adaptability:** education has to be flexible, so that it can adapt to the needs of changing societies and communities, and respond to the needs of students within their specific social and cultural context, including the evolving capacities of the child.

Using this formula, and adding to it the 'Q' to connote 'quality,' human rights activists can begin to take concrete measures to ensure that the right to education that is constitutionally guaranteed finds full realization. This is because while it is important to acknowledge the significance of the introduction of Universal Primary Education (UPE), it is as if the realization of the Right to Education has stopped at that stage. The above formulation demonstrates that there is much more to the right than simply the quantitative provision of more schools, with the subsequent increase in pupil enrolment. In this regard, human rights actors need to join together with civil society actors in order to ensure the improved implementation of this right, and to compel our courts to adopt a more activist approach towards protection of the right to education.

2.10 Family Rights (Art.31)

A man and a woman of 18 years and above are entitled to marry and found a family. The two are also entitled to equal rights in marriage and during its dissolution. In essence, this provision bans marriage or the making of a family by persons under the age of 18 years and by persons of the same sex, an amendment introduced in 2005. Article 31(2) empowers Parliament to make laws for the protection of the rights of widows and widowers in the inheritance of property of their deceased spouses and to enjoy parental rights over their children. Article 31(2a) expressly prohibits marriage between persons of the same sex.

Article 31(3) states that marriage shall be entered into by free consent of a man and woman intending to marry.¹¹⁰ The article also places the right and duty of caring for and bringing up children on their parents and that such children—except in accordance with the law—shall not be separated from their families or persons entitled to bring them up against the will of their families or of other persons. Article 31 has been actively litigated in several cases such as in *Maliyam Adekur & Anor v. James Opaja and Anor*,¹¹¹ where the custom in Palisa allowing wife inheritance was successfully challenged in a constitutional petition. In *Best Kemigisha v. Mable Komuntale & Anor*,¹¹² the Constitutional Court considered the tradition that a woman could not be allowed to inherit her husband's property simply because culture did not allow it to be repugnant to articles 21 and 31(2). Although not a constitutional case, *Bruno Kiwuwa v. Ivan Serunkuma & Juliet Namazzi*¹¹³ touched on Article 31(3) because it involved a challenge brought by a father against the intending marriage of his daughter. The father's objection to the marriage was based on the fact that the two were members of the same

¹¹⁰ In *Mifumi v. Attorney General*, the court held the view that the concept of bride price facilitates rather than fetters the consent of the parties to a customary marriage.

¹¹¹ Constitutional Petition No.2/1997.

¹¹² Civil Suit No 5 / 1998.

¹¹³ High Court Civil Suit No.52 of 2006.

Ndiga clan of Buganda. The Court agreed, issuing a permanent injunction preventing the union from taking place.¹¹⁴

Strengths, weaknesses and recommendations and recommendations for improvement.

- ✿ Article 31 covers a right essential to the protection of the institution of marriage, equalizes the situation between spouses and removes many of the inequalities in the institution that were previously the subject of considerable concern among human rights activists.

However, many problems still remain:

- ✿ First of all, parliament is yet to make appropriate laws for the protection of widows and widowers with respect to spousal inheritance.
- ✿ Secondly, the draft laws on marriage and divorce remain outstanding after decades of struggle by women's rights activists. The current Marriage and Divorce Bill is facing numerous hurdles with opposition coming from within Parliament and outside.
- ✿ Finally, it is quite clear that the bar against same-sex marriage violates articles 21 and 29(1) (b) which guarantee equality and non-discrimination among all people as well as freedom of thought, conscience, association, and expression.
- ✿ It is also a contradiction of Article 31 which only imposes a limitation of age as a barrier to legal marriage. If the intention of marriage is companionship as opposed to the bearing of children (not all people who marry want or can have children): why should a person be compelled to find companionship from a designated sex?
- ✿ Furthermore, implicit in the denial of certain couples the right to marry is a discriminatory intent that denies them equality of treatment with heterosexual couples. Sexual minority groups have nevertheless felt that challenging this provision of the law would not be strategic, especially within the context of the hysteria generated by the Bahati Bill at this material time.¹¹⁵

2.11 Affirmative Action(Art.32)

Until the 1995 constitution, women were the subject of gross human rights violations and the law offered only minimal protection to them. In the 1995 Constitution, the rights of women were given full effect. Article 32 provides affirmative action in favor of marginalized groups and can be traced from the provisions of Article 21 which provides for equality for all people. Under Article 32(1) the state shall take affirmative action in favor of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purposes of

¹¹⁴ See also R. Kakungulu Mayambala, 'Bruno Kiwuka v. Ivan Serunkuma & Juliet Namazzi: An Appraisal of the Right to Marry and Found a Family in Uganda?' *East African Journal of Peace & Human Rights*, 13/2, (2007) at 334-346.

¹¹⁵ See J. Oloka-Onyango, 'We are more than just our bodies': HIV/AIDS and the Human Rights Complexities Affecting Young Women who have sex with Women in Uganda, HURIPEC Working Paper No. No.36 (March 2012).

redressing the imbalances which exist against them. Article 32(2) prohibits any laws, customs and traditions that are against the dignity, welfare or interest of women or any other marginalized groups. Article 32(3) also creates the Equal Opportunities Commission (EOC) that is to ensure that the aspirations of the impugned article are achieved. The state has achieved this by putting in place laws that prohibit any conduct that is likely to limit the attainment of equal rights for women and other marginalized groups in society. However, whereas the state has struggled to improve the standards of women and persons with disabilities (PWDs), other marginalized groups have not been assisted at all and have consequently been discriminated against in society.

Strengths, Weaknesses and Recommendations for improvement.

The Article concretizes the issue of affirmative action in favor of marginalized groups, specifically those disadvantaged on account of gender, age or disability. The phrase ‘or any other reason created by history, tradition or custom,’ is sufficient to capture those other categories who need affirmative assistance. Of the three mentioned, the category of age has received least attention, and yet there are very many issues of concern that affect older people, revolving around issues of participation, protection and image.¹¹⁶

Given the recent scandal in the Pensions sector, it is necessary to devise appropriate mechanisms through which the right to social security—particularly for older persons—is not adversely affected. For this category, the right to their pension is equivalent to the right to life.

Several years after enactment of Article 32(4), the EOC has now come into existence. However, it is hamstrung on several counts, particularly in terms of resources and a strategic vision of the most appropriate direction in which to move with the equalization of opportunities. Furthermore, S.15 of the EOC Act places unreasonable and constitutionally questionable limitations on the powers of the Commission. This clearly raises significant problems in terms of its capacity to pursue the mandate of ensuring equal opportunities as properly understood. While a case challenging this provision has been filed in the Constitutional Court, it is taking inordinately long in being resolved.¹¹⁷

2.12 Women (Art.33)

Article 33 covers the rights of women and flows directly from Article 32. According to Article 33, women are to be accorded full and equal dignity of the person with men. The state therefore has to provide facilities and opportunities necessary to enhance the welfare of women so as to enable them realize their full potential and to advance socially, economically, politically and in other spheres of endeavour. The provision stipulates that women shall have the right to equal treatment with men and the right shall include equal opportunities in political, economic and social activities. Several cases have been brought in the courts of law in order to ensure that the provisions of Article 33 are realized. Among them have been the cases of *Law-U* (on criminal adultery) and *FIDA-U* (on the

116J. Oloka-Onyango, *Equal Opportunity, Age-Based Discrimination and the Rights of Elderly Persons in Uganda*, HURIPED Working Paper No. No.21 (November 2008).

117 See note 17, *supra*.

grounds for divorce). On the whole, these represent significant strides in the struggle to promote the rights of women in the country. However, some cases have registered setbacks, such as the case of *Mifumi v. Attorney General*,¹¹⁸ which unsuccessfully challenged the practice of bridewealth. The case demonstrated that there is a need for a more careful assessment of which cases civil society actors should pursue and of the potential gains and reversals that a court-based strategy may entail.

Strengths, weaknesses and recommendation for improvement.

Article 33 represents the most important foundation for securing the rights of women in the Constitution and seeks to meet the goals of equality of men and women as espoused in Article 21 of the Constitution.

However, clauses 2 and 3 of the article seem to be directed to the state alone. The article implies that it is the state to ensure equal treatment and protection, and to give equal opportunities to women. Quite clearly, non-state actors have a critical role to play in this regard, and should not consider themselves free of the obligations created under this provision of the Constitution. Discriminatory and unequal practices are present in the family, the community, private institutions of learning and in the employment sector. The rights of women need to be actively promoted and protected in these spheres too. The article therefore needs to be reviewed so that all stakeholders clearly bear responsibility to ensure the equal treatment, opportunities and protection to women.

2.13 Children (Art.34)

Article 34 basically provides for the right of children to know and be cared for by their parents or by those entitled by law (guardians) to bring them up. Children are also entitled to basic education, which is the responsibility of the state and of the parents of the child, although the article does not include the formulation 'free and compulsory' that is the internationally-accepted one. The article also ensures children's rights to medical care and other social or economic benefits. Children under the age of 16 years are also protected from social or economic exploitation and shall not be employed or required to work in conditions likely to be hazardous or to interfere with their education or conditions that may be harmful to their health or physical, mental, spiritual, moral or social development. The article also states that a child offender who is kept in lawful custody or detention should be separated from adult offenders. The article also states that the law shall accord special protection to orphans and other vulnerable children, a provision that flows from articles 21, 30 and 32.

¹¹⁸ Const. Pet. No.12 of 2007; [2010] UGCC 2 (March 26, 2010).

Strength, weaknesses and recommendations for improvement.

The constitutional provisions and the laws related to children have not been subject to a lot of litigation in Uganda, perhaps because the community they are supposed to serve lacks the capacity to appropriately articulate their grievances.

- ✿ Needless to say, the article represents an important landmark in the enforcement of children's rights, although the issue of basic education as described raises some questions: What does 'basic education' entail and what are the measures in place in order to ensure that the child is able to access it without discrimination?
- ✿ Article 34(7) states that special protection shall be afforded to orphans and other vulnerable children by the law, but this is largely an obligation that falls on private religious or voluntary actors, leaving the state largely free of obligation in this respect.
- ✿ Interestingly, there is no accompanying provision in the Constitution on the youth, despite the fact that they are given representation among the specially-elected groups in Parliament, alongside the army, workers, and persons with disabilities.¹¹⁹ While each of the other categories are expressly referred to elsewhere in the Constitution, there is no similar reference to the Youth.
- ✿ Given that they are an identifiable category and have been expressly referred to in a provision of the Constitution, there is a need for some cross-referencing in terms of definition: who exactly are 'the youth?'
- ✿ There is also a need for a provision permitting the youth to access relevant education and training, access to employment, freedom from exploitation and not to be subject to harmful cultural practices.¹²⁰

2.14 Persons with Disabilities (Art.35)

Under Article 35, persons with disabilities (PWDs) have a right to respect and human dignity. The state and society are therefore tasked to take appropriate measures to ensure that PWDs realize their full mental and physical potential. Parliament is also tasked to make laws for the protection of PWDs in line with articles 21 and 32 of the Constitution. Those laws should be geared towards equality and the protection of marginalized groups of people, respectively. This article has also not been subject to a lot of litigation in Uganda, although a constitutional petition challenging the method of choosing parliamentary representatives of the community is still in court. However, it is worthwhile noting that in practice government has not put in place practical and clearly enforceable measures for the realization of the stipulations in this article.

¹¹⁹ See Article 78(1)(c).

¹²⁰ cf. Article 55 of the 2010 Constitution of Kenya.

Strengths, weaknesses and recommendations for improvement.

- ✿ The article brings persons with disabilities to the fore as marginalized persons who need special attention.
- ✿ The article however is vague; it does not state the appropriate measures that the state and society are to take so as to help realize their full potentials.
- ✿ The article also does not use the same vigour of language as that used in Article 32 and consequently has not been treated with the seriousness and importance that it deserves by the state and society.
- ✿ Despite enacting progressive legislation to give effect to the provisions of Article 35, the state still lags behind in ensuring the more comprehensive respect and protection of the rights of PWDs. The state should therefore be tasked to ensure that appropriate mechanisms are implemented in order to achieve the aim of the legislation that has been made to address this issue.

2.15 Minorities (Art.36)

The article states that minorities have a right to participate in decision making processes, and their views and interests shall be taken into account in the making of national plans and programmes, again in line with articles 21 and 32. In this way, minorities and other marginalized groups have for the first time in Ugandan constitutional history been given constitutional recognition. Minorities above the age of 18 years of age have a right to vote their own leaders, to have representatives in the legislature and other organs that make decisions which may have an effect on them as is the case with other categories of persons. This article also ensures that minorities not only have their views in decision-making processes considered, but that their interests are also taken into account in the making of national plans and programmes.

- ✿ The article however does not expressly protect the economic and social rights of minorities, and only focuses on their political and civic rights.
- ✿ The article should therefore be reviewed to clearly indicate the social and economic rights of minorities on top of the political rights covered. It should also be clearly stated that minorities also include sexual minorities.

2.16 Cultural Rights (Art.37)

Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any cultural institution, language, tradition, creed or religion in community with others. Article 37 is however subject to the provisions of Art 2(2) and 32(2). Article 37 also needs to be read together with Article 246 of the Constitution which provides for the institution of traditional or cultural leaders. While ensuring that cultural rights have been respected it is important to point out that

such rights are only enforceable if they do not contravene the Constitution. It is trite to note that in the exercise of this right, people must not infringe or interfere with the rights of others.

Most contention over this right has been expressed *vis á vis* the rights of women and children, and in several instances, laws have been passed which expressly outlaw certain customs such as Female Genital Mutilation (FGM).¹²¹ The Constitutional Court also declared the practice as violating the rights of women in the landmark case of *Law & Advocacy for Women in Uganda (LAW-U) v. Attorney General*.¹²² But it is not only the rights of women which have been the subject of contention with regard to this provision of the Constitution. In *Ronald Reagan Okumu and Anor v. AG*,¹²³ the commander of Gulu Military Barracks had refused to release the body of one Peter Oloya to be prayed for and buried by the family. The High Court was tasked to determine whether this action violated Articles 37 and 29, among others. The High Court held that the refusal to hand over the deceased's body to the family to accord him a decent burial contravened the cultural rights of the relatives as enshrined in Article 37 of the Constitution.

Aside from the tensions between culture and rights, there has also been contention over the legislation on traditional/cultural leaders which was passed in the aftermath of a stand-off between the central government and the kingdom of Buganda over the issue of Kayunga and led to extensive riots in Kampala and across the region.¹²⁴ A petition challenging the Act for unconstitutionality was filed at the end of the year and is yet to be determined. At stake is the extent to which the legislation infringes on cultural leader's rights of expression, assembly and association, and the degree to which it conforms to the provisions of Article 246.

2.17 Civic Rights and Activities (Art.38)

Every Ugandan citizen has a right to participate in the affairs of government, individually or through his/her representatives in accordance with the law. Every Ugandan also has a right to participate in peaceful activities to influence the policies of government through civic organizations. Article 38 is laudable for the explicit mention of the civic rights of the people, and for its outright support for the actions of civil society and community based organizations. It is important to note that while clause 1 refers to participation '... in accordance with law,' clause 2 is categorical and unfettered by any limitation. Unfortunately, the actions of civil society actors have in practice met with considerable resistance from the state. For instance, peaceful demonstrations guaranteed under this provision, and further augmented by Article 29(1)(d) and (e) that are geared towards changing/influencing government policies through civic organizations have on several occasions been muzzled by the state in a very cruel manner.

Legislation on non-governmental organizations has emphasized the interests of regime security and stability at the expense of civic engagement and challenge. This can clearly be exemplified by

¹²¹ See for example, the Prohibition of Female Genital Mutilation Act, No.5 of 2010.

¹²² Const. Pet. No. 8 of 2007.

¹²³ Miscellaneous Application No. 63/2003.

¹²⁴ See HURINET-U

the brutal treatment accorded to the ‘Black Monday’ activists and the unconstitutional arrests effected by the Police. The NGO Board has regulations that are designed to stifle civic action, rather than enhance it, and the role of Resident District Commissioners (RDCs) intelligence operatives and Local Council officials also leave a great deal to be desired.

- ✿ While the constitutional provision is quite adequate in formulation, government action and legislation has clearly fallen short and needs challenge beyond local courts.

2.18 Healthy Environment (Art.39)

Every Ugandan has a right to a clean and healthy environment, which in some jurisdictions has been interpreted to include the right to life. The article is important in as far as it reaffirms that every Ugandan has a right to a clean and healthy environment. Although it initially floundered on the rough seas of judicial intransigence and conservatism,¹²⁵ over time the courts have become more comfortable with the idea. Since the initial mishaps in the BAT case, several cases have been decided on the issue. The biggest problem remains that of enforcement, as the regulatory mechanisms, particular the National Environmental Management Authority (NEMA), the Police and the various local government administrations are simply too ill-equipped to deal with the rise in demand for land, water and timber which has exploded exponentially. It is doubtful whether much more can be done by way of constitutional reform to improve the stipulation that is found in Article 39, although for comparative purposes one can look at the 2010 Kenyan Constitution which devotes several articles to ‘Environment and Natural Resources.’¹²⁶

2.19 Economic Rights (Art.40)

Article 40(1) tasks Parliament to make laws that provide for the right of persons to work under satisfactory, safe and healthy conditions, to ensure equal payment for work without discrimination, and to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, plus remuneration for public holidays. Article 40(2) states that every person in Uganda has the right to practice his/her profession and to carry on any lawful occupation, trade or business. Under Article 40(3) every worker also has the right to form or join a trade union of his/her choice for the promotion and protection of his/her economic and social interests, to collective bargaining and representation, and to withdraw his/her labour according to law. The article also states that the employer of every women worker shall accord her protection during pregnancy and after birth in accordance with the law.

¹²⁵ Justice Ntagoba in the case of *British American Tobacco Ltd. V. The Environmental Action Network Ltd.* (Civil Application No.27/2003), declared that a petition concerning unregulated smoking in public places disclosed no cause of action.

¹²⁶ See Articles 42, and 69 to 72.

Strength, weaknesses and recommendations for improvement.

- ✿ Article 40 is a crucial constitutional guarantee for all workers. It is also important because it accords female workers special treatment during pregnancy and after birth, reinforcing the principles in Article 33(3) which protect women's human rights.
- ✿ Indeed, Article 40 provided the basis for an extensive reform of our labour laws, which eventually came through parliament in the mid-2000s.¹²⁷ Those laws provided a whole slew of rights derived from the Constitution and in line with International Labour Organization (ILO) standards on the same. Despite the progressive character of the laws, they are limited by the overall government stance on foreign investment, the lack of effective machinery for their supervision or implementation and the low levels of unionization which give employers an upper hand, able to dictate wages and conditions of service at will.¹²⁸ To compound it all, Uganda still lacks a minimum wage policy. These problems are worsened by a weak and vacillating labour movement, which has been co-opted by the government and rarely pursues the interests of workers. That being the case, the implementation of the rights derived from Article 40 has been lackluster.
- ✿ Despite the fairly robust character of Article 40, its title is nevertheless slightly misleading since it only covers labour relations in formal employment. As is well known, the majority of the working population is in unregulated agriculture or the informal economy. Here there is little if any regulation of their working conditions.

Secondly, the content and coverage of Article 40 does not extend to other categories of social and economic action. Economic rights extend beyond the right to work, and include the right to social security, and to the protection of consumers. There is also the right to healthcare, adequate housing and sufficient food, all of which are recognized by International Law, and particularly found in the International Covenant of Economic, Social and Cultural Rights (ICESCR) to which Uganda has long been party. Given the importance of this category of rights to the overall struggle for improved living conditions and satisfactory conditions of life, we look at them in more detail in Part IV of the study.

2.20 Access to Information (Art.41)

Previous constitutions were silent on the right of access to information, and a high premium was placed on the protection of information in the custody of the state, thereby denying citizens legitimate access to information that was essential to the promotion of other rights and freedoms. Article 41 states that every citizen has a right of access to information in the possession of the state or of any other organ or agency of the state, except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to the privacy of any other person. Article 41(2) tasks Parliament to make laws that prescribe the classes of information referred to in

¹²⁷ See John-Jean Barya, *Freedom of Association and Uganda's New Labour Laws: A Critical Analysis of Worker's Organizational Rights*, HURIPPEC Working Paper No.4 of 2007, at 22-26.

¹²⁸ *Ibid.*, at 30-31.

Article 41(1) and the procedure for obtaining access to such information. The basic intent of Article 41 has been translated into law with the promulgation of the Access to Information Act of 2005. Unfortunately, the law appears to have deviated somewhat from the spirit of the constitutional provision placing obstacles in the way of ensuring that information ultimately belongs to the Public.¹²⁹ Thus, a Magistrate declined to grant several journalists from the *Daily Monitor* access to the oil exploration agreements signed by the government.

Article 41 represents a radical reformulation of the notion of information, and guarantees that the Public have access to it.¹³⁰ In the case of *Green Watch (U) Ltd v. A.G and Anor.*,¹³¹ the petitioner claimed that it had a right of access to the Power Purchase Agreement (PPA) pertaining to the proposed construction of a hydro-electric power dam at Bujagali Falls on the River Nile. The respondents raised a number of objections regarding the appropriateness of the application and argued that it had not infringed the right since it was not a party to the PPA. The Court was therefore tasked to determine whether the PPA was a 'public document' within the meaning of Section 72 of the Evidence Act. The Court described the elements of the right to information, holding that the right under Article 41 did not only envisage possession of the required information. Therefore, the fact that the state was not a party to the PPA did not excuse it from having to avail the information sought. On this point Justice Egonda-Ntende stated: "Article 41(1) of the constitution refers to information in the possession of the state The state does not have to be a party to the agreement." In *Tinyefuza's* case, Mulenga JSC noted that where the state contended that the information sought fell within the ambit of the restriction in Article 41(1), it had the burden to prove that the disclosure of such information was likely to prejudice the security or sovereignty of the state.

In *Zachary Olum and Anor v. Attorney General*,¹³² Court was concerned with the discretion given to the speaker of Parliament to grant or reject leave to a member of parliament to use proceedings of the house in evidence before a Court of law under Section 15 of the National Assembly (Powers and Privileges) Act. Justice Mpagi Bahigeine considered S.15 to be prescribing a special procedure for accessing information in the possession of Parliament which was inconsistent with Article 41 of the Constitution. This decision contrasted with the earlier case of *Jim Muhwezi Katugugu v. Patrick Kiggundu & Anor.*,¹³³ in which the Constitutional Court misapplied the provisions of Article 41, instead relying on the National Assembly (Powers and Privileges) Act (which restricted access) despite it being clearly subordinate to the Constitution. The case of *Attorney General v. Chief Editor, Monitor Publications Ltd., & Anor.*,¹³⁴ upheld the idea that government could not prevent the publication of what it regarded as sensitive matter on the grounds of privacy or sovereignty, even though the judge ultimately granted an injunction against the paper. The Supreme Court case of

129 See Human Rights Network – Uganda (2005), *Analysis of the Access to Information Act*, HURINET – U, Kampala.

130 See, for example *Attorney General v. Major General David Tinyefuza* (Const. App. No.1/1997) (SC); *Zachary Olum & Anor. v. Attorney General*, Const. Case No. 7/1999 (CC), and *Greenwatch (U) Ltd. V. Attorney General*, HCCS 139/2001.

131 Ibid.

132 Constitutional Petition No. 6 of 1999.

133 Const. Cause No.4/1998.

134 Misc. App. No. 675/2003 (HC).

*Paul K. Ssemwogerere & Anor. v. The Attorney General*¹³⁵ reiterated the same view.¹³⁶ In sum, whether or not the provision is given full expression is often dependent on what particular information is at stake. Furthermore, it is unclear whether government can comply with an order of court to disclose particular information that it originally declined to reveal, which raises questions about the implementation of the provisions of the Bill of Rights.

Strengths, weaknesses and recommendations for improvement.

- ✿ The article guarantees the right of access to information and tasks the state to provide the information in its possession to the citizens unless the release of such information may prejudice the security or sovereignty of the state.

However:

- ✿ Passage of the enabling legislation in 2005 has not brought about much added value, as has been demonstrated with the struggles over government's refusal to release the production sharing and other agreements concerning oil.
- ✿ Courts—especially in the lower levels of the judicial hierarchy—still appear reluctant to accede to requests for more access, and have generally adopted a posture that gives priority to obscurity, rather than transparency.
- ✿ There is a need both for enhanced sensitization over what increased access actually entails, and to more freedom of information type actions that compel the courts to confront the issue more frequently; familiarity in this instance would help breed less resistance.

2.21 Fair Treatment in Administrative Decisions (Art.42)

Any person appearing before any administrative official or body has a right to be treated justly and has a right to apply to a Court of law in respect of any administrative decision taken against him or her. The provisions of Article 42 are in line with Article 28 that secures a person the right to a fair hearing, and are crucial for persons appearing before administrative officials or bodies.

- ✿ The article ensures that administrative officials and bodies execute their duties diligently and that there is no bias or discrimination between individuals based on any grounds.
- ✿ It also affords individuals another chance to present their case for determination in case they feel that the decision that has been taken against them has not been reached in a just and fair process.

¹³⁵ Supreme Court Const. Appeal No.1 of 2000.

¹³⁶ See judgment of Justice Kanyeihamba at 21-22.

Although the provision is fairly clear, it is questionable whether it is broadly known by the population at large and as such whether it is utilized in the manner that it should be.

ADMINISTRATIVE AND ACCOUNTABILITY PROVISIONS

Aside from the substantive rights we have reviewed in the preceding section of this study, there are several provisions of an administrative or accountability nature which have an impact on the realization and enforceability of the Chapter Four provisions. These are important because in many respects, the human rights and fundamental freedoms covered in this chapter are general and abstract in nature. It is how they are translated into tangible entitlements for the citizenry that is ultimately crucial to the achievement of this goal. In this respect, this part of the study considers the issue of limitations and the question of derogation from the guaranteed rights. It also considers what the Constitution says about additional rights and states of emergency, and concludes with a look at the issue of enforcement.

2.22 General Limitation (Art.43)

Very few rights are absolute, and International Law has been very clear in this regard. At the same time, while limitations can be imposed on the exercise of human rights—in order to protect other individuals or society at large—caution needs to be exercised about the way in which such limitations are designed. The danger that always lurks over the enforcement of human rights is that the limitation could in effect take away the right ostensibly guaranteed. The 1967 Constitution was notorious for the limitations—otherwise known as claw-back clauses—that effectively undermined or even eliminated the right that was supposedly guaranteed. The same goal could be achieved by subjectively emphasizing the public interest when what is at stake is private gain or malfeasance, or the protection of other peoples' rights as a cover to acts of repression or censorship. Indeed, despite the attempt to tighten up recourse to 'public interest' excuses in the violation of human rights, the provision is often cited by the authorities to wrongly curtail people's enjoyment of rights such as rights of assembly, movement, and peaceful demonstration especially where the issue at hand relates to discontentment over political repression or social services delivery.

Given Uganda's historical experience, Article 43 represents a significant advance, especially in that it stipulates a general limitation on fundamental and other human rights and freedoms, while leaving most rights free of the so-called claw-back clauses. The article provides that in the enjoyment of the rights and freedoms prescribed in Chapter Four of the Constitution, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. Because the concept of 'public interest' had been so notoriously abused under previous regimes, Article 43(2) specifically states that public interest shall not permit political persecution, detention without

trial, and any limitation ‘...beyond what is acceptable and demonstrably justifiable in a free and democratic society.’ The article serves to limit and guide individuals while exercising their rights to always be mindful of the rights of others. Important to note from the analysis of this provision is that where there is a public interest at stake, then the rights of an individual person may be subjugated in order for the interests of the public to prevail.

This assertion however raises questions as to whether this will still be the case where the impugned right is one of the non-derogable rights laid down in Article 44 of the Constitution. It is important to note that the drafters of the Constitution were mindful of what may be the result of having the terminology of public interest open for purposes of the limitation under Article 43(1). They thus regulated the circumstances in which the public interest may limit the individual’s rights. It is trite to note at this point that Article 43(1)(c) has been the most contested with regard to this general limitation. Authorities have stated that any such limitation of the enjoyment of rights beyond what is reasonably justifiable in a free and democratic society or what is provided in the Constitution shall not suffice. This particular point was well exemplified in the *Muwanga Kivumbi* case which challenged the legality of Section 32 of the Police Act. While declaring that the contested section of the Police Act was unlawful, the Court stated that this was so partly because such a limitation was not reasonably justifiable in a free and democratic society.

2.23 Derogation (Art.44)

Article 44 prohibits the derogation of a select class of human rights and freedoms, and in this respect is a new provision in Ugandan constitutional history.¹³⁷ The wording of the provision is absolute in that it states, ‘...notwithstanding anything in the constitution there shall be no derogation from the enjoyment of the following rights and freedoms, namely; (a) freedom from torture and cruel, inhuman or degrading treatment or punishment. This provision not only restates but also strengthens Article 24 of the Constitution. The essence of this provision is clearly stipulated that under no circumstance can torture and cruel or inhuman treatment be done lawfully. Clause (b) of the article covers freedom from slavery and servitude, which is meant to strengthen and re-assert the contents of Article 25(1) of the Constitution. Clause (c) is concerned with the right to fair hearing, a provision which basically restates and strengthens Article 28 of the Constitution, while Clause (d) is concerned with the right to an order of *habeas corpus*.

- ✿ This Article further buttresses the rights guaranteed under Article 23(9) which states that the right to an order of *habeas corpus* shall be inviolable and shall not be suspended under any circumstances.
- ✿ Article 44 is important because of the emphasis it places on particular human rights and freedoms clearly prohibiting their violation.

¹³⁷ See Egonda-Ntende, *op.cit.*, at 202.

- ❁ Despite the categorical nature of the phrasing in the article, there have certainly been problems in terms of implementation. Different forms of torture and cruel, inhuman and degrading treatment abound, and the record of the state in making amends for these actions is abysmal, even in the face of decisions by courts and the Uganda Human Rights Commission finding culpability.

In light of our earlier discussion about the Death Penalty, adding the right to life to the non-derogable rights would seal the constitutional bar on using the penalty in the courts of law, translating the *de facto* situation of life imprisonment as the maximum sentence in Ugandan courts into a *de jure* prescription.

2.24 Additional Rights (Art.45)

Article 45 addresses the issue of human rights and freedoms additional to other rights. The provision simply states that the rights, duties and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in Chapter Four shall not be regarded as excluding others not specifically mentioned. In essence, the Article mandates that the Bill of Rights should not be regarded as a conclusive statement on the rights and freedoms to be enjoyed by the individual. In short, there are other rights that the individual is entitled to which are not specifically referred to in the Bill of Rights and it is necessary to consider the Bill as a foundation to be built on rather than a complete edifice that requires no modification. Article 45 is crucial in the enforcement of people's rights as it guarantees the individual all the rights they are entitled to regardless of whether or not they are mentioned in the Constitution. This comports with the declaration in Article 20(1) to the effect that the fundamental rights and freedoms of the individual are inherent and not granted by the state.

- ❁ Article 45 has been widely used by the courts in Uganda in the interpretation of the Constitution, especially by the Constitutional Court when exercising its interpretive mandate under Article 137.
- ❁ This Article has also been used in reading new rights (i.e. those not expressly stated in the Constitution) into the existing ones and widening the scope and meaning of the already stated rights. In this way it has been used to circumvent the provisions of the Judicature Act and the Ratification of Treaties Act where courts are only mandated to administer justice using among others, Ugandan laws that are clearly written down and enshrined in the collected volumes of law.
- ❁ Using this provision some judges have interpreted the human rights in the Constitution in order to bring them into conformity with various International treaties and conventions even when they have not yet been ratified and domesticated.

Recourse to Article 45 is of course necessary because the Bill of Rights is not a complete and final statement of all possible rights that may exist. Indeed, the article has proven exceedingly helpful to courts when they've found themselves stuck in terms of finding an appropriate remedy that is not provided for within the Constitution. At the same time, it is a rather circuitous route to justice.

Given that Uganda is a dualist rather than a monist state, some commentators have argued that it undermines the authority of the sovereign organs of the state such as Parliament and the Executive.

2.25 State of Emergency (Arts.46-49)

Articles 46-49 provide guidance on how human rights and freedoms will be handled during a state of emergency. It should be noted that when a country undergoes a state of emergency, numerous things change and some of the rights of the individual such as movement are subject to restriction or outright curtailment. Despite the numerous insurgencies and several natural disasters, a state of emergency has not been declared in Uganda for the last two decades. Perhaps this is in recognition of the fact that declaration of a state of emergency has far reaching effects especially on the rights of the individual, but also on the flexibility of the government to carry on activities that it would otherwise have done during a peaceful period.

Article 46 provides guidance on the effects of laws enacted for a state of emergency, with Clause 1 thereof stating that an Act of Parliament shall not be taken to contravene the rights and freedoms guaranteed if that Act guarantees the taking of measures that are reasonably justifiable for dealing with a state of emergency. In essence, this provision states that a violation or restriction of some rights and freedoms of the individual if done or authorized by an Act of Parliament while putting in place reasonably justifiable measures to deal with a state of emergency, such Act shall not be taken to contravene a human rights provision. Article 46(2) is to the effect that the provision of any enactment which is not an Act of Parliament dealing with a state of emergency shall only apply to that part of Uganda where the emergency exists. Article 46(3) is to the effect that an Act of Parliament authorized by Article 46(1) may make provision for the detention of persons where this is necessary for the purposes of dealing with emergency.

Article 47 provides the conditions that are to apply when a person is detained under emergency laws i.e. such a person shall be furnished with a statement in writing specifying the grounds upon which he/she is restricted or detained within 24 hours from the date of detention, the spouse or next of kin of the detained person shall be informed within 72 hours after the commencement of the detention or restriction and such a person should be allowed reasonable access. This is in line with Article 23 (5) of the Constitution. Article 47 (c) states those 30 days after the commencement of detention or restriction, a notification shall be published in the gazette and in the media showing why he/she was so detained or restricted and under what law it was done. The above provisions are meant to avoid arbitrary arrests and detentions without lawful purposes most of which had characterized our Ugandan history for a very long time.

The Uganda Human Rights Commission is given power under Article 48 to review the orders for the detention or restriction of a person detained under Article 47. Such person must be afforded a lawyer of his or her own choice. The Commission is mandated to review a case and the grounds under which such person was detained or restricted. The commission may also order the release of that person or uphold the grounds of the restriction or detention. It should be noted that this is a very

Article 50 is very important insofar as it not only guarantees the individual the right to apply to a competent court so as to seek recourse for the violation of the individual's rights but it also empowers other persons or organizations to pursue a case of human rights violation in the interest of another person or group of persons.

important safe guard for individuals from political arrest and persecution in a situation of emergency.

Article 49 states that there shall be a report to Parliament every month by the relevant minister clearly showing the number of people who have been restricted or detained under the emergency and the actions taken in compliance with the findings of the Human Rights Commission. This serves to ensure that the findings of the Commission are worked upon. The relevant minister also has to present a report to parliament and publish in the official gazette and the media on a monthly basis the names and addresses of the persons restricted or detained, the number of cases reviewed by the Commission, and the actions taken in compliance with its findings. Most important is Article 49(3) which is to the effect that once the state of emergency is over, all persons in detention or custody as a result of the emergency declaration are to be released immediately, unless they are charged with criminal offences in a court of law.

An emergency has never been declared under the 1995 Constitution. Consequently, the provisions discussed above have not had the opportunity to be tested. Perhaps this is because of the history of such actions in the country, particularly the emergency which followed the 1966 disturbances, and the subsequent overthrow of the independence constitution. Emergencies—political or natural—are not good for politics.. This provides the most plausible explanation why the government stubbornly refused to declare an emergency throughout the twenty years of war in Northern Uganda or in respect of any of the situations of serious disruption to the conduct of daily existence that have hit the country since 1995. The flip side to the non-declaration of an emergency is that the government is exempted from meeting the stringent reporting and review provisions that are outlined in the various articles governing the same. Why declare an emergency when you can impose emergency-like restrictions without meeting the legal obligations entailed by an official declaration?

2.26 Enforcement (Art.50)

Article 50 provides that any person who claims that a fundamental or other right has been infringed or threatened with infringement is entitled to apply to a competent court for redress which may include compensation. The Article also empowers a person or an organization to take action against the violation of another person's or group's human rights, and allows a person aggrieved by a decision of any court to appeal to the appropriate

court. Clause 4 of Article 50 empowers Parliament to make such laws as are necessary for the enforcement of rights and freedoms under Chapter Four. Article 50 is very important insofar as it not only guarantees the individual the right to apply to a competent court so as to seek recourse for the violation of the individual's rights but it also empowers other persons or organizations to pursue a case of human rights violation in the interest of another person or group of persons. This is what has been described as a 'busy-body' provision in that it does away with the restrictive rules of *locus standi* which restricts the legal capacity to sue in court only to an individual/group who can show a direct interest in the matter.

Article 50 is particularly important because it directly operationalizes and enforces the rights and freedoms of the individual enshrined in Chapter Four of the Constitution in as far as it provides for the right to apply to court in case of any violation or threat to the right and it also empowers courts to give the appropriate redress including awarding compensation for such violation. In other words it provides a right of access to justice in respect of human rights. By empowering other persons to take action in favor of another or of a given group of persons this enables even those who are not in position to take an action or those who may be unaware of their rights to also benefit from the operation of the Bill of Rights.

Since the enactment of the 1995 Constitution, human rights and women's rights organizations have invoked Article 50 while petitioning court to make declarations most of which favor other marginalized groups of people. Article 50(3) gives individuals the right to appeal any decision of the court to the appropriate appellate court, be in line with the provisions of Articles 28 and 42 of the Constitution.

2.27 Uganda Human Rights Commission (Arts.51-58)

Article 51 of the Constitution creates the Uganda Human Rights Commission and states that the Commission shall be composed of a chairperson and not less than three other persons appointed by the President with the approval of Parliament. The chairperson of the Commission shall be the judge of high court or a person qualified to hold that office. The chairperson and members of the commission must be persons of high moral character and proven integrity who serve for six years and be eligible for reappointment.

Article 52 lays down the functions of the Commission, ranging from investigations, visiting jails, making recommendations to Parliament, to overseeing programmes intended to inculcate in the citizens of Uganda awareness of their civic responsibilities and appreciation of their rights and obligations. The Commission also has to publish a periodic report on its findings and submit an annual report to Parliament on the state of human rights and freedoms in the country. In the performance of its functions, the Commission has to establish operational guidelines and rules of procedure, request the assistance of any department or bureau in the performance of its functions and also observe the rules of natural justice. Article 52 provides the main engine for the operations of the Commission in protecting and defending people's rights.

The most deafening omission from the 1995 Constitution is the broad range of economic, social and cultural rights enshrined in the International Covenant of Economic, Social and Cultural Rights (ICESCR), to which Uganda has been party since 1987

Article 53 states the powers of the Commission, which range from issuing summons, committing persons for contempt of its orders, to requiring the disclosure of any information important to its investigations. Article 53(4) however, states that the Commission shall not investigate any matter which is pending before a court or judicial tribunal, a matter involving the relations or dealings between government and government of any foreign state or international organization, a matter relating to the exercise of the prerogative of mercy. Although this provision gives the Commission a wide range of powers all of which are very essential for the execution of its functions under Article 52, the provision also limits the powers of the commission not to investigate certain issues. Article 54 states that the commission shall be independent in the exercise of its duties and shall not be subject to any person's control. This is a very important provision because impartiality must be part and partial of the diligent execution of the Commission's functions. Article 55 states that the expenses of the commission shall be covered from the consolidated fund. Adequate funds are a prerequisite for the diligent performance of the Commission's work however, for a long time the commission has attributed its limitations, to among others, limited funding. Article 56 states that while removing a Commissioner from office the provisions of the Constitution relating to the removal of a judge of the High Court are to apply with the necessary modifications. Article 57 states that the appointment of officers and other employees of the commission shall be made by the commission in consultation with the public service commission.

Article 58 states that Parliament is to make laws to regulate and facilitate the performance of the functions of the Commission, which it has done.

Strengths, weaknesses and recommendations

Since its establishment, the UHRC has been a prominent actor on the human rights scene in the country. It has been particularly helpful in shining a spotlight on the most notorious institutions of government involved in human rights violations, as well as in cataloguing and reporting on those violations. In this respect, the Commission has played an important role in the dissemination of human rights ideals and in improving the enforcement of the Bill of Rights provisions of the Constitution.

However, the Commission faces a number of problems, among them the following:

- ✿ Some agencies of the state continue to refuse full access to those facilities that are notorious for the commission of human rights abuses, such as the so-called ‘safe houses’ as well as some military establishments.
- ✿ Although the Commission regularly makes decisions regarding acts of violation (such as torture) by state agents, there is very little follow-up and the victims of such violations are rarely compensated.
- ✿ While the Commission regularly submits reports to Parliament, questions have been raised about the extent to which Parliament takes up and implements the recommendations of the Commission, an omission that will hopefully be addressed with the recent establishment of a standing Parliamentary committee on Human Rights.

3.0 The Case of Economic, Social and Cultural Rights

The most deafening omission from the 1995 Constitution is the broad range of economic, social and cultural rights enshrined in the International Covenant of Economic, Social and Cultural Rights (ICESCR), to which Uganda has been party since 1987 and which instrument has given states around the world great inspiration for their domestic constitutional and legal regimes. Justifying why these rights were important in the post-apartheid South African context, Justice Albie Sachs has stated that they were necessary to advance ‘... the claims of the dispossessed.’¹³⁸ Expounding on why he thought such rights needed to be included in the Bill of Rights and made enforceable, Sachs argued:

The problem was not to simply prevent continuing or new discrimination, but to ensure that everyone was entitled to at least the minimum decencies of life. Equal protection coupled with affirmative action would greatly assist the emerging black middle class. But it would be far less helpful for the desperately poor... some form of broad social advancement was required.¹³⁹

Sachs contention is that recognizing only one category of rights leads to the bifurcation of human existence. We are not only thinking and speaking beings. We also eat, we need to stay healthy, and without water, we have no life. And unless such basics of human existence are made enforceable, our living conditions are not complete. Freedom of speech is an essential right that has become well recognized. But without food one is unable to speak. Put another way, the two categories of rights—civil and political, and economic, social and cultural—are intimately linked. Indeed, it is rather odd that we so easily acknowledge these links when we consider the rights of children or PWDs, but balk at their application to the broader population.

In the case of Uganda, the absence of many of the basic economic and social rights has led to a circuitous and torturous approach to their implementation and enforcement. In the first instance, human rights activists are reluctant to bring these kinds of suits to the courts. Secondly, one has to undertake a ‘careful scrutiny’ of a variety of human rights provisions, and also to read them into rights such as the right to life, in addition to seeking recourse in regional and international

¹³⁸ Albie Sachs, *The Strange Alchemy of Life and Law*, Oxford University Press, New York, 2009 at 166.

¹³⁹ *Ibid.*, 169-170.

human rights instruments.¹⁴⁰ As a final option recourse can be made to Article 45 which states that the rights mentioned in Chapter Four of the Constitution are not exclusive, allowing courts to creatively look elsewhere in a bid to secure the necessary legal protections in instances where Ugandan Human Rights law is silent.¹⁴¹ But if you have judges not schooled in International Law, or who look askance at applying Comparative Jurisprudence, you only have your domestic legislation to look to. And if your Constitution says that economic, social and cultural rights are not justiciable, you are unlikely to pay them much heed, or alternatively to dismiss such cases without much scruple.

What are the crucial economic, social and cultural rights that the 1995 Constitution leaves out? Among those that are enshrined in international instruments are the right to the highest standard of health, the right to accessible and adequate housing or shelter, reasonable standards of sanitation, freedom from hunger and the right to adequate food of acceptable quality; clean and safe water in adequate quantities and the right to social security. Other rights of the same genre include the rights of consumers, which within a context of rapid and uncensored globalization is of particular importance to consuming society.

Some economic and social rights were relegated to the National Objectives and Directive Principles of State Policy. It is unnecessary to review the politics of how these rights ended up in this section of the instrument, but some analysis needs to be given on the effect of doing so. Insofar as the enforcement of human rights is concerned, the main focus of attention is the rights in Chapter Four which are readily regarded as justiciable, or subject to review and enforcement by courts of law. On the other hand, it has been argued that the National Objectives and Directive Principles of State Policy are only of salutary value and cannot form the basis of a court action, in the same was as, for example, an action rooted in Article 29 (on freedom of expression) may easily be.

The net impact of the relegation of what are crucial economic, social and cultural rights to the National Objectives is that it has been difficult to sustain actions such as those contending a violation of the right to health. Unlike other constitutions such as the South African one, or unlike the right to education which is enshrined in Chapter Four of the 1995 Constitution, the rights omitted from the Bill of Rights and only cited in the National Objectives face an additional hurdle of enforcement. While courts will accept without question that the Right to Education can be the subject of court review and enforcement—irrespective of how poorly they may adjudicate it—the same cannot be said to be the case with respect to the right to Social Security, for example. The implication of this dichotomy is twofold. Either these rights need to be moved from the National Objectives into the Bill of Rights, or more effort needs to be put into ensuring that the courts actively begin to give effect to them through judicial activism. The first of these reforms is unlikely to succeed for reasons that we will explore in more detail subsequently. In relation to encouraging the Judiciary to become more active, the approach has to be very well thought out.

140 See Ben Twinomugisha, 'Barriers to the Protection of Rural Women's Right to Maternal Health Care in Uganda,' *East African Journal of Peace & Human Rights* 11/1 at 74-75 (2005).

141 Indeed, the courts of law in Uganda have invoked this provision where necessary.

Although the *CEHURD* case was unsuccessful, it helps us point the way towards a reformist agenda with respect to the approach of the courts to the application of this category of rights. In the first instance, it is necessary to help courts at all levels develop a framework within which to evaluate government policy on economic, social and cultural rights, say for example, on health care and the provision of medical services, or in relation to the provision of adequate housing. Second, is to consider the most appropriate remedies that a court can order, given the different nature of the rights under contention. The usual remedies given in cases involving civil and political rights might not be the most appropriate in the case of economic, social and cultural rights. Finally—and this was a central concern in the *CEHURD* decision—the courts need to find the most appropriate arguments to address the Separation of Powers concerns that would invariably be raised, i.e. that the courts are interfering with legislative work and executive policy making and implementation.

Ultimately, there needs to be critical engagement with the Judiciary and advocates by way of continuing legal education in order to ensure that the approach to the enforcement of economic, social and cultural rights changes.¹⁴²

It goes without saying, however, that without an activist and deliberate strategy of both taking the courts on board and enlightening them about these concerns, and bringing more cases that touch on this category of rights, the picture with respect to the enforcement of economic, social and cultural rights will remain bleak. In other words, short of a constitutional amendment, there is a need to consider different strategies to achieve the realization and enforcement of this category of rights. We return to a consideration of these points after critically looking at the National Objectives section of the Constitution.

Recommendations

Given the near-total absence of economic, social and cultural rights from the Bill of Rights, there is a need to do several things including the following:

- ✿ Drawing from the ICESCR, and more progressive constitutions such as that of South Africa and Kenya, there is a need to include this category of rights within the Bill of Rights.
- ✿ In the alternative, courts need to be persuaded that the economic, social and cultural rights which can be found in the National Objectives and Directive Principles of State Policy are now binding because of Article 8A.
- ✿ Law School curricula need to be reformed in order for law graduates to become more acquainted with this category of rights. Similarly, the Judicial Training Institute should incorporate more courses on these subjects to demonstrate that this category of rights is indeed justiciable.

¹⁴² Also see Christopher Mbazira, *Public Interest Litigation and Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights*, HURIPEC Working Paper No.24 (February, 2009).

4.0 The National Objectives and Directive Principles of State Policy

Unlike the 1962 and 1967 constitutions, the 1995 Constitution contains a preambular section entitled the National Objectives and Directive Principles of State Policy. Deriving their origin in the first instance from Ireland and India, several African countries, including Nigeria, Ghana and Namibia have adopted them as guiding frameworks for a mode of governance that is arguably more organically linked to the needs of the people. In the words of Justice Odoki:

National Objectives and Directive Principles are meant to serve several purposes namely, to make the state more responsive to social needs; to organically link the state and society; to define the role of society; and to identify the duties of the state and the purposes for which power is to be exercised.¹⁴³

Uganda's chapter on National Objectives contains twenty-nine sections, ranging from political objectives to the duties of a citizen. Of these, nine fall under the section on 'Protection and Promotion of Fundamental and other Human Rights and Freedoms,' although several of the others, such as the recognition of the role of women in society or the recognition of the dignity of persons with disabilities fall within the same framework of human rights concerns. A number of the objectives speak to what can best be described as economic and social rights which do not appear in Chapter Four, including the objectives on Medical Services (XX), Clean and Safe Water (XXI), and Food Security and Nutrition (XXII).

The key question that arises with respect to the National Objectives is their legal status and whether or not they are justiciable. Justiciability simply means making the rights in question the subject of judicial review and enforcement, the argument being that some rights are readily (and obviously) enforceable while others aren't. Views on this matter are divided. The courts in Nigeria have held that they are not,¹⁴⁴ while Indian courts have creatively used them in order to make them enforceable. In the case of Nigeria the argument for their non-justiciability is made stronger by Section 6(6) of the 1999 Constitution, which explicitly excludes them from judicial scrutiny and interpretation.¹⁴⁵

The members of the Constitutional (Odoki) Commission and several of the delegates to the subsequent Constituent (Wapakhabulo) Assembly that debated the draft of the 1995 Constitution were largely of the view that they were not enforceable and should serve as mere guidelines to state action.¹⁴⁶ Perhaps the most articulated perspective on the guidelines came from Odoki in his review of the process of the making of the 1995 Constitution, where he describes them as...non-enforceable policy directives which are nevertheless fundamental in the governance of the country. They differ from

¹⁴³ Odoki, *op.cit.*, at 299.

¹⁴⁴ See *Archbishop Olubunmi Okogie v. Attorney General of Lagos State* (1981) 2 NCLR 337.

¹⁴⁵ See also Olubayo Oluduro, 'Environmental Rights: A Case Study of the 1999 Constitution of the Federal Republic of Nigeria,' *Malawi Law Journal*, 4/2 (2010), at 256-257.

¹⁴⁶ For a short history of these developments, see J. Oloka-Onyango, *Economic and Social Human Rights in the Aftermath of Uganda's Fourth Constitution: A Critical Reconceptualization*, Working Paper No. 88/2004 at 12-21.

fundamental rights which are enforceable and justiciable. Directive principles have been referred to as ‘aspirational rights.’ They have also been described as ‘The conscience of the constitution.’ It seems to me that although these principles may not be legally enforceable in Uganda, they have moral and political force and significance in guiding governmental actions and programmes and in holding government accountable.¹⁴⁷

Of course the problem with this view is that it means that several economic, social and cultural rights which did not make their way into the Bill of Rights (Chapter Four) of the Constitution are not enforceable. This would include the right to food, to adequate shelter and to social security, all of which are internationally-recognized economic and social rights.

Fortunately, the history of the judicial response to the National Objectives has been somewhat less cavalier. Starting with *Tinyefuza*’s case, the courts have stated that the National Objectives are part of the constitution and as such should be taken into account when interpreting the Constitution.¹⁴⁸

5.0 Articles 1, 2, 3, 4 and 8A

The first four articles of the 1995 Constitution represent a mix between the old and the new. Article 1, 3 and 4 are all new, while Article 2 which declares the Constitution supreme represents a development on the earlier formulation in the 1962 and 1967 instruments. By highlighting the role of the people and conferring in them ‘All power,’ Article 1 gives expression to the key link between the governors and the governed that was lacking in all previous constitutional enactments, reinforcing the rights-based approach of the instrument. Needless to say, the exercise of the power conferred in Article 1 is tempered by an important limitation that is often opportunistically overlooked in the interest of short-term political gain: ‘... who shall exercise their power in accordance with the Constitution.’

Article 2 is more explicit than its predecessors of 1962 and 1967 in proclaiming the supremacy of the Constitution. The 1995 Constitution added the crucial phrase, ‘... and shall have binding force on all authorities and persons throughout Uganda.’ The effect of this provision—as several important decisions have pointed out—is to finally subordinate every individual and institution in the country to the full authority of the Constitution. In the words of the Constitutional Court, “There is no dispute as to the supremacy of the Constitution of Uganda, 1995 (Article 2). Everybody, including institutions and organs of Government are bound and must respect it.”¹⁴⁹ In this way, it marks some distance concerning the argument of supreme especially as against the argument that Parliament is supreme, which is often made when the legislators are making law. The fact is that when there is a written constitution, parliament is only supreme in the law-making process, but all laws must be made in conformity with the Constitution. This is a crucial support for the enforcement and protection of fundamental human rights.

¹⁴⁷ Odoki, *op.cit.* at 299 and 301.

¹⁴⁸ *Op.cit.*, note 17.

¹⁴⁹ See *Saverino Twinobusingye v. Attorney General*, Const. Pet. No. 47 of 2011.

Article 1 is crucial to the improved observance of human rights because it reiterates the people-centred character of the 1995 Constitution. As such, it provides a strong foundation for the argument that all actions by the State and its agencies must protect the people and guarantee the realization of human rights. Unfortunately, the article is often misquoted, particularly through the omission of the words, ‘...who shall exercise their sovereignty in accordance with this Constitution.’ The omission—which is often made by politicians—is intended to reduce or minimize the overall binding force of the Constitution and to assert that ‘the people’ (read ‘politicians’) can do anything, even that which the Constitution clearly prohibits.

Article 3 represents an attempt to bring an end to the extra-constitutional taking of power, and to mark distance with the infamous decision in the case of *ex parte Matovu* which effectively conferred legal authority on the *coup d’état*. It prohibits any taking of power outside the provisions of the Constitution, declares such acts as treasonous, and retains the force of the Constitution even if the government has been overthrown by force of arms. Under clause 4, it also gives Ugandan citizens the right and duty to defend the Constitution. Several attempts have been made to invoke the provisions of Article 3, most without much success because the courts have held it not applicable to the particular cases filed which have not involved an illegal capture of state power. The most successful recourse to Article 3 has been with respect to clause 4. Thus in the *FIDA-U* case, the judges of the Constitutional Court ascribed a wider meaning to the clause, asserting that the right and duty to defend the Constitution was to be exercised *at all times*, and not exclusively if or when the Constitution had been overthrown.¹⁵⁰

Article 4 is on public awareness of the Constitution and is unfortunately, one of the least implemented of the Chapter One provisions in the Constitution. It is nevertheless of crucial importance to the enhanced protection and implementation of human rights for several reasons. First of all, it provides that the state must translate the Constitution and disseminate it as widely as possible. Secondly, it provides for the widespread teaching of the Constitution and for regular media programs on the same. Again, the value of spreading the word about the instrument cannot be over-emphasized. Until both the broad message and the specific detail of the Constitution have become internalized by all Ugandans, it will remain an instrument of only limited value.

Finally, Article 8A—surprisingly introduced with the constitutional amendments of 2005—is entitled ‘National Interest’ and simply states that Uganda ‘... shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.’ The origins of this clause are not very clear especially given that paragraph I(i) of the National Objectives employs a similar phrase. Nevertheless, it is an extremely important provision, because it in effect makes the National Objectives binding. Although paragraph I(i) is couched in similar language, it is outside the main body of the Constitution. Article 8A is part of the main body and hence deals a death-blow to the argument about the justiciability of the Objectives. While Clause 2 of 8A specifies that Parliament is to make the relevant laws in order to give full effect to

¹⁵⁰ See judgement of Justice Twinomujuni at 13, confirmed in the case of *Fox Odoi_Oywelowo & Anor. v. Attorney General*, Const. Pet. No. 8/2003.

Clause 1, this does not detract from the binding force now conferred on the provision. The task for human rights activists is thus twofold; first, it is to flood the courts with cases that invoke the National Objectives as binding principles, while the second is to urge Parliament to enact the necessary legislation envisaged by Clause 2. Needless to say, the latter is not necessarily contingent on the former.

6.0 Other Relevant Provisions

While the Bill of Rights forms the central platform on which human rights and freedoms in the 1995 Constitution is built, numerous other sections of the instrument have implications for their enhanced protection. In this section of the study we provide a broad survey of those provisions, and particularly take a look at the three important institutions of State (the Legislature, Executive, and the Judiciary) that have a key role in ensuring that human rights and freedoms are given full expression. Nevertheless, the section begins with a look at the Right to Vote.

6.1 Chapter V (Representation of the People)

Given the historical experience with elections and the issue of representation, it is of no surprise that the 1995 Constitution—unlike its predecessors—devotes a whole chapter to the question of representation. Indeed, neither the 1962 or 1967 instruments expressly speak about the right to vote. In that regard Article 59 is quite revolutionary, although fairly straight-forward in guaranteeing the right to vote and also describing it as a duty of every citizen of above eighteen years to register as a voter.¹⁵¹ The actual exercise of the right to vote has nevertheless been dogged by the delegation of the power to make laws over the process to Parliament *via* Article 59(4). The laws which a Parliament dominated by the ruling party make are manifestly partisan, lop-sided and discriminatory. These laws are compounded by manipulation of the process of balloting, which has involved a variety of electoral malpractices and outright criminal offences. As a consequence, the courts have been filled with election petitions in the aftermath of a national presidential and parliamentary vote. The number of successful petitions exposing the serious irregularities and deficiencies in the polls clearly demonstrates that there is a huge problem with this issue.

With respect to the disputes over the parliamentary poll, the courts have in general acquitted themselves fairly well, although some decisions have

The laws which a Parliament dominated by the ruling party make are manifestly partisan, lop-sided and discriminatory. These laws are compounded by manipulation of the process of balloting, which has involved a variety of electoral malpractices and outright criminal offences. As a consequence, the courts have been filled with election petitions in the aftermath of a national presidential and parliamentary vote.

¹⁵¹ Article 59(2).

come up for serious criticism.¹⁵² Concerning the two petitions over presidential elections, in both instances the Supreme Court has ruled in favour of the incumbent, President Museveni, although with serious criticisms of the process and its management by the EC.¹⁵³ Controversy has arisen as to the degree of malpractice and irregularity that is permissible in a presidential election. The problem is that the Presidential Elections Act favoured a quantitative test which raises the burden of proof exceptionally high and correspondingly limits the exercise of the courts accountability function.¹⁵⁴ Of particular concern is whether the irregularities and malpractices in such an election affected the result in 'a substantial manner' so as to justify nullification.¹⁵⁵ Article 104 also sets impossibly short periods within which a petition must be lodged and correspondingly within which the court must dispose of the same. This places the party with fewer resources—usually the petitioner—at a disadvantage, especially *vis á vis* an incumbent President. Justice Kanyeihamba has also raised queries as to the method of the delivery of a ruling in such a petition as provided by Article 104(3).

It is trite to point out that the right to vote critically depends both on the manner in which the voting process is organized and on who organizes it. And in the case of the 1995 Constitution, the provisions on the Electoral Commission (EC) raise serious questions as to whether the present formulation can actually deliver a free, fair and genuine representation of the will of the people as to who should be their elected representatives in parliament and the presidency. Certainly, there is a strong need for constitutional reform in this regard. Articles 60 through 67 govern the functioning of the EC and raise serious concerns as to their impact on the right to vote. In the first instance, all the members of the EC are appointed by the President.¹⁵⁶ Secondly, the formulation used in the 1995 Constitution reflects the situation under the monolithic Movement system of government and is not reflective of the transition to a multi-party political dispensation. Thirdly, unlike the Uganda Human Rights Commission, the Inspectorate of Government, the various courts of the Judiciary and the many other public bodies of a fiduciary nature created by the Constitution, the chair of the EC does not have any special qualifications. Furthermore, the limitations on who can hold office covered in Article 60(5) are too lax to fully insulate the body from the many pressures of political life involved in the supervision of an issue as fraught with tension as an election. Finally, it is the President who has the power to remove any member of the Commission without recourse to any countervailing force as is the case with several other constitutional bodies and with the Judiciary. Thus, unlike justices of the courts of the Judiciary, or a commissioner on the Human Rights Commission, a member of the EC can be removed at the mere whim of the President. This

152 See, for example the case of *Masiko Winfred Komuhangi v. Babiluga J. Winnie*, Election Petition Appeal No. 9 of 2002 (Court of Appeal), and Edith Kibalama, 'Opening Up Into a *cul-de-sac*: The State of Constitutionalism in Uganda in 2002', in Frederick W. Jjuuko, (ed.), *CONSTITUTIONALISM IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS IN 2002*, Fountain, Kampala, at 19-29.

153 See *Rtd. Col. Dr. Warren Kizza Besigye v. Kaguta Yoweri Museveni and the Electoral Commission*, Election Petition No.1 of 2001.

154 See *Gloppen et al, op.cit.*, at 19. Not all the judges agreed that the test was a quantitative one. See judgment of Justice Arthur Oder.

155 Monica Twesiime, 'The State of Constitutional Development in Uganda,' in J. Oloka-Onyango (ed.), *CONSTITUTIONAL DEVELOPMENT IN EAST AFRICA FOR YEAR 2001*, Fountain, Kampala, at 86-87.

156 Article 60(1).

is what happened when the President replaced Mr. Aziz Kasujja with Engineer Badru Kiggundu at the end of 2002.¹⁵⁷

Combined, the above factors affect the most critical element in the functioning of an electoral body, i.e. its independence, and thus undermine the full realization of the right to vote. Although Article 62 decrees that the EC will not be subject to the direction or control of any person or authority, the mode of appointment, the lack of serious public participation in the vetting of members and the ease with which they can be removed all bode ill for the effective functioning of the body and by implication, for the full realization of the right to vote. In light of these limitations, it becomes fairly clear that there is a need for a radical reformulation of the constitutional provision on the manner in which the Electoral Commission is established, its operation and its disbandment. On the issue of composition, for example, the South African Independent Electoral Commission (IEC) is made up of five members, one of whom must be a judge.¹⁵⁸ Members must not have a high party-political profile,¹⁵⁹ and although appointed by the President as is the case in Uganda, this is on the recommendation of the National Assembly following nominations by a National Assembly inter-party committee, which examines a list of at least eight nominations submitted by a panel consisting of the President of the Constitutional Court (Chair) and representatives of the Human Rights Commission, the Commission on Gender Equality and the Public Prosecutor.¹⁶⁰

¹⁵⁷ Kibalama, *op.cit.*, at 33.

¹⁵⁸ See, Electoral Institute for the Sustainability of Democracy in Africa (EISA), South Africa: Independent Electoral Commission, accessed at: <http://www.eisa.org.za/WEP/souiec.htm>

¹⁵⁹ Section 6, South African Electoral Commission Act No.51 of 1996.

¹⁶⁰ *Ibid.*, Section 6(2).

The table below comparing the different Electoral Commissions of the countries that belong to the Southern African Development Community (SADC) gives some idea of both the range and the variety of methods countries in the region have adopted to ensure the independent functioning of these bodies:

Table 1: Composition of SADC Electoral Management Bodies

Country	Structure
ANGOLA	<p>National Electoral Commission (CNE)</p> <ul style="list-style-type: none"> 11 members, four year term renewable once: 2 nominated by the President, 3 nominated by the ruling party 3 nominated by opposition parties in National Assembly 1 Justice of the Supreme Court 1 representative of Ministry of Territorial Administration 1 elected by the National Council of Social Communication CNE President elected from these by the National Assembly
BOTSWANA	<p>Independent Electoral Commission (IEC)</p> <ul style="list-style-type: none"> 7 members with 10 year term Nominated at an all-party conference and appointed by the Judicial Service Commission
DRC	<p>Independent Electoral Commission (CEI)</p> <p>Not yet constituted, governing organic law yet to be passed by Parliament</p>
LESOTHO	<p>Independent Electoral Commission (IEC)</p> <ul style="list-style-type: none"> 3 members, 6 year term renewable once Appointed by the King on advice of State Council, chair must be a judge

Country	Structure
MALAWI	<p>Malawi Electoral Commission (MEC)</p> <ul style="list-style-type: none"> 7 members, 4 year term renewable Chair is a judge nominated by the Judicial Service Commission 6 appointed by the President in consultation with leaders of political parties in National Assembly
MADAGASCAR	<p>National Independent Electoral Commission/Commission Electorale Nationale Indépendante) (CENI)</p> <ul style="list-style-type: none"> 19 members, 12 with voting rights 10 nominated by civil society bodies Two representatives of administration, one each from the Ministry of the Interior and the Ministry of Decentralization; and Seven nonvoting representatives from political parties, three governing, three opposition, one other
MAURITIUS	<p>Electoral Supervisory Commission (ESC)</p> <ul style="list-style-type: none"> Supervisory body, 7 members, 5 year term Appointed by President on advice of Prime Minister after consultation with leader of the opposition
MOZAMBIQUE	<p>National Electoral Commission (CNE)</p> <ul style="list-style-type: none"> 13 members, 5 year term 5 members designated by parties/coalitions in Assembly of the Republic 8 members chosen by 5 from nominees by civil society bodies Commission president elected by 13 from among the 8 civil society representatives
NAMIBIA	<p>Electoral Commission of Namibia (ECN)</p> <ul style="list-style-type: none"> 5 members, 5 year term Chair must be a judge Appointed by president from shortlist compiled by Selection Committee (a nominee of the Chief Justice, a nominee of the Law Society and a nominee of the Ombudsman)

Country	Structure
SEYCHELLES	<p>Electoral Commissioner</p> <ul style="list-style-type: none"> 7 year term, renewable Appointed by the President Candidates proposed by the Constitutional Appointments Authority
SOUTH AFRICA	<p>Independent Electoral Commissioner (IEC)</p> <ul style="list-style-type: none"> 5 members, 7 year term, renewable Appointed by President on recommendation of National Assembly, following nominations by a National Assembly inter-party committee One commissioner must be a judge
SWAZILAND	<p>Elections and Boundaries Commission (EBC)</p> <ul style="list-style-type: none"> 5 members, term 12 years, non-renewable Chair and Deputy-Chair appointed by the King on advice of the Judicial Service Commission 3 members appointed by King in consultation with ministers responsible for elections and for local government
TANZANIA	<p>National Election Commission (NEC)</p> <ul style="list-style-type: none"> 7 members, five year term Appointed by President, according to complex legislative requirements Chair and Vice-Chair have to be judges of the High Court or the Court of Appeal
ZAMBIA	<p>Electoral Commission of Zambia (ECZ)</p> <ul style="list-style-type: none"> 5 members, 7 year term, renewable Appointed by President, subject to ratification by the National Assembly
ZANZIBAR	<p>Zanzibar Electoral Commission (ZEC)</p> <ul style="list-style-type: none"> 7 members, 5 year term Appointed by President, according to complex legislative requirements

Country	Structure
ZIMBABWE	<p>Zimbabwe Electoral Commission (ZEC)</p> <ul style="list-style-type: none"> 7 members, 5 year term renewable once: Chair must be a judge and is appointed by President after consultation with the Judicial Service Commission 6 other members (at least three must be women) appointed by President from 9 nominees supplied by Parliamentary Committee on Standing Rules and Orders
SOURCE: Electoral Institute of South Africa http://www.eisa.org.za/WEP/comemb1.htm	

The above table demonstrates that the Ugandan situation is well below the standard, and this is only with regard to the SADC area. A majority of the Commissions listed above adopt a much more transparent and inclusive process for the appointment of its chair and members. Several explicitly include a judge, either as chair or as a member of the body. Security of tenure is also crucial in securing the independence of the Commission, and again the situation in Uganda falls short of the ideal.¹⁶¹

Further lessons on strengthening the independence of the EC can be drawn from the case of Kenya, which has only recently adopted a new constitution which represents current best practice. In the first instance, the 2010 Kenya Constitution stipulates that a member of the Independent Electoral and Boundaries Commission (IEBC) must not have held *or stood* for the position of Member of Parliament or a County Assembly within the preceding five years, or been a member of the governing body of a political party.¹⁶² Appointment of the chair and members is uniform for all constitutional bodies and is explicit on the mode of identification, approval and appointment. The Constitution also requires commitment to national values that reinforce integrity and good governance.¹⁶³ There is an elaborate process involving the National Assembly (Parliament), a Tribunal and eventually the President in the removal of the chair or members of the IEBC from office, which means that the President cannot—in contrast to the situation in Uganda—act on his or her own initiative in the matter: removal must be for cause. Members of the South African IEC may be removed for misconduct, incapacity or incompetence by the President on a resolution of the National Assembly. The removal must be initiated by the Electoral Court and the member must first be found wanting by a committee of the National Assembly before the Assembly as a whole entertains the resolution of removal.¹⁶⁴

¹⁶¹ See Christopher Mbazira, *Reform Overdue: Making the Case for Electoral Restructuring in Uganda*, HURIPEC Working Paper No.26 (December, 2009).

¹⁶² Article 88 of the Constitution of Kenya.

¹⁶³ Ibid., Article 10.

¹⁶⁴ South African Electoral Commission Act No.51 of 1996.

Aside from independence, the mode of functioning of the EC also needs to be reformed. Thus, it should be possible for voter registration to take place at any time, not for short periods of time and only when an election is around the horizon. In fact, if Uganda were to adopt a national identification card with smart features, this would greatly ease the process of registration and participation in polls, although efforts in this direction have so far been highly unsuccessful and riddled with scandal. Finally, it is important to make regulations on the amounts of money that political parties as a whole and single individual candidates can spend in an election. The question of campaign finance and expenditure has become a prime factor in the abuse of the electoral process and existing regulations are insufficient to prevent the vice.¹⁶⁵ In current circumstances the poll belongs to the highest bidder.

6.2 Chapter VI (The Legislature)

It is not by accident that of the three arms of government, the legislature is listed first before either the Executive or the Judiciary. While the 1995 Constitution subscribes to the doctrine of constitutional supremacy and not to that of parliamentary sovereignty,¹⁶⁶ there is no doubt that after the Constitution, the legislature enjoys a place of prominence in relation to the other two arms of government. This is both on account of its representative nature, but also because of its law-making power. In line with this function, Chapter VI provides for the Parliament of Uganda and its composition, functions, and qualification, among others. In this respect, Parliament has a fundamental function to play in ensuring that human rights and freedoms are respected and enforced.

The provisions of Chapter VI provide the framework for a fairly robust system of checks and balances in relation to the Executive, and in this way serve to strengthen the posture of the legislature with regard to the protection and enhancement of human rights and democratic freedoms. Measures for the vetting of presidential and constitutional appointees, for the censorship of Cabinet ministers and for a robust committee system have all greatly enhanced the oversight function of this arm of the state. Unfortunately, the record of Parliament as an accountability mechanism has been a mixed one, with different sessions of the House producing their own peculiar features. Most notably the 7th (1996-2001) and currently the 9th (2006-2011) are generally recognized as the most robust, while the 8th (2001-2006) is considered as the most lackluster and ineffective, particularly on account of the '3rd term' debacle. Several factors account for this mixed bag, the most prominent of which is the dominance of the legislature by the ruling National Resistance Movement (NRM). The problem is compounded by the composition of the body, which aside from directly-elected and women representatives, also includes representatives of the army, youth, workers, and persons with disabilities (PWDs).¹⁶⁷ While the role and presence of most of these constituencies can be fully justified with different reasons, in a multi-party political dispensation that of the UPDF representatives certainly cannot. A mechanism for periodic (5-yearly) review written into Article

¹⁶⁵ Yash Pal Ghai & Jill Cottrell Ghai, *KENYA'S CONSTITUTION: AN INSTRUMENT FOR CHANGE*, Katiba Institute, Nairobi, at 158.

¹⁶⁶ This is a point reiterated in several court decisions. See *Charles Onyango Obbo & Anor. v. Attorney General*, Const. Appeal No.2 of 2002 (SC).

¹⁶⁷ See Article 78(1).

78(2) means that the opportunity for revisiting this particular issue will come up again in 2015. Civil society actors thus need to make a cogent preparation of the argument for the termination of UPDF representation, especially since at the last review in 2005 arguments against their representation were roundly defeated. Army legislative representation in a multi-party political system is quite clearly an anomaly.

Other provisions that require attention include Article 84(7) which restricts the right of recall only while the Movement political system is in operation. This means that under a multiparty system such as that now in place, the power of recall has been removed from the population, despite occasional threats to invoke the provisions against one MP or another. The power of recall represented a radical departure from previous constitutional arrangements, and confirmed the overall supervisory power of the electorate over their elected representatives. However, in the transition to a multiparty system, the provision was opportunistically amended. Not only does the current formulation of the power of recall make parliamentarians more inclined to operate without due regard to their constituents, it considerably reduces on their accountability to them. Finally, there are several problems with the amendments introduced with the first amendment to the Constitution in 2000. These concern the quorum (Article 88), voting (89) and Parliamentary immunities and privileges (97), all of which were designed to reduce external scrutiny of the legislature, and correspondingly to lessen accountability in the aftermath of the scandal over the passing of the Referendum Act that was declared unconstitutional. In particular, with Article 97 that reduced access to the proceedings of Parliament, the letter and the spirit of Article 41 (on access to information) was dealt a severe blow.

With the ninth (9th) Parliament, many of the questions of accountability, transparency and improved governance that lie at the core of the 1995 Constitution have been put to a severe test, culminating with the latest stand-off between the legislature and the Executive over the controversial death of Butaleja Women's representative, Cerinah Nebanda and its aftermath. What the Nebanda saga demonstrates is that for all its dominance of the political arena, a few determined legislators with principle on their side can seriously force the state and the ruling NRM to be more accountable and transparent. In short, there are important civil society, anti-corruption and human rights-progressive allies within Parliament, few though they may be. Consequently, it is necessary to embark on a process of outreach to those allies in order to consolidate the gains of democratic governance and to ensure that Parliament remains true to its function as an effective check on the Executive.

On the flip-side stand-offs between the Legislature and the Executive can lead to irresponsible and ill-timed threats against the Constitution, such as the recent comment about the possibility of a military coup.

At the same time, it is important to be cautious. Parliament can act in a tyrannical and even anti-democratic fashion, and in a manner that undermines constitutionalism, good governance and improved transparency, not to mention the protection of fundamental human rights. This is most often the case with respect to the issue of perks and benefits in which every Parliament is embroiled at the start of its legislative session. Here without fail, the parliamentarians—ruling

“what happens when there is a stalemate and Parliament refuses to accept or outrightly rejects a presidential nominee? Where the President properly accepts Parliament’s refusal (as he has done in the cases of Nasser Ssebagala and James Kakooza as ministers), there is no problem. However, when he refuses to do so (as in the case of Idah Nantaba) and decides to railroad his nominee through the appointments process with utter disregard for the rules in place over the matter, then the checking power of Parliament is brought into serious contention.”

party, opposition and independent—exercise very little self-restraint or modesty. Instead, they engage in an orgy of raiding the Treasury in order to improve their personal benefits at the expense of the taxpayer. Parliament has also acted in patently unconstitutional ways as it did with the first amendment to the 1995 Constitution in 2000, rejected by the Supreme Court on appeal.¹⁶⁸ Despite public scrutiny and expert comment, Parliament has been known to pass laws that violate fundamental human rights.¹⁶⁹ To crown it all, sometimes Parliament acts in a manner which seriously undermines its status and moral authority in terms of setting an example of transparent and accountable methods of governance, even when it is pursuing noble goals such as attempting to censor a Cabinet minister.¹⁷⁰

6.3 Chapter VII (The Executive)

Chapter VII clearly stipulates the composition of the executive arm of government, beginning with the President who is the fountain of honor and the Head of the executive under Article 98. The constitution also provides for the Vice President under Article 108, with the statutory duty confined to deputizing the President. In comparison to previous constitutions in which the Executive held nearly unbridled power, the 1995 Constitution sought to bring the powers of the President and his/her Cabinet within the controls of both the legislature and the judiciary. Hence, the application of the Constitution to *all persons and all authorities*, which includes the President. Where under previous instruments the President was wholly immune from court sanction, in the current formulation it is only ‘while holding office.’¹⁷¹ At every turn, the President is enjoined to ‘uphold,’ ‘abide by,’ and ‘safeguard,’ the Constitution.¹⁷² The election of the President is subjected to challenge and judicial review.¹⁷³ Provision is made for the removal of the President, and throughout the instrument attempts have been made to counter-balance the dangers of excess. Most importantly, in recognition of the tendency for presidents to overstay in office and become a liability and as a basic principle of tested good governance, Article 105(2) originally stipulated that a president would hold office for only two terms. In sum, the 1995 Constitution sought to mark clear distance from its predecessors, the 1962 and 1967 instruments.

168 See *Paul K. Ssemogerere & 2 Ors. v. Attorney General*, Const. App. No. 1 of 2002.

169 See Onoria, (2005), *op.cit.*, at 363-364.

170 See the comments of Deputy Chief Justice Mpagi-Bahigeine in *Saverino Twinobusingye v. Attorney General*, Const. Pet. No.47 of 2011, at 18-20.

171 See Article 98(4) and (5).

172 See Article 99(1), (2) and (3)

173 Article 104.

While the Presidency was still strong, imbued with respect and reverence as well as significant power, it was also made more accountable, less dictatorial and more transparent.

What then happened? Why is it that nearly two decades after the enactment of a new constitutional order and the 2005 introduction of a multiparty system of government, we appear more beholden to executive tyranny than at perhaps any other time in Ugandan history? How has the omnipotence of the executive affected the protection and enforcement of human rights? Most importantly, what needs to be done in order to revive the initial promise of the 1995 Constitution as an instrument that would ‘tame’ what Ugandans have often experienced as a ‘wild’ presidency?

The answers to the above questions are much more complex than can be attempted in a study of this size, but they can be found both within the provisions of the 1995 Constitution and in the flaws in the checks and balances sought to be created by it, and also outside of the same in the wider political economy of the Ugandan state since 1986. With respect to executive power in the 1995 Constitution, reforms were also made to the office of Director of Public Prosecutions (DPP) under Article 120, but not to the office of Attorney General (Article 119) in any substantive way. With regard to the latter, it is proposed that the AG not be a Member of Parliament, that the process of appointment be made more stringent and that the process of removal be firmed up in order to increase on its independence. The model provided by the Auditor General in Article 163 would be a useful one to follow. Concerning the DPP, despite rigorous protestations about his independence, the current DPP appears to be closely beholden to the whims of executive power. Clearly there is a need for a reform.

The second issue concerning the executive is that some of the checking powers given to the legislature were simply not strong enough. Thus, virtually all presidential appointees and nominees to constitutional bodies are vetted by Parliament, which is clearly an advance on the earlier constitutions where the President could appoint and dismiss at will, and also where Presidential prerogatives were upheld.¹⁷⁴ However, what happens when there is a stalemate and Parliament refuses to accept or outrightly rejects a presidential nominee? Where the President properly accepts Parliament's refusal (as he has done in the cases of Nasser Ssebagala and James Kakooza as ministers), there is no problem. However, when he refuses to do so (as in the case of Idah Nantaba) and decides to railroad his nominee through the appointments process with utter disregard for the rules in place over the matter, then the checking power of Parliament is brought into serious contention.

A similar situation prevails with respect to the parliamentary power of censure, provided under Article 118 of the Constitution. In the first instance, the serious advance that was made by this provision needs to be duly acknowledged, as under the previous instruments there was simply no way that a Cabinet Minister could be removed other than by the President. Article 118 at least provides that Parliament can pass a vote of censure against a Cabinet minister. But that's where the problems begin. Clause 2 of the same article stipulates that upon such a vote being passed against a

¹⁷⁴ See for example, the case of *Opolot v. Attorney General* [1969] EA 631.

minister, ‘... the President shall, unless the Minister resigns his or her office, *take appropriate action in the matter*.’ What does ‘appropriate action’ mean? A quick interpretation of this provision implies that while the initiative to censure rests with Parliament, the final determination on its outcome rests with the President. And indeed, the President is under no obligation to sack the offending individual. This means that the checking power of Parliament is incomplete and in any case is subject to a presidential override: what then is the use of the power to check in the first place? Contrast the 2010 Kenyan Constitution which provides that the President *shall* dismiss a Cabinet Secretary if a parliamentary resolution of dismissal has been passed against them.¹⁷⁵

But the real problem with the exercise of executive power in Uganda today lies in the removal of presidential term limits. The fact is that in the tours of the Odoki Commission and in the Constituent Assembly debates there was unanimous approval that one of the most serious problems that Uganda had faced historically was the tendency of presidents to seek to extend their stay in office. As such, the idea of term limits was introduced in order to impose a limitation on the time one can stay in power, but more importantly, in order to ensure a peaceful transfer of power. Once this provision was amended, any serious attempts at checking executive power flew out the window. When coupled with the use of militaristic methods of curtailing opposition, a near-fatalistic determination of the incumbent president to remain in power and a fractured and disorganized opposition unable to provide any real alternative, the future does not look very bright. The problem is compounded by the phenomenon of *presidentialism*—the suffocating omnipotence of the presidency—which prevents any public office from functioning effectively without direct interference from the President himself.

6.4 Chapter VIII (The Judiciary)

There is no doubt that the Judiciary is perhaps the most important institution with respect to the enforcement of human rights, standing together with the Uganda Human Rights Commission, which is the principal organ of the state entrusted with this task. That role is manifest through both enforcement of the provisions of the Bill of Rights by a ‘competent court’ (Article 50) and interpretation of the Constitution by the Court of Appeal sitting as a Constitutional Court (Article 137). The provisions of Chapter VIII that govern the institution, particularly Article 126 on the exercise of judicial power, 128 on the independence of the institution and 144 on the tenure of judicial officers have been particularly helpful in marking out a distinctive mode of operation for the Judiciary in comparison to the pre-1995 era. Through the mechanism of public interest litigation (PIL) in particular, the judiciary has demonstrated that it is responsive to a public that often felt that it had no outlet for its many frustrations about the manner in which the state operated.¹⁷⁶

¹⁷⁵ See Article 152(5) to (10) of the 2010 Constitution of Kenya.

¹⁷⁶ For an account of the rise and development of PIL under the 1995 Constitution see Phillip Karugaba, ‘Public Interest Litigation in Uganda: Practice & Procedure, Pitfalls and Landmarks,’ *Makerere Law Journal*, [2004-5].

Needless to say, the Judiciary can find itself the target of intimidation and coercion in the performance of the functions it has been designated under the 1995 Constitution. When the Constitutional Court declared the Referendum Act null and void, the government came out to condemn the judges and organized riotous protests outside the High Court precinct. The Judiciary also faces executive-led impunity, particularly when its judgments are willfully disobeyed or ignored. Thus, in the case of *Uganda Law Society v. Attorney General*,¹⁷⁷ and in *Attorney General v. Uganda Law Society*,¹⁷⁸ both the Constitutional Court and the Supreme Court held that military courts do not have jurisdiction over civilians. Despite this ruling, the various security agencies of the State continue to subject civilians to military trials with impunity.¹⁷⁹ The peak of executive disdain of the courts came with the infamous attack of the 'Black Mamba' on the High Court in what Justice James Ogoola poignantly described as the 'rape of the temple of justice.'

Throughout this study we have seen how the judiciary has sought to exercise its power in a manner that gives primacy of place to the protection and enforcement of human rights. It has largely carried out this task with dignity and devotion. Although in the early years of the 1995 Constitution the Judiciary appeared excessively timid, it grew out of the cocoon of reluctance and has become a steady and forceful bastion against executive excess and human rights abuse. Unconstitutional legislation has been struck down; electoral malpractices in both the parliamentary and presidential polls have been highlighted and condemned, and the principle of gender equality has found a sympathetic hearing and necessary boosting in several landmark decisions. Over time, the institution has earned the respect of the legal profession in particular and of the wider public in general.

However, the Judiciary also suffers internal problems that need to be addressed in order to ensure that it is fully equipped to address the contemporary needs of the Ugandan populace. First, is the question of corruption. Every survey of public institutions in the country places the Judiciary in the top five of the most corruption-riddled bodies involved in the administration of justice. Perceptions are made worse by the minimal action that is taken by the authorities to address the vice, whether by authorities within or those outside the Judiciary. And there is no doubt that corruption is a human rights problem, given that it tends to undermine a whole range of services to which the public is entitled. The second is the issue of competence and capacity, both of which relate to whether the members of the Bench are able

The system of military justice that has been established particularly to address charges such as treason, terrorism and violent crime is largely outside the supervision of the civilian justice regime, potentially raising serious questions as to whether human rights are adequately protected therein"

177 Constitutional Petition No. 18 of 2005: January 31, 2006.

178 Constitutional Appeal No.1 of 2006; January 20, 2009.

179 See Human Rights Watch, *op.cit.*, at 12.

to robustly defend the rights of the most dispossessed. This relates to the manner of recruitment of judicial officers, which although the 1995 Constitution attempted to improve, still has loopholes. With the impending retirement of Chief Justice Benjamin Odoki and the scandal surrounding the appointment of Justice Anup Singh Choudry, the opportunity should be taken to overhaul the recruitment process for the hiring of judges.¹⁸⁰ A leaf should perhaps be borrowed from the recent process of recruitment of new judges in Kenya, where all positions on the Bench were advertised (including that of the Chief Justice), public interviews were held, and questions were posed about the judicial philosophies and human rights records of the applicants.

6.5 Chapter XII (Defense and National Security)

The provisions on defense and national security were designed to bring the main agencies involved in such matters—the UPDF, the Police, Prisons and the intelligence services—under strict civilian control. Article 221 enjoins these security organizations to ‘... observe and respect human rights and freedoms in the performance of their functions,’ a provision designed to mark distance from the dominant practice of previous coercive arms of the state in Uganda. Nevertheless, the extent to which this provision has been enforced is questionable. A quick review of the provisions of the Constitution demonstrates that the regulation of our security services is left to parliament, which is done by the respective legislation that it passes. However, particular problems have been encountered with the legislation made on the UPDF and on the Police. With the former, the problem remains that of army involvement in matters of a civilian nature and the rather harsh penalties imposed on members of the service. The system of military justice that has been established particularly to address charges such as treason, terrorism and violent crime is largely outside the supervision of the civilian justice regime, potentially raising serious questions as to whether human rights are adequately protected therein.¹⁸¹ Regarding the Police Act, the mechanisms of oversight, accountability and non-political civilian control continue to bedevil the force. For both institutions, these limitations undermine the goals of professionalization; they render them regime rather than state institutions, and they have serious implications for the enhanced protection of human rights.¹⁸²

While the established security agencies are plagued by deficiencies there is also a problem in that the government has created a plethora of intelligence, militia and vigilante groups without any supportive parliamentary legislation, including the CMI, PPU, PGB, KAP, PIN, VCCU, Operation Wembley, and the infamous ‘Kiboko Squad.’¹⁸³ Such bodies have been established in clear contravention of Article 218 of the Constitution.¹⁸⁴ Needless to say, their impact on human rights has been largely negative. Their operations are beyond scrutiny by the established organs of oversight, including the Uganda

180 Justice Choudry’s petition to the High Court challenging the proceedings initiated for his removal failed to make headway. See *Anup Singh Choudry v. Attorney General* [2012] UGHC 37.

181 See Ronald Naluwairo, ‘A Reassessment of Military Justice as a Separate System in the Administration of Justice: The Case of Uganda,’ *East African Journal of Peace & Human Rights* 18/1: 136-151 (2012).

182 On the Police see J. Oloka-Onyango, *Taking Orders from Above: Police Powers, Politics and Democratic Governance in Post-Movement Uganda*, HURIPEC Working Paper No.31 of 2011.

183 See Bakayana, *op.cit.* at 43-44

184 Human Rights Watch (2011), *Righting Military Injustice: Addressing Uganda’s Unlawful Prosecutions of Civilians in Military Courts*, HRW, New York.

Human Rights Commission. Although the courts also get to deal with issues such as torture, this represents only the short tip of the ice-berg of a much larger problem—the question of impunity. In sum, while the provisions on defense and national security are on the whole progressive, there are serious problems at the level of implementation and oversight.

6.6 Chapter XIII (Inspectorate of Government)

Chapter XIII covers the Inspectorate of Government, particularly the office of Inspector General of Government (IGG) created under Article 223. The IGG is appointed by the President with the approval of Parliament under Article 223 (4). Article 227 states that the IGG shall be independent in the performance of his/her duties and shall not be subject to the direction or control of any person or authority, and shall only be responsible to Parliament. Although this article is crucial in guaranteeing the optimal performance of the office, its applicability has been undermined by the effect of articles 223(4) and 224, which respectively cover the mode of appointment and removal of the IGG and his/her deputy, and raise questions concerning the independence of these officials.

These problems can be discerned from an analysis of the terms in office of the respective IGGs since it was established, elaborated in the table below:

Table 2: Tenure of Inspectors of Government (Before the 1995 Constitution)

1. Augustine Ruzindana	July 31, 1986 to June 03, 1991 (retired)
2. Wasswa Lule (deputy)	April 25, 1989 to August 14, 1992 (dismissed)
3. David Psomgen (deputy)	August 14, 1992 to November 11, 1996
4. Jotham Tumwesigye	June 03, 1991 to November 11, 1996
5. David Psomgen (deputy)	August 14, 1992 to November 11, 1996

Table 3: Tenure of Inspectors of Government (After 1995)

1. Jotham Tumwesigye	November 11, 1996 to October, 2004
2. David Psomgen (deputy)	November 11, 1996 to October, 2004
3. Faith Mwendha	February 23, 2005 to February 22, 2009
4. Raphael Baku (1 st deputy)	February 23, 2005 to February 22, 2009 (1 st term)
5. 2 nd deputy (vacant)	

6. Raphael Baku (in charge)	February 22, 2009 to June 22, 2012**
7. Irene Mulyagonja	June 22, 2012 to present (1 st Term)
8. Raphael Baku (1 st deputy)	February 23, 2009 to February 22, 2013 (2 nd term)
9. George Bamugemereire (2 nd deputy)	March 18, 2013 to present (1 st term)

Although meant to be impartial, the tenure of the last two occupants of the office has been problematic. In particular, the saga of Justice Faith Mwonda and her tenure in office provides invaluable lessons about the functioning of the office. In particular, it raised serious questions about the relationship of the IGG to the executive and the legislature, and the question of security of tenure for such a sensitive position. Justice Mwonda's main mistake was to view her mandate as reporting to the President, overlooking her constitutional subordination to the legislature. When she refused to submit herself for parliamentary vetting before she could vie for a second term in office it was clear that her position in the office was no longer tenable, a position confirmed by the Court of Appeal. Whatever one thinks of Mwonda's tenure, it raised a fundamental question about the relations of that office to the legislature and the executive.

On account of the Mwonda saga, but also in a bid to improve its security of tenure, the IGG should serve only one term in office. As opposed to the current period of four years provided by Article 223(7), the formula adopted should follow that used for the Auditor General.¹⁸⁵ Thus, the IGG should be able to retire at any time after attaining the age of 60 years, and must vacate the office on attaining the age of 70. The effect of this would be twofold. First of all, it would make the IGG more secure in his/her tenure. Secondly, it would eliminate what is an overtly political process from intervening at the point when an incumbent is seeking review. Parliamentarians are not immune from many of the vices that the IGG would have investigated and this would avoid a situation where they are sitting as judges in their own cause.¹⁸⁶ Quite clearly, Justice Mwonda had problems in the manner in which she executed her task: she was partial, open to direction by the President and vindictive. However, the parliamentary review of her quest for a second term in office was unduly affected by its politicization. Under a single-term IGG, removal must be for cause, which means that the vetting process for the recruitment of the individual must be much more vigorous.

Although meant to be impartial, the tenure of the last two occupants of the office has been problematic. In particular, the saga of Justice Faith Mwonda and her tenure in office provides invaluable lessons

** Raphael Baku took charge of the office following the debacle involving Mwondha, and although designated as Acting IGG, such an office does not exist under the Constitution. Faced with this problem in a constitutional challenge, the Court of Appeal ruled that as substantive Deputy IGG Baku was able to carry out the functions of the office. Baku remained in that capacity until Mulyagonja's appointment in June 2012

¹⁸⁵ See Article 163(11).

¹⁸⁶ Indeed, many of the problems faced by the office have been caused by parliamentarians seeking to evade justice. See *Muhwezi & 3 Others v. AG and Another* (Constitutional Petition No. 10 of 2008), *Prof. Gilbert Bukenya v. AG*, and *Kuteesa, Nasasira & Mwesigwa-Rukutana v. AG*, (Constitutional Petition No. 46 of 2011).

about the functioning of the office. In particular, it raised serious questions about its relationship to the executive and the legislature, and the question of security of tenure for such a sensitive position. When Justice Mwonda refused to submit herself for parliamentary vetting before she could vie for a second term in office it was clear that her position in the office was no longer tenable, a position confirmed by the Court of Appeal. Whatever one thinks of Mwonda's tenure, it raised a fundamental question about the relations of that office to the legislature and the executive.

In my view, the IGG should serve only one term in office. As opposed to the current period of four years provided by Article 223(7), the formula adopted should follow that used for the Auditor General. Thus, the IGG should be able to retire at any time after attaining the age of 60 years, and must vacate the office on attaining the age of 70. The effect of this would be twofold. First of all, it would make the IGG more secure in his/her tenure. Secondly, it would eliminate what is an overtly political process from intervening at the point when an incumbent is seeking review. Parliamentarians are not immune from many of the vices that the IGG would have investigated and this would avoid a situation where they are sitting as judges in their own cause. However, the parliamentary review of her quest for a second term in office was unduly affected by its politicization. Under a single-term IGG, removal must be for cause, which means that the vetting process for the recruitment of the individual must be much more vigorous. MPs have only themselves to blame for having allowed Mwonda through the vetting sieve in the first place.

Passage of the Whistleblower Act in 2010¹⁸⁷ ostensibly boosted the fight against corruption. However, the saga of the scandal in the office of the Prime Minister and the Permanent Secretary's claim to whistleblower status make a mockery of the Act. Thus, even though government is in the process of introducing a law to recover the assets of public officials involved in corruption,¹⁸⁸ unless the political will to actually do something about the vice is in place, nothing will really change.

6.7 Chapter XIV (Leadership Code of Conduct)

Article 233 mandates Parliament to establish a leadership code of conduct for persons holding such offices as may be specified by Parliament. Under Article 233(2)(a), the leadership code of conduct requires specified officers to declare their incomes, assets and liabilities from time to time and to indicate how they acquired or incurred the same as the case may be. The leadership code also prohibits any such conduct that is likely to compromise the honesty, impartiality and integrity of specified officers among others. Article 234 empowers the Inspectorate of Government or any other such authority as may be prescribed by Parliament to enforce the leadership of conduct. Any person who is disqualified for breach of the code, is under Article 235 not allowed to hold any public office whether appointive or elective either generally or for a prescribed time.

¹⁸⁷ Act No.6 of 2010.

¹⁸⁸ The Proceeds of Corruption Assets Recovery Bill, 2013.

These are obviously very important provisions in respect of the improved observation and protection of fundamental human rights. The makers of the Constitution included this chapter to enhance government checks and balances hence facilitating transparency and efficiency among public officers. However this chapter has been manipulated, abused and rendered nugatory by the actions of devious public officers keen on wiping out their tracks of public malfeasance.¹⁸⁹ Indeed, these provisions of the Constitution could be regarded as a dead letter. Attempts to implement the Leadership Code by the IGG have fallen by the wayside. They have also been bedeviled by several court actions which have effectively thrown the baby out with the bath water. Starting with the case of *Fox Odoi Oywelowo & James Akampuzza v. Attorney General*,¹⁹⁰ and followed by those of *Kakooza Mutale*¹⁹¹ and *John Ken Lukyamuzi*,¹⁹² action against public officials with respect to the Leadership Code was effectively rendered impossible. Now with the full contingent of the inspectorate—the IGG and two deputies—in place for the first time, perhaps we will see more movement in this area.

In light of the above developments, there is a need for urgent action to be taken with regard to implementation of the Leadership Code. First, there should be a review in order to ensure that the main goals of the legislation are revisited in order to ensure maximum transparency in government and public life.

7.0 Towards the enhanced enforcement and protection of Human Rights

Quite clearly, this study has aptly demonstrated that there are several loopholes that plague the improved enforcement and protection of human rights under the 1995 Constitution. On the one hand, there are omissions, tensions and even outright contradictions that plague the instrument. In other words, several of the provisions in the Bill of Rights adequately capture the main issues of concern and reflect best practice both in the substantive right protected, as well as in the manner in which such protection is formulated. Hence, several of these articles do not require reformulation, amendment or repeal. On the other hand, there are some provisions that require tightening and reformulation. There are also several omissions which do not reflect the many concerns that affect the people of a 21st Century African state that has set its sights on building a sustainable democracy. Although a radical instrument at the time at which it came into existence, the 1995 Constitution was clearly behind the times with respect to the recognition of economic, social and cultural rights. At the same time—given the liberalized economic environment which gave pride of place to the ‘foreign’ investor and disdained worker’s rights such as a minimum wage—it is perhaps not so surprising that the instrument virtually ignored this category of rights. But how could we leave out the right to health care, or the right to food? What happened to the right to adequate shelter?

189 See Daniel Ronald Ruhweza, *Frustrated or Frustrating? The Inspector General of Government and the Question of Political Corruption in Uganda*, HURIPEC Working Paper No.20 (November, 2008) at 17-27. HC Misc. Cause No.24/06.

190 Const. Pet. No.8 of 2003.

191 See Roland Kakooza Mutale v. Attorney General (Application No.665 of 2003, arising out of HCCA No.40 of 2003).

192 Const. Pet. No. 19 of 2006.

This study has also outlined both the substantive as well as the procedural dimensions of the struggle to improve human rights since the enactment of the 1995 Constitution. It has demonstrated that there are different aspects to the implementation, enhancement and enforcement of human rights. Some of those dimensions are internal to the 1995 Constitution and the manner in which it was designed and currently operates, others lie in the realm of the operation of the institutional mechanisms established to give life to the letter of the rights and freedoms protected in the document. Yet other factors are made up of the wider socioeconomic and political mosaic that is woven into the fabric of the nation called Uganda. There is a clear problem of state impunity and of the failure of the institutions designed to protect human rights to effectively do so. Through an examination of these mechanisms it is clear that this failure is a reflection much less of the inadequacies in the Constitution, than it is of the institutions which are supposed to uphold it. Among them, one could most readily point to security agencies such as the Police and the UPDF, as well as the many more clandestine and questionable intelligence services that have sprouted into operation over the years.

But even the more sacrosanct and less coercive arms of the state—the Executive, Legislature and the Judiciary—are not free from blame. Consideration needs to be given to how the provisions governing the operation of each of these institutions were constructed, plus the manner in which they relate to each other, and especially the manner in which they can be progressively reformed. What particularly stands out in the survey of these institutions is the dismaying fact that we have returned to a position of executive omnipotence. This is what so much of the struggle for improved human rights in the country was all about. Central to that omnipotence is Article 105(2) that now allows for unlimited presidential terms in office. Herein lies the ultimate check. If a finite limit is place on how long an individual can remain in power, it is quite clear that the extent of the rights violations under that particular individual are likewise limited. Remove those limits, and so too go the limits on what can be done to ensure the continued grip on power. In other words, the gloves can so easily be taken off, and an all-out bid to retain absolute power embarked upon. As we review the phenomenon of executive power, not only should we strive to restore the limitation on presidential tenure, we should also be wary of possibilities to manipulate it further, by, for example, removing the limits on age.¹⁹³

All the above lead to one major conclusion. The struggle to return to the spirit that motivated the human rights principles in the 1995 Constitution will be a long and difficult one. Different tactics will have to be deployed to ensure their realization, each of which has to be carefully thought out. Thus, for example, could the initiation of a process of constitutional review not result in amendments that make the struggle even more difficult? This is why when considering the different courses of action that it is possible to take, it is important to think of the allies who would be involved in its execution. We need to think outside the ‘Usual Suspects,’ i.e. members of the human rights movement. We need to think of those both within the political arena and outside of it who can be recruited to the cause of progressive human rights reform. And in choosing those allies, we need to acknowledge that the struggle will be both long and hard.

¹⁹³ Article 102(b) provides that the maximum age for a President is seventy-five years.

Conclusion: Amend, Restore or Repeal?

Given the analysis which has been undertaken in this study, it is abundantly clear that despite the significant improvements introduced by the Bill of Rights of the 1995 Constitution, there are still loopholes and inconsistencies in this chapter of the instrument. Indeed, among the other chapters of the Constitution, there are even provisions that negate the effective observation and implementation of human rights. That being so, the critical question becomes what would be the most appropriate course of action to improve the protection of human rights? Most of the provisions of Chapter Four and the rest of the Constitution remain both relevant and essential in ensuring the full respect of human rights. Some require amendment in order to address a few of the mishaps that have been encountered by way of enforcement. Yet others—such as the provisions on parliamentary vetting, on the composition and tenure of the Electoral Commission and the restoration of term limits, to mention a few—require urgent action.

Needless to say, the process of amending or improving the provisions that affect human rights is highly political. Indeed, recent reports have indicated that moves are underway to introduce amendments over the provisions governing the right to bail, among others. The problem with such an action is twofold: first, it is not motivated by a wish to enhance the protection of human rights, instead it is actually designed to undermine them. Secondly, it could lead to additional amendments which effectively damage and emasculate the institutions supposed to protect them. Indeed, given the nature of the political class in the country, one could even envisage an amendment to Article 102(b) which stipulates an age limit of seventy-five for the presidency. As President Museveni soon approaches this historical landmark—with no hint in sight that he intends to leave office—it is not beyond imagination that such an amendment could be on the cards.

In light of the above, the proposal in this study is that human rights activists should prepare for a struggle over the amendment of the Bill of Rights as well as over those provisions outside the Bill which we have identified as crucial to the improved protection of those rights. In this kind of a situation it is necessary to marshal the necessary resources—political, civic and social—in order to ensure that the process of amendment does not negate or undermine the existing provisions. Rather, any amendment must ultimately ensure that it improves the observation and protection of human rights. Being an intrinsically political process, human rights activists need to ultimately prepare for a political contention over what the Bill of Rights means.

By way of conclusion, Table 4 outlines those provisions which will be at the core of this struggle, while also highlighting provisions that do not require change or amendment.

Table 4: Summary recommendations on the Bill of Rights and related provisions

	Recommendation	Reason
I. BILL OF RIGHTS [CHAPTER 4]		
Article 20	No change	Adequate
Article 21 (Equality)	No change	Adequate
Article 22 (1) (Right to life)	Amend	Abolish death penalty
Article 22 (2) (Bar to Abortion)	Amend	Allow abortion in express circumstances, i.e. emergency treatment; danger to the mother, or in the event of rape or incest.
Article 23 (1) (Personal liberty)	No change	Adequate
Article 23 (2) (Authorized detention)	No change	Adequate
Article 23 (3) (Reasons for arrest/right to lawyer)	No change	Adequate
Article 23 (4) (Release before 48 hours)	No change	Adequate
Article 23 (5) (Next-of-kin)	Amend	Tighten court discretion
Article 23 (6) (Bail)	No change	Adequate
Article 23 (7) (Compensation)	No change	Adequate
Article 23 (8) (Redaction of term)	No change	Adequate
Article 23 (9) (Habeus Corpus)		
Article 24 (Human Dignity)	No change	Adequate
Article 25 (Forced Labour)	No change	Adequate
Article 26 (Property)	No change	Adequate
Article 27 (Privacy)	Amend	Tighten protection of family and private affairs

	Recommendation	Reason
Article 28 (1) (Speedy trial)	No change	Adequate
Article 28 (2) (Exclusion of press/media)	No change	Adequate
Article 28 (3) (Criminal safeguards)	No change	Adequate
Article 28 (4) (Reverse-onus clause)	Repeal	Offends presumption of innocence and violates non-derogable right to a fair trial guaranteed by Art.44.
Articles 28 (5) to (12)	No change	Adequate
Article 30 (Education)	No change	Adequate
Article 31 (Family)	No change	Adequate
Article 31(2a) (Same sex marriage)	Repeal	Discriminatory against sexual minorities
Article 32 (Affirmative action)	Amend	Accommodate rights of the youth and older members of society
Article 33 (Women)	No change	Adequate
Article 35 (PWDs)	No change	Adequate
Article 36 (Minorities)	Amend	Incorporate economic, social and cultural rights
Article 37 (Culture)	No change	Adequate
Article 38 (Civic rights)	No change	Adequate
Article 39 (Healthy environment)	No change	Adequate
Article 40 (Economic Rights)	Amend	Change title to 'Rights of Workers,' and make comprehensive provision for economic, social and cultural rights that are not in the Bill
Article 41) (Access to information)	No change	Adequate

	Recommendation	Reason
Article 42 (Administrative justice)	No change	Adequate
Article 43 (General limitation)	No change	Adequate
Article 44 (Derogation)	No change	Adequate
Article 45 (Additional rights)	No change	Adequate
Article 46 to 40	No change	Adequate
II. ECONOMIC, SOCIAL AND CULTURAL RIGHTS		
Right to accessible and adequate housing	Para. XIV(b) NODPSP	Improve and move to Bill of Rights
Right to social security	Para. XIV(b) NODPSP	Improve and move to Bill of Rights
Right to freedom from hunger and adequate food	Para. XIV(b) NODPSP	Improve and move to Bill of Rights
Right to highest attainable standard of health	Para. XX NODPSP	Improve and move to Bill of Rights
Right to clean and safe water	Para. XXI NODPSP	Improve and move to Bill of Rights
Right to reasonable standards of sanitation	Para. XXI NODPSP	Improve and move to Bill of Rights
III. NATIONAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY		
Paras. I to XIII; XV to XIX and XXIII to XXIX	No change	Adequate
Paras. XIV, XX and XXI	Amend	Per recommendations above

	Recommendation	Reason
IV. REPRESENTATION OF THE PEOPLE [CHAPTER 5]		
Article 60 (Electoral Commission)	Amend	<p>Include political party participation in nomination of chair and commissioners</p> <p>Chair (or at least one EC member) to be a judge</p> <p>Increase tenure to ten (10) years (single term)</p> <p>Strengthen removal provisions under Art. 60(8)</p>
General	Campaign finances	Need for comprehensive reform
V. THE LEGISLATURE [CHAPTER 6]		
Article 78(1)(c) (Group representation)	Amend	Remove Army representation for being incompatible with multiparty system of government
Article 84(7) (Right of recall)	Delete	Recall should operate in all political systems, not only under the Movement
General	Parliamentary approval/vetting processes	Need for improvement in order to expand transparency, increase public involvement and enhance accountability
VI. THE EXECUTIVE [CHAPTER 7]		
Article 105(2) (Tenure of office)	Repeal	Restore and entrench Presidential term limits
VII. INSPECTORATE OF GOVERNMENT [CHAPTER 13]		
Article 223(7) (Tenure of IGG and deputies)	Amend	<p>Extend term of office to 7 or 8 years, or reformulate as per Art.163(11) on the Auditor General</p> <p>Tenure of 1 term only; no renewal</p>

HUMAN RIGHTS NETWORK-UGANDA

Plot 94, Old Kiira Road, Ntinda (Near Ministers Village)

P. O. Box 21265 Kampala-Uganda

Tel: + 256-414-286923,
 + 256-414-285362

Fax: + 256-414-286881

E- mail: info@hurinet.or.ug/executive@hurinet.or.ug

Website: www.hurinet.or.ug