THE DOMESTIC PROTECTION AND PROMOTION OF HUMAN RIGHTS UNDER THE 1995 UGANDAN CONSTITUTION

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ABSTRACT

This article examines the domestic constitutional framework for protection and promotion of human rights in Uganda. It considers the historical evolution of Uganda's Bill of Rights in the context of Uganda's history, which has been characterised by gross human rights violations. It observes that in 1986 Museveni under his 'Movement' or 'no-party' government declared a period of 'fundamental change', but argues that despite some positive aspects, the change as related to the protection and promotion of human rights has been far from being 'fundamental'. It contends that, although the 1995 Ugandan Constitution attempts to protect human rights, the constitutional restrictions on civil and political rights and the relegation of most economic and social rights as 'directive principles' coupled with elastic executive powers together with the 'no-party' political system undermine the effective protection and promotion of civil, political as well as economic, social and cultural rights. The article concludes by calling for a democratic constitutional reform representative of all interest groups, judicial activism on the part of the Ugandan Judiciary and Human Rights Commission and developing a culture of constitutionalism in Uganda to give effect to the indivisible and interdependent nature of all human rights in accordance with Uganda's international human rights obligations as a State party to the two international human rights covenants on civil and political as well as economic, social and cultural rights.

1 INTRODUCTION

The primary method of protection of human rights in Uganda is through constitutional provisions, particularly the entrenchment of a chapter or a bill of rights in the constitution. Uganda has undergone a number of constitutional changes in its relatively brief history as an independent State.[1] The Constitution is the fundamental and

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1 In the period 1962 to 2001, Uganda has had four Constitutions. The first was the *1962 Constitution* promulgated upon obtaining formal political independence from Britain on 9 October 1962. The second was the *1966 Interim Constitution* that came into force after the abrogation of the 1962 Constitution. It remained in force until 1967, when it was replaced by the *1967 Constitution* (as the third) that continued in force, subject to several amendments, until 1995 when a fourth Constitution, the *1995 Constitution* (available at: http://www.government.go.ug/constitution/) came into force on 22 September 1995. Subject to only one amendment, the *Constitution (Amendment) Act, 2000*, the 1995 Constitution is still to date Uganda's supreme law. At the time of writing this article, the Constitution was under review by the Uganda Constitutional Review Commission set up in March 2001 to consider and get opinions of all Ugandans on reviewing the Constitution, but the composition of the Commission is totally unrepresentative handpicked by then the Justice and Constitutional Affairs Minister and thus not intended to further the cause for human rights and constitutionalism. See Blaustein, Albert P. and Flanz, Gisbert H. (eds.), *Constitutions of the*

supreme law of Uganda with binding force on all authorities and persons throughout Uganda.[2] All laws and customs are required to be consistent with the Constitution.[3] One of the central issues in Uganda's constitutional history has been concern for the protection and promotion of human rights.[4] Despite this, domestic human rights jurisprudence in Uganda is still relatively limited.

The UN Charter imposes obligations on member States (including Uganda) to achieve international co-operation in promoting and encouraging respect for human rights.[5] Since 1945, a considerable number of rules of international law, both customary and treaty have been developed at the international and regional levels with the aim of promoting human rights. Uganda is a State party to the two international human rights Covenants of 1966 and a number of other international and regional human rights instruments.[6]

In this article I focus on the analysis of the Constitutional framework for protection of international human rights in Uganda under the 1995 Constitution. To set the stage for this analysis I consider the constitutional evolution and background to the bill of rights in Uganda (section 2). This is followed by an examination of the protection of human rights in contemporary Uganda under the 1995 Constitution (section 3), and a critical analysis of the constitutional basis for applying international human rights norms in Uganda's domestic legal system (section 4), followed by concluding observations (section 5) that calls for judicial activism, democratic constitutional reform and developing culture of constitutionalism in Uganda to give effect to the indivisible and interdependent nature of all human rights.

2 Constitutional Evolution and Background to the Bill of Rights in Uganda

Uganda became a member of the international community on 9 October 1962, the date of attaining formal political independence. Before this date, Uganda had been ruled by the United Kingdom as a British Protectorate. Uganda is characterised by conflicting political and cultural traditions ranging from monarchism and authoritarianism to

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Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies, Vol. 1-19, Dobbs Ferry, N.Y, Uganda, 1997.

2 1995 Uganda Constitution, Article 2(1) states: 'This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda'.

3 *Ibidem*, Art. 2(2) provides: 'If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'.

4 Khiddu-Makubuya, E., 'The Rule of Law and Human Rights in Uganda: the Missing Link', in: Hansen, H.B. and Twaddle, M. (eds.), *Changing Uganda*, James Currey, London, 1991, pp. 217-223.

5 See Preamble to the UN Charter, together with Articles 1(3), 55 and 56 of the UN Charter.

6 Uganda acceded to the ICESCR, 21 January 1987; ICCPR, 21 June 1995; the Optional Protocol to ICCPR, 14 November 1995; ICERD, 21 November 1980; CEDAW, 22 July 1985; CAT, 3 November 1986; CRC, 17 August 1990; and MWC, 14 November 1995. At a regional level, Uganda ratified the African Charter on Human and Peoples' Rights (ACHPR), 10 May 1986; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; and the African Charter on the Rights and Welfare of the Child, 17 August 1994.

liberalism, but generally lacks a culture of Constitutionalism.[7] This has meant that not infrequently groups in power tend to ignore the formally established rules and attempt to dictate terms that inevitably provoke negative reactions, culminating in instability, civil war and other forms of conflict.[8] This section examines Uganda's historical constitutional framework and socio-political context, thereby establishing the basis for a critical consideration of the contemporary constitutional framework for protection and promotion of human rights.

2.1 Pre-Colonial and Colonial Uganda

Prior to the advent of colonialism in Uganda, the present day societies that constitute Uganda had their own indigenous legal systems.[9] Like other pre-colonial African societies, individuals existed within their social contexts that recognised and protected a variety of legal and social rights in ways that varied with the particular settings.[10] The indigenous legal and social rights system was interfered with by colonial conquest when Uganda was declared a British 'Protectorate', substantially a colony, in 1894.[11] This meant that British interests in Uganda would be protected from the interests of rival imperialist powers. Thus new legal and administrative arrangements were established based on alien ideological, administrative and legal frameworks.[12] Most of them conferred arbitrary powers on administrators with no democratic component or safeguards for Africans. This is not surprising, as Africans were considered sub-human as reflected in colonial court decisions.[13]

In this context, a mentality emerged that the colonising power was of a superior race with a mission to rule inferior races[14] thereby promoting inequality and discrimination. Pre-colonial institutions were destroyed or modified to the extent that the interests of the colonial power were served. In effect, the colonial power usurped the sovereignty of the Ugandan people, who lost the ultimate right to define their own rights and interests. Interesting to note is that throughout the colonial period 1894-1962, there was no emphasis on respect for, protection and promotion of human rights in Uganda.

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7 See *The Report of the Uganda Constitutional Commission: Analysis and Recommendations*, Uganda Constitutional Commission, Kampala, 1994, p. 56 [hereinafter UCC Report].

8 *Idem.*

9 As at 1 February 1962, Uganda had 56 indigenous communities. See Third Schedule to the 1995 Uganda Constitution.

10 Welch, Claude E. jr. and Meltzer, Ronald I., *Human Rights and Development in Africa*, State University of New York Press, Albany, 1984, p. 8; Wai, D.M., 'Human Rights in Sub-Saharan Africa', in: Pollis, A. and Schwab, P. (eds.), *Human Rights: Cultural and Ideological Perspectives*, Praeger, New York, 1979, p. 115.

11 Louise, P.M, 'History to 1971', in: Middleton J. (ed.), *Encyclopedia of Africa South of the Sahara*, Charles Scribers Sons, New York, 1996, pp. 303-306.

12 See Seidman, R.,'The Reception of English Law in Colonial Africa' in: Ghai, Y., *et al.* (eds.), *The Political Economy of Law: A Third World Reader*, OUP, Delhi, 1987, pp. 107-116.

13 See for example, *Rex* vs *Earl of Crewe, exparte Sekgome* [1910] 2 K.B. 576, 609 where it was stated that 'the Protectorate is over a country in which few dominant civilised men have to control a great multitude of semi-barbarous people'.

14 See Dore, I., 'Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach', *Saint Louis University Law Journal*, Vol. 41, 1997, pp. 1301-1318 at p. 1303.

Instead, the emphasis was placed on developing a socio-economic and political system that would tie Uganda into a web of imperialist interests.[15] Accordingly, the 68 years of British colonialism in Uganda undermined the protection and promotion of human rights. The main colonial achievement was the firm establishment of 'an intricate system that would keep Uganda dependent on imperialism, British or otherwise, even after political independence'.[16] Colonial laws affecting Africans in all their spheres of life were very harsh and oppressive and designed to silence any form of resistance to alien domination. Fundamental human rights and freedoms of the individual African were severely curtailed by laws enacted under the pretence of maintaining peace, public order and security. The right to personal liberty, freedom of movement and freedom of association were the most affected rights, and it could be safely concluded that they were virtually non-existent in colonial Uganda.[17] Besides, the colonial education system was not linked to strengthening respect for human rights and fundamental freedoms but rather education was geared towards perpetuating subordination, and exploitation. It was based on creating a minority class by selecting a few Ugandans to participate in the domination and exploitation of the majority in the country as a whole. This is not surprising since 'colonialism was a negation of freedom [or human rights] from the view point of the colonised.'[18] Consequently, the colonial legacy left Uganda in 1962 ill equipped to adequately address the question of full protection and realisation of human rights.

2.2 Post-Colonial Uganda

2.2.1 1962 Constitution and Human Rights

In 1962, Uganda was formally declared independent with the first written Constitution, which was an annex to the Uganda Independence Act 1962[19] passed by the British Parliament incorporating a bill of rights. The 1962 Constitution was drafted at the 1961 London Constitutional Conference following negotiations between Britain as the departing colonial power and the nationalist politicians at the time.[20] At this conference, it was decided that the Constitution of Uganda would contain a chapter protecting a number of human rights and freedoms.[21] These rights were to be enforceable by the

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15 See Mamdani, M., *Imperialism and Fascism in Uganda*, Heinemann Educational Books, London, 1983, pp. 6-7. Summarising the effect of colonialism Mamdani rightly notes that: 'Walter Rodney [*How Europe Underdeveloped Africa*, (1982)] observes that the African peasant went into colonialism with a hoe, and came out with a hoe. He should have added that the hoe the peasant went in with was locally manufactured; the hoe he came out with was imported!'

16 *Ibidem*, p. 8

17 Kabudi, P. J., *Human Rights Jurisprudence in East Africa*, Nomos Verlagsgesellschaft, Baden, 1995, p. 47.

18 Rodney, W., *How Europe Underdeveloped Africa*, Howard UP, Washington, D.C., 1982, p. 223.

19 10 & 11 Eliz. 2 c.57 passed by the Imperial Parliament in August 1962.

20 See Oloka-Onyango, J., 'Constitutional Transition in Museveni's Uganda: New Horizons or Another False Start?', *Journal of African Law*, Vol. 35, 1995, pp. 156-172, at p. 157.

21 Colonial Office, *Report of the Uganda Constitutional Conference*, HMSO, London, 1961, Cmnd 1523, p. 29. The rights related to life; personal liberty including protection from arbitrary arrest; freedom from slavery and forced labour; the right to a fair criminal trial and fair

High Court of Uganda.[22] The list only contained civil and political rights with no mention of economic and social rights. This is not very surprising, since the leading architects of the 1962 Uganda Constitution were the very same colonial authorities that had maintained non-democratic colonial government insensitive to the civil, political as well as the social, economic and cultural rights of the colonised Ugandans. It is important to note that the European Convention on Human Rights (ECHR)[23] was the model used for drafting the Ugandan Constitution bill of rights,[24] although neither its provisions nor the jurisprudence developed under it has been cited in judgments of the Ugandan courts.

In June 1962, the last constitutional conference in the run up to the independence of Uganda was convened in London. It was finally agreed that a bill of fundamental rights or, as referred to in the conference reports, 'the Code of Fundamental Rights'[25] be included in the Constitution as chapter two.[26] Despite the events that led to numerous constitutional changes in Uganda, including the repeal of the 1962 Constitution and enactment of the 1967 Constitution, this bill of rights remained on paper with minor modifications until the enactment of the 1995 Constitution that attempted to improve the bill of rights under chapter four of the Constitution.

The 1962 Constitution had a justiciable bill of rights protecting, as noted above, largely civil and political rights; created a periodically elected Parliament and a cabinet drawn from and responsible to Parliament; and defined powers for the major organs of government – the legislature, executive and judiciary. In the period when the 1962 Constitution was in force, there was an important constitutional case involving the legality of political detention. In *Grace Ibingira and Others* vs *Attorney General*[27] the appellants (five cabinet ministers) had been held in custody pending the Minister's decision whether or not an order for their deportation should be made under the Deportation Ordinance (Cap. 46). On application for a writ of *habeas corpus*, the Court of Appeal for Eastern Africa held that the detention was unlawful and void, since it violated the appellants' right to personal liberty and freedom of movement contrary to

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determination of civil rights; freedom from inhumane treatment; freedom from expropriation of property; the right to privacy of the home and to be protected against arbitrary search; freedom of expression; freedom of thought, conscience and religion; freedom of assembly and association; freedom from discrimination; freedom of movement and freedom from retrospective criminal legislation. It was further agreed that derogation from the fundamental human rights provisions be permissible in certain cases but only if authorised by regulations made under the emergency law.

22 *Idem.*

23 Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* 3 September 1953.

24 Cmnd 1523, *supra* (note 21); Morris, H. F. and Read, J. S., *Uganda: The Development of Its Laws and Constitution*, Stevens & Co., London, 1966, p. 169.

25 Colonial Office, *Report of the Uganda Independence Conference, 1962*, HMSO, London, 1962, Cmnd 1778, p. 4.

26 Morris and Read, *supra* (note 24), pp. 76 and 169. The 1962 Ugandan Constitution Bill of Rights was substantially based on the Nigerian bill of rights that was in turn based on the ECHR. See generally, Nwabueze, B.O., *Constitutional Law of Nigeria*, Butterworths, London, 1964.

27 (1966) EALR 306.

the provisions of the 1962 Constitution.[28] The ministers were freed from detention, but were rearrested and detained under emergency regulations. Legislation was immediately passed, barring the courts from awarding any damages or costs against the government in cases instituted against it by the five ministers. In effect, the ministers were deprived of protection of the law and courts rendered impotent in protecting the human rights of the detainees.

2.2.2 1966 Constitution and Human Rights

On 22 February 1966, the then Prime Minister of Uganda (Apollo Milton Obote) seized all the powers of Government. He thereafter suspended the 1962 Constitution following allegations that he had been involved in gold and ivory smuggling in Congo. He declared himself the Executive President of Uganda and imposed the interim Constitution of 1966 that came into force on 15 April 1966, with neither debate nor discussion, hence the apt description adopted for it as the 'Pigeon-Hole' Constitution.[29] Although a bill of rights was retained, enormous powers were vested in the president thereby laying a basis for undermining the promotion of human rights. The suppression of dissenting views and criticism against the government culminated in violation of human rights including the banning of opposition parties in 1969.[30] Uganda became a one party State. After the adoption of the 1966 Constitution, a state of public emergency was declared and the Emergency Powers (Detention) Regulations 1966 were made. Attempts to challenge the legality of the 1966 Constitution were unsuccessful. In *Uganda* vs *Commissioner of Prisons, exparte Matovu*[31] a citizen sought to challenge the constitutionality of his detention under the Emergency Powers (Detention) Regulations 1966; the authority of the government, which had come to power by abrogating the 1962 Constitution and the validity of the 1966 Constitution. The High Court of Uganda sitting as a Constitutional Court rejected this view on the basis of the classic theory borrowed from the Austrian legal philosopher, Hans Kelsen, that the taking over of the powers of the Government by the Prime Minister, the abrogation of the 1962 Constitution and its replacement by the 1966 Constitution amounted to a 'victorious revolution' which overturned the previous legal order and established a new legal order based on the 1966 Constitution and that this rendered legitimacy to the new order.[32] By so holding, judicial endorsement was made of the

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28 The relevant provisions were s. 19 (1) (j): 'No person shall be deprived of his personal liberty save as may be authorised by law (...) to such an extent as may be necessary in the execution of a lawful order ...' and s. 28 (1): 'No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Uganda, the right to reside in any part of Uganda, the right to enter Uganda and immunity from expulsion from Uganda'.

29 *Loc.cit.* (note 20), p. 158.

30 See generally, Sathyamurthy, T.V., *Political Developments in Uganda*, Aldershot, Gower, 1986; Penal (Unlawful Societies) No. 2 Order S.1233 of 1969.

31 (1966) EALR 514.

32 See generally, Kelsen, H., *General Theory of Law and State*, Russel and Russel, New York ,1961, pp. 117-118 and p. 220; Also M.D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell, London, 7th ed., 2001, pp. 255-330; and *Madzimbamuto* vs *Lardner-Burke*, 1969, 1 A.C

abrogation of Uganda's Constitution through unconstitutional means. This set a dangerous precedent.[33]

As late as 1979, the Court of Appeal in Uganda when faced with a similar situation, involving the use of extra-constitutional means of assumption of power, still applied Kelsenian principles as good law in Uganda.[34] However, it seems clear that the aim of the 1995 Ugandan Constitution was to outlaw Kelsen.[35] But in my view this amounts to an exercise in futility since Kelsenian principles are likely to assert themselves after abrogation of this Constitution and eventually one has to face the facts.

Another case brought under the 1966 Constitution concerned the powers of the President to dismiss. In *Shabane Opoloto* vs *Attorney General of Uganda*,[36] the appellant, who was formerly a Brigadier in the Uganda Army and Chief of the Defence Staff, was discharged by the Ugandan president from the army on 7 October 1966, and was detained under Emergency Regulations. He sought to challenge his discharge from the military service by the President of Uganda. The Ugandan Court of Appeal held that by virtue of Article 131 of the 1966 Constitution, the President had the prerogatives which the British Crown had before the independence of Uganda with respect to public servants in Uganda, and that one such prerogative was the power to dismiss at will officers, including military officers, unless that right was fettered by statute.[37] Accordingly the court found that the appellant was validly discharged from the Armed Forces.

2.2.3 1967 Constitution and Human Rights

On the basis of judicial endorsement of the events of 1966 as 'successful revolution', Obote's Government was accorded legitimate powers to promulgate the 1967 Constitution without reference to the requirements of the 1962 Constitution. The 1962 Bill of Rights was substituted with the 'watered-down 1967 version'.[38] The bill of rights under the 1967 Constitution was subordinated to overriding State interests that

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33 In reaching its decision, the Ugandan Court considered and relied on the Pakistan case of *The State* vs *Dosso and Another*, 1958, 2 PSCR 180, which at the time had been overruled and rejected in Pakistan in *Asma Jilani* vs *Govt. of Punjab*, Criminal Appeal 19/1972, PLD 1972 Supreme Court 139 (discussed in Lyer, 1973) *Am. J. Comp. Law*, Vol. 21, p. 759 and Ssempebwa, E.F., *Uganda Law Focus*, 1974, p. 178, where the Court held, *inter alia*, that the order which the usurper of power imposes remains illegal.

34 *Andrew Lutakome Kayira and Anor* vs *Edward Rugumayo and others*, Const. Case No. 1/1979.

35 See Art. 3(3) 'This Constitution shall not lose its force and effect even where its observance is interrupted by a government established by the force of arms; and in any case, as soon as the people recover their liberty, its observance shall be re-established and all person who have taken part in any rebellion or other activities which resulted in the interruption of the observance, shall be tried in accordance with this Constitution and other laws consistent with it'.

36 (1969) EALR 631.

37 See *Terrell* vs *The Secretary of State for the Colonies*, [1953] 2 Q.B. 482 and *Dunn* vs *The Queen*, [1896] 1 Q.B. 116.

38 Ssekandi F.M. and Gitta, C., 'Protection of Fundamental Rights in the Uganda Constitution' *Columbia Human Rights Law Review*, Vol. 26, No. 1, 1994, pp. 191-213, 202. See, Chapter III, 1967 Constitution.

authorised: the imposition of a state of emergency without limitation; the arrest and detention of people without trial; deprivation of individual property without adequate compensation; and unreasonable searches and seizures in the interest of State security. In essence, therefore, the conditions imposed on the constitutional safeguards by the 1967 Constitution eroded and negated the very substance of international human rights.[39]

In 1971, Uganda was plunged into a military dictatorship when the army led by Idi Amin Dada seized power after a military coup. To 'legitimise' and validate the extra-constitutional usurpation of power by the military regime, the key articles of the 1967 Constitution were suspended.[40] In effect, Amin became the supreme law of Uganda. The new government relied on decrees[41] and terror was simply used as an instrument of policy. The government of Idi Amin lasted for nine years characterised by a consistent pattern of gross violations of human rights on a wide scale,[42] the abolition of democratic institutions including parliament, and the subjection of other institutions such as the civil service and the military to one-man dictatorship. Uganda became internationally notorious for human rights violations including killings, disappearances, torture, arbitrary arrest, and discrimination as evidenced by Amin's expulsion of 'non-citizens' - Asians.[43]

It is against this background that a number of political forces emerged and took up arms to resist the dictatorship eventually leading to the fall of Amin in 1979. The several regimes that followed, suspended key constitutional provisions to justify their extra-constitutional usurpation and exercise of power.[44] After the fall of Amin, Uganda's new president addressed the United Nations General Assembly and observed that 'the United Nations looked on with embarrassed silence [while] at least half a million people

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39 Ssekandi, *Ibidem*, p. 198. Other Constitutional cases under the 1967 Constitution include, *Shah* vs *Attorney General of Uganda*, 1969, EALR 261, and *Sempebwa* vs *Attorney General* Constitutional Case No. 1 of 1986 both on right to property, here the court held that judgment debt was property within the meaning of the 1967 Constitution; In *Kyesimira* vs *Attorney General* Civil Appeal No. 1 of 1981, the Court of Appeal declared unconstitutional a detention order that had been served on the appellant, an opposition member of parliament, in accordance with the *Public Order and Security Act, 1967* (Act 2 of 1967). Though, the Court released the appellant, the government served him with another detention order, and he languished in prison until July 1985.

40 By Legal Notice No. 1 of 1971, Arts. 1 (supremacy of the Constitution), 3 (its alteration) & 63 (power to make law) were suspended.

41 See, Morris, H. F., 'Uganda' in Rubin N. N. and Cotran E. (ed.), *Annual Survey of African Law*, Rex Collings, London, 1977, pp. 126-127. For almost a decade Amin banned all political parties pursuant to the suspension of political parties activities decree, Decree No. 14 of 1971.

42 See Twinomugisha, B., 'Uganda', in: Heyns, C. (ed.), *Human Rights Law in Africa 1997*, Kluwer Law International, Hague, 1998, p. 293; Omara – Otunnu, A., *Politics and the Military in Uganda*, MacMillan Press, London, 1987, p. 77. See, also generally, International Commission of Jurists, *Uganda and Human Rights, Report of the UN Commission on Human Rights 1977*, Geneva, Switzerland.

43 See UCC Report *supra* (note 7), p. 10.

44 Gertzel, C., 'Uganda after Amin: the continuing search for leadership and control', *African Affairs*, Vol. 37. 1980. pp. 461-489.

were murdered in cold blood'.[45] A swift transition of power followed from one governing regime to another in 1979-1980, leading to elections in December 1980 that brought Obote back to power. The 1980 elections were endorsed internationally as widely having been 'free and fair', but they were domestically challenged although not in courts. Although the 1967 Constitution continued to be in force, 'neither the practice nor the law promulgated under it paid any homage to accepted notions of constitutionalism or democratic rule. The Constitution was at best an expeditious instrument for the consolidation of personal power and at worst was simply ignored'.[46] Internal armed conflict continued until January 1986 when Yoweri Museveni together with his National Resistance Army/Movement (NRA/M), seized power after a five year guerrilla warfare. By and large, the period 1962-1986 in Uganda has been classified as the era of human rights violations.[47]

3 HUMAN RIGHTS IN CONTEMPORARY UGANDA UNDER THE 1995 CONSTITUTION

Upon assuming power in 1986, Museveni together with his National Resistance Army/Movement (NRA/M), first sought like other previous regimes, to legitimise the unconstitutional usurpation and subsequent exercise of State power by altering the 1967 Constitution.[48] The NRM promised 'a fundamental revolution' and 'not a mere change of the guard'.[49] One would have expected this fundamental change to extend to the observance of democracy and human rights. However, Uganda's human rights record since 1986 indicates that a great deal has remained unchanged, while in other areas severe human rights violations have continued.[50] By way of example, in 1999 the Uganda Human Rights Commission (UHRC) found:

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45 Statement of Godfrey Binaisa, President of Uganda, at the 14th plenary meeting of the General Assembly (28 September 1979), *Official Records of the General Assembly, 34th Sess., Plenary meetings*, Vol. I, pp. 269-270.

46 Oloka-Onyango, *loc.cit.* (note.20), p.159.

47 See generally, UCC report, *supra* (note 7).

48 By *Legal Notice No. 1 of 1986* the following provisions of the 1967 Constitution were suspended: Art. 3 (on alteration of the Constitution); Chapter IV (the Executive), save Arts. 24, 28, 34, 35 & 36; Chapter V (on Parliament) & Art. 63 (on the power to make laws for Uganda).

49 See President Museveni, Y.K., *Sowing the Mustard Seed*, MacMillan, London, 1997, p. 172.

50 These include arbitrary arrests, detention in illegal detention centres operated by State organs famously known as 'safe houses' without charges and trial (*e.g*, a one Patrick Owomugisha Mamenero died at Chieftaincy of Military Intelligence (CMI) detention in July 2002 forcing the Chairperson of the Uganda Human Rights Commission, Margaret Ssekaggya, to pronounce that: 'Detentions by the Chieftaincy of Military Intelligence (CMI) are illegal', *Monitor*, 1 August 2002 , 'Human rights body condemns Army killings'); severe restriction of freedom of political assembly and association; torture and extra-judicial killings; harassment and arbitrary arrest of journalists; harsh and life threatening prison conditions; continued use of death penalty and executions and abuses by armed opposition groups mainly by the Lord's Resistance Army (LRA) in Northern Uganda. For recent reports see, *e.g*, Amnesty International, *Annual Reports*, Uganda, 1999, 2000 & 2001; U.S. Department of State, *Country Reports on Human Rights Practices* – Uganda, 1999, 2000 & 2001; Human Rights Watch, *World Report*, 2000 & 2001, Uganda; New Vision 31 July, 2002, 'Judiciary Protests On Kayanja'.

> '... several people detained for long periods in various Police Stations around Kampala (Uganda's capital). These were denied access to relatives, lawyers, and doctors. Members of the Commission were also denied access to detainees (...) In effect some Police Stations [were turned] into places of illegal detention'.[51]

This is not very surprising since from the very inception, the commitment of Museveni's Government to human rights and constitutionalism has been deficient. This was clearly manifested in Legal Notice (LN) No. 6 of 1986 that prohibited actions in any court against the Government resulting from violations of human rights committed between 1 November 1978 and 26 January 1986.[52] The Notice nullified any suit, action or proceedings brought against the Government before 23 August 1986 and any judgment, decree or order against the Government that was not fully executed or satisfied.[53] This was challenged in the case of *Ssempebwa* vs *Attorney General*[54] on the ground, *inter alia*, that it was not made in accordance with the Constitution and deprived the applicant of property (judgment debt) without compensation. The applicant had been awarded damages arising out of wrongful arrest and imprisonment, assault, search, humiliation, and loss of property. The Court found that this Legal Notice was not properly made[55] and was therefore null and void. However in a mockery of the Court's judgment, the government simply made a *verbatim* re-enactment that still applied retrospectively and rendered the constitutional provisions protecting against deprivation of property without compensation non operational. As a result, the applicant was deprived of any effective remedy.

Museveni's Government since its inception in 1986 created a 'no-party' or 'movement' system that restricts the operation of political parties except President Museveni's Movement. Although it has been claimed that this 'no-party' system is 'a relatively new democratic philosophy'[56] consistent with the conceptions of 'African democracy',[57] it is clear that it is inherently hostile to democracy and has imposed restrictions on the full enjoyment of civil and political rights[58] that in turn undermines the effective realisation of economic, social and cultural rights in Uganda. The 'no-party' system claims that political parties are inappropriate for Africa and will degenerate into ethnic or religious factions with attendant social strife because of the low ('classless') level of social and economic development in Africa.[59] The justification for a 'no-party' system in Uganda is the view that Uganda is still a 'pre-industrial society'

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51 See UHRC, *Annual Report*, 1999, para. 2.09.

52 See Legal Notice No. 6 of 1986, S. 12 (2) (i).

53 *Ibidem*, S. 12 (2) (ii).

54 Constitutional Case No. 1 of 1986.

55 As it had not been signed by the President and lacked a public seal contrary to the mandatory constitutional requirement introduced by LN No. 1/1986, para. 7.

56 Kirya, G.B., 'The 'No Party' or 'Movement' Democracy in Uganda', in: *ICJ, The Review*, No. 60, Special Issue, 1998, pp. 79-89, at p. 89.

57 See, *e.g*, Museveni, Y. K., *What is Africa's Problem?*, University of Minnesota Press, Minneapolis, 2000, pp. 219-220.

58 See, generally, Human Rights Watch, *Hostile to Democracy: The Movement System and Political Repression in Uganda*, Human Rights Watch, London, 1999 [herein after, HRW, 1999].

59 See, Oloka-Onyango, *loc.cit.* (note 20), p.160.

with mainly 'tribal groups' without any significant level of social stratification.[60] This view has formed the basis of curtailing civil and political rights in Uganda since 1986. To justify this, Museveni has argued that 'unlike the law of Moses, most human rights are not divinely ordained and are subject to modification to fit the political and socio-economic conditions of the societies where they are applied'.[61] This view of human rights is contrary to the position declared in the 1995 Uganda Constitution that repealed the 1967 Constitution.[62] The Constitution stipulates: 'Fundamental rights and freedoms of the individual are inherent and not granted by the State'.[63] Nevertheless, it was in the context of the 'no-party' philosophy that in 1988, a Constitutional Commission was established to collect views on the new Constitution for Uganda. The Chairman and members of the Commission were all appointed directly by the President, without any open democratic consultation or representation of interest groups and organisations. The Commission was therefore not intended to further the cause for democracy, human rights and constitutionalism but intended to assist the 'Movement' regime to entrench its stay in power without organised political opposition groups. It is this Commission that published a report preceding the 1995 Constitution after four years of discussion, deliberation and consultation, the most important part of which was the draft constitution.[64] In order to retain the 'Movement' system in power, the Commission as expected *inter alia* recommended restrictions on the operation of political parties thereby effectively stunting the development of political pluralism in Uganda and laying the basis for concretisation of Museveni's *de facto* single-party domination of Uganda's political scene as long as the 'Movement' pleases.[65] After discussion by the Constituent Assembly (whose composition included presidential nominees and army delegates commanded by the president),[66] a new Uganda Constitution was enacted on 22 September 1995. In the next section we will examine the protection and promotion of human rights under the 1995 Constitution.

3.1 The Preamble

The preamble to the 1995 Constitution recalls that Uganda's 'history has been characterised by political and constitutional instability'[67] and 'struggles against forces of tyranny, oppression and exploitation'.[68] It ends by committing Ugandans to building a better future based on 'the principles of unity, peace, equality, democracy, freedom,

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60 See Museveni, Y. K., quoted in Oloka-Onyango, *ibidem*, p. 156.

61 President Yoweri Museveni, Speech at 'Liberation Day' celebrations in Kampala, 26 January 1999, quoted in HRW, 1999, *supra* (note 58).

62 For a background to the 1995 Constitution, see generally, Mukoli, D., *A Complete Guide to Uganda's Fourth Constitution: History, Politics and the Law*, Fountain Publishers, Kampala, 2nd ed., 1995.

63 1995 Constitution, Article 20 (1).

64 See, generally, UCC Report, *supra* (note 7).

65 See Mamdani M., *Pluralism and the Right of Association*, CRB Working Paper No. 29, Kampala, 1993.

66 See Uganda *Constituent Assembly Statute*, 1996 (Statute No. 6 of 1993), S. 4.

67 1995 Constitution, preamble para. 1

68 *Ibidem*, preamble para. 2.

social justice and progress'.[69] Any meaningful interpretation of the bill of rights under the Constitution must be made in this context generally applying the whole Constitution as a human rights Charter.

This demands a break from past oppression to a society based on human rights. This can only be attained if there is commitment to the effective respect, protection, promotion and fulfilment of the indivisible and interdependent nature of all human rights. Thus, Uganda's bill of rights needs to be interpreted in light of the preamble and the social-historical context of Uganda's constitutional instability and 'chequered history on human rights'.[70] In doing so, sight must not be lost of the spirit of the 1995 Constitution, which is 'the establishment, and promotion of a just, free and democratic society'.[71]

3.2 National Objectives and Directive Principles

The 1995 Uganda Constitution distinguishes between a bill of rights (that is amenable to justiciability/legal enforcement) and the directive principles (merely as a 'guide' to applying the Constitution, and thus not justiciable in the strict sense). The principles outlined in the preamble to the 1995 Uganda Constitution are emphasised in the National Objectives and Directive Principles of State policy that requires the State to be based on democratic principles; work towards the promotion of national unity, peace and stability; guarantee and respect human rights including gender balance and representation of marginalised groups.[72] It is in this part of the Constitution that most social and economic rights are articulated in general terms as 'objectives' of the State. In this regard, the Constitution provides:

> 'The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that
> (a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and
> (b) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.'[73]

It is submitted that in interpreting the provision guaranteeing human rights, the courts must of necessity take into account the National Objectives and Directive Principles of State Policy.[74] Though not justiciable – subject to legal adjudication – in the strict sense,

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69 *Ibidem*, preamble para. 3

70 *Hon. Zachary Olum* vs *Attorney General*, Constitutional Petition No. 6/99 (judgment of Twinomujuni, p. 4). See also *De Klerk & Anor* vs *Du Plassis & Ors* (1994) 6 BLR 124, 128-129 (Supreme Court of SA) cited with approval by Uganda's Supreme Court (per Order) in *Tinyefuza* vs *AG*, Constitutional Appeal No. 1 of 1997.

71 *Ibidem* (judgment of G.M. Okello, p. 12).

72 See 1995 Constitution, objectives II, III, V & VI.

73 See, *ibidem*, objective XIV.

74 See Mukubwa G.P.T., 'The Uganda Constitution, 1995 and Human Rights: Interpretation and Enforcement of Chapter Four Rights and Freedoms' in: Walubiri P. M. (ed.), *Uganda:*

the objectives and principles should be given effect whenever it is fairly possible to do so without violating the meaning of the words used. In this connection, they can play a significant role in the development or furtherance of human rights jurisprudence.[75]

The Constitutional Court in Uganda has stressed the significance of the Preamble and the directive principles in the following words:

> 'The binding values in this constitutional dispensation are clearly set forth in the Preamble. These are unity, peace, equality, democracy, freedom, social justice and progress. In order to ensure that all citizens, organs and agencies of the state never lose sight of those values in all our actions, a statement of National Objectives and Directive Principles of State Policy was set forth (...) the first paragraph states: 'The following objectives and principles shall guide all organs and agencies of the state (...) and persons applying or interpreting this Constitution or any other law (...) for the *establishment and promotion of a just, free and democratic society*.' That ought to be our first canon of construction of this Constitution.'[76] (emphasis added)

This approach should be seen in the context of the 1995 constitutional requirement that directs courts to exercise judicial power 'in conformity with the law and with the values, norms and aspirations of the people'.[77] Some of these values are stated in the preamble and the National Objectives and Directive Principles of State Policy. This calls for a generous and purposive approach to interpretation of human rights looking at the Constitution as a living document to meet the demands and aspirations of an ever developing society. In the words of the former Uganda Deputy Chief Justice in *Tinyefuza* vs *Attorney General*:[78]

> '(...) While the language of the Constitution does not change, the changing circumstances of progressive society for which it was designed may give rise to new and fuller import to its meaning. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time and, therefore, while interpreting such a provision, the approach of the court should be dynamic, progressive and liberal or flexible keeping in view ideals of the people, socio-economic and politico-cultural values so as to extend the benefit of the same to the maximum possible.'

The dynamic approach to constitutional interpretation in the Ugandan context should involve the application and interpretation of the bill of rights in light of the directive principles. This would mean, for example, that in approaching the right to education

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Constitutionalism at the Cross-Roads, Uganda Law Watch Centre, Kampala, 1998, pp. 1-56 at pp. 13-14.

75 *NTN Rty Ltd and NBN Ltd* vs *the State* (1988) LRC (Const) 333 at 352 (S.C Papaua New Guinea).

76 See, judgment of Egonda-Ntende J. in *Tinyefuza* vs *Attorney General* ,Constitution Petition No. 1 of 1997, pp. 16-18.

77 See 1995 Constitution, Art. 126.

78 Constitutional Petition No. 1 of 1997, Judgement of Manyindo D.C.J. at 16.

guarantee under the 1995 Constitution, the court would need to take into context the education objectives under the directive principles. As regards the right to education, the 1995 Constitution within the Bill of Rights only stipulates that '[a]ll persons have a right to education'.[79] This is an important provision, because for the first time education was posited as a human right in Uganda's domestic constitutional framework. However, none of the aspects of the right to education as guaranteed under the Constitution have yet been subjected to judicial scrutiny in Uganda. The guarantee on education is cast in very general terms making it uncertain in several respects. What education do all persons in Uganda have a right to? What precisely are the rights of the right-holders? What are the obligations of the State as a primary duty-holder? Such questions, however, may be resolved if the right to education guarantee is interpreted in the light of the educational objectives under the Directives Principles of State Policy to the 1995 Constitution. Objective XIV states, *inter alia*, that:

> 'The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that all Ugandans enjoy rights and opportunities and access to education (...)'

The obligation here is to 'endeavour to fulfil' (rather than 'fulfil') the right to education of 'all Ugandans' (rather than 'all persons' as used in the Bill of Rights). This seems to reflect the notion of 'progressive realisation' taking into account 'available resources'. In addition, the Constitution stipulates the following as 'educational objectives':

> '(1) The State shall promote free and compulsory basic education.
> (2) The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible.
> (3) Individuals, religious bodies and other non-governmental organisations shall be free to found and operate educational institutions if they comply with the general educational policy of the country and maintain national standards'.[80]

The four basic principles that flow from interpreting the right to education guarantee under Article 30 in light of this educational objective are: first the principle of *free* 'basic' education. The second principle is *compulsory* 'basic' education. '*Basic*' education is not defined under the Constitution, but the 1992 White Paper considered it to mean the 'provision of opportunities for acquiring the minimum package of knowledge, skills and attitudes that will enable one to realise one's potential and to contribute constructively to local and national development'. The third principle relates to *equal access* to education and non-discrimination. This means that the right to education applies to 'all persons' within the jurisdiction of Uganda on a non-discriminatory basis.[81] It has to be

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79 1995 Constitution, Art. 30.

80 *Ibidem*, Para. XVIII.

81 *Ibidem*, Art. 21 (2) stipulates that '... a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability'.

realised in practice including by all historically marginalised groups like women,[82] persons with disabilities,[83] and minorities.[84] The final principle is the right to establish private educational institutions, so as to remove the State's monopoly over education and protect educational pluralism. In this way, the directive principles can be creatively applied to inform the substantive guarantees with the bill of rights so as to clarify the scope and content of such rights and enhance the protection and promotion of human rights. It is still uncertain whether the Ugandan Courts would adopt and apply this approach.

3.3 The Bill of Rights in the 1995 Uganda Constitution: A Comparative Analysis with Uganda's International Human Rights Obligations

3.3.1 Civil and Political Rights

3.3.1.1 General overview

Civil and political rights are guaranteed in the ICCPR to which Uganda acceded on 21 June 1995 without any reservations and for which it entered into force on 21 September 1995. Uganda is also a party to the first optional protocol to the ICCPR since 14 November 1995 that allows individual petitions to the Human Rights Committee (HRC) but as yet no petition has been filed against Uganda. However, Uganda is not yet a party to the Second Optional Protocol to the ICCPR, aimed at the abolition of the death penalty since the death penalty is still used as a tool to protect those in power.

The 1995 Uganda Constitution incorporates and protects civil and political rights guaranteed under the Covenant. The basic premise is that human rights are not gifts from the constitution or the State, but inherent in every human being by birth and not mere aspirations, but claims of entitlement for all human beings merely by virtue of being human. Thus the Constitution declares: 'Fundamental rights and freedoms of the individual are inherent and not granted by the State'.[85] As noted by the Constitutional Court in Uganda:

> 'This Article by stating that these rights are inherent in the individual and not granted by the state sets these rights [aside] from any in the Constitution granted by or under the Constitution. In respect of the rights in this chapter, the Constitution is recognising their inherent existence in the individual and not merely creating the rights. To that extent they must be looked at in a different

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82 *Ibidem*, Art. 33(2) provides: 'The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement'.

83 *Ibidem*, Art. 35 (1) states: 'Persons with disabilities have a right to respect and human dignity and the State and society shall take appropriate measures to ensure that they realise their full mental and physical potential'.

84 *Ibidem*, Art. 36 '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'.

85 1995 Constitution, Art. 20 (1).

> light from other rights created by law (...) The rights are inherent and not conferred by any mortal authority or person.'[86]

Thus, because of this recognition of the inherent nature of human rights, the enumeration of the rights under the Constitution should not be regarded as exclusive of other human rights not specifically provided under the Constitution. This is recognised by Article 45 of the 1995 Uganda Constitution that states that 'the rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'. Arguably therefore, all civil and political rights declared under the UDHR and guaranteed under the ICCPR constitute part of the Bill of Rights under the 1995 Uganda Constitution.

The civil and political rights contained in Chapter Four of the Constitution do not depart in any significant fashion from the body of rights and freedoms spelled out in the UDHR and the ICCPR. In brief, the Constitution recognises the right to equal protection of the law and freedom from discrimination;[87] the right to life;[88] personal liberty;[89] prohibition from torture, cruel, inhuman or degrading treatment or punishment;[90] protection from slavery, servitude and forced labour;[91] protection from deprivation of property;[92] right to privacy of the person, home or other property;[93] right to a fair hearing;[94] freedom of conscience, expression, movement, religion, assembly and association.[95] In addition, the Constitution protects the right of a citizen to participate in the affairs of government,[96] and the right of access to information in the possession of the State.[97] There is a total and absolute prohibition from derogation of freedom from torture, cruel, inhuman or degrading treatment or punishment;

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86 See judgement of Egonda Ntende J. in *Major General David Tinyefuza* vs *Attorney General*, Constitutional Petition No. 1/1996.

87 1995 Constitution, Art. 21.

88 *Ibidem*, Art. 22.

89 *Ibidem*, Art. 23.

90 *Ibidem*, Art 24.

91 *Ibidem*, Art. 25.

92 *Ibidem*, Art. 26. For a discussion of this constitutional provision, see Mugambwa J., 'Article 26 (2) of the 1995 Constitution of Uganda and the Protection of Private Property', *East African Journal of Peace and Human Rights*, Vol. 4, 1997, pp. 70-89.

93 *Ibidem*, Art. 27.

94 *Ibidem*, Art. 28.

95 *Ibidem*, Art. 29. See, *Uganda Journalists Safety Committee & 2 Others* vs *Attorney General*, Constitutional Petition No. 6 and 7 of 1997; *Charles Onyango Obbo & Andrew Mwenda* vs *Attorney General*, Constitutional Petition No. 15 of 1997; *Paul K. Ssemwogerere & Zachary Olum* vs *Attorney General*, Constitutional Petition No. 3 of 1999 and Constitutional Appeal No. 1 of 2000; *Dr. James Rwanyarare & Haji Badru Kendo Wegulo* vs *Attorney General*, Constitutional Petition No. 5 of 1999 and Constitutional Appeal No. 1 of 1999.

96 *Ibidem*, Art. 38.

97 *Ibidem*, Art. 41. See, *Hon. Zachary Olum & Hon. Rainer Kafire* vs *Attorney General*, Constitution Petition No. 6 of 1999.

freedom from slavery or servitude; the right to a fair hearing; and the right to an order of *habeas corpus*.[98]

3.3.1.2 General limitations on civil and political rights

The rights guaranteed under the Constitution are subject to two general limitations. The first is that in the enjoyment of the rights, no person shall prejudice 'the fundamental and other human rights and freedoms of others' and secondly 'the public interest' acceptable and demonstrably justifiable in 'a free and democratic society'.[99] In considering the scope of this limitation, one justice of the Ugandan Constitutional Court has taken the view that this limitation is 'not capable of precise definition as it is a new development. However the underlying principle is that the restrictions must have regard for a 'proper respect for the rights and dignity of man[human]kind'.[100] It is, however, possible to give meaning to this limitation by comparing with other similar Commonwealth jurisdictions. The phrase 'free and democratic society' appears in the Bill of Rights of many Commonwealth Constitutions,[101] while the phrase 'acceptable and demonstrably justifiable' as used in Article 43(2) of Uganda's 1995 Constitution is substantially similar to the Canadian Constitution phrase 'reasonable and demonstrably justified' as used in the Canadian Charter. This has been understood to mean that any limitation on a human right or freedom must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'[102] and the onus of justification is on the party seeking to limit.[103] Before a limitation is considered as 'sufficiently important' it is necessary, at the very minimum, that it relates to concerns which are 'pressing and substantial' in a free and democratic society.[104] The means chosen to limit the enjoyment of a human right should then be demonstrated to be 'reasonable [acceptable] and justified', which involves 'a form of proportionality test' necessitating the courts to balance the interests of society with hosts of individuals and groups.[105] In turn, proportionality demands that the measures adopted must not be arbitrary but rationally connected or designed to achieve the objective in question and the means adopted should impair 'as little as possible' the right or freedom in question.[106] The limitation should not only be 'acceptable and demonstrably justified' but must pass the ultimate standard of the principles necessary in a 'free and democratic society'. The principles essential to a free and democratic society include 'respect for inherent dignity of the human person, commitment to social justice and equality, accommodation of a

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98 *Ibidem*, Art. 44. On *habeas corpus*, see *Sheik Abdul Karim Sentamu and anor*, Constitutional Reference No. 7 of 1998.

99 *Ibidem*, Arts. 43 (1) and (2) (c).

100 Judgment of Mpagi-Bahigeine, JA, in constitutional petition No. 6/99, *supra* (note 97), pp. 6-7.

101 See, *e.g*, Canada, Papua New Guinea, Namibia, Zimbabwe, Nigeria and Zambia Constitutions.

102 *R V. Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (Supreme Court of Canada).

103 *R V. Oakes* (1986) 26 DLR (4th ed) p. 200 at p. 227 (Supreme Court of Canada) cited with approval in judgment of Twinomujuni, JA, in *Charles Onyango Obbo and Anor* vs *Attorney General* Constitutional Petition No. 15 of 1997 pp. 32-36. Also G.M Okello, JA, Constitution Petition No. 6 of 1999, 14-15 *supra* (note 97).

104 *R V. Oakes, idem.*

105 *Idem.*

106 *Idem.*

wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individuals and groups in society'.[107] It is submitted that such an approach would be an adequate standard to limit unacceptable restrictions on the violation of human rights if consistently adopted and applied by the Ugandan courts. The duty must be on the state to give relevant and sufficient reasons (legitimate aims) for the limitation and the courts should determine whether such reasons are proportionate to the limitation of the enjoyment of human rights, taking into consideration the character of a democratic society, and in particular whether there is an alternative, less intrusive way of protecting the public interest.

There remain, however, two disturbing constitutional provisions under the 1995 Constitution warranting further analysis. The first relates to the 'complex web of legal restrictions'[108] on the right to political association that negatively impacts on the enjoyment of other civil and political rights as well as economic, and social rights, and the second concerns the recognition of the death penalty and apparent conflict with the absolute prohibition from 'torture, cruel, inhuman, or degrading treatment or punishment'.

3.3.1.3 Restrictions on Political Association

Under Article 29(1)(e) and Article 270 of the 1995 Uganda Constitution, freedom of association including freedom to form and join a political organisation is guaranteed. Freedom of association as a political right 'is indispensable for the existence and functioning of democracy, because *political interests can be effectively championed only in community with others* (as a political party...)'.[109] However in Uganda, political parties are restricted from opening and operating branch offices; holding delegates' conferences; holding public rallies; sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections; and carrying on any activities that may interfere with the Movement political system.[110] Although it was envisaged that these restrictions were transitional, they have been carried forward by the *Political Parties and Organisations Act* 2002[111] that seeks in effect to further entrench the 'movement' as a one party system by excluding it from being defined as a political organisation. This provides yet an other example of how a Constitution can be used to subvert democracy. The Constitution, for example, does not define which activities constitute an interference with the Movement political system. This elastic provision has in practice been used by the Movement Government adversely to the detriment of the operation of non-Movement political groups' interests by declaring intended non-Movement rallies illegal.[112] In effect, the political parties exist only in theory. In practice, they are restrained from effectively carrying on all the activities normally associated with political

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107 See Dickson C.J., *The Regina* vs *Oakes* (1987) LRC (Const) 477, 499.

108 Human Rights Watch, *op.cit.* (note 58), p. 2.

109 Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, Engel, 1993, p. 385 (emphasis added).

110 1995 Constitution, Art. 269; For discussion, see generally, Mugaju J. and Oloka Onyango J. (eds.), *No-Party Democracy in Uganda: Myths and Realities*, Fountain Publishers, Kampala, 2000.

111 Act No. 18 of 2002 (enacted in May 2002).

112 See, *e.g*, 'Uganda: Freedom of Peaceful Assembly and Association', in: US Department of State, *Country Reports on Human Rights Practices*, 2000 & 2001.

parties. Only the current president's ruling political organisation ('the Movement' designed and disguised as a system different from other political parties, although for all practical purposes it functions as a single political party) in Uganda is exempted from the strict restrictions placed on other political organisations and thereby accorded unequal and preferential treatment, while the other political parties are discriminated against in terms of structure, operations, financing, membership and general participation in the affairs of the Government. All Ugandans are by law conscripted compulsorily into 'the Movement' including those opposing its political system.[113] This is a clear violation of the right to freedom of association, since an individual should not be compelled to become a member of a particular association nor disadvantaged if he chooses not to do so.[114] The restriction of political party activities in Uganda is a clear indication of the unwillingness of the Movement to leave power and has adversely limited the right of every citizen to take part freely and meaningfully in the conduct/general participation of public affairs and freedom of association,[115] including the right not to be forced to belong to an association. It is partly for this reason that the March 2001 presidential elections in Uganda were characterised by violence and widely believed to have been superfluous.[116] In order to contain the situation, the government increased repression to any form of non-violent opposition, thereby violating fundamental human rights and freedoms of individuals expressing views that are opposite to those of the ruling movement. This attracted Amnesty International to assert rightly that: 'since the outcome of the (March 2001) presidential elections, basic internationally recognised freedoms of expression, association and movement have become even more strictly curtailed'.[117] This was especially reflected in the 'continuous harassment of Besigye', president Museveni's strongest challenger in the March 2001 presidential elections, which highlighted 'the government's policy of intimidation and harassment of people purely for expressing views different to those of the ruling political movement'.[118] The climax of this policy took the form of the use of live ammunition by the authorities [uniformed police officers] to quell public rallies causing

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113 See *the Movement Act*, 1997 (Act No. 7 of 1997).

114 *Young, James & Webster* vs *UK* A44 para. 55 (1981).

115 See *General Comment* of the HRC, No. 25 (57): Article 25 ICCPR (1510th Sess., 12 July 1996) [UN Doc. CCPR/C/21Rev. 1/Add.7] *IHRR* Vol. 4 No. 1, 1997, pp. 1-5 para. 26, providing that: 'The right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25 [ICCPR]. *Political parties and membership in parties play a significant role in the conduct of public affairs and the election process ...*'.

116 See Judgment of the Supreme Court of Uganda in *Besigye Kiiza* vs *Museveni Kaguta Yoweri and the Electoral Commission*, Election Petition No. 1 of 2001, in which the Supreme Court unanimously found that during the conduct of the election, there was non-compliance with the law (Presidential Election Act, 2000); cheating in a significant number of polling stations in favour of president Museveni; and compromise of the principle of free and fair election and transparency. By a minority of 2: 3, the Court was of the view that Museveni was not validly elected as a president and nullified the purported election. (See judgments of their lordships Order, A. H. O., and Tsekooko, J. W.N).

117 See 'Uganda: Growing restrictions on freedom of association, movement and expression',AI index AFR 59/009/2001, 14 September 2001, available at: http://www.amnesty.org.

118 *Idem*.

death and injuries.[119] This signalled 'an apparent disregard for the lives of people' and reinforced 'the notion that the Uganda government [ruling movement] will continue to use all means in order to continue restricting the right to assembly and to free expression'.[120] It is in this context that it is beyond dispute that the 'Movement domination of the Government and the political process and some restrictive constitutional provisions limited [and continue to limit] citizens effective exercise of the right to change their government'[121] and enjoyment of human rights. Indeed the Movement's 'no-party democracy is a one-party system in all but name'.[122]

Under the ICCPR, derogation from the right to political association and some other rights is permissible only under the circumstances set forth in Article 4 of the ICCPR. The Sate party exercising its right of derogation must 'immediately inform' the other State parties of the provisions derogated from and of 'the reasons by which it was actuated'. Uganda has never complied with this requirement and has not yet filed its initial country report on its compliance with the ICCPR obligations which was due to the Human Rights Committee, on 20 September 1996.[123]

3.3.1.4 Recognition of the Death Penalty: Conflict with Absolute Freedom from 'Torture, Cruel, Inhuman, or Degrading Treatment or Punishment' or Reconcilable?

Article 22(1) of the 1995 Uganda Constitution provides: 'No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court'.[124] Although this provision does not constitutionalise capital punishment, it clearly recognises its existence and therefore sanctions its implementation. In 1999, for example, the High Court sentenced at least 21 people to death and the Supreme Court

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119 See Amnesty International, 'Uganda: Police use excessive force to stifle freedom of assembly and expression' AI-Index AFR 59/001/2002 (15/01/2002).

120 *Idem.* In its recent attack on freedom of expression, the Ugandan Movement government closed Uganda's main independent daily news paper, the Monitor, for seven days (between October 10-17, 2002), allegedly for publication of false news. See HRW, 'Uganda Attacks Freedom of the Press, closes Main Independent Newspaper' available at http://www.hrw.org/press/2002/10/uganda1011.htm visited October 31, 2002) ; Wakabi, M., et al, 'Closure of 'Uganda's Monitor Causes Outrage' in the East African, Nation Media Group, Nairobi, October 14, 2002.

121 See, 'Uganda: Respect for political rights: The Right of Citizens to Change Their Government', in: US Department of State, *Country Reports on Human Rights Practices*, 2000 & 2001.

122 See Katalikawe J, 'Freedom of Association: The Case For and Against the Referendum on Political Systems in Uganda', *Law, Social Justice and Global Development Journal*, Vol. 1, 2001.

123 See UN, *International Human Rights Instruments: Recent Reporting History Under Principal International Human Rights Instruments* (as of 6 June 2002), HRI/GEN/4/REV.2, 7 June 2002, p. 184.

124 The offences punishable by death under Uganda's *Penal Code* Act (Cap. 106), Laws of Uganda, 1964 include murder, kidnap with intent to murder, treason, aggravated/armed robbery, rape and defilement. In the period 1989-1999, 55 executions were carried out in Uganda, while over 1900 prisoners in Uganda's Luzira Maximum Upper Prison were facing capital charges in May 2000. See Makubuya, A.N., 'The Constitutionality of the Death Penalty in Uganda: A Critical Inquiry', *East African Journal of Peace and Human Rights*, Vol. 6, No. 2, 2000, pp. 222-252, at pp. 223-224.

confirmed sentences against five others.[125] In 2001, at least 23 people were sentenced to death.[126] The question that arises here is whether this recognition of the death penalty is in conflict with the absolute and unqualified prohibition of torture, cruel, inhuman or degrading treatment or punishment under Articles 24 and 44(a) of Uganda's 1995 Constitution:

> 'No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.'[127]

And

> '[n]otwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms – freedom from torture, cruel, inhuman or degrading treatment or punishment.'[128]

The above provisions apply 'notwithstanding anything' in the Constitution including Article 22(1) that recognises the imposition of the death penalty. The Supreme Court in Uganda has considered the ambit of the above provisions in the case of *Attorney General* vs *Abuki*[129] when it struck down S.7 of Uganda's Witchcraft Act that authorised courts to grant an exclusion order (an order that a person found liable of witchcraft be prohibited from entering and remaining in a specified area for a prescribed period) as being inconsistent with Articles 24 and 44(a) of the Constitution and therefore void. Justice Order held that the prohibitions under Article 24 are absolute and that the article seeks to protect everyone from seven conditions: (i) torture; (ii) cruel treatment: (iii) cruel punishment; (iv) inhuman treatment; (v) inhuman punishment; (vi) degrading treatment; (vii) degrading punishment. After observing that these terms are not defined in the Constitution, and that therefore they must be given their ordinary plain (dictionary) meaning, the judge noted that no question of justification could ever arise in the context of Article 24, since under Article 44 the protection from the seven conditions provided for in Article 24 is non-derogable. The Court cited with approval decisions from other jurisdictions where it has been held that the death penalty and corporal punishment are inhuman and degrading punishments. Whether the Ugandan courts will be prepared to follow many courts in the Commonwealth to hold that the

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125 *Amnesty International Report* Uganda, 1999, p. 343, Amnesty International Publications, London.

126 *Amnesty International Report* Uganda, 2002, Amnesty International Publications, London.

127 1995 Uganda Constitution, Art. 24. The phraseology is couched in the same terms as the UDHR, Article 5; ICCPR, Article 7; ECHR, Article 3; American Convention on Human Rights, Article 5(2); African Charter on Human and Peoples' Rights, Article 5.

128 *Ibidem*, Art. 44 (a).

129 Constitutional Appeal No. 1 of 1998, that arose from Constitutional case No. 2 of 1997 between the same parties concerning the constitutionality of S. 7 of the *Witchcraft Act*, Cap. 108, (laws of Uganda, 1964).

death penalty constitutes 'cruel, inhuman and degrading treatment or punishment'[130] or a violation of the 'right to life'[131] is a question that is yet to be determined.[132]

Uganda's Constitutional Court has nonetheless considered the question whether judicial or disciplinary corporal punishment amounts to inhuman or degrading treatment. In *Kyamanywa Simon* vs *Uganda*,[133] the appellant in this case had been convicted by the High Court of aggravated robbery and sentenced to death. On appeal to the Court of Appeal, the conviction for aggravated robbery was quashed and substituted by a conviction for simple robbery. The appellant was thus sentenced to six years' imprisonment with six strokes of the cane.[134] He appealed to the Supreme Court solely against the sentence of six strokes of the cane on the ground that it is inconsistent with the absolute prohibition of torture, cruel, inhuman and degrading treatment. The matter was then referred to the Constitutional Court for interpretation in accordance with Article 137(5)(a) of the 1995 Uganda Constitution. By a majority of three to two the Court found '[c]orporal punishment by its very definition, which is inflicting pain by beating a part of the body, falls squarely within the category prohibited by Article 24. It is by its nature a cruel, inhuman and degrading punishment, which amounts to [a] torture. (...) the sentence of six strokes of the cane is inconsistent with Article 24 of the Constitution'.[135] The Court on another occasion rightly observed that 'the imposition of corporal punishment contravenes Articles 24 and 44(a) of the Constitution'.[136] It is submitted that the majority decision was a correct interpretation of the prohibition against cruel, inhuman and degrading treatment or punishment. If judicial corporal punishment, as the court rightly found, is degrading treatment, then it is questionable whether the death penalty may be anything less than this. Indeed '[d]eath is a *cruel* penalty and the legal processes, which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an *inhuman punishment* for it "(...) involves, by its very nature, a denial of the executed person's humanity", and it is *degrading* because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.'[137] For similar reasons, it is essential that Uganda's Constitutional Court declares the death penalty to be in violation of Articles 24 and 44(a) above.

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130 See, *e.g*, *S* vs *Makwanyane and Another* (1995) (3) SA 391at 409-410 (para. 26) (Constitutional Court of South Africa).

131 In the English case of *R* vs *Home Secretary, Ex parte Bugdaycay* (1987) AC 514, 531G, Lord Bridge held that: 'Capital punishment imposed a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably. As such it was unconstitutional'.

132 For inquiry see, Makubuya, *loc.cit.* (note 124), pp. 222-252.

133 Constitutional Reference No. 10/2000.

134 This was in accordance with section 274A of Uganda's *Penal Code Act*, (Cap. 106) that authorised an additional sentence of corporal punishment upon a conviction of simple robbery.

135 Constitutional Reference No. 10/2000, p. 7. In reaching this decision the Court cited with approval a passage from the judgment in Namibian Supreme Court case of *Exparte Attorney General, Namibia in Re Corporal Punishment* (1991) 3 SA 76.

136 *Sewankambo Francis and 2 others* vs *Uganda*, Criminal Appeal No. 14 of 2000 (Court of Appeal).

137 See, *S* vs *Makwanyane and Another, supra* (note 130) (emphasis added).

3.3.1.5 Duties of a Citizen

Finally, the Constitution recognises that there are no rights without obligations and accordingly spells out the duties of a citizen.[138] This follows from the view that, 'the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations'.[139] Therefore, the citizen has, *inter alia*, duties to respect the rights and freedoms of others; protect children and vulnerable persons; create a clean and healthy environment; and defend the Constitution.[140] Article 17, however, lacks provisions that would prevent the government's violation of human rights under the pretext of enforcing duties of a citizen.

3.3.2 Economic, Social and Cultural Rights

Economic, social and cultural rights, which socialist governments emphasised in the early twentieth century, are guaranteed in the ICESCR and also, *inter alia*, in ILO Conventions. Uganda acceded to the ICESCR on 21 January 1987 and it entered into force for this country on 21 April 1987 but has to date failed to comply with its reporting obligations.[141] It follows that the State is under a duty to give effect to the Covenant obligations in Ugandan municipal law, policy and practice so that it is consistent with its international treaty obligations.

Despite this obligation, no effective steps have been taken to adequately entrench social and economic rights as entitlements within Uganda's domestic legal system or any effective administrative measures to give effect to economic and social rights or to provide effective means of redress to individuals or groups alleging violations. The selective enforcement of human rights in the context of worsening social, economic, civil, and political conditions is a heedless truncation of humanity.[142] While the 1995 Constitution breaks new ground in several different respects, in so far as the protection and enhancement of economic and social rights is concerned, it does not go very far.[143] The only provisions found in the Bill of Rights under Uganda's 1995 Constitution and thus considered enforceable are limited to protection from forced labour;[144] protection from deprivation of property;[145] the right to education;[146] the right to work;[147] and the

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138 See, 1995 Constitution, Art. 17 and Objective XXIX of the National Objectives and Directive Principles of State Policy.

139 *Ibidem*, Objective XXIX.

140 *Ibidem*, Art. 17.

141 See HRI/GEN/4/REV.2, 7 June 2002, *supra* (note 123) p. 184; Uganda Human Rights Commission (UHRC), *Annual Report*, Kampala, UHRC, 1998.

142 See Agbakwa, S.C., 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights', *Yale Human Rights and Development L.J.*, Vol. 5, 2002, pp. 177-216, at p. 215.

143 Oloka Onyango J., 'Poverty, Human Rights and the Quest for Sustainable Human Development in Structurally-Adjusted Uganda', *Netherlands Quarterly of Human Rights*, Vol. 18, 2000, pp. 23-44, at p. 31.

144 1995 Constitution, Art. 25 (2).

145 *Ibidem*, Article 26.

146 *Ibidem*, Article 30 only states that: ' All persons have a right to education.'

147 *Ibidem*, Article 40.

right to culture.[148] The majority of social and economic rights are confined to the National Objectives and Directive Principles of State Policy that is not subject (at least in the minds of the framers of the Constitution) to legal enforcement.[149] It is in this part of the Constitution that the rights of the aged and rights to health, water, natural resources, food security and nutrition are addressed. Yet, all these form part of the substantive human rights guaranteed under the ICESCR. The language used does not adequately bind and impose obligations on the State to realise these rights. Rather, it is provided that the 'objectives and principles shall *guide* (not 'bind') all organs and agencies of the state (...) in applying and interpreting the Constitution...'[150] In short, there is an imposition of moral obligations at best, but without provision for an enforcement mechanism. In the context of the right to health, the Minnesota Advocates observed that:

> 'The 1995 (Uganda) Constitution recognises and protects the right to life, but contains no explicit guarantee of the right to health and health protection in terms of the health services, safe water, and the care of children. The enforcement provisions of the Constitution do not apply to health.'[151]

The lack of serious and concrete focus to the social and economic rights in the 1995 Uganda Constitution is clear if the context in which the Constitution was enacted is addressed. Oloka-Onyango has rightly noted:

> 'Such omissions (of the economic and social rights) may be considered negligible, but not in the midst of IMF/World Bank structural adjustment programs, which have undermined the right to work and conditions of work, for the labouring and peasant classes, marginalised the right to health through the introduction of cost-sharing and privatisation in our hospitals, and eliminated the possibility of the development of an holistic and sustainable housing policy (...) The 1995 Constitution not only reflects the fairly typical prejudice and hierarchy of traditional human rights law, it also takes back the progress made in other categories of rights, which have been enshrined in the Bill of Rights of more progressive states.'[152]

It is noteworthy that since May 1987, the Ugandan Government in an attempt to address the almost two decades of economic malaise and decline experienced in the

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148 *Ibidem.* Article 37 states: ' Every person has a right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.'

149 See, *inter alia*, paras VI (Gender balance); XIII (protection of national resources); XX (medical services); XXI (clean and safe water); and XXII (food security and nutrition) of the National Objectives and Directive Principles of State Policy, 1995 Constitution of the Republic of Uganda.

150 1995 Constitution, objective I.

151 Minnesota Advocates for Human Rights, *Global Child Survival: A Human Rights Priority*, Minnesota Advocates for Human Rights, Minneapolis, 1999, p. 68.

152 Oloka-Onyango J., 'Commemorating the 1995 Constitution of the Republic of Uganda: One Step Forward, How many Steps back?', *Uganda Journal*, 1996, pp. 5 and 43.

1970s and 1980s embarked on an economic recovery programme under the International Monetary Fund (IMF) and the World Bank (WB) and has been implementing it for the past 14 years. Both the IMF and the WB have operated in Uganda in accordance with the 'Washington Consensus'[153] model of economic development that promotes the goals of free-market policies such as deregulation, liberalisation, privatisation, and emphasise the private sector over government institutions.[154] In order to obtain loans from the two institutions, Uganda had to undertake Structural Adjustment Programmes (SAPs) and it is in this context that Uganda's 1995 Constitution was made. Since the basic foundation of SAPs is a reduction of the role of the State in guaranteeing or protecting the individual against violation of economic and social rights, it is not very surprising that the Ugandan Constitution omitted to include most economic and social rights within the Bill of Rights. Despite this omission, it is important to realise that a society must seek to ensure within its available resources that the basic necessities of life are provided to all, as a matter of entitlements, if it is to be a society based on human dignity, freedom and equality. Since Uganda's 1995 Constitution place emphasis on principles of equality, freedom and social justice, it is essential that Ugandan judges take an approach that is more protective of economic, social and cultural rights. There is no doubt that human dignity, freedom and equality are denied to those without food, clothing or shelter. As noted above, this calls for the application of the Bill of Rights in light of the Directive Principles and applying guarantees of the rights to life and non-discrimination broadly to include social-economic aspects relating to social security; adequate standard of living including adequate food and water, clothing and housing; and health.

3.3.3 Collective Group/Solidarity Rights

The idea of solidarity human rights follows from the late twentieth century thinking and is linked to an extent with the concerns of developing States. The view expounded here is that in addition to the individual civil and political as well as social and economic rights, there are also collective or group rights, such as the right to self-determination; the right to development; the right to a decent, viable, healthy and sustainable environment; the right to peace and freedom of groups from genocide, and the rights of minorities, that may properly qualify as human rights.[155] Such rights cannot be obtained individually but can only be asserted by collections of individuals as a group.

The 1995 Uganda Constitution guarantees some solidarity rights, like the right to a clean and healthy environment[156] and rights of minorities[157] in the justiciable Bill of

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153 See O'Brien, *et al.*, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*, 2000, p. 117; Gore C., 'The Rise and Fall of the Washington Consensus as a paradigm for Developing Countries', World Development, 2000.

154 Gathii, J., 'Human Rights, The World Bank and the Washington Consensus: 1949-1999', *American Society of International Law Proceedings*, 2000, p. 145.

155 See, *e.g*, Articles 19-24, ACHPR, providing for peoples' rights such as the right to self-determination; right to development; national and international peace and security; and the right to a general satisfactory environment favourable to development.

156 Article 39 provides that '[E]very Ugandan has a right to a clean and healthy environment'. This guarantee is also contained in S.4 of the Uganda *National Environment Statute*, 1995 (Uganda

Rights. Article 39 provides that: 'Every Ugandan has a right to a clean and healthy environment'. The text clearly indicates that the guarantee only applies to Ugandans. Does it mean that non-Ugandans within Uganda are not guaranteed a 'clean and healthy environment'? There is no jurisprudence yet as to the scope and content of the right to a clean and healthy environment as protected under Article 39. However, it is noteworthy that Uganda's *National Environment Statute* 1995 guarantees that right to a healthy environment to 'every person'.[158] It is accordingly desirable to understand 'every Ugandan' in the context of the right to a healthy environment guarantee under Article 39 to include every person in Uganda. The substance of the right to a healthy environment should also be understood to include protection from environmentally damaging/harmful activities. This gives rise to freedom from air and water pollution, protection from emission of noxious gases, poor sanitation, and entitlement to ecological balance.[159] The first environmental case filed in the high court of Uganda sought the following declarations, *inter alia*, that unregulated smoking in public places constitutes a violation of the rights of non-smoking members of the public to a clean and healthy environment as prescribed under Article 39 of the Constitution of the Republic of Uganda and S.4 of the National Environment Statute 1995; and an order that necessary steps be taken to ensure the enjoyment by the Ugandan public of its right to a clean and healthy environment.[160] The case was only resolved by friendly settlement involving a consent judgment signed between the parties stating that smoking in 'public places' is a violation of non-smokers constitutional rights. The judge declined to endorse the said consent judgment because it did not name the 'public places' in which smoking would be prohibited. Accordingly, despite the significance of this case, it has only contributed little in terms of jurisprudence as to the meaning and scope of the right to a clean and healthy environment.

In relation to minority rights, Article 36 of the 1995 Constitution 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'. Ugandan courts have not yet addressed the question of minority rights, and therefore it remains unclear as to what is a minority in the Ugandan context. Other group rights such as development[161] and peace[162] are vaguely dealt with in the Objectives and Directive Principles, while self-determination is implied in the Preamble to the 1995

Gazette, No. 21 Vol. LXXXVIII, 19 May 1995). For discussion see Akello, C.E., 'The Right to Environment and Generational Equity', *East African Journal of Peace and Human Rights*, Vol, 4, 1988, pp. 125-137.

157 See 1995 Constitution, Art. 36.

158 *National Environment Statute* 1995, No. 4, 1995, S. 4, 'Every person has a right to a healthy environment'.

159 See 1995 Constitution, Objective XXVII.

160 *The Environmental Action Network Ltd* vs *the Attorney General and National Environment Management Authority*, Misc. Appl. No. 39 of 2001.

161 See the 1995 Constitution, paras. IX, X, XI and XII of the National Objectives and Directive Principles of State Policy.

162 See, para. XXVIII.

Constitution.[163] Such rights may also be read in the Constitution under Article 45 which recognises other human rights 'not specifically mentioned'.

3.4 Structural Safeguards and Amendment of the Bill of Rights under the 1995 Uganda Constitution

In the light of Uganda's past experience with human rights violations, Article 1 of the 1995 Constitution is emphatic about the sovereignty of the people by proclaiming, '[A]ll power belongs to the people who shall exercise their sovereignty in accordance with this Constitution', and 'shall express their will and consent on who shall govern them and how they should be governed through regular free and fair elections (...)' Article 20(2) demands that all organs and agencies of Government and all persons *respect, uphold* and *promote* human rights. The overthrow of the Constitution is treason punishable at any time once a constitutional order is re-established.[164] All Ugandan security forces are required to 'observe and respect human rights and freedoms in the performance of their functions',[165] while all citizens have an obligation to 'uphold and defend the Constitution'[166] including the rights guaranteed. The spirit of the Constitution is therefore to enhance and promote human rights and furthermore, to nullify all claims to legitimacy by governments that attain power in Uganda by unconstitutional means.

Generally, amendments of the Constitution can only be effected by Parliament in accordance with the Constitution. As regards amendment of the bill of rights, apart from Articles 44, 1 and 2 of the Constitution respectively dealing with non-derogable rights, the sovereignty of the people and the supremacy of the Constitution that require amendments to be approved by the people through a referendum,[167] all other provisions in chapter 4 of the Constitution guaranteeing human rights, can be amended only by Parliament by way of addition, variation or repeal.[168] The Bill of Rights is therefore adequately protected, if Parliament is in practice independent of the executive. This at the present time is not the case, given the legal restrictions on the operation of political parties generally, and in particular, the prohibition of political parties from 'sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections' including parliamentary elections.[169] In effect, the executive can successfully push any amendment through Parliament that is

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163 The preamble (para. 4) refers to Ugandans 'sovereign and inalienable right to determine the form of governance' for Uganda.

164 1995 Constitution, Art. 3. Commenting on this article, the Constitutional Court of Uganda in *Rwanyarare* vs *Attorney General*, Constitutional Petition No. 11 of 1997 observed 'It (Article 3) was introduced in the Constitution for the first time in the history of this country. It may have been put there in the light of our sad and nasty experiences of coup detats and other forms of illegal seizure of Governments by some Ugandans. It is clearly intended to spur Ugandans to resist such illegal seizures of Government in future and even empowers them to bring the culprits to book as soon as constitutional order is established (...)'

165 *Ibidem*, Art. 221.

166 *Ibidem*, Objective XXIX (g).

167 *Ibidem*, Art. 259.

168 *Ibidem*, Arts. 258, 261 and 262.

169 See, *ibidem*, Art. 269; and the *Parliamentary Elections Act*, 2001.

under the control of the ruling single party – 'movement' – without following the laid-down procedure, as was the case in enacting the law to provide for a referendum on the continuation of the restrictive 'no-party' system in Uganda.[170] When the Court declared the Referendum Act unconstitutional for having been enacted contrary to the procedure laid down under the 1995 Constitution especially in relation to the requirement for quorum, the Executive through a largely 'movement' Parliament effected the first amendment to the 1995 Constitution.[171] The effect of the amendment was to reduce the quorum of Parliament; amend the manner of ascertaining the majority of votes cast on any question and protect the proceedings of Parliament from being used outside Parliament without the leave of Parliament; and to insert a new Article 257A to ratify past Acts, resolutions or decisions passed by Parliament without complying with the laid procedure. A new legislation to give effect to the Referendum meant to legitimise the continued 'no-party' system in Uganda was passed[172] and the cases that were filed to challenge the constitutionality of this legislation and the Constitutional Amendment were dismissed on the ground that there was no evidence to show that Parliament did not follow the laid down procedure.[173] The majority took the narrow view that Parliament specified the articles to be amended and the Court was not concerned with the effect of the amended articles on other provisions of the Constitution.[174]

However, in a dissenting opinion on the constitutionality of the first amendment to the 1995 Constitution[175] Justice A. Twinomujuni rightly found that the Constitution was amended as a result of an earlier petition in which the court nullified the *Referendum and Other Provisions Act* 1999. He accordingly held that the amendment was intended to reverse the judgment of the Court and to control the damage perceived to arise from the Court's decision. He further found that the amendment created provisions that take away the right of access to information in possession of the State and the right to a fair hearing and thereby indirectly amended Articles 41 and 44 of the 1995 Constitution.[176] He found also that the amendment by necessary implication amended entrenched constitutional Articles 1, 2 and 44 which require consent of the people through a referendum before varying or repealing them but this was not followed.[177] He

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170 See The *Referendum and Other Provisions Act*, 1999 that was successfully challenged in Court and declared null and void for having been passed contrary to the procedure laid down under the 1995 Constitution in *Paul K. Ssemwogerere & Zachary Olum* vs *Attorney General*, Constitutional Petition No. 3 of 1999 and Constitutional Appeal No. 1 of 2000.

171 See the *Constitution (Amendment) Act, 2000* (Act 13/2000).

172 See The *Referendum and Other Provisions Act*, 2000.

173 See *Paul K. Ssemwogerere & 2Others* vs *Attorney General*, Constitutional Petition No. 7 of 2000 & *Uganda Law Society & Justine Semuyaba* vs *Attorney General*, Constitutional Petition No. 8 of 2000.

174 See judgments of Deputy Chief Justice L. Kikonyongo, Justice C.M. Kato and Justice C.N.B. Kitumba in Constitutional Petition No. 7 of 2000, *ibidem*, (judgment of 17 April 2002).

175 *Ibidem*, Constitutional Petition No. 7 of 2000.

176 Art. 41 deals with the right of access to information, while Art. 44(c) prohibits derogation from the right to a fair hearing.

177 Justice Bahigeine also concurred with Justice Twinomujuni and found that Articles 1 and 2 can only be amended through a referendum. Art. 1 deals with sovereignty of the people while Article 2 provides for the supremacy of the Constitution. Art. 1(1) states 'All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution'. Art. 259 requires a referendum before amending, *inter alia*, arts. 1, 2 and 44.

accordingly concluded that the amendment of the 1995 Constitution amounted to 'a coup against the sovereignty of the people and the supremacy of the Constitution'. It is submitted that this dissenting opinion correctly interpreted the Constitution by considering the effect of the amendment on other provisions of the Constitution, since the Constitution being a single document, must be interpreted as a whole in order to get the true meaning and intent of any particular provision.

3.5 Limitations on Human Rights

Under the 1995 Constitution, human rights are generally subject to two limitations. The first is a general limitation to the enjoyment of all human rights. The second limitation only applies during a state of emergency.

3.5.1 Public Interest limitation

Under Article 43 of the 1995 Constitution, it is provided that:

> '(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the *public interest.*
> (2) Public interest under this article shall not permit-
> (a) political persecution;
> (b) detention without trial;
> (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a *free and democratic society*, or what is provided in this Constitution.'[178]

The above provision seeks to strike a balance between the enjoyment of one's human rights on the one hand, and the rights of others or what is referred to as the 'public interest' on the other. Before such a restriction is imposed, it must be 'prescribed in the Constitution' and 'acceptable and demonstrably justifiable in a democratic society'. There is no Ugandan domestic jurisprudence yet as to the meaning of this phrase. However, it seems clear that in order to meet this test of 'acceptability' and 'justifiability' in a 'free and democratic society', such restriction must be 'necessary'. In other words, the restriction should 'correspond to a pressing need, and, in particular, that it is proportionate to the legitimate aim pursued'[179] taking into consideration the nature and character of a 'democratic society'[180] that requires 'tolerance and broad-mindedness'.[181] It follows therefore, as Mukubwa[182] rightly observes that when the Court is considering the extent of the foregoing limitations, the underlying rule should be that 'it is the

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178 Emphasis added. For discussion see section above on civil and political rights.

179 *Olsson* vs *Sweden* A 130 para. 67 (1988) (European Court of Human Rights).

180 See Jacot-Guillarmond, *Democracy and Human Rights,* Thessaloniki Colloquy Proc, 1990, pp. 43-66.

181 *Dudgeon* vs *UK*, A 45, para. 53, 1981.

182 Tumwine Mukubwa, G.P., *loc.cit* (note 74), p. 33.

fundamental rights which are fundamental and not the restrictions'.[183] Thus 'a restriction in relation to a fundamental right that it qualifies, is to be seen as an exception to the general rule, and therefore to be narrowly construed'.[184] Such a narrow construction is preferred to give effect to the rights protected; otherwise the guaranteed rights may easily be rendered meaningless by the limitations.[185]

3.5.2 Limitations During a State of Emergency

Article 110 allows the President, in consultation with the Cabinet, by proclamation to declare that a state of emergency exists in Uganda, or any part of Uganda (for not more than ninety days unless extended by Parliament) for a variety of reasons, including threat by war or external aggression; threat to security or economic life by internal insurgency or natural disaster; or existence of circumstances 'which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of *public order* and supplies essential to the life of the community' [emphasis added]. This provision gives the President wide powers to declare a state of emergency even in situations other than a state of war or threat to the life of a nation, or external aggression. Such wide powers to declare an emergency are contrary to the provisions of Article 4(1) of the ICCPR. Parliament is authorised to enact laws that permit the suspension of human rights if 'necessary' or 'reasonably justifiable' for enabling effective measures to be taken for dealing with any state of emergency (including the detention of persons).[186] In the light of Uganda's historical past and abuse of human rights in the name of public order, and given the fact that Parliament itself is under control of the ruling party/'movement', more safeguards against the likely abuse of human rights during emergency should be devised so that human rights are adequately respected in situations of 'emergency'.[187]

3.6 Institutional Framework for the Protection and Enforcement of Human Rights

Generally in Uganda human rights guaranteed under the Constitution are protected and enforced by the judiciary, the Uganda Human Rights Commission, and the Inspectorate of Government.

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183 *Mitikila* vs *Attorney General* Civil Case No. 5 of 1993, 43

184 *ANC & Another* vs *Chairman, Council of Ciskeo & Anor* (1995) 4 BCLR 401, 411.

185 *Pumbun* vs *Attorney General* (1993) 2 LRC 317, 323.

186 1995 Constitution , Arts. 46 and 110 (7).

187 Oraa, J., *Human Rights in States of Emergency in International Law*, (1992) 96; Amnesty International, *Uganda: The Human Rights Record 1986-1989*, (1989) p. 5.

3.6.1 The Judiciary

Under Article 129(1) of the 1995 Constitution, judicial power in Uganda is only exercised by the Courts of Judicature consisting of the Supreme Court; the Court of Appeal; the High Court; and subordinate/Magistrates and Local Council Courts established by Parliament. The theory is that 'in exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority'.[188] Judicial officers are guaranteed security of tenure[189] and there is a restriction on decreasing the salaries, allowances, privileges and other benefits of judicial officers to their disadvantage.[190]

In practice, however, judicial independence has not been achieved in view of the fact that the President has extensive legal powers that influence significantly the exercise of judicial independence. Judicial officers are appointed by the Judicial Service Commission whose composition is determined by the President with the approval of Parliament,[191] which itself is largely under the control of the President under the prevailing *de facto* single party/'movement' rule. This lack of independence of the judiciary adversely affects the protection of human rights, since an independent and impartial judiciary is an essential prerequisite for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.[192] In respect of independent judges, the President has remarked that they are 'part of the old regimes' and 'anti-movement' and he will make them 'irrelevant'.[193] Such attacks on the judiciary by the President not only threaten judicial independence but also undermine the foundational values of the 1995 Constitution. This is worsened by the inadequate system of judicial administration and a lack of resources, resulting in delays in the dispensation of cases and a serious backlog of cases.[194] The situation is compounded by the acute shortage of judicial officers and administrative staff.[195] The Ugandan judiciary, which is central in protecting human rights should be strengthened and made practically independent to effectively cope with both new and backlog of cases.

Any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, is entitled to apply to a 'competent court' for redress which may include compensation.[196] The 'competent

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188 1995 Constitution, Art. 128(1).

189 *Ibidem*, Art. 144.

190 *Ibidem*, Art. 128 (7).

191 *Ibidem*, Arts. 146 (2) and 148.

192 See UN Commission on Human Rights Resolution 2001/39, *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*. (72nd meeting, 23 April 2001).

193 See the Monitor, 24 April 2002, 'Judiciary anti-Movement - Museveni' and the New Vision, 15 July 2002, 'Don Defends Judges on Museveni's Accusations' in which Dr. J. Oloka-Onyango asked the President to spare the judges.

194 See Odoki, B.J., 'Reducing Delay in the Administration of Justice: the Case of Uganda', *Criminal Law Forum*, Vol. 5, 1994, p. 57.

195 As of March 2002, the Uganda's judiciary had a critical shortfall of 891 employees. See Uganda's Chief Justice, B.J. Odoki, 'The Judiciary in the New Millennium', *Journal of Uganda Judicial Officers Association*, Vol. 8, 2002; cited in the Monitor Newspaper, Kampala 10 April 2002 'Judiciary lacks 890 staff'.

196 1995 Constitution, Article 50 (1).

court' is not defined under the Constitution, but for purposes of the enforcement of human rights it is understood to mean the 'High Court'.[197] There is a right of appeal from the decision of the High Court to the Court of Appeal in the first place and a further appeal to the Supreme Court.[198] It is not yet sufficiently clear whether 'competent court' would in the context of Article 50 of the 1995 Constitution extend to the competency of regional and international human rights enforcement mechanisms to which Uganda may become a party, such as the African Court on Human and Peoples' Rights when it becomes operational, in the event that local remedies have been exhausted or are ineffective. Such an extensive interpretation of 'competent' court would, in my view, seem desirable and in harmony with the spirit of the Constitution of furthering realisation and effective protection of human rights.

Apart from granting compensation and declaratory judgments, the Constitution does not explicitly spells out all the remedies that courts should grant in case of violations of human rights. It is therefore left for the courts, upon finding that a violation or the existence of a threat to enjoyment of one's human rights, to grant an appropriate remedy. Such remedy may include a declaration that legislation, act or omission by any person or authority is inconsistent with the Constitution,[199] compensation,[200] award of punitive or exemplary damages, an order of *habeas corpus*,[201] and non-monetary remedies – such as an order to ensure reasonably adequate food, clothing, shelter, sanitation, necessary medical care, and personal safety of prisoners. The Court may also order that an action plan be presented and regular reports be submitted to the court on its implementation at regular intervals. The State may also be ordered to provide appropriate remedial services for the benefit of the victimised class as a whole.[202]

On the question of *locus standi*, the 1995 Constitution has a generous provision allowing a broad range of individuals and groups to enforce the rights in the Bill of Rights. The Constitution declares that *'any person* or *organisation* may bring an action against the violation of *another person's or group's human rights*'.[203] The provision was intended to abolish the common law rule on *locus standi* that required an individual to have sufficient interest in the decision to justify the court's intervention. Article 50 introduces the concept of public interest litigation and 'does not require that the applicant must have interest as the parties he or she seeks to represent or for whose benefit the action is brought'.[204]

Regarding interpretation of the Constitution, Article 137(1) gives exclusive jurisdiction on interpretation of the Constitution to the Constitutional Court when it

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197 See the *Fundamental Rights and Freedoms (Enforcement Procedure) Rules* S.I 26 of 1992.

198 See *Judicature Statute*, 1996; Art. 50(3), 1995 Constitution.

199 1995 Constitution, Arts. 137(3) & 2(2).

200 *Ibidem*, Arts. 23(7) and 50(1).

201 *Ibidem*, Arts. 23(9) and 44 (d).

202 See, *e.g*, *Milliken* vs *Bradley II*, (1977) 433 US 267, where the US Supreme Court approved an order requiring the state to provide remedial education to the victims of past race discrimination in the Detroit school system.

203 1995 Constitution, Art. 50 (2) (emphasis added).

204 *The Environmental Action Network Ltd* vs *The Attorney General & Anor*, Misc. Appl. No. 39 of 2001. (High Court of Uganda); *Mtikila* vs *Attorney General*, civil suit No. 5 of 1993 (High Court of Tanzania).

provides that 'any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court'. The Constitutional Court, however, is also given original jurisdiction to determine matters where 'a person who alleges that (a) an act of Parliament or any other law or anything in or done under the authority of any law; or (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate'.[205] In this regard, the Constitutional Court is a competent court within the meaning of Article 50 and can grant redress under Article 137(3) if the petition involves interpretation of the Constitution.[206] The rules require the action to be brought before the Constitutional Court within thirty days.[207] The effect is that, if a remedy is not sought within 30 days, the human rights action for a remedy is time barred. The question that arises here is whether this time limit is necessary in cases involving human rights? In my view it has the effect of limiting access to the courts on issues involving human rights violations. It is submitted that issues involving violations of human rights transcend technicalities, especially the rules of procedure leading to the protection of such rights. Accordingly, such matters should not be subjected to time-technicalities. Instead the focus should be placed on the substantive determination of claims involving infringement of human rights.[208] This necessitates a review of the rules of the constitutional court.

3.6.2 Uganda Human Rights Commission (UHRC)

The Commission is established under Article 51(1) of the Constitution with several functions, *inter alia*, to investigate, on its own initiative or on a complaint made by any person or group of persons against the violation of any human right; and to monitor the Government's compliance with international treaty and convention obligations on human rights.[209] The Commission is required to publish periodic reports on its findings

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205 Art. 137(3), 1995 Constitution; but see *Rwanyarare & Another* vs *Attorney General*, Constitutional Petition No. 11 of 1997, where the constitutional Court held that it has no jurisdiction in matters not covered by article 137 and can only deal with matters covered by article 50 by way of reference under Article 137(5). It is doubtable whether this is a right interpretation of Articles 50 and 137 of the Constitution when read together.

206 *Attorney-General*vs *Tinyefuza*, Constitutional Appeal No. 1 of 1997 (Supreme Court of Uganda, see judgments of Justices Tsekooko, 3-17; Kikonyogo 16; Mulenga, 21; Kanyeihamba, 22-26 and the dissenting judgement of Wambuzi C.J, 24; & Karokora, 11-12). See also *Serugo* vs *Kampala City Council*, Constitutional Appeal No. 2 of 1998 (Supreme Court of Uganda).

207 The Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the *Constitution) Directions, 1996* [Legal Notice No. 4 of 1996, made under the Judicature Statute, 1996, (No. 13 of 1996, s. 51(2) (c)].

208 See 1995 Constitution, Art. 126 (2) (e) directing that: 'In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles- substantive justice shall be administered without undue regard to technicalities.' For discussion see Mbabazi, M., 'The Court Jurisprudence on the Interpretation and Application of Article 126 (2) (e) of the I995 Constitution: A case for Desecration of the New Constitution' available at http://firms.findlaw.com/nkmadvo/memo1.pdf (visited 11 April 2002).

209 Art. 52, *ibidem*. See also the *Uganda Human Rights Commission Act*, 1997, section 8.

and submit annual reports to Parliament on the state of human rights and freedoms in the country[210] and has issued four such reports since its establishment in 1997.[211] In this way, the Commission has 'a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights'[212] by acting as a mechanism for the domestic implementation of Uganda's international human rights obligations and the strengthening of human rights protection by complementing the courts.[213] The Commission can also develop appropriate normative content of different human rights through both its monitoring, reporting and judicial process. It is particularly essential that the Commission gives full attention to Economic, Social and Cultural Rights (ESCR) in all its activities through promotion of education and information programmes; scrutinising existing laws, administrative acts and draft bills; identification of national level bench marks; conducting research and inquiries on realisation of ESCR; monitoring compliance with specific rights; and examining complaints alleging violations of ESCR.[214] In the performance of its functions, the Commission has the powers of a court and, if satisfied that there has been an infringement of a human right or freedom, it is empowered to order the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress.[215] In practice the Commission's approach to the complaints before it has involved mediation/conciliation, tribunal hearings, advice and referrals to the appropriate authorities.[216] A party aggrieved with the decision of the Commission has a right of appeal to the High Court.[217] In effect therefore, the Commission in terms of hierarchy is like a Chief Magistrate's Court in Uganda whose decisions can be appealed against to the High Court. As in the case of the judiciary, the independence of the Commission is guaranteed at least in theory.[218] The commissioners are guaranteed security of tenure,[219] but their salaries and allowances are left to Parliament to prescribe.[220] The fact that the Chairperson and all the Commissioners are appointed by the President with the

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210 *Idem.*

211 See Uganda Human Rights Commission, *Annual Report* 1997; 1998; 1999 and 2000.

212 See Committee on ESCR, General Comment No. 10 (1998) on the role of national human rights institutions in the protection of ESCR, para. 3; Report of the Committee on ESCR, UN doc. E/1999/22, 122-123.

213 See Reif, L.C., 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and human Rights Protection', *Harvard Human Rights Journal*, Vol. 13, 2000, pp. 1-69 at p. 2.

214 CESCR, General Comment 10, para. 3.

215 1995 Constitution, Art. 53(1) & (2).

216 In 1999, out of 1,221 complaints received, 69 were found to be time-barred, 102 were dismissed for want of jurisdiction, 7 were merely acknowledged because they were directed to other authorities and only copied to the Commission, 44 were successfully resolved through mediation; while 687 were referred to various organs and authorities. (See UHRC, *Annual Report*, (1999) para. 2.11)

217 *Ibidem*, Art. 53 (3).

218 *Ibidem*, Art. 54, provides: 'Subject to this Constitution, the Commission shall be independent and shall not, in the performance of its duties, be subject to the direction or control of any person or authority'.

219 *Ibidem*, Art. 56.

220 *Ibidem*, Art. 55 (2).

approval of Parliament[221] largely controlled by the President brings its independence into question. This is worsened by the fact that the nomination and selection process is carried out without involvement of the civil society, particularly local human rights organisations.[222]

The recent creation of the Commission and its limited capacity and funding has meant that its ability to monitor human rights abuses is hampered somewhat – and while it has done significant work, the UHRC has been silent on some of the most egregious abuses in Uganda.[223] This has been mostly noticeable in the relative absence of reporting on human rights abuses in the rebel-destabilised North, Northwest, and West of Uganda, where some of the most serious violations have been taking place, both at the hands of rebel groups and to a lesser extent by the Uganda Peoples Defence Forces (UPDF).[224] The Commission has also been often slow in effectively handling the complaints brought to it, partially caused by non-cooperation by security and other State agencies which has led to some frustration by victims and needs to be remedied if the UHRC is to keep up its constitutional role and credibility as an independent human rights institution.[225] It is in this respect that the Commission has been referred to as a 'toothless dog'.[226] In order to enable the Commission to effectively function countrywide, its independence must be implemented in practice and the Commission's budgetary allocation should be increased to enable it establish accessible offices and recruit and train adequate staff. In addition the recommendations of the Commission in its reports must be carefully scrutinised, and where appropriate be translated into practice.

3.6.3 Inspectorate of Government

The inspectorate is established under Article 223 of the Constitution (consisting of the Inspector-General of Government and Deputy Inspectors) to, *inter alia*, promote and foster strict adherence to the rule of law, eliminate corruption and abuse of authority; promote good governance and stimulate public awareness about the values of Constitutionalism.[227] These areas involve human rights issues and therefore the Inspectorate has the potential of complementing the work of the Commission. The Inspectorate is empowered to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of

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221 *Ibidem*, Art. 51(2).

222 See Human Rights Watch, *Government Human Rights Commissions in Africa: Protectors or Pretenders?* Uganda, HRW, 2001, (Available at http://www.hrw.org/reports/2001/Africa/Uganda/Uganda.html visited 17/11/01).

223 *Idem.*

224 *Idem.* HRW, LRA Conflict in Northern Uganda and Southern Sudan, 2002, (available at http://hrw.org/press/2002/10/uganda1029-bck.htm, visited 31/10/2002)

225 *Idem.*

226 Abdu Katuntu (Uganda's Member of Parliament, Bugweri), Monitor, 1 August 2002, 'Human rights body condemns Army killings'. See also Matshekga, J., 'Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of their Independence', *African Human Rights Law Journal*, Vol. 2, No. 1, 2002, pp. 68-69.

227 1995 Constitution, Arts. 225 and 226.

authority or of public office.[228] It is required to submit to Parliament a report at least once every six months.[229] Although the Inspectorate typically does not have power to make legally binding decisions in response to complaints of human rights violations, it can still play a valuable role in human rights protection and oversight of administrative behaviour. It provides a viable forum for investigation of complaints and administrative conduct especially to individuals who cannot afford to litigate the problems they experience. In this way it has the potential for building good governance through improving administration. In turn, good governance is essential for effective promotion of human rights. The independence of the Inspectorate is guaranteed.[230] Similarly the tenure of office is protected,[231] but the remuneration and other conditions of service are left for determination by Parliament.[232] In practice however, our observation on the question of independence of the Inspectorate is similar to the view expressed herein on the independence of the Judiciary and the Commission.[233]

4 Application of International Human Rights Norms in Uganda

The 1995 Constitution requires Uganda to respect and comply with international law, agreements, treaties and convention obligations.[234] Uganda is a party to a number of international human rights treaties including the ICCPR and its First Optional Protocol; ICESCR; CEDAW; the Convention on the Rights of the Child; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of Migrant Workers and the Members of their Families.[235] At the regional level, Uganda ratified the African Charter on Human and Peoples' Rights;[236] the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;[237] and the African Charter on the Rights and Welfare of the Child.[238] Thus Uganda is an active participant in the international legal regime viewed in terms of ratification of the major human rights instruments. It is important to note that under public international law Ugandan municipal law must be consistent with its international treaty obligations,[239] including those concerning the promotion and

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228 *Ibidem*, Art. 230(1).

229 *Ibidem*, Art. 231(1).

230 *Ibidem*, Art. 227 states: 'The Inspectorate of Government shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority and shall only be responsible to Parliament'.

231 *Ibidem*, Art. 224.

232 *Ibidem*, Art. 223(8).

233 *Ibidem*, Art 223(4), provides: 'The Inspector-General of Government and a Deputy Inspector-General shall be appointed by the President with the approval of Parliament ...'

234 *Ibidem*, Art. 286, 52(1)(h), and para. XXVIII of National Objectives.

235 See, United Nations International Instruments: Chart of Ratifications as at 31 December 1996, ST/HR/4/Rev 15. Uganda ratified the ICESCR on 21 April 1987 and the ICCPR on 21 July 1995.

236 See OAU Document CAB/LEG/67.1

237 See OAU Document CAB/LEG/24.3

238 See OAU Document CAB/LEG/153/REV 2.

239 Art. 26 of *the Vienna Convention on the Law of Treaties*, 1969 states that: 'Every treaty in force is binding upon the parties to it and must be performed in good faith'.

protection of human rights. The mere ratification of international human rights treaties without complying with their obligations in municipal law and practice constitutes a breach of international law.[240]

Uganda has adopted a dualist approach to treaties. It consequently follows that, unless the international norm is specifically incorporated by parliament, it is not part of Uganda's domestic laws. Uganda's problem is clearly not non-ratification of international human rights treaties, but taking effective steps to translate human rights into national legislation and national practices to bring about a real and meaningful change in peoples' lives. It is my view that under a dualist approach to international treaties a failure by the State to adopt legislation or policies that comply with international obligations or failure to enact legislation to incorporate human rights treaties into domestic law, is a violation of its international obligation if prior to such ratification, the State's legal system or policy framework lacked sufficient protection of the rights contained in the treaties. In practical terms Uganda has failed to meet the obligations imposed by these international instruments, including failure to submit timely reports.[241] Uganda should therefore as a matter of priority take effective measures to give effect to its international human rights treaty obligations.

Under the 1995 Constitution, the President negotiates treaties or a person authorised by the President on the advice of the Attorney General, but subject to ratification by Parliament.[242] Thus treaties, which are negotiated by the Executive and ratified by Parliament, become part of Uganda's municipal laws and stand at par with other Acts of Parliament.[243] The cumulative effect of the foregoing provisions is to make ratified international conventions applicable in Uganda or at least as aids to the interpretation of human rights provisions.[244] The courts should therefore construe the bill of rights under the Constitution 'not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit'[245] which is to protect and promote human rights.

5 CONCLUDING REMARKS

By and large, this article has taken the view put forth in the Vienna Declaration and Programme of Action on Human Rights 1993,[246] *inter alia,* that all human rights are 'universal, indivisible and interdependent and interrelated', and that 'while the significance of national and regional peculiarities and various historical and cultural and

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240 Art. 27, *ibidem,* provides that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

241 See UN International Human Rights Instruments, *Recent Reporting History Under the Principal International Human Rights Instruments as of 31 March 2001,* HR I/GEN/4/REV.2, 7 June 2002, *supra* (note 123), p. 184.

242 1995 Constitution, Articles 123 and 79.

243 Tumwine-Mukubwa, G.P., 'International Human Rights Norms in the Domestic Arena', *East African Journal of Peace and Human Rights,* Vol. 3, 1996, pp. 33-50, at p. 35.

244 *Tinyefuza* vs *Attorney General, supra* (note 18); *Unity Dow* vs *Attorney General* (1992) LRC (Const) 623, 656-7.

245 *Attorney General* vs *Whiteman* (1991) 2 WLR 1200, 1204.

246 (1994) 1-1 *I.H.R.R.,* Vol. 1, 1994, p. 240, see section I, para. 5.

religious backgrounds must be borne in mind, it is the duty of states [including Uganda], regardless of their political, economic and cultural systems, to promote and protect *all human rights* and fundamental freedoms', particularly in the domestic legal system.

The 1995 Constitution, despite its inadequacies, attempts to protect different categories of rights – civil and political; economic, social and cultural; as well as solidarity rights. However, since the majority of economic and social rights in the Uganda Constitution appear in the National Objectives and Directive Principles of State Policy, there is need to transform them into actionable and justiciable provisions of the Constitution. This can be addressed through constitutional reform to place all economic and social rights within the Bill of Rights or through the mechanism of public interest litigation, which will create certainty and force the State to acknowledge the nature and scope of its obligations with respect to economic and social rights. To achieve this, the Ugandan judiciary and the Human Rights Commission need to be receptive and play a more active role and be independent in practice. The lacklustre performance on human rights issues of the Ugandan judiciary that has historically been constrained by the doctrine of judicial restraint rather than judicial activism,[247] needs reform. The judiciary and the Human Rights Commission should generally interpret and apply Uganda's domestic law, particularly the Bill of Rights and the Directive Principles, as far as possible in a way, which conforms to Uganda's international law and human rights obligations, as this approach strikes a balance between judicial activism and appropriate judicial restraint. Neglect by the courts of this responsibility is incompatible with the principle of rule of law, which must always be taken to include respect for international human rights obligations.

The formal recognition of human rights in a country's constitution does not automatically guarantee their practical and effective realisation. Much depends on the commitment of the political authorities to the effective implementation of all human rights, and the willingness of the judiciary and other national institutions to enforce these rights.[248] In a nutshell, however, the overall constitutional framework for the protection and promotion of human rights in Uganda lacks a most significant factor, namely the genuine commitment of the government to a binding legal obligation to take effective measures to address the question of human rights in a comprehensive and exhaustive manner. The problem is compounded by the lack of a serious manner in which the Ugandan Government has addressed its legal obligations in the international arena. This is worsened by the silence of the international community in that, while vigorously advocating democratic reform and respect for civil and political rights elsewhere in Africa, it has remained remarkably quiet, let alone taking any recognition or action on the current abuse of human rights especially civil and political rights in Uganda under the disguised single party ('movement') in place since 1986. The virtual

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247 See Oloka-Onyango, J., 'Judicial Power and Constitutionalism in Uganda', in: Mamdani, M. and Oloka-Onyango, J. (eds.) *Uganda: Studies in Living Conditions, Popular Movements, and Constitutionalism*, JEP & CBR, Kampala, 1994, pp. 500-517.

248 See Liebenberg, S., 'The Protection of Economic and Social Rights in Domestic Legal Systems' in: Eide, A., *et al*, *Economic, Social and Cultural Rights*, Kluwer Law International, the Hague, 2001, pp. 55-84.

silence of the international community (including influential nations like the United Kingdom and the United States), while pouring millions of dollars of aid[249] into Uganda without a human rights face, has served as an endorsement of the restrictive 'movement' 'no-party' political system (a single party State in substance) since 1986. The 'no-party' system has severely undermined the promotion and protection of human rights particularly freedoms of association, assembly, expression and dissent as well as rights to political participation and democratic governance.[250] The focus of the influential nations has for too long been centred on Museveni's vital role in containing the 'islamist/fundamentalist' Government of Sudan through support for the Sudanese Peoples Liberation Army (SPLA), and significant economic growth – in terms of GDP – arising from adoption of the World Bank and the IMF economic adjustment policies, that failed to be conscious of basic principles of human rights relating to equality, non-discrimination and participation. Consequently, unless there is a significant transformation of the existing political system in Uganda in order to make it genuinely democratic and participatory, the quest for the protection and translation of human rights into realities will remain far from realisation. The Constitution cannot execute itself without a socio-cultural infrastructure, some of whose elements include democratic governance, a culture of constitutionalism, and human rights and peace education as well as international efforts to ensure compliance with human rights.

Finally, it is now clear, more than ever before, that Uganda is a one party State. The Political Parties and Organisations Act 2002 has, instead of creating an environment favourable for the operation of political parties for which it was designed, simply confirmed and entrenched the status quo *ante* by carrying forward the 'movement' and the constitutional restriction on the operation of political parties, and therefore, it has compounded the country's problems concerning respect, protection and promotion of civil and political rights, as well as economic and social rights. While political pluralism may not provide immediate answers it at least has the potential of providing more participation and alternative political, economic and social policy options, some of which may be more capable of dealing with the protection and promotion of human rights. Indeed, like Article 269 of the 1995 Constitution placing unjustified restrictions on the operation of political parties and the enjoyment of civil and political rights, it has simply provided, yet another example of how a Constitution and legislation can, for political expediency, be used to subvert democracy and human rights. In such a framework, Uganda needs a serious constitutional reform through a national conference that is independent of the Government.

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249 See Devarajan S., *et al* (eds.), *Aid and Reform in Africa*, pp. 103-163; Hearn, J., *Foreign Aid, Democratisation, and Civil Society in Uganda in the 1990s*, CRB Working Paper No. 53, 1999, pp. 1-31; Organisation for Economic Co-operation and Development, *Geographical Distribution of Financial Flows to Recipients 1992-1996*, p. 206.

250 See Lamwaka, C., 'Civil war and the Peace Process in Uganda, 1986-1997', *East African Journal of Peace and Human Rights*, Vol. 4, 1998, p. 139. See also *Democratic Republic of Congo* vs *Uganda*, http://www.icj-cij.org/icjwww/idocket/ico/ico.; Reno, W., *War, Debt and the Role of Pretending in Uganda's International Relations*, 2000, pp. 1-31.