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ABOUT THE JOURNAL

Islamic University in Uganda Journal of Comparative Law (IUIUJCL) is the official journal of the Faculty of Law, Islamic University in Uganda. It is devoted to the publication of faculty legal and interdisciplinary research and it publishes studies that contribute to the understanding of legal concepts from both classical and Islamic law perspectives. It is informed by a wide array of theoretical perspectives, innovative in form and content, and focused on both traditional and emerging topics. It provides in-depth analysis of legal concepts, institutions and topical and contemporary legal issues of fundamental importance.

SCOPE

Islamic University in Uganda Journal of Comparative Law is a peer reviewed journal providing an objective and industry focus and analysis of national and international legal, policy and ethical issues from Islamic and Classical perspectives. The Journal publishes articles that combine academic excellence with professional relevance on legal, ethical and policy issues concerning common and Islamic law.

It offers reference materials to practitioners, members of the academia, governmental and non-governmental organisations. The journal publishes two issues per year and welcomes articles concerned with theoretical and practical issues from classical and Islamic perspectives. All articles are subjected to double-blind review process to ensure objectivity, quality, and relevance. The journal is published in both print and electronic formats accessible from the Faculty of Law page of the University website. All correspondences are to be addressed to:

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From the Editorial Suite

On behalf of the Editorial Board, Islamic University in Uganda, I present to you Volume 6 Issue I of Journal of Comparative Law of Faculty of Law ,Islamic University in Uganda.

As in previous editions, this edition include scholarly articles, some doctrinal, some conceptual. The articles cover a wide range of themes of legal scholarship such as Public International Law, Environmental Law, Human Rights Law, and Family Law among others. A common thread in all the articles is that they deal with issues in a way that helps in part to fill the gap of scholarship in legal research on,the African continent.

Contributions are welcome for future editions from any one wish to contribute on various aspects of the law. The journal particularly welcomes scholarly articles that explore new horizons in legal development and help Uganda, African countries and other developing countries appreciate jurisprudential dynamics required for sustainable development in all aspects of human endeavours. It is noteworthy that many developing countries still operate within the ambit of colonial legal structure. Law played a role in colonialism and will pay a role in decolonization. Laws inherited during colonial eras continue to be the fulcrum of socio-economic and political organization directly or indirectly in a number of former colonies including Uganda. It is well known that colonial laws were made on the basis of exploitation, technological/ scientific development of that time and the conception of jurisprudence of governance operative at that time. Therefore, scholarly articles which explore this theme or have it in background in any area of law will better align to the journal's vision of contributing to the legal development of the society. The journal is also quite interested in comparative law not only for the normative advantage inherent in same but as an expression of promoting intellectual dialogues across jurisdictions and within different traditions of Law. Contributions in different aspects of Islamic Law in sundry areas such as Banking and Finance, rights of religious minorities among others are also most particularly welcome. Such contributions may treat the subject matter either on their own or in comparison with other legal traditions.

Editor-in-Chief

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THE STIFLING OF MEDIA FREEDOMS; THE CASE OF UGANDA'S MEDIA BROADCASTING REGIME.

WALYEMERA DANIEL MASUMBA[1]

Abstract

This article scrutinizes the broadcasting regime in Uganda. It specifically dwells on the endless and arbitrary directives from Uganda's broadcasting regulator, Uganda Communication Commission, to radio and television broadcasters. The article also considers whether the directives are consistent with international best practices or whether they are a violation of freedom of expression, media freedoms and the other interconnected human rights. A comparative case law analysis of the regulatory regimes in Burundi, Zambia, Botswana, Zimbabwe and Nigeria is carried out. The major finding of the study is that the broadcasting legal regime is ambiguous and as a result is used to promote partisan political interests. The ambiguous regulatory framework has, subsequently, facilitated violation of freedom of expression. It recommends for reform of the broadcasting regime in Uganda.

Key words: freedom of expression; media freedoms; broadcasting regime; violations; Uganda

1 Introduction

The Uganda Communications Commission (UCC) has since 2013[2] when it integrated with the Uganda Broadcasting Council, made several directives that have affected the freedom of expression of not only broadcasters and Journalists, but also ordinary Ugandan citizens.[3] These directives are based on the licensing conditions that were issued to the broadcasters.

It is important to note, from the onset, that the conditions for limiting the exercise of freedom of expression by citizens must be justifiable in a democratic society. The right to freedom of expression is protected by

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[2] The Uganda Communications Commission (UCC) was initially established in 1997 by the Uganda Communications Act Cap. 106. This law split up the Uganda Posts and Telecommunications Company Limited into four entities, with the UCC as the regulator of the communications sector. With the amendment of the Uganda Communications Act, CAP 106 in 2013, UCC merged with the Broadcasting Council.

[3] The UCC has consistently cited sec 31 of Uganda Communication Commissions Act No. 1/2013 and schedule 4 that provides for minimum broadcasting standards.

human rights instruments.[4] Uganda has ratified the International Covenant on Civil and Political Rights (ICCPR).[5] It has also ratified the African Charter on Human and Peoples' Rights (African Charter).[6] The East African Community Treaty (EAC Treaty) includes amongst its fundamental principles, the principles of good governance. These include democracy, rule of law, accountability, transparency and the rights contained in the African Charter.[7] Uganda is a state party to the EAC Treaty.

Article 29 of the Constitution of the Republic of Uganda guarantees the right to freedom of expression of every individual.[8] This basic human right, however, has had significant challenges since the promulgation of the Ugandan Constitution in 1995.

Arising from the foregoing, the question before the courts has always been whether the restrictions set up in the media laws against sedition, publishing false news, and administrative measures such as censorship, the banning and closure of newspapers and radio stations, are permissible as limitations under Article 43(2) (c).[9] Article 43 (2) (c) of the Constitution of the Republic of Uganda, 1995 (as amended) states that "Public interest under this article shall not permit; any limitation of enjoyment of 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". Thus, in *Charles Onyango Obbo & Another v Attorney General*[10], the two journalists were charged with publication of false news contrary to section 50 of the Penal Code Act. The Petitioners contended that section 50 was inconsistent with among others Articles 29(1) (a) and (b), 40(2) and 43(2) (c) of 1995 Constitution. The Constitutional Court ruled against the petitioners with only Justice Twinomujuni in a powerful dissent agreeing with petitioners. On appeal to the Supreme Court, Justice Mulenga stated that the protection of guaranteed rights is the primary objective of the constitution and the limitation of the enjoyment is an

[4] See Art 19, Universal Declaration on Human Rights (UDHR); Art 19, International Covenant on Civil & Political Rights (ICCPR) & Art 9, African Charter on Human and Peoples Rights (African Charter).

[5] In 1995.

[6] In 1986.

[7] Art 6(d), EAC Treaty.

[8] Art 29(1) of the Constitution of the Republic of Uganda, 1995 (as amended).

[9] Constitution of the Republic of Uganda, 1995 (as amended).

[10] *Constitutional Petition No. 15/1997.*

exception to their protection and is therefore a secondary objective. The Supreme Court therefore concluded that section 50 of the Penal Code Act was inconsistent with article 29(1) (a) and thus void.[11]

This article is limited to critically analysing the UCC directives from January 2015 to December 2017. The first part introduces the article. The second part problematizes the directives of UCC. The analysis of the legal mandate of UCC, specifically in relation to the regulation of media houses is discussed under part three. This part also canvasses the conduct of the UCC for three years under examination. The fourth part briefly investigates the international environment within which the right to freedom of expression is situated. It also details what the international best practices are on this basic human right. The fifth part analysis the impact of the conduct of UCC on media freedoms. Recommendations to reclaim this fundamental civic space from an authoritarian government are canvassed in the sixth part. Part seven concludes the article. The doctrinal research methodology was used to collect and analyse data for this article.

2 Problematizing UCC Directives

The right to freedom of expression is a fundamental right of every human being. This right can only be restricted under very strict circumstances, that are set out under international human rights law. Uganda is a state party to many international human rights instruments which provide for the guidelines on how this fundamental human right may be restricted[12].

The directives issued by UCC to media outlets since 2015 have affected the media freedoms of Ugandan citizens. The UCC has consistently cited section 31 of Uganda Communication Commissions Act 1 of 2013 (UCC Act) and schedule 4 that provides for minimum broadcasting standards in Uganda, as its yardstick of what responsible media freedoms are. Perhaps it is now important to interrogate whether the law upon which the UCC directives to media houses are established, is a fetter on the freedom of expression and by extension on a sustainable democracy for Uganda.

3 Uganda Communications Commission

The Uganda Communications Commission was established to enable one regulator take charge of the communications sector in Uganda. Section 3(a)

[11] *Constitutional Appeal No. 2/2002.*

[12] For example Uganda is state party to the ICCPR which it ratified in June, 1995.

of the UCC Act indicates that the objectives of the law are to develop a modern communications sector by establishing one regulatory body for communications in line with international best practice.[13]

3.1 Mandate of Uganda Communications Commission

The mandate of the UCC is quite wide. For purposes of this article, the author will highlight the functions that relate to media freedoms. They include the following; to implement the objectives of the Act;[14] to monitor, inspect, license, supervise, control and regulate communications services;[15] to allocate, license, standardize and manage the use of the radio frequency spectrum resources in a manner that ensures widest variety of programming and optimal utilization of spectrum resources;[16] to set national standards and ensure compliance with national and international standards and obligations laid down by international communication agreements and treaties to which Uganda is a party;[17] to receive, investigate and arbitrate complaints relating to communications services, and take necessary action;[18] to advise the Government on communications policies and legislative measures in respect of providing and operating communications services;[19] to set standards, monitor and enforce compliance relating to content,[20] among other functions.

3.2 Licensing of Media Houses

Part IV of the UCC Act provides for the licensing of radio and television stations. Perhaps it is important to highlight a few provisions that are relevant to this article. Section 21 of the UCC Act provides for the issuance of a licence by UCC for radio communications. A person also shall not install or operate a radio or television station without a licence issued by UCC.[21] Section 26(5) criminalises operation of a radio or television station without a licence.[22] A producer of a radio or television station is required to

[13] sec 3(a).

[14] sec 5(a).

[15] sec 5(b).

[16] sec 5(c).

[17] sec 5(i).

[18] sec 5(j).

[19] sec 5(p).

[20] sec 5(x).

[21] sec 26.

[22] secs 27 & 28 that criminalizes broadcasting without a license.

ensure that what is broadcast is not contrary to public morals.[23] The producer is also supposed to keep a record of a broadcast for sixty (60) days.[24] Section 31 of the UCC Act which is often cited by UCC when issuing directives to media houses provides that "A person shall not broadcast any programme unless the broadcast or programme complies with Schedule 4". Schedule 4 details the minimum broadcasting standards as follows: -

> A broadcaster or video operator shall ensure that—
> (a) any programme which is broadcast—
> (i) is not contrary to public morality;
> (ii) does not promote the culture of violence or ethnical prejudice among the public, especially the children and the youth;
> (iii) in the case of a news broadcast, is free from distortion of facts;
> (iv) is not likely to create public insecurity or violence;
> (v) is in compliance with the existing law;
> (b) programmes that are broadcast are balanced to ensure harmony in such programmes;
> (c) adult-oriented programmes are appropriately scheduled;
> (d) where a programme that is broadcast is in respect to a contender for a public office, that each contender is given equal opportunity on such a programme;
> (e) where a broadcast relates to national security, the contents of the broadcast are verified before broadcasting.

Is the aforementioned provision of the law that is often cited by the UCC in tandem with international best practice, as specified by the objectives of the UCC Act?.[25] We explore the answers to this question later in part 3.6.

3.3 Conditions and Sanctions

The UCC Act has a number of sanctions against radio and television stations including their staff. Some of the penalties provided for in the law, concerning this article, are as follows: The UCC Act provides that a person who broadcasts without a license issued by the UCC commits an offence and is liable on conviction to a fine not exceeding twenty-five currency

[23] sec 29 (a).

[24] sec 29 (b).

[25] sec 5 (f) of the UCC Act that provides that the UCC shall set national standards and ensure compliance with national and international standards and obligations laid down by international communication agreements and treaties to which Uganda is a party.

points or imprisonment not exceeding one year or both.[26] One currency point under the UCC Act is twenty thousand Uganda shillings.[27] The law also provides for penalties for unethical broadcasting standards by media houses.[28] It prescribes that the ethical broadcasting standards which apply to broadcasters are the professional code of ethics specified in the First Schedule to the Press and Journalist Act.

It is important to note that a constitutional petition was filed challenging this code of ethics as restrictive and unconstitutional.[29] The key prayer in the said petition is that the Press and Journalists Act[30], violates Article 29 of the Constitution of Uganda. The petition also makes specific reference to the code of ethics that holds journalists liable for disseminating "incorrect or untrue" news or allegations and requires them to disclose their sources if there is "an overriding consideration of public interest," as restrictive and compromising journalists' ability to carry out their duties in a professional way.

The arbitrariness of the said code of ethics is also found in section 32(2) of the UCC Act that empowers the UCC to modify the standards as it wishes. Under section 41 of the UCC Act, the UCC may suspend or revoke the licence issued under the said law.

Under Section 44 of the UCC requires radio and television operators to file an annual report. The annual report must indicate to what extent the conditions under which the licence was issued were met for that particular year. The report must also indicate what operations and services were carried out in that year. Part eight of the UCC Act provides for circumstances under which UCC may carry out investigations and inquiries, if there is a complaint against a licensee[31]. The UCC also has powers to inspect premises where it suspects there are violations of the Act.[32] Section 85 of the UCC Act provides for general penalties. It states that any person

[26]sec 27 (2).

[27] sec 2 and schedule 1 of the UCC Act.

[28] sec 32 of the UCC Act.

[29]*Centre for Public Interest Law, Human Rights Network for Journalists and East Africa Media Institute Versus Attorney General of Uganda, Constitutional Petition Number 9 of 2014.* The petition is yet to heard by Constitutional Court.

[30]Ch 105.

[31] secs 45, 46, 47 & 48.

[32] secs 49 & 50.

convicted of an offence under this Act for which no penalty is expressly provided is liable to a fine not exceeding ninety six currency points or imprisonment not exceeding four years or both.[33]

3.4 Conduct of Uganda Communications Commission

For the last three years, the UCC has issued many directives to media houses that have stimulated public resentment and debate like the period under study. This is partly because 2016 was a general election year. The subsequent events surrounding the constitutional amendments to remove the age limit to allow President Yoweri Museveni to rule Uganda until his death, also engaged the year, 2017. A sample of UCC directives to media houses have been retrieved for the period under study. They are traversed hereunder.

In 2015, UCC issued numerous directives to media houses. We shall sample a few considering the directives seem to be couched in similar language. In March 2015, the UCC ordered radio and televisions stations to boost the live coverage of President Museveni, who was soon to contest for the presidency of the country, as a candidate in the general elections in 2016.[34] UCC told local broadcasters that they were subject to "licensing conditions issued by the commission, whereby all broadcast stations are expected to provide live coverage of major national events and addresses" by the president. The directive also ordered the compulsory live coverage included the "pronouncements of natural emergency or disaster, security threats or any event… that necessitates the entire public to have simultaneous access to information". The UCC also threatened that any radio or television station that would not observe this directive, would be penalised.[35] In early July 2015, the Executive Director of UCC, Mr. Godfrey Mutabazi, issued a one-page directive, warning all broadcasters in Uganda.[36] This was against what he termed as "negative and unprofessional trends such as lack of balance, sensationalism, incitement, abusive language and relying on unauthorised and unreliable sources for information".[37] The UCC document did not state the justification for such a warning. This was a general election period for

[33] The UCC Act No. 1/2013.

[34] http://www.theeastafrican.co.ke<news> (accessed 5 January 2018).

[35] As above.

[36] http://www.ifex.org/uganda/2015/07/04/electionreporting/> (accessed 5 January 2018).

[37] As above.

which the fundamental right to freedom of expression not only by the media but by the candidates and general public was key, if the said general election was to be considered free and fair. In December 2015, the UCC banned Tamale Mirundi, an outspoken government public relations operative, from being hosted on any radio or television station. The justification for banning Mirundi from being hosted by any station was premised on the fact that he allegedly used abusive language against some government officials. Godfrey Mutabazi stated that the language used by Mirundi "doesn't deserve to be used on airwaves". He directed that such programs be stopped with immediate effect. Media Houses, however, ignored the ban and continued to host the former presidential press secretary, who indicated he would continue to "spill" democracy on the airwaves.[38]

In February 2016, the UCC issued a warning to media houses indicating that it was watching the situation closely. This was a few days to the polling day of the general elections. UCC subsequently switched off social media and other social communication platforms. MTN confirmed that they had been instructed by the regulator to block access for security reasons[39]. President Museveni declared it a necessary measure to stop people from using the platforms to tell lies.[40] UCC subsequently half-heartedly apologised on 23 February, 2016 for any inconvenience caused to Ugandans in a post on its face book page but stated that their decision was in line with the UCC Act.[41] In a letter to NTV, UCC threatened to revoke its licence over abusive language in July 2016.[42] UCC alleged that a guest speaker, Frank Gashumba was using profane and abusive language on air. UCC ordered NTV to cease hosting programs which it stated "disparage" views about government and individual leaders in government.[43] Following the Kasese massacre in December 2016, UCC warned that it would ban media stations

[38] As above., In May 2017 the UCC suspended the license of NBS TV for sixty days when Tamale Mirundi beat up Muyanga Lutaya, his host, on air.

[39] https://www.unwantedwitness.or.ug/wp/content/uploads/2016/uganda-internet-freedom-report-2016.pdf. > (accessed 5 January 2018).

[40] As above.

[41] As above.

[42] https://www.guru8.net/2016/10/ucc-threatens-ntv-uganda-over-frank-gashumba> (accessed 5 January 2018). Gashumba was recently arrested for "forging" passports in his names by the Chieftaincy of Military Intelligence. Other sources however state that the "forged" passports were planted in his office by Uganda's military intelligence because he is a critic of the NRM government.

[43] As above.

that were airing live broadcasts of the Kasese massacre.[44] UCC also stated that there should be no live broadcasts of the court proceedings of the Rwenzururu Cultural leader, Wesley Mumbere.[45] The trial was taking place in the Chief Magistrate's Court in Jinja, hundreds of kilometres away from where the massacre occurred.

In March 2017, the UCC ordered all television broadcasters from using images of dead bodies of the late Assistant Inspector General of Police Andrew Felix Kaweesi, his late bodyguard and driver. Mr. Mutabazi argued that "such broadcasts were sensational and unnecessarily alarmist".[46] In May 2017, UCC issued two directives against media houses. On 11 May, 2017, UCC notified NBS television of the suspension of its licence for sixty days.[47] The suspension emanated from a show which regularly hosted Tamale Mirundi as a guest speaker. UCC stated that the actions and words used by the aforementioned guest were contrary to public morals. On 25 May, 2017, UCC suspended the broadcasting licence of radio Hoima allegedly over promotion of sectarian tendencies.[48] The UCC stated that radio Hoima had hosted a group calling itself Bunyoro Kitara Reparation Agency "BUKITEREPA" who were uttering sectarian statements. UCC also ordered radio Hoima to provide all recordings where it had hosted members of the said group.[49] In September 2017, UCC issued two directives. ABS TV's licence to broadcast was suspended by UCC. UCC ordered all signal distributors to immediately disable ABS television content from their broadcasting platforms. UCC alleged that in spite of several warnings to ABS television management to review its programs and avoid offensive programs, it had continued to broadcast the same offensive programs.[50] On 26 September 2017, Godfrey Mutabazi issued a general directive on live broadcasts.[51] This was a period when the age limit Bill was about to be tabled in the Ugandan Parliament. UCC claimed "broadcasting operators

[44] https//www.ugandatoday.com/ucc-moves-to-ban-media-houses-over-kasese-massacre> (accessed 5 January 2018).

[45] As above.

[46] UCC Notice referenced UCC/LA/181 and dated 17 March, 2017.

[47] UCC Notice referenced LA/181/39 and dated 11 May, 2017.

[48] UCC letter referenced CMM/433.

[49] As above.

[50] '2017 and Mutabazi's endless media orders' *The Observer* 1 January 2018.

[51] UCC Notice referenced LA/181.

were "relaying live broadcasts which are inciting the public, discriminating, stirring up hatred, promoting a culture of violence amongst the viewers." UCC stated that the said live broadcasts were likely to create public insecurity or violence. UCC also warned that any broadcaster that would disobey its directive on live broadcasts on what was happening in Parliament would have its licence suspended and revoked.[52] In October 2017, the UCC ordered Kanungu Broadcasting Station (KBS) suspend two of its staff, on what it alleged was breach of minimum broadcasting standards.[53] When KBS refused to heed to its directives, Godfrey Mutabazi directed the said station to cease its operations, three days later, on 20 October 2017. UCC had earlier on 17 October 2017, suspended the broadcasts of Pearl FM over what it termed as "breach of minimum broadcasting standards".[54] It stated that it had received complaints regarding a program known as "the inside story" hosted by Suliman Kalule. The UCC ordered Pearl FM to suspend Suliman Kalule immediately. UCC stated that this program was likely to cause public insecurity and violence.[55] A local weekly newspaper reported that George Mutabazi directed Mbarara-based Endigyito Radio in western Uganda to suspend a popular political programme - World Express and its host James Kasirivu.[56] The World Express runs weekly and is broadcast in Luganda. Mutabazi said the commission had also kick-started investigations into the programme.[57]

To crown the year 2017, George Mutabazi ordered all radio and television stations to air President Museveni's new year message on 22 December.[58] They were also required to run advertisements about the said new year message prior to its live coverage. This was to be done for free with no payment whatsoever from government especially to private broadcasters. When complaints intensified about broadcasters being forced to air the President's New Year message, UCC a few days later issued a public warning to all broadcasters.[59] UCC indicated with "concern that despite the various engagements and warnings, some broadcasters have continued to

[52] As above.

[53] UCC Notice referenced LA/182/121.

[54] UCC Notice referenced LA/182/123.

[55] As above.

[56] The Observer, (n 48 above).

[57] As above.

[58] 'Radios, TVs to air President's New Year message' *New Vision* 28 December 2017.

[59] A UCC Public Notice on Page 34 of the New Vision Newspaper dated 29 December, 2017.

breach the minimum broadcasting standards…" UCC "strictly warned broadcasters to adhere and comply with the minimum broadcasting standards and all the laws of Uganda, failure of which the UCC would invoke regulatory sanctions including criminal proceedings against broadcasters.[60] UCC with that warning and threat of criminal proceedings managed to achieve its objective of having all media stations provide free, simultaneous live coverage for President Museveni's 2018 New Year message.

The thread that can clearly be gleaned from the UCC directives for the period under study, is that they are vague, not only to those who should enforce them, but also to the broadcasters who ought to obey them.

3.5 General limitations of freedom of expression

The UDHR provides a general limitation clause that states that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". [61] The African Charter has a similar general provision, which provides that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".[62]

Rights may only be limited on the basis of the specific conditions prescribed in the applicable treaty. As stated in the General Comment No. 34,[63] these grounds "may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets, and human rights", and one can never justify an attack on any person seeking to exercise their right to freedom of expression, including forms of attack such as arbitrary arrest, torture, threats to life and killings.[64]

3.6 International Standards and Best Practices

[60] As above.

[61] Art 29. https//http://www.humanrights.com/what-are-human-rights/videos/responsibility.html> (accessed 17 May 2018).

[62] Art 27(2) of the African Charter.

[63] General Comment 34 on art 19 of the CCPR.

[64] As above.

The fundamental right to freedom of expression is not absolute. This basic right may be lawfully restricted. The restrictions are subject to conditions that are laid down by the law. These restrictions must be reasonable and justifiable in an open and democratic society. Perhaps we could look at the international, regional and sub-regional provisions restricting the right to freedom of expression.

Article 19(3) of the ICCPR and Article 9(2) of the African Charter present the internal limitations clauses to the right to freedom of expression in both treaties. In this regard, Article 19(3) of the ICCPR states that: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:(a) For respect of the rights or reputations of others;(b) For the protection of national security or of public order (order public), or of public health or morals." Article 9(2) of the African Charter provides a much wider restriction, in that it requires that freedom of expression is exercised 'within the law'.[65] It states:(2) Every individual shall have the right to express and disseminate his opinions within the law. The challenge that remains for interpretation is whether the phrase "within the law" refers to domestic or international law. Thank fully, the African Union has resolved this dilemma.[66]

3.7 The three-part test

To be justified, any limitation of the right to freedom of expression must meet the three-part test, requiring that; first, it must be provided for in law. Secondly, it must pursue a legitimate aim; and thirdly, it must be necessary for a legitimate purpose. In particular, restrictions on the right to freedom of expression may not put the right itself in jeopardy. This is coherent with article 5(1) of the ICCPR which provides that "nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". Thus, rights cannot be limited in a way that would render the right itself nugatory. As stated by the Zimbabwe Constitutional Court, in *Chimakure versus Attorney*

[65] The African Commission in *Constitutional Rights Project & Others v. Nigeria (2000) AHRLR 227 (ACHPR 1999),* has interpreted the phrase "within the law to mean within international law and not domestic law.

[66] As above.

General of Zimbabwe[67] "To control the manner of exercising a right should not signify its denial or invalidation".[68]

Furthermore, a restriction or limitation must not undermine the essence of the right to freedom of expression and the relationship between the right and the limitation – or between the rule and the limitation.

Importantly, all restrictions and limitations shall be interpreted holistically, in the light and context of the particular right concerned. Furthermore, it must be consistent with other rights recognized under the treaty in question and other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination - on the basis of race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status. The burden of proving this, rests on the state.

Wherever doubt exists as to the interpretation or scope of a law imposing limitations or restrictions, the protection of fundamental human rights shall be the prevailing consideration. Restrictions already established must be reviewed and their continued relevance analysed periodically.

The United Nations Human Rights Council has highlighted certain categories of speech that ought not to be limited under Article 19(3) of the ICCPR. These include:"(i) Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups;(ii) The free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship;(iii) Access to or use of information and communication technologies, including radio, television and the Internet."

While, indeed, all speech can arguably be limited in line with provisions of the applicable limitations clauses, certain forms of speech – for instance, political speech, or matters relating to corruption or human rights issues –

[67] *SC 14-13.*

[68] As above.

should be carefully guarded in light of the important public interest role that it serves. The African Commission in *Amnesty International versus Zambia*[69] has found that freedom of expression is a fundamental human right essential to an individual's personal development, political consciousness and participation in the public affairs of a country. In *Kenneth Good versus Botswana*[70] court noted that "a higher degree of tolerance is expected when it is political speech and even higher threshold is required when it is directed towards the government and government officials."[71]

The EAC Treaty includes amongst its fundamental principles, the principles of good governance. These include democracy, rule of law, accountability, transparency and the rights contained in the African Charter.[72] Uganda is a state party to the EAC Treaty. The aforementioned provision of the EAC Treaty was relied on by the East African Court of Justice (EACJ) in upholding the right to freedom of expression in a case brought before it recently.[73] The EACJ decided that when state parties are enacting laws they must adhere to the principles enshrined in Treaties that they have signed. The EACJ also stated that: -

> Firstly, under articles 6(d) and 7(2), the principles of democracy must of necessity include press freedom. Secondly, a free press goes hand in hand with principles of accountability and transparency which are also enshrined in articles 6(d) and 7(2). Thirdly, by acceding to the Treaty and based on our finding above that Articles 6(d) and 7(2) are justiciable, Partner States including Burundi, are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind.[74]

We have, in brief, stated what the international, regional and sub-regional standards and best practices are on the right to freedom of expression. Uganda being a signatory to the ICCPR, the African Charter and the EAC Treaty ought to uphold these standards on this fundamental human right.

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[69] *(2000) AHRLR 325 (ACHPR 1999).*

[70] *(2010) AHRLR 313 (ACHPR 2005).*

[71] As above.

[72] Art 6(d), EAC Treaty.

[73] *Burundi Press Union Versus Attorney General of Burundi, Reference No. 7/2013, EACJ.*

[74] As above.

The key question, however, is whether the UCC directives to media houses and the law upon which they are based meets these aforementioned standards. The aforementioned authorities and international best practices indicates that the law on which the UCC directives are issued to media houses is vague.

4. Implications of UCC's Conduct on Media Freedoms

One of the immediate implications of UCC's conduct is self-censorship by the media houses themselves. The owners of these media houses have invested their resources and therefore would not want their businesses jeopardised by suspension or revocation of licences for minor altercations with the government of the day. The most likely outcome is that they will ask the journalists working at their media stations not to antagonise any government officials or government to enable their businesses to operate smoothly.

The other implication of the conduct of the government agency is that it will lead to a loss of employment for journalists where the UCC orders for immediate suspension/sacking of presenters or producers. But more importantly, in cases where the broadcasters licence is revoked a large number of citizens working for that particular broadcaster will be out of jobs and a source of livelihood.[75] The aforementioned scenario will not only lead to unemployment, but also a loss of investment incentives for investors who will avoid investing in such businesses because of the arbitrary conduct of a regulatory agency. Therefore, this may lead to a reduction in tax revenue collected by government.

The government as a result of the inadequate collection of tax revenue will be hard-pressed to provide social services to the citizens. Subsequently, this may lead to violence, public insecurity and national insecurity, the purported challenges the UCC is trying to prevent, as citizens demand for the said social services from government.

The suppression of media freedoms is a violation of fundamental human rights. Not only is the right to freedom of expression violated but other human rights associated with this fundamental right are curtailed. These

[75] The most recent case is the closure of the Red Pepper Newspaper including its related publications and radio station. This was even when the other publications and radio station were not involved in "treason charges" that were read to the Red Pepper newspaper editors at Buganda Road Court.

include, the right to participate in public affairs, voting rights and the right to equal access to public services. It is also important to note the violation of media freedoms may also lead to political instability in the long term. This will obviously manifest because the citizens are unable to inform government about their grievances due to the reduced civic space for the citizen – state engagement.

5 RECOMMENDATIONS

There is need for a capacity building and advocacy strategy to facilitate the building of a critical mass of key stakeholders as media proprietors, journalists, civil society activists, parliamentarians and ordinary citizens to boost the civic efforts against the regulatory framework under which UCC is issuing directives to media houses.

A law reform strategy should be crafted and implemented by the key stakeholders. This law reform should be in tandem with international best practices. This strategy should involve as many legislators as possible to curtail detractors from bastardising provisions of reform bill when it is tabled before the committee stages of Parliament for scrutiny. The sponsoring of a private members bill should also be explored as a viable law reform strategy. The only challenge that a private members bill may meet is the procurement of a certificate of financial implication from the ministry of finance. The said certificate is a major challenge to private member bills that are usually intended to democratize the civic space and to curtail the arbitrary authority of government. This is because the government may not allow for the amendments to the UCC Act to proceed, considering the current broadcasting regime is facilitating its suppression of citizens dissent.

As a last resort, if all the aforementioned cumulative strategies fail to yield law reform of the broadcasting environment, the stakeholders have to pursue strategic public interest litigation at domestic, sub – regional, regional and international levels. This litigation strategy should also be carried out in an incremental manner. For example, at domestic level, the stakeholders may file cases both at the High Court and the Constitutional Court for enforcement of individual rights of journalists and media house proprietors. They may also petition the courts for interpretation of the UCC Act.

6 Conclusion

The article explored the impact of UCC directives to media houses on media freedoms. The study has found that the regulatory regime of the broadcasting industry is ambiguous. This legal environment has facilitated the issuance of vague directives by UCC to broadcasters. It has also facilitated the numbing of any criticism against the NRM government and bolstered the circulation of propaganda by the NRM government to sustain itself in power. This, subsequently, has led to the violation of the fundamental right to freedom of expression and other rights in Uganda. The aforementioned challenge has become a barrier to Uganda witnessing a peaceful transfer of power and, consequently, a sustainable democracy. The article also found that Uganda is not respecting the international instruments on the freedom of expression, to which it is a signatory. To enable comprehensive findings on media freedoms in Uganda, the print media needs to be considered, when further research is carried out.

COMBATANT JIHAD IN ISLAMIC LAW OF WAR AND PEACE: SCOPE AND JUSTIFICATION

DR. A. A. OWOADE[1]

ABSTRACT

Local and international media has portrayed Jihad as equal to terrorism, as result of terrorist acts of some people, Jihad is to struggle in the cause of truth with our tongue, wealth, actions and life. Jihad is wider than combatant fighting, it includes saying the truth, going for hajj, kindness to the parents, struggling against one selves, Shytan, kuffar and hypocrites. Justification of Jihad is to fight against injustice, persecution and to protect Islam. If all peaceful ways fails the combatant Jihad has some conditions that must be met before engaging in it such as commandment of a political leader, strength, fighting the combatants only, not killing of women and so on. The hadith of Abu hurairah and the verse of the sword has been explained in the paper in that context.

1.0.0 INTRODUCTION

Jihad is seen by some to be synonymous to terrorism; the term jihad becomes a global term in local and international media due to the misuse of same by some religious violent extremists.One factor that also contribute to this is as a result of misconception by some regarding the term and misinterpretation of some religious text by some writers.

In this piece the meaning, classification and types of Jihad will be given, after that the justification for combatant Jihad will also be discussed, and clarification of some religious texts that are misunderstood by some to justify aggression against peace loving people of other faith will also be made. It is not in the scope of this piece to discuss the importance of Jihad, its ethics and conditions, or the termination of war or treatment of prisoners of war. It is also not part this work to comment on contemporary practices of some Jihadist groups such as ISIS, Al-Qaeda, Shabab, Jabhatu al-NUsra, Jaysh Yarmuk, and Boko Haram.

2.0.0 MEANING OF JIHAD

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The word "*Jihad*" is an Arabic word derived from the verb "*jahada*"[2]. In literal sense it simply means "to struggle","to exert effort"[3] or "exert oneself", "to toil" or "to strive" or "it signifies the exertion of one's power to the utmost of one's capacity in the cause of Allah"[4] As stated where Allah (SWT) said:

> "Those who criticize the contributors among the believers concerning [their] charities and [criticize] the ones who find nothing [to spend] except their effort",[5]

Jihad technically has been defined by many scholars of different schools of juristic thoughts, which include the following:

Hanafi Scholars defined Jihad to mean: "Inviting pagans to embrace the true religion,(Islam)and waging war against them if they refuse to accept "[6]

According to Ibn Rushd: "Any body that strive in the way of Allah has performed Jihad, although when ever Jihad is mentioned it is referring to fighting pagans (*kuffar*) until they embrace Islam or pay *Jizya*"[7]

According to the Mali ki school Jihad is " Waging war against a pagan that has no peace treaty with Muslims for sake of Allah or he entered into their land with out permission."[8]

According to the Shafi'i school Jihad means "Fighting pagans in the cause of Allah to make His word victorious and to support His religion"[9]

Hanbali scholars defined Jihad as "Fighting pagans alone not Muslims"[10]

Among the contemporary scholars Ahmad Al-Dawoody, he defined Jihad as: "to exert great effort or strive to achieve a laudable goal, either by doing something good or by abstaining from doing something bad. Jihād is thus a

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[2] Al-Jauhari I H, *Al-Sihah*, (Dar al-Qalam, Beirut, 1919), vol.3 p22

[3] Al-Fayumi, A.M al-*Misbahul Munir*, (al-Maktabat al-Asriyya), vol.1 P62

[4] Ibin Faris A., Mujam MAqayis al-Lugah, Dar al-Fikr, Beirut, 1979, vol.1P486

[5] Qur'an 9:79

[6] Ibn Nujaim Z, *Al-Bahr al-Raiq sharh kanz al-Daqaiq*, (Dar al-Marifa, Beirut), vol.5p76

[7] Al-Suhaimi A. S, , *Al-Jihad fil Islam*, (Dar al-Nasiha, Madinnah, Kingdom of Saudi Arabia, 1429) p29

[8] Al-Abi S.A, *Al-Thamar al-Dani*, (al-Maktabat al-Thaqafiyya, Beirut), p. 412

[9] Al-Dimyati A.M, I anatu al-Talibeen,(Dar al-Fikr), vol.4p.180

[10] s Al-Buhuti M. Y, *Kashaf al-Qina*, (Dar al-Fikr, Beirut, 1402), vol.3p.32; Al-Ruhaibani M, *Matalib Uli al-Nuha*, (al maktab al-Islami, Damascus), vol.2p.497,

broad concept that refers to acts related to both oneself and others. Advising rulers to stop their tyranny is the highest degree of jihād. The Prophet Muhammad said: "The best [type of] jihād is a word of truth to a tyrant ruler"[11]."

> *Jihad* technically means the unceasing effort that an individual must make towards self-improvement and self-purification. It also refers to the duty of Muslims, both at the individual and collective level, to struggle against all forms of evil, corruption, injustice, tyranny and oppression – whether this injustice is committed against Muslims or Non-Muslims, and whether by Muslims or Non-Muslims. In this context, *jihad* may include peaceful struggle or, if necessary, armed struggle.

The Qur'an generally uses the term "*jihad*" in the broader sense of struggle in God's cause which could include fighting. It was first used in the Qur'an in verses revealed at Makkah long before the early Muslims were permitted to fight:

Allah says: *"And those who engage in jihad (striving) in Our (cause), We will certainly guide them to Our paths".* (Q.29:69) He also says in another verse: "*And whoever engages in jihad (striving), he does so for his own soul…"* (Q.29:6) He also says: *"Therefore, listen not to the unbelievers, but engage in jihad (striving) against them (with the utmost endeavour)*[12]*, with it (the Qur'an).* (Q.25:52)

Similarly, Jihad is being used in the tradition of the Prophet (pbuh) in broader sense of struggle in God's cause. The following traditions prove this assertion: Another man asked, "What kind of *jihad* is best?" The Prophet (ρ) replied, "*A word of truth before an oppressive ruler*."[13]

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[11] Al-Dawoody A, *Islamic law of war Justification and regulations*, (Pelgrave macmillan, New York, United State of America, 2001), P76

[12]Ibn Kathir states that this was the interpretation of Ibn Abbas (*TafsirIbnKathir (Abridged)*, Riyadh: Darussalam Publishers). vol.7.

[13] Al-Tirmithi M. I. *Sunan al-Tirmithi,* (Dar Ihya al-Turath al-Arabi, Beirut, hadith number: 2174) vol. 4p471; Ibn Majah M.Y. *Sunan Ibn Majah*, (Dar al-Fikr, Beirut, Lebanon, hadith number: 4011,) vol. p.1329; Al-Nasa'i A;S. *Sunan al-Nasa'I* Maktab al-Matbuat al-Islamiyyah, Halab, Syria, 1986, hadith number : 4209) vol.7p.161

'Aisha asked, "O Messenger of Allah, we see *jihad* as the best of deeds, so shouldn't we join it?" He replied, "*Hajj is the most excellent of all jihad (for women).*"[14]

3.0.0 TYPES OF JIHAD

Different jurists used different measures to classify Jihad, some classified Jihad into two namely offensive Jihad and defensive Jihad,[15] while others classified Jihad into *Jihad bi al-Nafs* and *Jihad bi al-Mal*, and others divide Jihad into *Jihad al-Akbar* (the greater Jihad) and *Jihad al-Asgar* (the lesser Jihad),[16]On the other hand Yusuf Al-Qardawi among the contemporary jurists classify Jihad into three namely Fighting open enemy (Mujahadat al-Aduwu al-Zahir), Struggling against Satan (*Mujahadat al-Shaitan*) and Struggling with one self for self improvement (*Mujahadat al-Nafs*)[17]

Ibn al-Qayyim (may Allaah have mercy on him) said:

> Once this is understood, then jihad is of four kinds: Jihad al-nafs (jihad against one's self), jihad al-Shaytaan (jihad against the Shaytaan), jihad against the kaafirs and jihad against the hypocrites.
>
> Jihad al-nafs (jihad against one's self) is of four kinds:
>
> 1 – Striving to learn the teachings of Islam without which one cannot attain success and happiness in this world or in the Hereafter; if this is missing then one is doomed to misery in this world and in the Hereafter.
>
> 2 – Striving to make oneself act in accordance with what one has learned. Simply knowing without acting, even though it may not cause any harm, is not going to bring any benefit.
>
> 3 – Striving to call others to Islam, teaching those who do not know about it. Otherwise one will be one of those who conceal that which Allaah has revealed of guidance and teaching, and it will not benefit him or save him from the punishment of Allaah.

[14] Al-Bukhari M. I. *Sahih al-Bukhari*: (Dar tauq al-Najat, Beirut, Lebanon, 1422AH, hadith number:2784) vol.7p.194

[15] Shaltut,M., *Al-Qur'an wa-al Qital,* (1951).(cited in Nuraen Taiwo Hassan DINDI N. T. *The concept of war and peace in Islamic law,* (2012),p65; Al-Qardawi Y, *Fiqhul Jihad,* (Maktabat Wahbah, Cairo, 2009), p.69

[16] [16] Al-Dawoody A, *Islamic law of war Justification and regulations*, pp. 76-77

[17] Al-Qardawi Y, *Fiqhul Jihad*, p.66

4 – Striving to bear patiently the difficulties involved in calling people to Allaah and the insults of people; bearing all that for the sake of Allaah.

If a person achieves all these four levels, then he will be one of the rabbaaniyyeen (learned men of religion who practise what they know and also preach to others. Cf. Aal ‘Imraan 3:79). The salaf were agreed that the scholar does not deserve to be called a rabbaani unless he knows the truth, acts in accordance with it and teaches it to others. Whoever teaches, acts in accordance with his knowledge and has knowledge, he will be called great in the kingdom of heaven.

Jihad against the Shaytaan is of two types:

1 – Warding off the doubts that he stirs up to undermine faith.

2 – Striving against him to ward off the corrupt desires that he provokes.

The first jihad is followed by certainty of faith, and the second is followed by patience. Allaah says (interpretation of the meaning):

“And We made from among them (Children of Israel), leaders, giving guidance under Our Command, when they were patient and used to believe with certainty in Our Ayaat (proofs, evidences, verses, lessons, signs, revelations, etc.)”(*Q. 32:24)*

Allaah tells us that leadership in religion is attained through patience and certainty of faith. Patience wards off desires and certainty wards off doubts.

Jihad against the kaafirs and hypocrites is of four kinds: with the heart, the tongue, one’s wealth and oneself. Jihad against the kaafirs is more along the lines of physical fighting whereas jihad against the hypocrites is more along the lines of using words and ideas.

Jihad against the leaders of oppression and innovation is of three kinds:

1 – Jihad with one's hand (i.e., physical jihad, fighting) if one is able. If that is not possible then it should be with one's tongue (i.e., by speaking out). If that is not possible then it should be with one's heart (i.e., by hating the evil and feeling that it is wrong).

These are the thirteen types of jihad, and "Whoever dies without having fought or having resolved to fight has died following one of the branches of hypocrisy."[18]

However among the contemporary scholars Ibn Baz has following to say on types and classifications of Jihad:

"Jihad is of various kinds, with one's self, one's wealth, by making du'aa', by teaching and guiding, by helping to do good in any way. The greatest form of jihad is jihad with one's self (i.e., going oneself and fighting), followed by jihad with one's wealth, jihad by speaking out and guiding others. Da'wah is also part of jihad. But going out oneself to fight in jihad is the highest form."[19]

4.0.0 JUSTIFICATION OF COMBATANT JIHAD (*SABAB QITAL AL-KUFFAR*)

The disagreement over whether it is *kufr* (unbelief) or acts of aggression against Muslims that is the Qur'ānic *casus belli* results in two different juridical positions being taken on the justifications for war against non-Muslims.

The first group include Hanafi, Maliki, Some Hanbalis, Sufyan al-Thauri, Ibn Taimiyyah,[20] al-San'ani, Shaltut and Yusuf Al-qardawi[21] are of the view that justification of jihad is aggression and persecution and not unbelief.

Allah says in Quran: "Permission (to fight) is given to those (believers) who are fought against, because they have been wronged; and surely, Allah is able to give them victory.) (40. Those who have been expelled from their homes unjustly only because they said: "Our Lord is Allah." For had it not been that Allah checks one set of people by means of another, Sawami`, Biya`, Salawat, and Masjids, wherein the Name of Allah is mentioned much, would surely

[18] Ibin Qayim M. A, *Zad al-Ma'ad fi hadyi khair al-Ibad,* (Muasasatu al-Risalah, Beirut, 1994), vol.3P 9-11.

[19] Ibin Baz A. A., *Majmu Fatawa wa Maqalat Mutanawi'a,* (Dar al-Qasim, Riyadh, 1420), vol.3 pp. 334-335.

[20] Ibn Taimiyyah A A, Majmu'u al-Fatawa, Dar al Wafa'a, vol.28 p358

[21] Al-Qardawi Y, *Fiqhul Jihad,* ,p 70

have been pulled down. Verily, Allah will help those who help His (cause). Truly, Allah is All-Strong, All-Mighty.)"[22]

Al-`Awfi reported that Ibn `Abbas said, "This was revealed about Muhammad and his Companions, when they were expelled from Makkah.[23]" Mujahid, Ad-Dahhak and others among the Salaf, such as Ibn `Abbas, `Urwah bin Az-Zubayr, Zayd bin Aslam, Muqatil bin Hayan, Qatadah and others said, "This is the first Ayah which was revealed about Jihad." Ibn Jarir recorded that Ibn `Abbas said, "When the Prophet was driven out of Makkah, Abu Bakr said, `They have their Prophet. Truly, to Allah we belong and truly, to Him we shall return; surely they are doomed."[24]

Allah says in the Quran: ". And fight in the way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors. And kill them wherever you find them, and turn them out from where they have turned you out. And Al-Fitnah is worse than killing. And fight not with them at Al-Masjid Al-Haram (the sanctuary at Makkah), unless they (first) fight you there. But if they attack you, then kill them. Such is the recompense of the disbelievers. But if they cease, then Allah is Oft-Forgiving, Most Merciful. And fight them until there is no more Fitnah (disbelief and worshipping of others along with Allah) and the religion (all and every kind of worship) is for Allah (Alone). But if they cease, let there be no transgression except against Az-Zalimin (the polytheists and wrongdoers)".

The verse is saying Fight for the sake of Allah and do not be transgressors,' such as, by committing prohibitions. Al-Hasan Al-Basri stated that transgression (indicated by the Ayah), "includes mutilating the dead, theft (from the captured goods), killing women, children and old people who do not participate in warfare, killing priests and residents of houses of worship, burning down trees and killing animals without real benefit."[25] This also the

[22] Qur'an 2:190-193

[23]l bn Kathir I , *Tafsir al-Quran al-Azeem*, Dar Taibah lil nashr, 1999, vol.5p433

[24]Abu Jafar Muhammad bin Jarir al-Tabari, Jami'ul Bayan fi Ta'wil al-Quran, Muasasa al-Risalah, 1420AH, vol.18 p645

[25] bin Kathir I , *Tafsir al-Quran al-Azeem* vol.1 p524

opinion of Ibn `Abbas, `Umar bin `Abdul-`Aziz, Muqatil bin Hayyan and others.[26]

It has been reported from Sulaiman bin. Buraid through his father that when the Messenger of Allah (may peace be upon him) appointed anyone as leader of an army or detachment he would especially exhort him to fear Allah and to be good to the Muslims who were with him. He would say: Fight in the name of Allah and in the way of Allah. Fight against those who disbelieve in Allah. do not embezzle the spoils ; do not break your pledge; and do not mutilate (the dead) bodies; do not kill the children[27]

Allah said: "And what is wrong with you that you fight not in the cause of Allah, and for those weak, ill-treated and oppressed among men, women, and children, whose cry is: "Our Lord! Rescue us from this town whose people are oppressors; and raise for us from You one who will protect, and raise for us from You one who will help. Those who believe, fight in the cause of Allah, and those who disbelieve, fight in the cause of the Taghut. So fight against the friends of Shaytan; ever feeble indeed is the plot of Shaytan.)" [28]

From the above verses of the Quran it is clear that the justification for combatant Jihad is prevention of aggression (Qur'an .2:190,2:216-217,4:75-76) Fighting must cease once religious freedom is granted(Q.8:60-61) and the mission to preach Islam is protected.

In the analysis of the Quranic verses on warfare Mahmud Shaltut concluded in his *Al Qur'an Wa al-Qital* as follows that:

"There are only three reasons for which the Islamic state may go to war, vis-à-vis.:

1.To repel aggression against it.

2.To protect the religion of Islam and

3.To defend religious freedom[29]

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[26] Ibn Jarir al-Tabar M, *Jami'ul Bayan fi Ta'wil al-Quran*,(Muasasa al-Risalah, 1420AH), vol.3p562

[27] Muslim H. *Sahih Muslim*, (Dar al-Jeel, Beirut, Lebanon, 4619 vol5 p139), Ibn Majah M.Y. *Sunan Ibn Majah* hadith number::2857; Al-Darimi A.A, *Sunan al-Darimi*, (Dar al-kitab al-Arabi, Beirut, 1407AH, hadith number::2439), vol2 p.284

[28] Qur'an 4:75- 76

[29] Shaltut,M., *Al-Qur'an wa-al Qital*, (1951).(cited in Nuraen Taiwo Hassan DINDI N. T. *The concept of war and peace in Islamic law* p. 57

For proper understanding of verses related to Jihad we need to understand that Prophet and his companions faced allot persecution from pagans, Bilal bin Rabah was punished, Ammar bin Yasir was maltrited and forced to pronounce kufr[30] and Sumaiya was killed, Some companions migrated to Abysinia (Habasha) just to run away with their faith, yet Meccans sent Amru bin As and his team to Abysinia to bring Muslims back to Mecca. The Meccans boycott Banu Hashim, Quraish unanimously agree to kill the Prophet(Qur'an .8:30), Abu Jahal was sent even after Prophet's Migration to Madina to crush Islam because they abandon idol worshiping.

The Prophet Muhammad (p) lived peacefully with peaceful people of other faiths – both *Ahl al-Kitab* (People of Earlier Scriptures) and others.[31] The combative form of Jihad is against aggression, oppression and intolerable injustice, whether it be initiated by Muslims (Qur'an 49:9-10) or by non-Muslims. There is no compulsion in religion (Qur'an 2:256), and the fact that Muslims are even allowed to marry chaste women from among Jews and Christians (Qur'an 5:5) is itself proof that Islam cannot at the same time teach aggression to peaceful non-Muslims. The Prophet said to his Companions, *"leave the Abyssinians alone as long as they leave you alone. And do not engage the Turks (in battle) so long as they do not engage you (in battle)*".[32] The Prophet had peace treaties with various people of other faiths,[33] and there were communities of Jews living in Medina which was the capital city of Islam at the time.[34] Additional evidence that combat is only against injustice and not due to religious difference is the prohibition by the Prophet (ρ) of killing Non-Muslims who were non-combatants, such as women, children, etc.[35] For example, he said,

[30] bn Kathir I , *Tafsir al-Quran al-Azeem*, vol.4 p605

[31] Ahmad bin Hnbal, *Musnad Ahmad*, (Al-Maktabah Ash-Shamilah); vol. 3, pg. 211.

[32] Abu Dawud, *Sunan Abu Dawud*, (Dar al-Kutub al-'Arabi, Beirut), Vol.4 p.186.

[33] Al-Bukhari, *Sahih al-Bukhari*, (Dar Ibn Kathir, Beirut, 2nd Edition, 1987), vol.2, p.974. Al-Mubarakpuri S, *Al-Rahiq al-Makhtum*, vol.1, p.148., Al-Sallabi A. M, *Al-Sirah al-Nabawiyyah 'Ard waqa'I' wa Tahlil Ahdath*. Vol.1, p.492.

[34] Safiu Rahaman al-Mubarakpuri ,*Al-Rahiq al-Makhtum*.,Vol.1, pg.138, Ali Muhammad Muhammad al-Sallabi, *Al-Sirah al-Nabawiyyah 'Ard waqa'I' wa Tahlil Ahdath*. Vol.1, p.492.

[35] Al-Zuhaili W, *Al-'Alaqaat al-Dawliyyah Muqaranatan bi al-Qanun al-Dawli al-Hadithi*. Pg.93, Al-Nawawi, *Takmilah al-Maajmu' Shar al-Muhaddhab*, (Dar al-Kutub al-'ilmiyyah, Beirut, 1st ed., 1423), Vol.24, p.163., commented on by a group of scholars.

"Never kill women, children, and the old weakened with age"[36], "Do not kill hermits"[37] "Do not slay the old and decrepit nor…,"[38]
and "Leave them (monks) and that to which they devote themselves."[39]

To this list, scholars add other non-combatants such as the blind, chronically ill, the insane, peasants, serfs, etc.[40] If all these categories of non-Muslims are not to be fought, it means then that fighting any non-Muslim is not because they are non-Muslims *per se*, but because they have been aggressive or combatants against Muslims. The injunction in the Qur'an (60:8-9) regarding those who have not fought Muslims on account of their faith nor driven them from their homelands, is that they should be treated with kindness (*birr*) and fairness (*qist*). The Prophet Muhammad (p) was sent as a mercy to mankind (Qur'an 21:107).

The second group who hold the view that the cause for war is disbelieve(*kufr*), and that Muslims are to wage war against unbelievers if they refuse to accept Islam or submit to Muslim rule, this group include Shafi'i[41], some Hanbalis and Ibn Hazm[42] of Zahiri school, while among the contemporary Sayid Qutb and Abu al-Ala al-Maududi also shared the same opinion with them, they rely on (Q.9:5 and 9:29) They also rely on the hadith of Abu Hurairah.

5.0.0 HADITH OF ABU HURAIRAH AND THE VERSE OF THE SWORD

The Messenger of Allah (p) said: "I have been ordered to fight the people until they say, There is none Worthy of worship but God"[43]

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[36] Abu Ishaq A. M, *Al-Kashf wa al-Bayan*, (Dar Ihya al-Turath al-Arabi, Beirut, 1st Eed., 2002), vol. 2, p.87; Ibn Qudamah, *Al-Mughni*, (Dar al-Fikr, Beirut, 1st Edition, 1405AH), vol.10, p.530.

[37] Abu Yala A M, *Musnad Abu Ya'la*, (Dar al-Mahmun li al-turath, Damascus, 1st ed., 1984, Scrutinized by:Husain Salim Asad). Vol.5, p.59.; Ibn Abi Shaibah A. A. *Al-Musannaf fi al-ahadith wa al-Athar*, (Maktabah al-Rushd, al-Riyadh, 1st ed., 1409), vol.6, p.484.

[38] Ibn Hazm A , *Al-Muhalla*, (Idarah al-iba'ah al-Muniriyyah, 1347AH), vol.2, p.297.

[39] *Ibid*

[40] Al-Zuhaili W., *Al-Fiqh al-Islami wa Adillatuhu*, (Dar al-Fikr, Syria, 4th ed)., Vol.8, p.11.

[41] Al-Shafi'I M. I, *Al-Umm*,(Dar al-Fikr, Beirut, 1980), vol.4 p169, Al-Dimyati A.M, *I anatu al-Talibeen*, vol4 p108;

[42] Ibn Hazm A , *Al-Muhalla*, vol.7 p291

[43] Al-Bukhari M I, *Sahih al-Bukhari* hadith number::25; Muslim H, *Sahih Muslim*, hadith number:133

The Arabic word in this *hadith* is not "*qat'l*" ("fight" or "kill") but "*qaatal*," which means "to fight back" – a meaning more ambiguous than *qatl* which implies proactively and taking the first initiative. The word "*qaatal*" implies reciprocity, and thus may not be used for a scenario where one initiates attack without provocation. This act of fighting with a people may also not contradict the injunctions of the Qur'an on the type of people to be fought, the specific exemptions mentioned in Q.2:193, 9:4-7, 4:90 and others like them (all of which should be read in their contexts), as well as the example of the Prophet (p). 98 The second aspect of this hadith conveys the sacredness of the declaration of faith in One God, since it is one of the means (and not the only means!) to cease fighting.99 This understanding has also been demonstrated by the Prophet (p) in other hadith where he chastised a believer for killing an enemy in battle after the enemy uttered the declaration of faith on the brink of being defeated. Like any other hadith or verse of the Qur'an, the hadith under consideration cannot be interpreted outside the context of the whole Qur'an and Sunnah, neglecting other explicit statements in the Qur'an and hadith on this issue, and disregarding the rules of interpretation (*tafsir*) of religious texts. Furthermore, it would be wrong to try and conclude that this hadith (or any other hadith) abrogates any of the verses of the Qur'an on this topic. *"There is no compulsion in religion"* (Q2:256), If the interpretation of this hadith is to be taken in its literal meaning without considering other texts, we will not have Christians and Jews in the Middle east today, eg. Egypt, Syria, Iraq, and Lebanon.

Ibn Hajar in his commentary on this hadith he said this hadith has no general application, it has restrictions (*Amun Makhsus*), there is another narration in *Sunan al-Nasai* that said "have been ordered to fight the the pagans"[44] which exclude people of the book, it also exclude people with treaties, those who paid Jizya, and non hostile.[45]

The verse of the sward is said to have abrogate more than one hundred verses in the Quran which teach peaceful relationship with non hostile people of

[44] Al-Nasa'i A;S. *Sunan al-Nasa'I* hadith number::3966; vol.7 p.75

[45] Ibn Hajar A. H. *Fathul Bari*, (Dar al-Fikr, Beirut), vol.1 p77

other faith, this is said by many scholars in their Tafsir,[46] Ibn Zaid, Imam Al-Qurtubi, Jamal Alqasimi, Badru al-Din al-Zarkashi, and Ibn Taimiyya, said the verse of the sward did not abrogate other ones, and is also not abrogated, all are Muhkam[47] If Muslims are persecuted by others and they are strong they should use the verse of sward after failure of other peaceful means, in line with the whole objective of Sharia. On the other hand if they are persecuted and they have no power to fight back the verses patience (Q.4:63,81; 15:94; 32:28-30; 53:29-30; 28:55; 51:54; 7:199) will apply and Finally If they are not hostile to us we should be kind to them, engage in dawah, and the verse of Mumtahina (Q.60:8) will apply.

6.0.0 CONCLUSION

The term Jihad has a wider meaning which includes commanding good, forbidding harm, pilgrimage, kindness to the parents and striving for the right thing. Fighting aggressive people who fight Muslims and entered into their land without permission is also part of Jihad after fulfilling all necessary conditions. The justifications for combatant Jihad are to repel aggression against it, to protect the religion of Islam and to defend religious freedom. Some scholars argued that the verse of the sward has abrogated the verses of peaceful relationship while the strongest opinion is it does not. For proper understanding of the justification of Jihad in Islam there is need to study the life history of the prophet and the reasons for his battles carefully, there is also need to have a holistic approach to the whole relationship of the prophet and his companions with different people before and after migration. Alll verses that discus the war in Qur'an there is need to understand it within its context, read verses before it and verses after it.

[46] Al-Shinquity M.A , Adwaul Bayan, (Dar al-Fikr, Beirut, 1995), vol.5p263; Ibn Atiya A, *Almuharar al-Wajiz*, (Dar al-Kutub al-Ilmiyya, Beirut, 1993) vol. p249, Ibn Al Araby, *Tafsir Ayat al-Ahkam* vol.1 p99; Al-Qurtubi M. A ,*Tafsir al-Qurtubi*, vol.2 p351; Muhammad bin Ali Al-Shaukani M. A, *Fathul Qadir*, vol.2p489

[47] Al-Shaukani M.A , *Fathul Qadir*, vol.2p489; Al-Qasimi M.J , *Mahasin al-Tawil*, (Maktba Muhammad Fud Abdul Baqi, Cairo, 1957), vol.8 p3074

LEGAL PROTECTION OF MINORITY SHAREHOLDERS IN NIGERIA: A MYTH OR A REALITY

O. Y. ABDUL-HAMID* ,JADE MOHAMMED (Mrs) & D. A. ARIYOOSU*****

ABSTRACT

The chequered legal position is that once a company is incorporated, it becomes an artificial person in law, capable of suing and being sued in its corporate name. The corollary of this is that if a company is wronged, it is only the company, and the company alone, that can challenge or remedy the wrong. However, this position is not without exceptions, one of which is that an individual minority shareholder may challenge the wrong done to the company, especially in matters of fraud committed by the majority shareholders or the company's directors. This paper is therefore out to examine the issue whether minority shareholders are really protected under the law. The methodology employed in arriving at a logical conclusion in this paper is doctrinal, with the use of both primary and secondary sources of law such as the provisions of the Companies and Allied Matters Act, the relevant case law and text books.

It has been found that the protection accorded the minority shareholder is inadequate. It has been suggested that in order to protect the minority shareholder, appointment of directors of companies should be based on proportional representation method with each class of shareholders represented on the board. This is capable of guaranteeing some equity into corporate managements. There must also be educational or enlightenment programmes for shareholders for increased awareness and the urge to seek improvement on the various provisions affecting shareholder's rights generally and the minority in particular.

Keywords: Legal Protection, Minority, Shareholder, Directors

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INTRODUCTION

A company is an association of persons in business for profit duly registered under the law. Since the case of *Salomon v. Salomon*[1] "once a company has gone through the rituals of incorporation as stipulated under the law, it becomes an entity distinct from the co-operators or what we may choose to call the shareholders."[2] It is thus obvious that there are many parties (stakeholders) involved with the issue of corporate management, the shareholders being in the forefront. Others include creditors, directors, managers, employees, government and the general public. Therefore, for a company's legislation to be effective, it must strike a balance between the various often conflicting interests. This paper looks into the provisions of the major Statute relating to corporate management in Nigeria, that is Companies and Allied Matters Act, (CAMA) 1990[3], and how far there is this balance of conflicting interest particularly between the minority shareholders and the company as an entity? Have all problems been frozen out? If not, how can they be frozen out?

The general rule is that the majority of the members of a company must not commit a fraud on the minority. They must thus act *bonafide* for the benefit of the company as a whole.[4]

When one talks of protecting minority shareholders in company matters, one wonders whether the interest of the majority shareholders has been adequately protected. This calls for concern, moreso when the tussle between shareholders and Board for the control of the corporate entity is anything laid to rest. Although this is beyond the scope of this paper, the position of the minority shareholder cannot be discussed without reference to the majority *shareholder*s.

[1] (1897) AC, 22.

[2] Asomugha E. M., *Company Law in Nigeria under the Companies and Allied Matters Act* (Toma Macro Publisher, Lagos, 1994) Page 119.

[3] Now embodied in *Cap C20 Laws of the Federation of Nigeria 2004*.

[4] C. S. Ola, *Company Law in Nigeria* (Heinemann Law Studies in Nigerian Law, 2002) 337.

THE RULE IN FOSS VS HARBOTTLE OR THE MAJORITY RULE

The elementary principle of the law relating to incorporated companies is that the court will not interfere with the internal management of companies acting within their power and in fact has no jurisdiction to do so. It is also clear that the proper person to bring an action to redress a wrong done to the company is the company itself. These cardinal principles are laid down in the well known cases of *Foss v Harbottle*[5] and *Mozley v Alston.*[6]

Asomugha E. M. in his book, Company Law in Nigeria under the Companies and Allied Matters Act[7] expressed the above principles more vividly as follows:

It means that where a wrong is done to the company or where there is an irregularity in its internal management which is capable of confirmation by a simple majority of members, an action will not lie at the suit of a minority of members.[8]

It is imperative at this juncture to look at the facts of the case of *Foss v Harbottle* which is the *locus classicus* of the majority rule and the minority protection. Foss and another person brought an action on behalf of themselves and other shareholders against the defendants who consisted of five directors, a solicitor and an Architect of the Company alleging *inter alia* a fraudulent sale by the directors of their own property at an inflated value to the company. The plaintiffs also claimed damages from the defendants to be paid to the company and asked for the appointment of a receiver. The court refused to permit the action on the argument that there was nothing preventing the company itself from bringing the action. The court stated further that upon becoming a member of a company, the shareholder agrees to submit to the will of the majority of the members expressed in general meeting and in accordance with the law, memorandum and articles. The basis of the rule therefore is that the will of the majority should prevail. However, the rule will apply only where the majority can cure the irregularity or illegality

[5] (1843) 67 Eng Rep 189; (1843) 2 Hare 461.

[6] (1847) I ph 786, 790 odj 16 Ljch, 217.

[7] Asomugha E.M. *Company Law in Nigeria under the Companies and Allied Matters Act* pg 125.

[8] Ibid.

complained of, by the ordinary resolution where this cannot be done; the court will interfere at the instance of the minority.[9]

The rule in *Foss v Harbottle* and the exceptions thereto have since been adopted or applied in Nigeria.[10] The justification for making the exceptions is that those who have appropriated company's property may by their control prevent the company from calling them to account.[11] The exceptions to the rule have also been developed in several authorities to include:

a) an act which is ultra vires the company or illegal;
b) an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company;
c) a resolution which requires a qualified majority but has been passed by a simple majority;
d) where the rights of the shareholders are infringed or about to be infringed.

The Supreme Court has even recognised the need to protect the minority in the interest of justice. This is the fifth exception in Nigeria. These exceptions, according to a learned author, Akanki E.O., should be treated as *obiter dicta* because "It is clear that the minority was allowed to sue under the exception now contained in Section 300 (c)."[12] Granted that the fact of the case of *Edokpolo & Co Ltd v. Sem-Edo Wire Industries Ltd & Ors*[13] showed that the applicant's individual rights as a member was affected, it can also be said that all the listed exceptions (i.e. Section 300 (a)-(f) of CAMA) will fall under interest of injustice because the provisions are to meet the end of Justice.

STATUTORY PROTECTION OF MINORITY SHAREHOLDER IN NIGERIA

[9] *Burlard v Earle* (1982) AC 83; *Balis v Oriental Telephone* (1915) 1 Ch. 603.

[10] *Abubakri and Others v Smith & Others* (1973) 65; *Trade Links International Nig. Ltd. v Banks of America P*. 355 (Zaire). See also *Yalaju-Amayev. Associated Registered Engineering Contractors Ltd & Ors* (1990) 4 NWLR (Pt. 145) 422.

[11] Susan Barber, *Company Law* (4th ed, Old Bailey Press, London, 2003) 274.

[12] E. O. Akanki, 'Protection of the Minority in Companies' in E.O. Akanki (ed), *Essays on Company Law* (University of Lagos Press, Akoka, Lagos, 1992) P. 278.

[13] (1984) 7 SC. 119.

Section 201 of the 1968 Companies Act preserved the rules in *Foss v Harbottle* as well as the exceptions thereto as follows: that any member of the company who complains that the affairs of the company are being conducted in an oppressive manner may bring a petition to court for an order regulating the conduct of the affairs of the company as it is fair and just. This operates as an alternative remedy of winding up.

Under the current company legislation, that is Companies and Allied Matters Act, 1990, the whole of Part X with 32 sections is devoted to the protection of minority against illegal and oppressive conduct. The sections are further divided into four major parts. The rule in *Foss v Harbottle* is preserved in section 299. Section 299 provides that "Subject to the provision of this Act, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct."`

This provision has been criticized as having negative effect[14] because what the provision appears to suggest is that only the majority can decide whether or not to sue or ratify the irregular conduct of directors. However, the fear expressed has been subdued, though not totally removed, by the provision for exceptions which are enshrined in Section 300 of the same Act, the effect of which is that a member can sue to prevent the Company from the following:

a) entering into any transaction which is illegal or ultra-vires;
b) purporting to do by ordinary resolution any act which by its constitution or the Decree requires to be done by special resolution;
c) any act or omission affecting the applicant's individual rights as a member;
d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;
e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and

[14] E. O. Akanki, 'Protection of the Minority in Companies' pg. 276.

f) where the directors are likely to derive a profit or benefit, or have profited or benefited from their breach of duty.

Section 300 (e) above has been said to be simply the codification of the decision in *Hodgson v NALGO*[15] which applied the rule that where the "interest of Justice demands, the rule in *FOSS v. Harbottle* should not apply". But the vision of section 300 (e) is much narrower than can be said to mean the same thing as "in the interest of Justice."

IMPROVEMENTS MADE BY THE CAMA, 1990

Although the new CAMA does not provide new methods for protecting the minority, it certainly introduced new ideas into the legislation towards making the minority protection provision more potent. For example, there is no change in the discretion given the court under section 209 of 1968 Act to wind up the Company to end oppression. However, the concept of oppression under S. 201 of 1968 Act has been enlarged under the 1990 CAMA as well as the power of the court. This is achieved by adding to the word "oppression" to elucidate a wider meaning.

Accordingly, by section 311(2)(a) of the CAMA 1990, a member is allowed to complain to the court:

that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member or of the members as a whole;

that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution or, a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or could be in manner which is in disregard of the interests of a member or the members as a whole.

Significant differences can be identified between section 201 of Companies Act 1968 and the new sections (S.311)[16] as follows:

[15] (1972) I W.L.R. 130.

[16] K.D. Barnes, *Cases and Materials on Company Laws* (O. A. U. Press Ltd, Ile-Ife, 1992).

a) the substitution of unfairly prejudicial conduct for oppression.
b) the relief for conduct that is unfairly discriminatory
c) the expansion of the category of persons who may petition
d) the removal of the link with winding up
e) the coverage of isolated transactions and omissions to act
f) the possibility of relief for threatened acts

A major obstacle in the way of a minority shareholder was the *locus standi*, that is whether a minority shareholder has any standing in law to bring an action in court in respect of wrongs done to a company. Of particular significance is breach of duty by directors which is a major source of injury to the company and consequently the minority.

Although from the provisions contained in section 300 CAMA, it is almost clear that a minority shareholder has *locus standi* to sue either personally or in a representative capacity.[17] It will however appear that any ground that does not come under the provisions will not entitle the minority shareholder to sue. This does not totally remove the judicial obstacle of *locus standi* against the minority shareholder. The enlargement of the class of those who can seek remedy under section 310 of the new Act is however commendable. Those who can seek remedy now include the personal representative of a deceased member and any person to whom shares have been transferred by operation of law.

Also, a minority shareholder wishing to ventilate his grievance in a derivative action before the court under Section 303 of CAMA must comply with the requisite procedural steps as a condition precedent to the hearing of his case, otherwise the proceedings will be declared a nullity on the authority of *Agip (Nigeria) Limited v. Agip Petroli International & Ors.*[18]

What will remove the judicial obstacle totally is by including in the provisions of section 300 an omnibus provision of ground to sue in the interest of justice.

[17] Sections 301-303 CAMA.

[18] (2010) 1 SC (Pt. II) 98.

FOSS V HARBOTTLE: A CRITIQUE

In the case of *Edwards v Halliwell and others*[19], the Court of Appeal decided that the rule in *Foss v Harbottle* applied where a corporate right is infringed and has no application where an individual right of membership is denied to a member. The question that comes to mind is even if corporate right is exercised in any given situation, will that preclude an exercise of an individual right by a minority shareholder?

This question has to be answered in the negative, that is corporate right should not preclude individual right. A share is a property to which an individual holding it has a right. Proprietary right affects him as the holder. In the words of Sir George Jessel M. R.:[20]

He is a member of the company and whether he votes with the majority or minority he is entitled to have his vote recorded – an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in Foss v Harbottle and that line of cases. He has a right to say 'whether I vote in the majority or not, you shall record my vote, as that is a right of property belonging to my interest in this company and if you refuse to record my vote I will institute legal proceedings against you to compel you...'.

In the same vein, it has been observed by Jerkins L. J.[21] that:

The personal and individual rights of membership of each of them have been invaded by a purported, but invalid alteration. In those circumstances, it seems to me the rule in Foss v Harbottle has no application at all, for the individual members who are suing sue in their own right to protect from invasion their own individual rights as members".

From the foregoing, it is doubtful whether the very fabric of the rule established by *Foss v Harbottle* has not been torn on a close examination of the various interpretations which have emerged. A breach of director's duty was concerned in that case and it was thought that it concerned corporate right of the company rather than the individual right of a shareholder. With due

[19] (1950) 2 ALLER 1064.

[20] Asomugha E. M., Opcit P. 135

[21] Ibid.

respect, this rule can no longer stand, because it will be illogical to divorce anything affecting the corporate life/right of a company from the individual right of the shareholders. That will amount to cloaking a reality with fantasy which will work great injustice against the shareholder. Granted that the two, that is the company and shareholder are distinct personalities, the corporate right has reflections of the individual right of shareholders and the two are therefore intertwined or at best the latter attached to the former. The need to fully recognize the individual right of members of company becomes even stronger when the principle of the Anglo-Nigerian Law is that the majority owes no fiduciary duty towards the minority[22].

To a large extent Section 300(f) has greatly whittled down the effect of the rule laid down in *Foss v Harbottle*.

It appears that section 300 read with Section 310(1) and 311(2) has recognized and widened the scope of the individual right of members, as members of a company. This is a better guarantee to minority shareholders to protect themselves based on the aforementioned argument.

Even though that might look like opening the flood gate to litigations, it is surely a better democratic approach to intra-corporate disputes with an independent arbiter, that is the court left to determine/decide the justice of each case.

HAVE THE PROVISIONS OF CAMA 1990 LAID THE MINORITY PROTECTION ISSUE TO REST?

The above question cannot be answered in the affirmative. Although, the combined effect of Sections 300, 310(1)(a), 310 and S. 311 guaranteed the individual member's right, there is the need for the entrenchment of the decision in *Edokpolor's* case which could be termed a omnibus 'minority protection clause' in the new company legislation. What will qualify as being in the interest of justice will depend however on the peculiar circumstances of each case? There are no closed criteria for what is in the interest of justice'. This was evident in *Edopkloro's* case where liberal interpretation of the words dismantled the *locus standi* barrier in its entirety when read in conjunction with section 408(a) of the Companies Act, 1968.

[22] Akanki E.O. Supra, 278.

In the case of *Edokpolor and Co. Ltd. v Sam Edo Wire Industries Ltd & Ors*[23], the plaintiff applied to the court to have the allotment of shares made by the company's directors set aside on the ground that there was a collusion between the company and the allottees to his own detriment. The defendants contended that plaintiff had no right to bring the action because he was barred by the rule in *Foss v Harbottle*. Moreover, the defendants contended further that the cause of action did not accrue because he was barred by the rule in *Foss v Harbottle*. Moreover, the defendant contended further that the cause of action arose before the company was incorporated. The Federal High Court overruled the defence and granted he plaintiff's claim. The judgment of the Supreme Court led by Nnamani, JSC was most elucidating. He said, listing the four exceptions, "A fifth exception appears to have developed from the cases. An individual minority shareholder can also sue where the interest of justice demands that he be so allowed to sue"[24]

It should be noted that investigation into the companies' affairs is also provided for in Section 314 of CAMA. The investigation which could be initiated by a company or that of its members appears not to favour a minority shareholder as there is no reference to minority or membership in the singular sense, hence access to court by minority shareholder is not so freed, open under this section. Although Section 314(2)(a) provides that in the case of a company having a share capital, members applying for investigation should hold not less than one-quarter of the class of share issued. This may be impracticable in view of the high level of ingenuity and corporate politics usually played by most Nigerian businessmen who might have designed the shareholding structure of their companies to sabotage the possible implementation of this provision.

Recent events of arresting company executives especially in banks who hold majority shares for financial frauds is also a step in the right direction. The Economic and Financial Crimes Commission has arrested a number of them in recent times and some are already being prosecuted – featured in the News both electronic and the print media.

[23] (1984) 15 NSC 553; (1984) 7 S.C. 119.

[24] At P 142 of the report.

In a typical Nigerian company, shares are concentrated from hands of a few powerful individuals while the rest holding is allotted in such a way that renders the members ineffective in the decision making process of the company. Twelve years after shareholding pattern largely remains lopsided even with the drive of privatization. As at 2010, UBN Plc had its share structure is follows:

Shareholding analysis

The shareholding pattern of the Bank as at 31 December 2010 is as stated below:

	Range	Number of Shareholders	Shares Held	Percentage of Shareholding %
1	1,000	76,751	34,868,611	0.26
1,001	5,000	242,960	553,225,994	4.09
5,001	10,000	55,066	466,279,219	3.45
10,001	50,000	35,118	1,790,638,150	13.24
50,001	100,000	11,573	807,211,626	5.97
100,001	1,000,000	9,686	2,308,710,402	17.07
1,000,001	5,000,000	590	1,370,831,219	10.14
5,000,001	10,000,000	77	530,375,174	3.92
10,000,001	and above	114	5,662,615,578	41.86
		492,035		100.00

(Headlines in Vanguard Newspaper, Dec. 1, 1990, AGM's turn battle grounds as minority shareholders protest).[25]

The analysis shows that 881 Shareholders hold 54.92% of the total shares of the bank, while 491,354 shareholders hold 45.08% of the shares. The annual meeting is the only popular forum of shareholders which is usually in metropolitan centres such as Abuja, Port Harcourt, Lagos etc. Most members do not attend this meeting for social-economic reasons. One wonders how 25% members of a company such as UBN Plc can get themselves together for

[25]Headlines in Vanguard Newspaper, Dec. 1, 1990, AGM's Turn Battle Grounds as Minority Shareholders Protest.

the purpose of taking a decision on investigation of their company. It has equally been observed that general meetings of public liability companies with substantial government shares had fallen prey to politics. During the same period the president of the Nigerian Shares Solidarity Association, Mr. Akintunde Asalu expressed concern that companies were being ruined and hard-earned investments of minority shareholders were being endangered. The then Deputy Director of the Ministry of Finance Incorporated, J.E. Odiri dismissed the allegation and challenged any shareholder irked by his inability to gain a foothold on the board to increase his shares or keep quiet[26]. That was most unfortunate a response, which was not augur well for a healthy corporate management regime. Odiri believed that all what minority shareholders could do is to attend the Annual General Meeting, raise issues if there need be, collect gifts and be grateful that their dividends had climbed several notches. It is doubtful whether this oppressive stance of the like of Odiri has changed even at this moment.

CONCLUSION AND RECOMMENDATION

It should be noted that majority of companies incorporated in Nigeria are glorified partnerships and often disputes are resolved without recourse to formality or the company abandoned where there is deadlock. The attitude reflects our educational level and also the traditional attitude to business association as the existing provisions have not been fully utilized. However, since a large number of companies also exist with good spread of their membership; the minority shareholder issue deserves the great attention which it is receiving.

However, one thing that deserves to be looked into is the socio-economic condition in Nigeria. It serves as the premise for effective application or implementation of any statutory law. It has been suggested in some quarters that appointment of directors of companies should be based on proportional representation method with each class of shareholders represented on the board. This is a welcome suggestion capable of guaranteeing some equity into corporate managements. It will not be an exaggeration to say that the majority of the Nigerian populations are largely illiterates or poorly educated in

[26] C.S. Ola, *Company Law in Nigeria*, P 352.

general and in investment laws in particular. The question is if the bulk of Nigerian shareholders should be enlightened or educated as to their rights at whose expense? This may not be of much interest to the Board of Management, since the more informed, the more the demands by shareholders.

Perhaps this is an area where the shareholders' Association has a role to play. If there are educational or enlightenment programmes for shareholders there will be increased awareness and the urge to seek improvement on the various provisions affecting shareholder's rights generally and the minority in particular, in accordance with the dictates of the time. Since the world is dynamic and law is organic by this, the legal needs of the minority shareholder *vis-a-vis* their protection will be met or nearly met always. This is imperative since the number of shareholders in the country is bound to swell as the privatization policy is still waxing strong in the psyche of policy make.

THE NATIONAL LEGAL AND POLICY FRAMEWORKS GOVERNING THE MANAGEMENT OF FOREST RESOURCES IN UGANDA: THE CASE OF MABIRA FOREST

AMINA WAHAB*

Abstract

Uganda is experiencing a high rate of deforestation. Tropical High Forests in Uganda are degrading at a rate on 30%. If this is not addressed Uganda is likely to see a 40% growth of semi-desert space in the country[1] as reported by the National Forestry Authority. This paper analyses the national legal and policy framework governing forests in Uganda with specific reference to Mabira forest. Using doctrinal legal research method, the paper analyses a string of laws and policies enacted to protect forest resources in Uganda and how efficient these laws have been applied.

Introduction

This paper analyses the efficiency of the legal and policy frameworks in governing the utilization of forest resources in Uganda with specific reference to Mabira forest. The paper also identifies the strengths and weaknesses therein. A number of laws and regulations have been put in place to protect the Ugandan environment, including the conservation and sustainable utilization of forest biodiversity. The government of Uganda just like most of civilized governments in the world appreciates that forest biodiversity is a very important component and contributor of a condusive human environment and that is why many laws and regulations have been adopted in addition to the ratification of international instruments for its protection and conservation. This paper is aimed at establishing a better understanding of the provisions and gaps within the national legal and policy frameworks, with a view to strengthen harmonized utilization of forest resources in Uganda.

Review of the Legislative Framework

1. The 1995 Constitution of the Republic of Uganda

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[1] NFA Conservation Report 2009.

The constitution of Uganda lists environmental and natural resource protection as one of the fundamental human rights and freedoms Ugandans are entitled to by Law. The National Objective and Directive Principle of State Policy XIII asserts that the State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.[2] Further, the Constitution clearly stipulates the legal protection of the Uganda's environmental resources like Mabira forest. Article 39 provides that every Ugandan has a right to a clean and healthy environment. Parliament is mandated by law, to provide for measures intended to protect and preserve and (2) of the Constitution and Rule 3 (1) of the Fundamental Rights, and Freedoms (Enforcement Procedure Rules 65 and sought to regulate the manufacture, use, distribution and sale of plastic bags and bring about a restoration of the environment to the state it was in before the menace caused by the plastic bags. Counsel for the respondents raised a preliminary objection that the applicant had no cause of action since he brought the application under Article 50 of the Constitution instead of the Civil Procedure Rules. The court overruled the objection and held that Article 50 does not require the applicant to have the same interest as the parties he seeks to represent or for whose benefit the action is brought. The judge stated:

There is limited public awareness of the fundamental rights or freedoms provided for in the Constitution, let alone legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites ... It is just appropriate that a body like the applicant, comes to discharge the constitutional duty cast upon every Ugandan to promote the constitutional rights of the citizens of Uganda and the institution of suit of this nature is one of the ways of discharging that duty.

The Constitution generally centralized all powers of natural resources management in the government. This is understandable given the limited perception of the range of values of natural resources and lack of capacity to

[2] Article 245 of the Constitution of the Republic Of Uganda

handle the management issues under decentralization.[3] Although it is still too early to assess the impact of the 1995 Constitution on environmental management, it is clear that it backs environmental management more strongly than previous Constitutions.[4]

Further, the Constitution requires the state to hold in trust for the people and protect natural resources-land, water, forest, wetland, mineral, oil, fauna and flora, wildlife on behalf of the people of Uganda.[5] It thus, provides a concrete basis for the sustainable management of forest resources and sets a good foundation for other laws that are relevant to the forest management. However, as the supreme law of the country, the Constitution has caused some fundamental inconsistencies in some laws passed in the recent past. For example, under the National Environment Statute 1995, the powers to bring legal action against anyone degrading or polluting the environment is vested in NEMA or local environment committees while the Constitution vests that power in every Ugandan.

2. National Forestry and Tree Planting Act (2003)

The National Forestry and Tree Planting Act is the main law that controls the management of forest in Uganda. The Act provides that all forest biological resources and their derivatives, whether naturally occurring or naturalized within the forest, shall be conserved and managed for the benefit of the people of Uganda. The transfer of biological resources and their derivatives from the territorial jurisdiction of Uganda shall not diminish or extinguish the sovereignty of Uganda over those resources.

The Act provides for the conservation and management of forest by safeguarding the forest ecosystem and its environmental benefits, and thus, making it relevant to Mabira forest

[3] E. Kasimbazi, (2005) "Review Of Policy And Legal Framework And Its Implications For Natural Resource Management And Investment In Agriculture In Uganda "PRIME WEST And USAID"

[4] S. Okwaare, (2004) "The Fight For Land Rights Of A Minority People: The Case Of The Benets Of Mountain Elgon In Eastern Uganda,: In Innovative Methodologies For Assessing The Impact Of Advocacy, No. 4, March 2004, Nairobi Action Aid.

[5] Article 27 (2) (b) of the Constitution

ecosystem. It also introduces the aspect of private forests, which an individual is able to own, transfer, mortgage and manage as long as it is managed under a management plan approved by the relevant authorities. Further, it prohibits several illegal activities in forest reserves or community forests[6] which includes removal of forest; clearing or occupying land; livestock farming; recreational, commercial, residential, industrial or hunting purposes; or construction of infrastructure which if implemented can reduce on the threats impacting on Mabira forest.

As an incentive, the Act provides for collaborative management of forests for the purpose of managing a central or local forest reserve but fails to make provisions for the sharing of benefits derived from the use of forestry resources.[7] However, it also fails to give vivid incentive measures for the protection of reserved forest biological species on private and communal forest in Uganda which includes Mabira forest.

3. The National Environment Act Cap 153

The National Environment Act provides a framework for environmental management that had hitherto not been deployed, including Environmental Impact Assessments (EIAs). It imposes a mandatory duty on a project developer to have an environmental impact assessment conducted before embarking on a project.[8] The Third Schedule to the Act specifies the types of projects to be subjected to EIA. A rough guide for the same is that an ElA should be conducted for planned activities that may or are likely to, or will have significant impacts on the environment.[9] Hence through the use of this tool, the continued survival of species and habitat in Mabira forest can be assured. The Act further provides for the preservation of biological diversity in principle 3 (1)(e), which can be read as covering Mabira forest.

The National Environmental Act empowers NEMA, in consultation with lead agencies, to issue guidelines and prescribe measures and standard for the

[6] Section 38 of the National Forestry And Tree Planting Act 2003

[7] Ibid, Section 15.

[8] Section 18 Of The National Environment Statute, No. 4 Of 1995

[9] Ibid.

sustainable management and conservation of natural resources and the environment in general.

This Act was enacted to address the constraint and problems affecting environmental management as identified during the National Environment Action Plan (NEAP) process and create an enabling environment that allows for thorough and holistic amendment to sectoral laws on environmental matters.[10]

In addition, the guiding principles of the Act provide for maximum participation by the people of Uganda in issues relating to the management of the environment hence giving the community around Mabira forest a chance to participate in its sustainable management. The local environment committees are responsible for ensuring that the guidelines are complied with. Notably, the Act also protects the traditional use of forests, which are indispensable to the local communities and are compatible with the principles of sustainable development.

Realizing that much of the population is illiterate, both the Act and the Constitution call for general environmental awareness programmes. Whereas the awareness strategies are being developed and implemented, the right of all categories of people to a healthy environment is guaranteed through the provision which empowers NEMA or a local environment committee to bring action on behalf of any other person whether that person has locus standi or not.[11] A general legal principle is that a person cannot bring action unless the action complained of has caused him or her personal injury. This is another novelty of this Act which greatly protects those who are not aware of their rights in such Cases.[12]

4. The National Environment (Wetlands, River Banks and Lake Shores Management) Regulations, 2000

[10] Ibid, Section 70

[11] E. Kasimabzi, (1998) "The Environment as Human Right: Lessons from Uganda." *In Power of Human Rights international standards and Domestic Norms*. Cambridge: Cambridge University Press

[12] Ibid

These Regulations stipulate that a developer who desires to conduct a project, which may have adverse impacts on a wetland, riverbank or lakeshore shall carry out an environmental impact assessment in accordance with the provisions of the Environment Act.[13]

The regulations are relevant to Mabira forest because they empower various categories of people and the general public. For example, it is a legal requirement to incorporate environmental education into the school curriculum[14] and indeed steps are already being taken with the National Curriculum Development Centre to implement this.

4. Uganda Wildlife Act Cap 200

This Act seeks to promote the conservation of wildlife with the intention that the abundance and diversity of their species are maintained at optimum levels commensurate with other forms of land use, in order to support sustainable utilization of wildlife for the benefit of the people of Uganda.[15]The objective of this Act is to provide for sustainable management of wildlife, to consolidate the law relating to wildlife management, establish a coordinating, monitoring and supervisory body for that purpose. The Act upholds wildlife as a sustainable resource and provides for the means of management and sustainable use of the resource.[16] Another innovation is the intention to involve Ugandans as widely as possible in the conservation of the nation's wildlife. However, the management of wildlife, especially the wild animals which are not confined to protected areas, was and is still a problem for the relevant authorities.

The functions of the Uganda Wildlife Authority include the identification and recommendation of the area to be declared wildlife conservation areas and for

[13] Regulation 34 of the National Environment (Wetlands, River Banks and Lake Shores Management) Regulations; Such developer is required in terms of regulation 34(2) to carry out annual audits and monitoring on such activities. Similarly, provision is made in The National Environment (Waste Management) Regulations, 1999, for management of all waste, hazardous and non-hazardous, in an environmentally sound manner. The duty to manage waste in accordance with the provisions of the law is placed on the owner of an installation or premise.

[14] Ibid

[15] Section 2 of the Uganda Wildlife Act.

[16] Wildlife Policy of Uganda.

the revocation of such declaration.[17] Significantly, the Act provides for greater protection of wildlife outside protected areas by encouraging greater participation by the local community in their management through the introduction of wildlife use-rights. If this provision is properly implemented, it will be possible for an individual to manage the wildlife on his land and derive benefits from it in a sustainable manner.

This is a departure from the earlier arrangement where the community mostly suffered from having wildlife on their land, for example, through the destruction of their crops, other properties, and threat to the life of domestic animals and human beings.

The relevance of the Act to Mabira forest ecosystem is portrayed by the fact that it provides for sustainable management of wildlife and consolidates the law relating to wildlife management. Participation of local communities in the conservation of wildlife is guaranteed by the requirement that one third of the Uganda Wildlife Authority Board Members should be representatives of the local communities.[18] The Act also introduces the concept of planning, environmental impact assessment and monitoring as veritable instruments for the management of wildlife resources.[19]

Community rights to property around the protected areas are also provided for in the Act since it guarantees for historical rights of individuals and communities which were recognized in previous laws such as the Forest Act thereby reducing land clashes amongst the communities living around Mabira forest.

5. The Water Act Cap 150

The Water Act was enacted in 1995 to provide the legal basis for the water resources management in Uganda. It provides for the use, protection and management of water resources and supply. The objectives of the Act are to

[17] Section 5 of the Uganda Wildlife Act.

[18] Section 12 of the Uganda Wildlife Act Cap 200.

[19] Section 15 and 16 of The Uganda Wildlife Act Cap 200.

promote the rational management and use of waters in Uganda through the introduction and application of standards and techniques, the coordination of all public and private activities that may influence water quality and quantity and to allow for the orderly development and use of water resources for such activities as generation of hydro-electric or geothermal energy. Promotion of the provision of a clean, safe and sufficient supply of water for domestic purposes to all persons is a major objective of the Act.[20]

At the outset, the Act confirms that all water in Uganda is vested in the government and that rights to use water; to construct or operate any works; or to pollute water can only be conferred under the provisions of the Act. Regarding general right to use water for domestic purposes, fire-fighting, subsistence garden irrigation the Act does not authorize allocation of permanent water rights. Rather, it provides for the issuance of time-bound permits to abstract water, to construct hydraulic works and to discharge waste.[21] The basic foundation of most of the Act's provisions is the reconciliation between protecting the environment and ensuring the availability to the population of water of sufficient quality and quantity.[22]

The Act has provisions for a system of appeals from administrative decisions on water permits and put much more serious penalties for pollution, and enables the government to recover the cost of major environmental damage from polluters.[23] It further establishes a comprehensive framework for issuing permit to use water or construct hydraulic works or discharge waste into water bodies by forming a water policy committee to coordinate national management and use of water and arbitrate disputes between agencies on water management.[24]

Promising as they may be in view of sustainable management of forest resources, such laws still have some gaps and need to more fully address the

[20] Section 4 of the Water Act Cap 150.

[21] Ibid , Section 6.

[22] Ibid, Section

[23] E. Kasimbazi, (1999) "Review of the Functional Structures of The Ministry of Water Lands and Environment(MWLE) to Provide for the Management of the Environment in Uganda." Uganda: IUCN Publication Services Unit.

[24] The Water (Waste Discharge) Regulations, 1998.

particular interests of forest ecosystems and inhabitants. For example, environmental laws should provide for greater participation of forest surrounding communities in decision-making processes affecting them for better coordination with related laws and for the creation of more suitable institutional mechanisms. The Act also provides for a number of activities, which should be implemented in order to protect, manage and sustain water resources and developments as guided by the objectives. The permit system ensures that use of water resources is environmental friendly and promotes sustainable development. These controls also ensure that water is not treated as a free good but as a good with a value to be paid for, and this can only be practical by ensuring compliance with guidelines and standards and preventing degradation of water resources.

Regrettably the Act does not promote an ecosystem approach of the conservation and sustainable management of water resources and thus does not cover all aspect of water use, wetlands management, conservation of aquatic biodiversity and the management of forest water resources.

6. The Land Act Cap 227

The Act vests the ownership of all land in the hands of the people except for protected areas, lakes, rivers and land under public utility use, where government holds in trust on behalf of the citizens.[25]In fact, this law empowers the people to own natural resources such as forests and trees on their private land but requires them to manage their land in accordance with the National Forestry and Tree Planting Act, National Environment Act, Water Act and any other law.

It provides for the tenure, ownership and management of land in Uganda in respect to sustainable utilization of the environment and in a bid to avert the issues of ecosystem degradation.[26] The Act empowers the Minister responsible for water to regulate the management and utilization of such water. Under this Act, a person who acquires land is required to manage and

[25] Section 44 and 45 of the Land Act Cap 22

[26] Section 6 of the Water Act Cap 150

utilize it in accordance with the existing environmental laws, and any use of land must conform to the Jaws relating to town and country planning. Further, the Act makes it clear that a person is not allowed to construct or operate any works unless he has a permit granted for that purpose by the Director in the ministry. In this regard, construction is defined to include alteration, improvement, maintenance and repair.[27] The detailed provisions regarding acquisition of permits are contained in The Water Resources Regulations, 1998.

In relation to forest ecosystem, the Act allows for reasonable use by the occupier or owner of a piece of land, of water for domestic and small-scale agricultural purposes. The government or local government holds land in trust for the people and protects environmentally sensitive areas such as natural lakes, rivers, groundwater, natural ponds, natural streams, wetlands, forest reserves, and national parks and any other land reserved for ecological and tourist purposes for the common good of the citizens of Uganda.

However, the Act does not provide for community participation in sustainable management of the natural resources, although it encourages conservation of environmentally sensitive area through land use planning and zoning, common land management schemes through communal land associations to be formed by any group of persons and this can spur public interest litigation in the natural management. This does not augur well for sustainable management of forest resources.

7. The Local Governments Act Cap 243

The Act defines roles for different levels of governments in provision and management of water and sanitation related activities with the intention of giving effect to decentralization and devolution of functions, powers and services so as to ensure good governance and democratic participation.[28] In that respect, the Act reiterates the position of the Constitution by providing for the participation of local government in decision making in the management of the ecosystem.

[27] Ibid, Section 18.

[28] Ibid, Section 9..

It empowers the different levels of local government to plan and implement development interventions according to identified local priorities and provides for the system of local governance which is described as units based at the district with lower local governments and administrative units as well. The chairperson nominates committees of each council and the committees' functions include, initiating and formulating policy for approval of the council, which may include policies with regard to the use of local natural resource reserve areas.[29] Additionally, the local government councils are authorized to control hunting and vermin in consultation with the ministry responsible or wildlife and this promotes collective management.[30] This Act therefore facilitates the centralization of the management of Mabira ecosystem at local levels which can be a basis for community based natural resource management.

8. The Physical Planning Act, No.8 of 2010

Section 61 of this Act repealed the Town and Country Planning Act, Cap 246. It provides for the establishment of a National Physical Planning Board; the composition, functions and procedure of the Board; establishes district and urban physical planning committees; and provides for the making and approval of physical development plans and for the applications for development permission.[31]

Section 9 of the Act establishes the district physical planning committee which must include the district environment officer and the natural resources officer. The district physical planning committee is mandated to ensure integration of social, economic and environmental plans into the physical development plans.[32] Section 37 of the Act provides that where a development application relates to matters that require an environmental impact assessment to be carried out, the approving authority or physical planning committee may grant preliminary approval of the application subject to the applicant obtaining an environmental

[29] Section 3 of the Local Governments Act Cap 243

[30] Ibid, Section 9.

[31] The Physical Planning Act, No. 8 of 2010, long title.

[32] Ibid, section l0 (h).

impact assessment certificate in accordance with the National Environment Act.

9. The Agricultural Seeds and Plant Act Cap 29

The Act provides for promotion, regulation and control of plant breeding and variety release, multiplication, conditioning, marketing, importing, and quality assurance of seeds and other planting material and for other matters connected therewith.[33] Under the Act, the Minister may after consultation with the National Seed Industry Authority, make regulations, for the control of breeding, multiplication, marketing and certification of seed and generally for better carrying out the provisions of this Act. There is a need for further collaboration of other nations on appropriate technology generation, standard setting, and regulation and certification of agricultural inputs, and plant products in Mabira forest.

10. Plant Protection Act Cap 31

This is an Act criminalizing the introduction and spread of disease destructive to plants. The Act empowers the Minister to make rules for the purpose of preventing and controlling attacks by or the spread of pests or diseases in Uganda. The Act provides a penalty for deliberate introduction of any pest and/or disease into any cultivated land and makes it punishable.[34] This section is significant to Mabira forest which has been invaded by the introduction of alien species.

The Act charges the relevant commissioner and plant inspectors with the duties of prevention of the introduction and spread of diseases to plants. However, the Act does not provide for participation by the local communities who are the culprits.

11. Prohibition of Burning of Grass Act Cap 33

This Act prohibits the burning of grass in Uganda and seeks to prevent undesirable consequences of burning grass,[35] but it Jacks strong legal

[33] The Republic of Uganda (2003 and 2004) "Ministerial Policy Statements Financial Years 2003/2004 and _004/2005, Ministry of Tourism,Trade and Industry" MTTI), Kampala

[34] Section 8 Plant protection Act Cap 39 of 1994

[35] Section 3 of the Act.

enforcement and institutional mechanism to enable its effective implementation of its provisions. In cases where the burning takes place during the dry seasons, environmental degradation is inevitable because it is accelerated by wind and water erosion in the ecosystem. Prolonged drought after extensive lands have been deprived of vegetation cover by burning may also result in belated rains, lowering of water table and modification of the climate.

12. Registration of Titles Act

This was introduced in Uganda in 1922 as the Registration of Titles Ordinance. It introduced the Torrens system of conveyancing in Uganda. The ordinance was to apply to all land owned under mailo, freehold and leasehold tenure. Apart from a few amendments, the Ordinance currently known Registration of Titles Act has remained largely unchanged. It however, does not apply to the registration of customary land unless it is converted to freehold under section 10 of the Land Act. Much of the land under which private forests are found is registered as per this Act.

Review of the Policy Framework

1. The National Environment Management Policy for Uganda, 1994[36] (NEMP)

The NEMP is an output of the National Environment Action Plan (NEAP) process. The NEMP gave rise to the National Environment Act. The overall policy goal is to establish sustainable social and economic development, which maintains or enhances environmental quality and resource productivity on a long-term basis that meets the needs of the present generations without compromising the ability of future generations to meet their own needs.[37]

The policy recognizes that although Uganda is endowed with a rich diversity of forestry resource, these resources are highly threatened by over exploitation and inadequate implementation of policies and laws.

[36] The Republic of Uganda (1994) The National Environment Management policy for Uganda, The Ministry of Water and Environment, Kampala.

[37] Ibid, page 3.

One of the objectives of the policy is to manage sustainably forest resources in protected areas, public and private land.[38]

The guiding principles of the policy are; Uganda's forests provide a wide range of environmental services and value such as stabilization of soil, which are critical to national development; the role of the forestry department should continue to be supervisory and regulatory; local community involvement in the planning and management of protected areas and in sharing benefits derived there from.[39] These principles have been incorporated in the National Environment Act and the National Forestry and Tree Planting Act.

It should be noted that despite the existence of this policy, there is still a gap in its implementation as far as Mabira forest is concerned. The policy emphasizes local community participation in the management of forestry resources. However, individuals at the local community level lack technical information and the relevant skills that are required.

2. The Uganda Forestry Policy (2001)[40]

The objective of this policy is to establish an integrated forest sector that achieves sustainable increases in the economic, social and environmental benefits from forests and trees by the people of Uganda, especially the poor and the vulnerable.[41] The policy provides for the protection of permanent Forest Estate (PRE) under government trusteeship and the development and sustainable management of natural forests on private land. The policy provides for the participation of the government, the private sector, local communities and farmers in the conservation and sustainable use of forest biodiversity.

This policy, being the leading policy in forest management in Uganda, lays down guidelines for forest management. For instance, that Uganda's forests should be managed to meet the needs of this generation without

[38] Ibid, page 30

[39] Ibid, page 33

[40] The Republic of Uganda (2001) The Uganda forestry policy, The Ministry of Water and Environment, Kampala

[41] Ibid, page 1

compromising the rights of future generations, the improvement of livelihoods should be the major goal in all strategies and actions for the development of the forest sector so as to contribute to poverty eradication; forest sector development should safeguard the nation's biodiversity and environmental services through effective conservation strategies.[42]

The policy also emphasizes partnerships in governance of forestry resources. New institutional relationships should enhance efficiency, transparency, accountability and professionalism, and build confidence in all forest stakeholders. The central government should withdraw from activities that can be carried out more effectively by the private sector or other stakeholders, but develop core functions of policy development and regulation, more forest resources should be managed through devolved responsibility wherever practical and advisable; the public's participation in the management of the country's forests should be actively encouraged; NGOs/CBOs should be encouraged to strengthen the civil society, to build the capacity and grassroots participation and to help develop the rights and responsibilities of forest users.[43]

The forestry policy is a modern and good policy drafted with the intent to curb exploitation of forest resources. However, its application to Mabira forest is limited due to lack of adequate funding for the implementation of its activities especially the local communities and NFA.

3. The Uganda Wildlife Policy (1999)[44]

The aim of the wildlife policy is to promote the long term conservation of wildlife and biodiversity in a cost effective manner, which maximizes the benefits for the people.[45]This policy is relevant in the management of forests in the wildlife conservation areas. The policy objectives include conserving the resources within the national parks and other Wildlife

[42] Ibid, page 20

[43] Ibid, page 10

[44] The Republic of Uganda (1999), The Uganda wildlife policy, The Ministry of Water and Environment, Kampala.

[45] Ibid, page 12.

areas, and enabling the people of Uganda and the global community to derive ecological, economic, aesthetic, scientific and educational benefits. The policy has important elements towards forest management. It imposes an obligation on UWA to involve local communities and to ensure that conservation contributes towards rural economic. It also requires UWA to share 20% of its entry fees with local government for the development of communities living around the protected areas. One advantage with the policy is that most of these principles have been incorporated into the Uganda wildlife Act.

There are several bottlenecks that affect the implementation of the policy in relation to forests: There is limited technical and managerial capacity at the districts to provide adequate advice to deal with forest in these. Revenue sharing policy is not transparent which impacts on the collaborative aspects

4. National Policy for the Conservation and Management of Wetland Resources, 1995[46]

This policy was adopted in 1995 to compliment the goals and objectives of the NEMP and sectoral policies including those of fisheries, forestry, and wildlife. Water, land tenure and soils, among others, as well as the Ramsar Convention on wetlands of international importance especially as waterfowl Habitat. The overall aim of the policy is to promote the conservation of Uganda's wetlands in order to sustain their ecological and socio-economic functions for the present and future generations. One of the goals of the policy is to promote the recognition and integration of wetland function in resource management and economic development decision making with regard to sectoral policies and programs such as forestry, agriculture, fisheries, wildlife and sound environmental management.

The policy also calls for maintaining the biological diversity of natural or semi-natural wetlands, maintain wetlands functions and values and integrating wetlands concerns into the planning the decision making of other sectors. The policy recognizes traditional uses and access rights thus

[46] The Republic of Uganda (1995) National policy for the conservation and management of wetlands resources, the Ministry of water and environment, Kampala

people living adjust to a wetland may derive benefits from that wetland such as cutting of trees, rids, water supply, fishing and fazing. The policy mentions specific activities that may lead to deforestation in wetland areas such as production of bricks from clay soil and instead encourages use of papyrus for smoking fish instead of fuel wood. The policy also has specific guidelines which discourage practices of annual burning of wetlands unless beneficial management is demonstrated with the district authorities and is approved.

The weaknesses of the policy include the following: the policy does not discourage planting of trees in wetlands that drain a lot of water in the wetlands such as eucalyptus trees. Secondly, it does not clearly provide for the lead agency of wetlands management. The policy has not been transformed into a specific act like other resources such as water aspects wildlife and forests. Further, the Policy does not classify types of wetlands and how they can be managed. This Policy is relevant to Mabira forest as some parts of the forest have wetlands.

5 The National Soils Policy for Uganda 1999[47]

This Policy contains Government Policy directives, plan of action and statements of aim and objectives to ensure sound management of the soils of Uganda on a sustainable basis. The objectives of this policy include promotion of optimal land use without unnecessarily compromising the environment through the use of soils and establishing a structure for continuous monitoring and assessment of Uganda's Potential in terms of its soil properties and whether there is soil degradation and then undertaking technical measures required to control it.[48]

The Policy identifies direct causes of soil erosion to include the climate, slope, soil, surface cover and conservation practices. One of the strategies for policy implementation includes land use improvement which requires land resources inventory to provide up-to-date information and

[47] The Republic of Uganda (1999), The National Soils Policy for Uganda, the Ministry of Agriculture.

[48] Ibid, Page 2.

reliable data on land resources such as soil, water, climate, vegetation, wildlife and forestry.[49]

The Policy provides the legal strategies to include review of existing legislation with view to enacting a comprehensive soil conversation Act and urging districts to make Ordinances and Bye laws on soil conservation.[50] However this Policy has not been fully operationalized and therefore the strategies have not been fully implemented. Secondly, there is no Soil Conservation Act in place and Bye laws and Ordinances at the districts have not been made.

Conclusion

This paper has reviewed the national legal and policy frameworks of Uganda, and has gone further by identifying the strengths and weaknesses in so far as efficiency in applicability is concerned. This paper reveals that Uganda has a sound legal and policy framework, however, there is a big gap between the existence of these laws and their actual implementation.

[49] Ibid, Page 8.

[50] Ibid, Page 11.

GENDER DISCRIMINATION UNDER THE NIGERIAN LEGAL SYSTEM: AN APPRAISAL

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ABSTRACT

Despite the existence of constitutional provisions and commitments of regional and international human rights conventions, the rights of female are grossly violated and devalued in Nigeria and many African countries. The establishment of structures of inequality has generated gender discrimination against women. Although, women play vital roles in nation development, they do not have equal share of land, credit, education, employment, and political power with men. Fundamentally, women have been subjected to domination by men as a result of persisting cultural stereotype, abuse of religious and traditional practices, patriarchal societal structures in which economic, political and social powers are dominated by men. This article examines the concept of female gender discrimination and empowerment, its background and its causes in Nigeria. This study reveals that in spite of the existence of various legal frameworks protecting women against discrimination, the practices continue in Nigeria. It further reveals that Islamic law protects women's' rights in Qur'an and Sunnah contrary to some expressed negative opinions. To accomplish the thrust of this study, the writers employed primary and secondary sources like international, national and regional instruments on human rights, Nigerian Constitution, Qur'an and Sunnah. Others are text books, journals and internet. The study recommends for the abrogation of practices that discriminate against women, amendment of provisions of Nigerian legislations that discriminate against women and to restructure some federal agencies that discriminate against women folk.

Keywords: Gender Inequality, Gender Discrimination, Gender Based Violence, Empowerment

INTRODUCTION

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The etymology of commitment to gender equality in the United Nations can be traced to the UN Charter and Universal Declaration on Human Rights 1948 which states that rights and freedoms will not be limited by person's gender and establishes that all human beings are born free and equal in dignity and rights. UN created the Division for the Advancement of women (DAW) in 1946 to champion women's empowerment and gender equality in order to ensure that women that constituted half of the world's population enjoy equal rights as well as living in dignity as equal citizen everywhere.[4] The AU member states are signatories to the AU General Assembly landmark Convention for the Elimination of all forms of Discrimination against Women which was adopted in 1979. The AU commitment to gender equality has its origin in the African Charter on Human and Peoples Right. This commitment is reinforced by the protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa, the solemn Declaration on Gender Equality in Africa (SDGEA) and the Post Conflict Reconstruction and Development adopted by the Heads of State and Government in 2006 among others. Although many conferences gave birth to the recognition of the crucial role of women in rural and urban areas, at family, community and national levels, women's specific contributions to national development has not been appreciated.[5]

Therefore, gender based discrimination is pervasive and ubiquitous everywhere in the world. This is why females find it difficult than males to access market activities, political power, health and education inputs.[6] No country in the world has attained equality between men and women in critical

*This paper is in compliance with the ethical standards as expressed in the editorial policy of the Journal.

* The authors declare that nowhere in the article was informed consent required as this is a doctrinal research study.

[4] African Union Gender Policy. 2009.

[5] ibid, 3.

[6] Fasina F F. 2017.

capacities like economic participation, education, health and political empowerment.[7]

It is momentous to state here that gender inequality and discrimination thrive among various strata in Nigeria.[8] This was obvious during the debate on the amendment of the 1999 Constitution of Nigeria[9] which raised controversial questions on the position and treatment of women under the law. Serious shock and disappointment have been expressed over the unequal treatment of women by the Constitution. Its language has been criticized to be gender insensitive[10] because the male pronoun "He" appears in the Constitution about 235 times. Consequently, some advocates have recommended replacing the pronoun "he" with "a person" or "He and She." Also, the provision of Section 29 (4) (b) of the Constitution has come under fire by anti-child marriage advocates as being inequitable for the girl child/women. Discrimination is growing more complex and there is the need for Nigeria to start initiating legislation that tends to incorporate all forms of discrimination not hitherto provided for in the 1999 Constitution. Without mystification, the Constitution gives every citizen the right to freedom from discrimination relating to particular community, ethnic group, place of origin, sex, religion or political opinion.[11] However, discrimination against women continues unabated contrary to this constitutional guarantee. This study identified areas of the Nigerian law that are gender discriminatory in one form or the other.

UNDERSTANDING CONCEPTS

i. Gender**:** Images of men and women are conveyed by myths and fairy tales as well as pictures and religious texts. These images may be the source of attitudes and beliefs and they may reflect and maintain stereotypes.[12] Gender

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7 Fasina, ibid, 6.

8 As at 2017,with an index of 0.64, Nigeria ranked 122 on the world global gender gap index see World Data Atlas https://knoema.com/atlas/topics/World-Rankings/World-Rankings/Global-gender-gap-index?baseRegion=NG

9The Constitution of the Federal Republic of Nigeria 1999. The Constitution has undergone several amendments, the current debate is with regard to a prospective alteration via the Constitution of the Federal Republic of Nigeria, (Fourth Alteration) Bill, No. 1, 2017.

10 See Editorial, *Nigeria Law Legalised Gender Discrimination. Online*

11 Constitution of the Federal Republic of Nigeria, 1999, section 42 (2).

12 Crawford M and Unger R. 2004. 49

is a system of power relations that affects individuals, relationships and society.[13] It can also be said to mean a woman or man in a specific place and time.[14] It changes from time to time and varies from culture to culture. It subsists from country to country and whilst appreciable progress may have been made in some jurisdictions, legal roadblocks still persist in legislations to stem gender discrimination.

ii. The term discrimination has been defined as "a practice that confers privileges on certain class or that denies privileges to a certain class because of race, age sex, nationality, religion, or handicap or differential treatment, especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."[15] Discrimination is painstaking as consequential from the conception, conservation and preservation of configurations of inequality against women contrary to men. The process of engineering transformation involves both the manipulation of rules, norms and procedures as well as organisation for political action by women to protect what rights they have to improve the quality of protection and increase the comprehensiveness of the rights to which they are authorised.[16]

iii. Gender discrimination has been defined as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, religion, cultural, civil or any other field.[17] It has further been described as a situation in which someone is treated less because of their sex, usually when a woman is treated less than a man.[18] Gender inequality can be the disadvantageous treatment of an individual or group of individuals based

[13] Ibid, p 517

[14] S. Coltrane & Adams M. 2003. *Gender & Families.*

[15] Bryan AG. 2014. Black's Law dictionary.

[16] Fasina. ibid 7.

[17] European Institute for Gender Equality.

[18] Cambridge Dictionary. *Gender Discrimination*.

on gender. Sexual harassment is a form of illegal gender discrimination. It is treating of an individual differently based upon his/her gender in academic or extracurricular activities, class assignments given in classroom, class enrolment, physical education, grading and/or athletics.[19]

iv. Discrimination against women is defined as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[20] Nigeria signed the convention on 23 April 1984 and ratified it without any reservations on 13 June 1985, and it ratified the optional protocol to CEDAW on 8 September 2001.

DISCRIMINATION AGAINST WOMEN IN NIGERIA

In many developing countries, Nigeria inclusive, it is common to find women employed in unskilled, heavy manual work, such as laborers on construction sites and road building. Similarly, women are responsible for much of the manual work in the agricultural sector. Such employment goes unpaid. Gender discrimination, sexual exploitation and the denials of life's opportunities to women are being presented as part of culture that should be preserved. Gender inequality is, thus, the result of unjust economic, political and social relations. Discrimination against women takes different forms in different societies and historical epochs, thus requiring differential strategies in each place and time. It occurrences are examined below:

Nigerian Constitution and Citizenship Rights

The provision of the Constitution which is deemed as gender biased is Section 26 (2) (a) of the 1999 Constitution. This provision confers the right of citizenship to any woman who is married to a Nigerian citizen but denies such right to foreign men married to Nigerian citizens who are women. Section 26(1) broadly provides:

[19] Langston University. *Gender Discrimination Defined*.

[20] The United Nations Convention on Elimination of all forms of Discrimination against Women (now referred to as Convention or CEDAW), 1979, article 1.

> *Subject to the provisions of section 28 of this Constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the President is satisfied that -*
> *(a) he is a person of good character;*
> *(b) he has shown a clear intention of his desire to be domiciled in Nigeria; and*
> *(c) he has taken the Oath of Allegiance prescribed in the Seventh Schedule to this Constitution.*
> *(2) the provisions of this section shall apply to-*
> *(a) any woman who is or has been married to a citizen of Nigeria; or*
> *(b) every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.*
> The implication of this provision is that by literal application, only women who are/were married to a Nigerian man can be registered, to the exclusion of women married to foreign men. This is obviously a discrimination against Nigerian women married to foreigners.[21]

It is pertinent to state the position of Islamic law here before it is fully discussed in the last part of this study. Based on a broad religious basis, a Muslim woman is formally forbidden to marry a non-Muslim man regardless of his religion while a Muslim man is allowed to marry a non-Muslim woman, Christian or Jew, considered by the Islamic jurists as 'People of Book.'[22]

[21]The current alteration bill inter alia seeks to alter section 25of the Constitution to guarantee a married woman's right to choose either her indigeneship by birth or by marriage for the purposes of appointment or election. See *Full List 1999 Constitution Amendment*. Online at: https://www.channelstv.com/2017/07/27/full-list-1999-constitution-amendment/ We submit that this alteration may be better suited for section 26 of the Constitution even though this alteration fails to address the identified limitation

[22] People of Book or ahl al-Kitab are people belonging to a religion in which a Book was revealed as the Torah or Bible. Muslims are compelled to believe in these Books because they were revealed by the same Creator. The Qur'an, the last revelation, is

The only verse that discusses this issue is absolutely the main verse that states the provision on marriage with the category of non-Muslim. It provides as follows:

> And do not marry Al-Mushrikat (idolatresses) they believe (Worship Allah Alone). And indeed a slave woman who believe is better than a (free) Mushrikah (idolatress), even though she pleases you. And give not (your daughters) in marriage to Al-Mushrikun till they believe (in Allah Alone) and verily, a believing slave is better than a (free) Mushrik (idolater), even though he pleases you. Those (Al-Mushrikun) invites you to the Fire, but Allah invites (you) to Paradise and Forgiveness by His Leave, and makes His Ayat (proofs, evidences, verses, lessons, signs, revelations, etc) clear to mankind that they may remember.[23]

The Quranic verse tackling the marriage of Muslim men or women to a believer or other religions, sets some rules using egalitarian language. However, it is worth mentioning here that the scholars agreed unanimously on the prohibition of the marriage of Muslim woman to a Jew or Christian while no part of the Qur'an provides for such or justifies the discrimination. This verse clearly forbids the marriage of believing men and women to polytheists, called at the time Mushrikin.[24]

We should go back to the meaning, the purpose and the moral of the Quranic verse that talks about the interreligious marriage through a dispassionate debate that goes beyond emotions. We should review the real and deep meaning of some concepts in our globalized and multicultural societies, such as 'the believing men and women and 'people of Book'…. We should stress the main value and the initial

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the follow-up of the same universal spiritual message addressed by Allah to all human beings by means of His successive prophets.

[23] Al-Bakarah 2: 221.

[24] Asma L. 2013. "What Does the Qur'an Say about the interfaith Marriage?"

spiritual trend that underlie this verse that calls for honesty, decency and mutual respect as the pillars of any marriage.

However, if we construe another provision of Qur'an relating to marriage, we may have second thought to the above verse. The Almighty Allah enjoins Muslims men to marry women among people of Books as follows:

> … (Lawful to you in marriage) are chaste women from the believers and chaste women from those who were given the Scripture (Jews and Christians) before your time, when you have given their due Mahr (bridal money given by the husband to his wife at the time of marriage)... And whosoever disbelieve in oneness of Allah and in all the other Articles of Faith (i.e. His Allah's), Angels, His Holy Books, His Messengers, the Day of Resurrection and *AlQadar* (Divine Preordainments), then fruitless is his work, and in the hereafter he will be among the losers.[25]

This verse allowed only Muslim men to marry 'People of Books' but Muslim women are not allowed to marry any other person but Muslim men. The rationality behind this is that most people of other Books did not believe in oneness of Almighty Allah but in Trinity which is contrary to dictate of Almighty Allah in the Qur'an, where Allah says: "*Say (O Muhammad): He Allah (the) One; The Sufficient Master, Whom all creatures depend; He begets not, nor He begotten; And there is none co-equal or comparable unto Him."*[26]

Furthermore, section 37 of the 1999 Constitution provides that "*the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected*." Some activists have expressed fear that this section is too broad and can serve as a cover for those who engage in Child marriage and domestic violence.[27]

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[25] Al-Maidan 5:5.

[26] Al-Iklaas 112: 1-4.

[27] Editorial, Nigeria Law Legalised Gender Discrimination. ibid.

[25] ibid

Construed in its ordinary meaning, it prohibits interference into a person's private matters, without limitation or exception.

Discrimination against Female Police officers and others

A government agency that has come under attack for discriminating against women is the Nigeria Police Force. For instance, Police women on duty are prohibited from putting on jewelry except wedding or engagement rings and /or wristwatches and they are prohibited from applying face powder, lipstick or colored nail varnish. [28] Police women are required to place the alphabet 'W' before their rank. In addition, in cases of compensation, gratuity and disability pensions, provision was made for payment only to wife or widow. There is no reference to spouses (husbands).[29] Police women married to civilian husbands are disallowed from living in police barracks.[30]. Again, travel allowance made only for accompanying 'wife' and children but no provision for police women's husbands[31]. According to Rule 121 of the Police Regulations, women police officers shall as a general rule be employed on duties which are concerned with women and children.

According to Rule 122, married women are disqualified from enlisting in the Police; a Police woman who is single at the time of her enlistment must spend two (2) years in service before applying for permission to marry and she has to give particulars of her fiancé who must be investigated and cleared before permission for marriage is granted.[32]

Section 125 of the Police Regulation states that "A married woman police officer shall not be granted any special privileges by reason of the fact that she is married and shall be subjected to posting and transfer as if she were unmarried.'[33]

Section 126 of the Police Regulations provides that "A married woman police officer who is pregnant may be granted maternity leave in accordance with

[26] ibid.

[27] Ibid

[28]Ibid

[32] ibid

[33] ibid

the provisions of general order (a Federal Government instruction that regulated the condition of public officials). However, an unmarried woman police officer who is pregnant shall be discharged from the force.[34]

Another instance of gender discrimination in a government agency was the complaint made to the Senate Committee on Ethics and Privileges by a dismissed former employee of the National Drug Law Enforcement Agency, Miss Udoka Tochukwu on account of her engagement to a driver with the Niger Delta Development Agency, Mr. Ozorumba Osondu.[35] She also stated in her testimony that the agency recommended the abortion of her pregnancy in an attempt to stop her from getting married.[36] It is disheartening that some government agencies still operate obnoxious rules and practices that contravene the Constitution amidst the fight against discrimination of women and gender equality around the world.

Nigerian Law on Inheritance and Customary Practices

Nigerian law on testate inheritance/succession include the Received English law- the Wills Act of 1837 and its Amendments (1852); the Wills Law Western Nigeria,[37] Succession Law Edict, 1987, of old Anambra State as amended and applicable to Enugu and Ebonyi States. While the Wills Act do not place any disability on widows with regard to their right to inherit property under testamentary disposition, the Nigerian Laws and statutes do not extend this to widows who contracted customary law marriages. Judicial attitudes until recently tended to perpetuate this discrimination. In Nezianya v Okagbue,[38] the court held that under the native law and custom of Onitsha, a widow's right on her deceased husband's property is like that of a stranger. She cannot deal with her late husband's property without the consent of her husband's family. Further, if a husband dies without a male issue, his real property descends on his family and his daughter (s) are not entitled to inherit

[34] ibid

[35] http://saharareporters.com/2010/02/20gender-inequality-and-official-discrimination-against-women-nigeria-agencies.

[36]ibid.

[37] Wills Law, CAP 133. 1958. Laws of Western Nigeria.

[38](1963) ALL NLR 358.

the property based on the custom. Also in the case of Nzekwu v Nzekwu,[39] the Supreme Court of Nigeria restated the principle that the widow's dealings over her deceased husband's property must receive the consent of the family, and she cannot by the effluxion of time claim the property as her own. She has however, a right to occupy the building or part of it during her lifetime but this is subject to her good behaviour. It is worthy to note that under Shar'iah or Islamic law, women can acquire and retain their own property, can pass it on to their heirs, and can inherit from their deceased parents, husbands, brothers, sisters, daughters and other relations.[40]

Recent judicial pronouncements have taken a second look at discriminatory customs against women. In Mojekwu v Mojekwu,[41] the Court of Appeal, Enugu division, held that the "Oli-ekpe" custom of Nnewi in Anambra State where only male children inherit their father's property is unconstitutional. Honourable Niki Tobi J.C.A (as he then was) delivering the lead judgment asked the following questions: '

> *Is such a custom consistent with equity and fair play in an egalitarian society such as ours? Day after day; month after month and year after year, we hear of and read about customs, which discriminate against women in this country. They are regarded as inferior to the men. Why should it be so?*

The learned Justice further observed:

> *All human beings-male and female-are born into a free world, and are expected to participate of freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on ground of sex, apart from being unconstitutional is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi "Oli-ekpe" custom are not consistent with our civilized world in which we all live today. In my humbly view, it is the monopoly of*

[39] (1989) NWLR (Pt.104) 373.

[40]Editorial, ibid.

[41] (1997) 7 NWLR (Part 512)283

> *God to determine the sex of a baby and not the parents. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront, I have no difficulty in holding that the "Oli-ekpe" custom of Nnewi, is repugnant to natural justice, equity and good conscience.*[42]

Also in the case of *Muojekwu v Ejikeme*,[43] the Court of Appeal held that a female child could inherit from the deceased father's estate in Igboland without the performance of the Nrachi ceremony.[44] The Court held as follows:

> *by section 42 (1) of the Constitution of the Federal Republic of Nigeria 1999, a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person,*
>
> *(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government ethnic to disabilities or restrictions which citizens of Nigeria of other communities, groups, places of origin, sex, religious or political opinions are not made subject.*

Consequently, the court held that such a custom clearly discriminated against the daughter of the deceased who did not perform the ceremony and was therefore unconstitutional in the light of the provisions of section 42 of the Constitution. The court refused to apply the custom and declared it repugnant to natural justice, equity and good conscience in that it legalized

[42] ibid

[43] [2000] 5 NWLR (Part 657) 402.

[44]According to Francis O A. Reducing Gender Discrimination and Violence against Women. Online at: http://unllib.unl.edu/LPP/. Nrachi is a ceremony in which a man keeps one of his daughters at home unmarried for the rest of her life to raise issues, especially males, to succeed him. After a daughter performs this rite, she takes the position of a man in her father's house. Technically, she becomes a "man". In that case, the court took the liberty to interpret the constitutional nature of freedom from discrimination vis-à-vis the "ili-ekpe or Oli-ekpe custom of Nnewi that does not recognize female inheritance unless Nrachi ceremony has been performed on the female.

fornication and encouraged prostitution, as the women remained unmarried procreating outside the bounds of marriage.

Child Custody under Customary Law

Generally speaking, Statutory and Customary law in the Southern Region of Nigeria dictates that children are under the custody of their father. In the absence of a custody order, the father is given priority. This position was given credence in the case of Ejanor v. Okenome[45]which re-examined the position of Edet v. Essien[46] forty-four years later.

In the case, the Ishan customary law stipulates that the paternity of a child born by a wife at a time when the customary marriage has not been dissolved, by the refund of the bride price (dowry) paid, belongs to the husband, even though he is not the biological father.[47] The court stoutly refused to declare this custom as repugnant to natural justice, equity and good conscience.[48] Ijalaiye rightly observed as follows:

> *In a matter like this, quasi-legal sources and results of sociological research on what the people have regarded as their laws are very vital. Dr Obi in his Modern Family Law in Southern Nigeria at 302 (1966) quotes Dr Elias as saying that "if a married woman leaves her husband for another man by whom she later has a child, before her first marriage has been formally dissolved and the dowry returned to her husband, customary law would award the child to the first man to whom she is still regarded as married." This statement aptly applies to the present situation. It goes to show that the Ishan custom has support in some other areas in the country, I think we should not be in a hurry, in our courts to condemn the old and established customary law of the people by holding that it is*

[45] (1976)6 ULLR (Case decided on March 4,, 1976 at the High Court of Bendel state, Sapele Judicial decision

[46](1932) 11 N.L.R 47 here the Plaintiff had paid bride price for a woman and she left him and entered a new marriage with another by whom she subsequently had two children, it was held per Carey J. that a rule under native law and custom which held that the Plaintiff was entitled to the custody of the children since the bride price had not been refunded to him was repugnant to natural justice, equity and good conscience

[47] Ijalaye D A. 1993. *Natural Law and the Nigerian Experience in Nigerian Essays in Jurisprudence*, in Elias T O and Jegede M I(eds), Lagos: MIJ Publishers.

[48] Ijalaye .ibid.

> *contrary to natural justice, equity and good conscience where the people have all along regulated their lives by that custom.*

With due respect to Ijalaye, this position can be cited as an example of a chauvinistic culture and belief where the woman is seen as property of her husband, equated with chattel or animal, so much so that her offspring is deemed to belong to any man who has paid her bride price notwithstanding the biological and physical fact of paternity. By this, the opinion of the woman does not count under customary law in southern Nigeria; this is reinforced by the disheartening stance of a judge who having undergone formal education was expected to rise to the occasion.

Criminal Code and Penal Code Provisions on Rape and Indecent Assault

The Definition of Rape in Nigeria is gender specific. It has been defined as:

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.[49]

The Penal code provides:

> A man is said to commit rape who, save in the case referred to in Sub-Section (2). Has sexual intercourse with a woman in any of the following circumstances:(a) against her will:(b) without her consent;(c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;(e) with or without her consent, when she is under fourteen years of age or of unsound

[49] Section 357 of Criminal Code Act, Cap 77, Laws of the Federation, 1990.

> mind;(2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.[50]

Furthermore, in the case of Idris Rabiu v The state,[51] court defined rape as an "act of sexual intercourse committed when the woman's resistance is overcome by force or fear or under other prohibitive conditions." The underlying theme from the foregoing is that consent is central to the offence of rape. Where there is consent from the woman or girl to the sexual intercourse, then the charge of rape must fail.[52]

Historically, women have been subjugated and oppressed by men in most cultures in Nigeria.[53] This situation is due to the inequality in gender relations between men and women. Rape has always been with mankind throughout the world.[54] However, in recent times, the incidence of rape has increased in Nigeria. The hegemonic patriarchal values and practices make it difficult for women who are raped to obtain justice.[55] Perpetrators often go unpunished even if the victims have the courage to report the incidence. In a study about causes and incidence of rape among middle aged and young adults in Lagos State, Nigeria, Peters and Olowa[56] found that between 2001 and 2005, 10,079 rape cases were reported. The same study also indicated that only 18 per cent of rape cases in Nigeria are reported. A figure of 10,079 (which is assumed to be 18%) within these few years, is an indication that rape is very rampant in Nigeria and constitutes a serious public health problem. In the same vein, it was indicated in the WHO multi-country

[50]Section 282 (1) of the Penal Code. No. 18 of 1959, designated as Cap 89, the Laws of Northern Nigeria, 1963.

[51] (2005) 7 NWLR (Pt. 925) 491.

[52] Alobo E E. 2016. *Criminal Law and Sexual Offences in Nigeria.* Lagos: Princeton & Associates Publishing Co. Ltd, 119

[53] Muoghalu C O. 2012. *Rape and Women's Sexual Health in Nigeria: The Stark Realities of Being Female in a Patriarchal World.* African Anthropologist 19 (1-2): 1. Online at: https://www.ajol.info/index.php/aa/article/view/118206/107765. Last accessed 20th November 2018.

[54] ibid,

[55] ibid,

[56] Peters, T.O. & Olowa, O.W. "Causes and Incidence of Rape among Middle Aged and Young Adults in Lagos State, Nigeria." *Research Journal of Biological Sciences.* 5 (10): 670-677. 2010.

study[57] on women's health and violence against women, that 15-59 per cent of women had at some time experienced sexual violence from intimate partners in Nigeria, Kenya, South Africa and other sub-Saharan African countries. According to Amnesty International,[58] rape by police and security forces is endemic in Nigeria as is the abject failure of the Nigerian authorities to bring perpetrators to justice.[59] The court acquits most of the rape offenders on account of the lack of evidence or because the victim has a 'questionable' character. Owing to this, rape victims suffer in silence due to the stigma and humiliation attached to the public acknowledgement of rape. In addition, By virtue of judicial practice in Nigeria,[60] a person may not be convicted of rape without the corroboration of the evidence of the victim. In Isa v. Kano State,[61] the Supreme Court Per Muhammad, J.S.C. held: "*On the issue of corroboration of the offence, it should be noted that no law in Nigeria, as of now that says that corroboration is necessary. It is however, desirable to get the evidence of the prosecution strengthened by other implicating evidence against the accused*[62]*(Emphasis mine)."*

There is also the issue of marital rape. Many countries across the globe recognize marital rape. The Nigerian criminal law doesn't recognize marital rape. Section 282(2) of the Penal Code[63] provides that "sexual intercourse by a man with his own wife is not rape if she has attained puberty." Indeed, by the same provision 282 (e), a girl who is at least 14 years of age cannot claim to have been raped if her consent was attained. Giving that the legal age of majority in Nigeria is 18, and the common law age being 21, those advocating for recognition of marital rape claim that this provision condones defilement

[57]Ilonzo N, Ndungu N, Nthamburi N, Ajema C, Taejimeyer M and Theobald S. 2009. "Sexual Violence Legislation in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages." *Reproductive Health* Matters. 17 (34): 10-19.

[58] *Rape, the Silent Weapon*, Amnesty International, Nigeria Report in http://web.amnesty.org/library/index/ENGAFR440202006. 28th November, 2006

[59] Abuja policemen raped us after raid-Ladies detained after mass arrest in Nigeria's capital city. Punch, 4 May, 2019. Online at: Https://bit.ly/2SVnw2.

[60]There is no law in Nigeria that requires corroboration in proving rape.

[61](2016) LPELR-40011(SC)

[62]See also Reekie v The Queen (1954) 14COACA 501, 502; State v. Ojo (1980) 2 NCR 391 and Ogunbayo v. State (2007) 8 NWLR (Pt.1035) 157

[63] Fasina. ibid

of young girls. Indeed, it has been asserted that as at 2015, despite the prevalence of rape cases in the country, only 18 rape convictions have been held in the country.[64]

The Criminal Code Act discriminates against women on the issue of punishment against personal assault. If a man is assaulted, it is a felony (serious offense). When a woman is assaulted, it is a misdemeanor (less serious offense). Section 353 of the Criminal Code Act provides that "*Any person who unlawfully and indecently assaults any male person is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant."* Conversely, Section 360 provides that "Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanor, and is liable to imprisonment for two years."

Gender Based Violence and Spouse Abuse

According to the United Nations, gender-based violence, interchangeably used with Violence against Women or at times domestic violence, is any act of violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women/young girls, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in private [domestic] or public life.[65] Violence against women can be physical, sexual or psychological. Other types can be in form of neglect and abandonment and economic disempowerment. Physical violence can occur both in private and in public and it includes but not limited to such acts as slapping, kicking, stabbing, shooting, hitting, pouring acid or any corrosive substance and murder. Other forms include harmful traditional practices and female genital mutilation.[66] It is estimated that 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives. However, some national studies show that up to 70 per cent of women have

[64] *Only 18 Rape Convictions Recorded In Nigeria's Legal History – Lawyer,* Online at:https://www.premiumtimesng.com/news/top-news/192895-only-18-rape-convictions-recorded-in-nigerias-legal-history-lawyer.html

[65] Cited in Bilikis B. 2014 *Tackling Gender-Based Violence.* in PM NEWS Online at:https://www.pmnewsnigeria.com/2014/04/15/tackling-gender-based-violence/amp/

[66] ibid

experienced physical and/or sexual violence from an intimate partner in their lifetime.[67]

Although we may agree that Gender-based violence is a global phenomenon and not limited to Nigeria, It however seems to be the norm in the Northern part of Nigeria so much so that domestic violence was codified as legal in the Penal Code Act[68]. Section 55(1) of the Penal Code provides,

> *Nothing is an offence which does not amount to the infliction of child, pupil, grievous hurt upon a person and which is done-*
>
> *a) by a parent or guardian for the purpose of correcting his child or ward that child or ward being under eighteen years of age; or*
>
> *b) by a schoolmaster for the purpose of correcting a child under eighteen years of age entrusted to his charge; or*
>
> *c) by a master for the purpose of correcting his servant or apprentice, the servant or apprentice being under eighteen years of age; or*
>
> *d) by a husband for the purpose of correcting his wife such husband and wife being subject to any customary law in which the correction is recognized as lawful.*

One can argue that this provision condones domestic violence and may be used as justification for abuse against women in matrimonial relationships. It is also interesting to note that in this provision a wife is equated with a child,

[67]World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council (2013). Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence, p.2. For individual country information, see The World's Women 2015, Trends and Statistics, Chapter 6, Violence against Women, United Nations Department of Economic and Social Affairs, 2015 and UN Women Global Database on Violence against Women. Online at:http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes

[68] Penal Code (Northern Nigeria) Act Chapter 53 LFN Cap P3, 2004

servant or a ward under the age of eighteen. Does this mean that a woman is equated as having the mental faculty of an under aged child? This truly leaves much to be desired.

POSITION OF WOMEN UNDER ISLAMIC LAW

The concept of human right is not applicable in Islamic jurisprudence, rather, there are Divine rights.[69] There is absolute no distinction between men and women in Islamic jurisprudence as far as their relationship to Almighty Allah is concerned because both are promised the same reward for good conducts and the same punishment for evil conducts.[70] While Almighty Allah is addressing the believers, often uses the expression, 'believing men and women' to emphasis the equality of men and women regarding their respective duties, virtues and merits. He says:

> Verily! The Muslims (those who submit to Allah) men and women, the believers men and women (who believe in Islamic monotheism), the men and the women who are obedient (to Allah), the men and women who are truthful (in their speech and deeds), the men and women who are patient (in performing all the duties) which Allah has ordered and in abstaining from all that Allah has forbidden, the men and women who are humble (before their Lord-Allah), the men and women who give sadaqat (i.e, Zakat and alms), the men and women who observe saum (fast) (the obligatory fasting during the month of Ramadan, and the optional Nawafil fasting), the men and women who guard their chastity (from illegal sexual acts) and the men and women who remember Allah much with their hearts and tongues, Allah has prepared for them forgiveness and a great reward (i.e, paradise).[71]

Islam also abolished the principle of discrimination between men and women as human being. Islam declares that men and women are equal as human being in this world and in the hereafter. This is expressed in the following

[69] Abdul Fatah Ibn Raji. 2001 CE/1422 A.H. Islam and Human Rights in Broader Perspective, 57. Lagos: Alashela Islamic Publication 57.

[70] AbdulRahaman Doi (undated) Women is Shar'iah, Islamic Law, 5.

[71] A—Ahzaab 33: 35

verse of the Qur'an: 'So, their Lord accepted of them (their supplication and answered them), 'Never will I allow to be lost the work of any of you, be he male or female. You are member one of another…'[72] Islam not only permitted the Muslim women to acquire knowledge but also commended her to do so if it would assist her in her life in this world and in the hereafter.[73]

The principle of equality between men and women is greatly protected in Islamic jurisprudence thereby protecting the rights of women in Islam. A woman is permitted to hold any position outside her matrimonial home provided she occupies in respectable and dignified manner that do not put her in any embarrassing predicament that is contrary to the principles of Shar'iah.[74] Muslim working women are allowed to associate with the male sex in the public according to the rules and teachings of Islamic jurisprudence.[75]

Shar'iah grants the Muslim women equal civil rights and the right to manage her business affairs like participating in legal contracts that deal with sale and purchase of any property or foods in addition to her legal right to grant gifts and to contract a will. Islam frowns at derogation from the right of a woman to personally manage her wealth and supervise her financial affairs. These rights naturally necessitate association with male sex and it is a well –known historical fact that Aishat, a daughter of Talha, the granddaughter of Abubakar Al- Sidddiq, first companion after the death of the prophet, fought side by side with men in the battle against the infidels and that she fought bravely with spears and arrows.[76]

Islam ordains equality between men and women before the law and in all civil rights matters. This applies to married women and unmarried girls. The Islamic law of marriage do not cancel her civil rights or capacity to possess

[72] Ali-'Imran 3: 195.

[73] An-Nisaa 4: 32.

[74] Hanafi A H & Wahab OE. 2017. "Protection of Women's Rights in Africa: Roles of the New Partnership for Africa's Development, Islamic Jurisprudence and other Human Rights Instruments," Novena University Law Journal. 3 (1):

12-37, 31.

[75] ibid.

[76] ibid

property or wealth. She can own property in her name and her wealth belongs to her alone and cannot be appropriated by her husband. A husband has no right to dispose off his wife's property or wealth without being grants a power of attorney to act on her behalf. It is equally the right of the wife to cancel the power of attorney granted to her husband and to subsequently make a grant to whoever she wishes.[77]

Shar'iah do not discriminate between Man and woman except in matters where this discrimination is due to the nature of their sex for their welfare and for the welfare of the community, the family and in particular, for the welfare of the woman.[78]

In Islam, a married woman has the absolute right to own, sell, give away or manage her property. This property include the gift (Mahr) given to her by her husband at the time of marriage. The husband has no right to take it away from her. A Husband and wife can however acquire property together during marriage.[79]

Allah further commands regarding the personal property of women in the following verse:

> O you who believe! You are forbidden to inherit women against their will, and you should not treat them with harshness, that you may take away part of the gift (*mahr*) you have given them, unless they commit open illegal sexual intercourse. And live with them honourably. If you dislike a thing and Allah bring through it a great deal of good.[80]

In Islamic jurisprudence, men and women have equivalent rights, including but not limited to working, acquiring wealth, possession of property and the concept of inheritance. The Qur'an declares that for men, there is a share from what their parents and their close relative leave, and for women, there is share

[77] Ali Abedel Wahi Wafy. 1423-2002. *Human Right in Islam*. Arab Republic of Egypt Ministry of Al-Awqaf Supreme Council for Islamic Affairs 59.

[78] ibid

[79] Leslie H. 2014. "Women's Rights in Uganda." Centre for Women's Land Right, 6.

[80] An-Nisa 4: 19.

from what their parents and close relative leave, be it little or considerable, a definite share.[81]

This verse makes it clear that like men, women inherit and have definite share. The verse regarding inheritance were revealed to the Prophet (SAW) at a time when women in the world and especially among benighted Arabs were bereft of worth of status. In the age of ignorance, men were ashamed when they heard that their newborn child was a girl and many innocent baby girls were even buried alive.[82] The possessions of the deceased went to their sons or eldest son only and girls were deprived of inheritance unless a father determined an amount in his will or his sons took property upon their female siblings and gave them something. Thus, when the verse of inheritance was revealed, it gave women definite share in the legacy, some people were also astonished. Regarding the conditions revolving around this verse revelation, Imam Fakhr Razi written:

Ibn Abbas gives account that Aus Ibn Thabit Ansari died and left behind his wife with three daughters. Two of his male cousins by names Sawid and Arafjah, who were his inheritors, came and took all the properties. Aus's wife came to the Prophet and narrated her experience and said; Aus's two inheritors left nothing for my daughter and I. The Prophet said, return home until I see what God instructs. Subsequent to this was the revelation of the aforementioned verse which shows that both men and women can inherit.[83]

Indeed, by legislating women's inheritance in such times, Islam has honourned women and has considered their status as inheritors equal to that of men. However, In Islamic law, the share of women's inheritance is half that of men's inheritance. Allah has stated in the Qur'an as follows: "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half…."[84]

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[81] An-Nisa 4: 7.

[82] Ibrahim A. "An Introduction to the Rights and Duties of Women in Islam." Online at: https://www.al-islam.org/introduction-right-and-duties-women-islam-ayatulah-ibrahim-amini, accessed 31 May 2019.

[83] ibid

[84] Al-Nisaa 4:11

Based on the Quranic provision, sons inherit twice of daughters, brothers, twice that of sisters, and husbands inherit twice that of wives except regarding the father and mother if the deceased. If they are living at the same time of their child's death, each equal receive one-sixth of the deceased legacy.

The law of inheritance has been crictised because woman has been discriminated against with allotment of half the share of man. Is this not prejudice and oppression? The difference in the inheritance shares of man and woman should not be seen disassociate from the laws and commandments and discussed and judged independently. It is true that regarding inheritance, there is differentiation in Islamic law between men and women. However, this distinction is due to realistic perception and financial obligations that men bear. In Islam, men have to bestow property (mahr) on their wives. Therefore, men must work diligently to provide all living expenses, whereas women are not required to work and pay for living expenses. If a woman has wealth, she is not expected to spend it for the family, she may save it for her self-desire. All possessions that she gains through work, mihr, gifts, inheritance or any other legitimate methods are solely hers and she can amass it all if she wishes. This is in contrast to men who are legally and canonically requird, in addition to bestowing mihr, to provide all living expenses of their spouses and all members of the family.

The reason why male takes twice of male is justified in the following verse of Qur'an:

> Men are the protectors and maintainers of women, because Allah has made one of them to excel the other and because they spend (to support them from their means). Therefore, the righteous women are devoutly obedient (to Allah and to their husbands) and guard in the husband's absence what Allah orders them to guard (eg, their chastity, their husband's property)….[85]

Equally illustrated this, is the prophet who reported to have said that the reason why women receive half the share of men from inheritance is that when woman marries, she takes mahr and gifts, for this reason, man have larger share. Another reason is that a wife is dependent on her husband and

[85] An-Nisaa 4: 34.

the husband must pay for her expenses, while a wife is not expected to pay her husband's expenses or financially support him in need.[86]

Also in Islamic law, man and woman enjoin equal right in marriage and divorce and this is why it is provided in the Qur'an as follows: 'O you who believe, you are forbidden to inherit women against their will, and you should not treat them with harshness, that you may take away part of the *Mahr* you have given them, unless they commit open illicit sexual intercourse. …['87]

Woman can also initiate dissolution of marriage through a procedure known as khul'. Khul' is an Arabic term derives from the verb 'khala' which means ,'to dispossess' and in effect, this legal procedure allows the woman to remove herself from the tie of possession that binds her to her husband. If the husband accepts the financial compensation offered by his wife to end their marriage, the marriage dissolved immediately.[88]

Al-*khul'*: While *talaq* is the right of a man to initial and determine the fate of a marriage contract with respect to all injunctions of Allah, al-*khul'* is the dissolution of marriage at the instance of a woman when she can no longer cope with her marital obligations her husband, putting into consideration all injunctions of Allah.[89] It is substantiated in a Qur'anic verse as follows: 'If you fear that they cannot observe the limits prescribed by Allah, then it shall not be a sin on any of them in what she offers to get freedom.'[90]

Almighty Allah gives right to initiate divorce in Qur'an as follows:

> Then, if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her KKhul' (divorce). These are limits ordained by Allah, so do not transgress them. And whoever

[86] Bilar al-Anwar, Vo. 104, 326.

[87] An-Nisaa 4: 19

[88] Corinne Fortier, ibid

[89] Ambali MA, 2003.The Practice of Muslim Family Law in Nigeria.

[90] Al-Bakarah 2: 229.

> transgresses the limits ordained by Allah, then such are Zalimun (wrong doers).[91]

It obvious from this verse that it is not illicit for you to take back anything you have given them unless the two of them fear that they cannot conform to the bonds of Allah, no blames attaches to them both.

It is further based on a hadith where prophet instructs a man to agree to his wife's wish of divorce if she give a man back a garden received from him as part of Mahr. A Khul' is concluded when the couples agreed to divorce in exchange of a monetary compensation paid by the wife, which cannot exceed the value of Mahr she had received and generally a smaller sum or involving wife. The divorce is final and irrevocable, effective when the contract is concluded.[92]

In the studies of Mamluk Egypt and the Balkans under Ottoman rule, Khul' was known to have been the principle means of divorce. Women employed a number of strategies to force settlement from their husbands. Some neglected their marital and household duties, making family life impossible for their husbands. Others demanded immediate payment of the deferred Mahr, knowing that their husbands had no means to comply and would be jailed if failed to do so.

Custody of Children (*Hadana*): In the case of Odejayi Jemilat v. Odejayi Muktar Taiwo[93] Custody of children, *Hadana* has been defined as protection and care of a child in his worldly affairs such as feeding, clothing and cleanness of his body. This is applicable to a person who is not independent in taking care of his body and it is a form of guardianship and women are considered to be more suitable to assume because they are more experience in the area of looking after children and they are generally more caring and compassionate. The jurists unanimously agreed that the mother has the right to the custody of her biological children after separation or death of

[91] Al-Bakarah 2: 229.

[92] Ambali ibid.

[93] Appeal No: KWS/SC/cv/ap/il/01/2013, 63-83, 76.

her husband. Except if she becomes adulteress or goes out every time and abandoned her children at risky.[94]

Abdullahi Ibn 'Umar said that a woman complained to prophet saying: This my child, my stomach was his abode, my thigh was his playing centre, my breast was reserviour to quench his thirst. His father wants to take him from me.' The Prophet replied him saying: 'You have better claim to the guardianship than his father as long as you have not remarried.[95] A girl remains with her mother until she marries while the boy remains with her until he reaches the age of puberty, that is, maturity. After this, he is given the choice to stay with his father or mother.[96]

CONCLUSION

This study has examined the concept of gender discrimination and particularly, discrimination against women. Nigeria is signatory to various International and national instruments that frown at discrimination against women in all ramifications, in fact, its organic law prohibits any discrimination in section 42. Despite all these, practices of discrimination against female gender are prevalence in every sectors of human endeavours in Nigeria. The provisions of most of legislations on the protection of discrimination against women in Nigeria are nebulous and contradictory as can be seen from this study. This study therefore recommends for the amendment of the provision of the Constitution which favours male against the female. More so, there is need to stem the practices that tend to discriminate against women in some Federal Agencies like the Nigerian Police, National Drug Law Enforcement Agency, Immigration and others. The study equally recommends for the abrogation of obnoxious practices that discriminate against female gender and to imbibe with religion ethics that recognise and protect the chastity and rights of women.

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[95] As-Syyid Sabiq (403H/1983) Fiqh Sunnah, Darul Fikr, Lebanon, (4th edn) Vol. II, 289.

[96] Imam Al-Hussein, 'The South Circular, Dublin. Online at: https://www.irfi.org/articles_551_600_custody_of_children_shariah.htm

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IMPACT OF ARMED CONFLICTS ON THE PROTECTION AND CONSERVATION OF NATURAL WORLD HERITAGES :CASE OF VIRUNGA NATIONAL PARK.

ASSINGYA VICTOR*1 AND TAJUDEEN SANNI(LLD)**

Abstract

The article 2 of the Convention on the Protection of Word Heritage provides that "natural heritage can be natural sites or precisely delineated natural areas of outstanding universal value from the point view of science or conservation or natural beauty".[2] UNESCO's Word Heritage Convention (1972) sets out to protect the World natural and cultural heritage, in the Democratic Republic of Congo, Virunga National Park was inscribed on their list in 1979.[3] The Virunga landscape is home to some of Africa's richest biodiversity. Unfortunately, the area surrounding the Virunga National Park has also been the site of some of the continent's most intense social and political conflict.[4]The duty of protection and conservation of biological diversities in natural Worlds Heritage is primarily to the State government which has the responsibility of the protection of it territorial integrity. In DRC, Virunga National Park has been invaded by both foreigns and national armed groups since two decades. The failure of the State government to ensure it territorial integrity has engendered illegal exploitation of the fauna and the flora in this natural World Heritage site. Despite both, the ratification of Multilateral Environmental Agreements by the DRC government and some national rules relatives to the protection of environment such as the right to a healthy environment[5], the right to enjoy World Heritage Sites[6] and conservation of natural World Heritages, the implementation is still facing out to the continuity of both foreigns and national armed group's activities in Virunga National Park.

Introduction

The convention on the protection of Worlds heritage provides on it article 4 that "each State party to this Convention recognize that the duty of

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[2] Article 2 of the 1972 Convention on the Protection of Worlds Heritages.

[3] A. Craford& J. Bernstein, 'Multilateral Environment Agreements', International Institute of Sustainable Development, 2008, available at http://http://www.iisd.org/pdf/2008/meas accessed on 5/11/2018.

[4] ibid

[5] Article 53 of the Constitution of DRC (2006)

[6] Article 59 of the Constitution of DRC (2006)

ensuring the identification, protection, conservation, presentation and transmission to future generation of the cultural and natural heritage referred to in article 1 and 2 situated on its territory belong primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.[7]

This provision cited above confirmed the national government duty in the protection and the conservation of World Heritages sites because human activities have an impact on the environment. Each person has an ecological footprint; he is contributing to the environmental degradation by everything his doing. That is the reason why, in Virunga National Park, some species are in danger because of armed group's presence in this site.

Both principle 25 of the Rio Declaration and principle 17 of the Stockholm Declaration highlight the duty of the State to ensure peace and to control the environment resources notably, the principle 25 of the Rio Declaration provides :" Peace, development and environmental protection are interdependent and indivisible"[8] and princi17 of the Stockholm declaration stipulate: "Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environment resources.[9]

The implementation of these rules by the national government could be realisable after resolving the peace keeping issue in the Democratic Republic of Congo, especially in Noth Kivu province.

> Experience and scientific expertise demonstrate the prevention of the environmental harm should be the "golden rule" for the environment, for both ecological and economic reasons. It frequently impossible to remedy environmental injury: the extinction of species of fauna flora, erosion, loss of human life and dumping of persistent pollutants in to the sea, for example, creating irreversible situations. Even when harm is remediable, the costs of rehabilitation are often prohibitive. An obligation for prevention also emerge from the international responsibility not to the cause of

[7] Article 4 of the Convention on the Protection of Worlds Heritages.

[8] Principe 25 of the Rio Declaration

[9] Article 17 of the Stockholm Déclaration.

significant damage to the environment extra territorial, but the preventive approach seeks to avoid harm irrespective of whether or not there is transboundary impact or international responsibility.[10]

The Virunga National Park protection should also be considered as a golden rule by the DRC government since it is inscribed on UNESCO World natural Heritages and it biodiversity has a great impact on the global ecosystem.

Overview of the Virunga National Park in DR Congo

First of all, we should underline that the Virunga National Park is one of elder Parks in Africa; it was created in 1925 in the period of Belgium colonisation in Congo belge. It's situated in the North Kivu Province at the East side of D RCongo.

Virunga National Park is unique with its active chain of volcanoes and rich diversity of habitat that surpasses that of any other African park. Its range contain an amalgamation of Steppes, Savannas and plains, marshlands, low altitude and afro mountains forest belt unique to afro alpine vegetation and permanent glacier and snow on Mont Rwenzori whose peaks culminate in 5000 m height. The property includes the speculator massif of Rwenzori and Virunga mountains containing the two most active volcanoes in Africa.[11]

By it diversified relief with chain of volcanoes, mountain, steppes and savannas with wonderful landscapes, biological diversities with many rare species; Virunga National Park was a great source of budgetary takings in the DR Congo before it invasion by rebels groups during multiple war conflict in the country.

Virunga National Park offers the most speculator mountain landscape in Africa. Mt Rwenzori with it jagged relief and snowy summit, their cliff and steep valleys, the volcano of Virunga massif covered with an afro-alpine vegetation of trees ferns and lobelia and their slopes covered by dense forest

[10] NICOLAS Robinson, *Traning manual on International environmental law*, in " Pace law faculty publication", Pace university, 2006, pp.32-33.

[11] Virunga National Park, available on http://whc.unesco.org/uploads/activities/documents/activity-562-4.pdf[accessed on April 5, 2018]

are the place of exceptional natural beauty. The volcano which erupted at regular interval of few years constitutes the dominant land feature of the outstanding landscape. The park presents several others spectacular panoramas like the eroded valley in Sinda and Ishango regions. The park also contain important concentration of wild life, notably elephants, buffalo and Thomas cobs and the largest concentration of hippopotamuses in Africa, with 20000 individuals living on the banks of lake Eduard and along the Rwindi, Ruchuru and Semuliki rivers.[12]

The Unique characteristic of Virunga National Park, have been a primarily reason of tourist attraction during the 4 last decades before the different DRC's war. The sector of tourism doesn't realize generous benefits as it have been doing when the park was not yet invaded.

Virunga National Park is located in the center of Albertine Rift on the great rift valey. In the southern of the park, tectonic activities due to the extension of the earth's crust in this region has caused the emergence of Virunga massif comprising eight volcanoes, seven of which are located totally, or partially in the park. Among them there are two most active volcanoes of Africa notably Nyamulagira nearby Nyiragongo which between them are responsible for two fifth of the historic volcanic eruptions on the African continent and which are characterised by the extreme fluidity of the alkaline lava[13], the activity of Nyiragongo is of a word importance as a witness to volcanism of a lava lake: the bottom of catastrophic consequences for the local communities. The northern sector of the park include 20 percent of the massif Mont Rwenzori, the largest glacial region of Africa and the only true alpine mountain chain of the continent. Its border the Rwenzori mountain national park of Uganda., inscribe as Word Heritage, with which it share the "Pic Marguerite", the third highest summit of Africa 5, 109 m.[14]

Apart of the park, volcanoes are also touristic zones which are among the most visited natural sites in the World. The Nyiragongo volcano within the

[12] Ibidem

[13] Virunga National Park, available on http://whc.unesco.org/uploads/activities/documents/activity-562-4.pdf [accessed on April 5, 2018]

[14] Ibid

Virunga National Park still active and it last eruption was in 2002. The protection and security of these sites is primarily a state government duty on the territory of which they are located.

Due to it variation in altitude from 680m to 5,109 m, rainfall and nature of the ground, Virunga national park possesses a very wide diversity more than 2 000 premier plants species have been identified of which 10% are endemic to the Albertine Rift. The Afro Montana forest represents about 15% of the vegetation. The Rift Albertine also contains more endemic vertebrate's species than any other region of the African continent and the Park possesses numerous examples of them. The Park contain 218 mammal species, 706 bird species, 109 reptiles species and 78 amphibian species. It also serves to refugee to 22 primates species of which three are the great ape mountain gorilla (gorilla beringei beringei)[15], the Easter plain gorilla (gorilla beringei graueri) and the Eastern chimpanzee (pan troglodyte schweinfurthi), with a third of the world population of mountain gorillas. [16]

The savannas zone of the park contain a diverse population of ungulates and the density of biomass and wild life is one of the highest of the planet (27,6 ton Km^2). Among the ungulate there are certain rare animals such as the okapi (okapi johnstoni) endemic to the Democratic Republic of Congo, and the red forest duiker (cephalofus rubidus) endemic to Mont Rwenzori. The park also comprises tropical zones essential for the wintering of Palaearctic avifauna.[17]

So to speak, it was purely normal for the UNESCO to inscribe the Virunga National Park on World's natural Heritages sites for many criterions which it satisfies. The biological diversity added to the unique relief and landscape of the Virunga national Park are determinants of it originality from other African parks. As it the old park in Africa, the conservation and protection of this World Natural heritage should be among prior preoccupations of the Democratic Republic of Congo government.

[15] Ibid

[16] Ibid

[17] Ibid

1. Integrity

The park is characterized by a mosaic of extraordinary habitats that extend over 790 000 ha. The property is clearly delineated by 1954 ordinance. The wealth is well protected despite the economic and demographic challenges to its periphery.[18]

The park contain two highly important ecological corridor as its connect the different respective sectors. The Muaro corridor connect the Mikeno sector and the Nyamulagira Sector, the West side connect the North to the center sector of the Virunga Massif. The presence of the Queen Elisabeth national park a protected area contiguous with Uganda, also constitute an ecological land and corridor connecting with the center and the north sector.. Also Lake Eduard forms an important aquatic corridor.[19]

Nowadays, the integrity of the Virunga National Park is still threatened by illegal exploitation of natural resources and illegal trade of some rare species within it. The deforestation highest is profiting to some charcoal mafia who are still exploiting the forest by cutting trees which are most important components of a good environment in the Park. The illegal trade of ivory is intensifying the elephants poaching in the Park by some members of armed groups.

2. Protection and management requirements

The property has benefited from the Status of national park since 1925. Its management authority is the Congolese Institute of Nature and conservation (ICCN) the body which has lost numerous of agents killed on active service. The park encounters management's problems. To assure the perpetuation in resource value of the property, the park must be managed on a scientific basis and posses a management plan which will facilitate, among others, a better delineation of the different zones. Strengthened surveillance is required to assure the integrity of the park boundaries. It would reduce

18 Virunga National Park, available on http://whc.unesco.org/uploads/activities/documents/activity-562-4.pdf[accessed on April 5, 2018]

19 ibid

poaching, deforestation, and pressure on the fishery resources (which risk increase) notably activities by isolated armed groups. To this end, the strengthening of staff and availability of equipment as well as the training of the park staff are of primary importance.[20]

In addition to these above cited recommendations, the number of Park staff should be increased as long as their actual number is unable to control the entire territory of the Virunga Park notably 790 000 ha. The availability of equipment is also an important factor in the protection and the conservation of the Park since, guardians are not facing only to track civilians poachers or charcoal mafia, but armed groups which are using guns to impose their integration in the Virunga National Park.

Improvement and strengthening of the administrative and surveillance infrastructures would contribute toward reducing the pressure on the rare and threatened species such as the mountain gorilla, elephants, hippopotamuses and chimpanzee. In view of the important increase of the population, the establishment of buffer zone in the entire sector is indispensable and a matter of urgency. Another priority is to establish a trust fund to guarantee sufficient for the long term protection and management of the property. The promotion of a local and controlled tourism could increase the income and contribute toward new regular financing for the maintenance of the property.[21]

The instauration of a good leader ship is essential for to ensure security in the Virunga Park zone which have been invaded by war conflicts since about two decades. That is the reason why the protection and conservation issues look hard to understand and difficult to solve in Virunga National Park.

The impact of conflicts on Virunga National park

The illegal presence of members of armed group constitutes the most frequent reason of illegal exploitation of natural resources in the Virunga National Park. By their presence, both the fauna and the flora are threatened since they are exploiting the forest by building houses, searching for

[20] Ibidem

[21] Virunga National Park, available on http://whc.unesco.org/uploads/activities/documents/activity-562-4.pdf[accessed on April 5, 2018]

firewood, poaching and trading some rare species such as elephant meat, ivory and some animal's pelts.

Environmental threats to the Virunga landscape, prior to the recent conflict, were numerous: widespread deforestation driven by energy and construction demand feeble environmental legislation; weak institutional capacity; inappropriate agricultural practices, the degradation of the environmental inside protected areas, posing a threat to biodiversity; and inadequate approaches to environmental education and awareness.[22]

Direct and Indirect impact of armed conflicts on Biodiversity

Measuring the environment losses suffered by the Virunga National Park over this period is difficult due to the absence of reliable data before the wars, and the difficulty of collecting such data during times of insecurity.[23] Despite these constraints, some observations can be made that point toward significant direct and indirect impact resulting from the local level rebellion and international armed conflict that have plagued the region since the 1980s. According to Kalpers and Mushenzi (2006), these include[24]:

Direct impacts on biodiversity:

- Direct and often deliberate destruction of the environment (i.e. deforestation or land clearing to limit or stop ambushes);
- The use of park-based natural resources to finance conflicts; and
- Movement and settlement of refugees displaced by conflicts, and the extraction of park based natural resources by theses populations.

Indirect Impacts:

- Logistical constraints and safety threats to park staff;

[22] Karpers, J. (2001) "Volcano under siege: Impact of a decade of armed conflicts in the Virungas", *Biodivesity Support Program,* Washington, DC.

[23] Hart, T. And R. Mwinyihali (2001) "Armed Conflict and Biodiversity in Sub-Saharan Africa: The case of Democratic Republic of Congo", *Biodiversity Support Program,* Washington DC.

[24] A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf [accessed April 10 2018]

- Financial constraints as funders withdraw in the face of armed conflict and tourism receipt decrease; and
- A shift in priorities as national authorities let environmental considerations slip down their list of priority issues and resources are diverted to the humanitarian crisis.

Threat to the park pre-date the 1994 Rwandan refugee crisis. Mobutu's decision to end single party rule in 1990 led to the formation of a number of rebel groups in Virunga National Park Northern Sector, patrol posts were attacked, guards and their families killed, looting increased and IZCN (ICCN's former name when the country was known as Zaire) increasingly lost control of the north of the park.[25] This insecurity prompted UNESCO in October 1993 to conduct an evaluation of the park and subsequently place Virunga National Park on the list of Word Heritage Sites in Danger, a decision taken before the Rwandan genocide.[26]

In neighbouring Rwanda, the January 1991 offensive of the Rwandan Patriotic Front (RPF) in the northwest of the country signalled the first time the Virunga massif become a theatre of military operations.[27] Strategists realized that the forest zone between Rwanda, Uganda and DRC provided cover and retreat option, and as the RPF began the cover of Sabinyo volcano (which lies at the border of the three countries) to move around the region, the transboundary area became the site of infiltration (by the RPF) and searches (by the Rwandan Armed Forces, FAR). Hundred of mines were laid in the forest, particulary along the Rwanda-DRC border.[28]

III.2The Rwandan refugee crisis impact (1994-1996)

The environment and protected areas were not severely affected during the hundred days of Rwanda's genocide in1994. However the victory of

[25] Kalpers, J. And N.Mushenzi (2006) 'les annéees de crise (1992-2003)' quoted in Languy, M. and E. De Meraude (eds) (2006) Virunga : Survie du premier parc d 'Afrique. Lannoo, Tielt, Belgique.352pp.

[26] Multilateral Environments Agreements: Case Study of the Virunga National Park, at 15, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf [accessed April 10, 2018]

[27] Kalpers, J. And N.Mushenzi (2006) 'les annéees de crise (1992-2003)' in Languy, M. and E. De Meraude (eds) (2006) Virunga : Survie du premier parc d 'Afrique. Lannoo, Tielt, Belgique.352pp.

[28] ibid

RPF(Rwandan Patriotic Forces) triggered the mass displacement of two million Rwandan, mainly hutu fearing Tutsi retributions; many fled to Zaire (DRC) across the Virunga, with livestock in tow. On July 15 alone, 500.000 arrived in Goma, with a further 300.000 following in the few days.[29]

These refugees came to Goma seeking water, firewood and food, all things readily available in the Virunga Park.[30] Five refugee camp were constructed (kibumba, Mugunga, Katale, Lac Vert and Katindo), and by the end of 1994, 72.000 refugee were settled on the border of the park.[31] They would stay there for over two years, and have a significant impact on the Southern Sector of the Park.[32]

Key impacts were:

- **Deforestation**: Cutting and collecting firewood for building and cooking quickly became a threat to the park. At the beginning of the crisis, 40.000 people were entering the park every day to look for wood; this figure went as high as 80.000 on certain days over the next 27 months. Within two years, 105 Km^2 had been affected by deforestation and 35 K m^2 completely cleared.[33]
- **Poaching**: With many refugees having retained their weapons and ammunitions, poaching increased in the Southern Sector, particulary attacks on antelope, elephants and buffalo.[34]

[29] Karpers, J. (2001) "Volcano under siege: Impact of a decade of armed conflicts in the Virungas", *Biodivesity Support Program*, Washington, DC.

[30] Kalpers, J. And N.Mushenzi (2006) 'les annéees de crise (1992-2003)' in Languy, M. and E. De Meraude (eds) (2006) Virunga : Survie du premier parc d 'Afrique. Lannoo, Tielt, Belgique.352pp.

[31]Ibid

[32] A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, , available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

[33] Kalpers, J. And N.Mushenzi (2006) 'les annéees de crise (1992-2003)' in Languy, M. and E. De Meraude (eds) (2006) Virunga : Survie du premier parc d 'Afrique. Lannoo, Tielt, Belgique.352pp.

[34] A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, , available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

- **Security**: The security situation deterioted**,** primarily due to the presence in the camps of ex-Rwandan armed Forces soldiers, and Interahamwe and Hutu power rebels (those responsible for the genocide). IZCN (Institut Zairois pour la Concervation de la Nature) the former congolese wildlife authority, lost complete control of portions of Nyamulagira and Mikeno Sectors.[35]
- **General disorder**: Illegal activitie in the park as result of period's disorder.[36]
- **Fall in tourism receipts**: the refugee crisis and the state of insecurity led to a significant drop in tourism to Virunga National Park.[37]

The fact that Rwandan and not Congolese were primarily responsible of the environmental destruction around the Park generated significant tensions between the local populations and the refugee camps. In addition, the international community's shift in focus from conservation activities to the humanitarian crisis after a feeble response to the Rwandan genocide was soon matched by president Mobutu, and environmental destruction ceased to be considered a priority area during the crisis.[38]

The great consequence of the Rwandan crisis on the Virunga National Park is the establishment of the FDLR (Forces Democratique pour la Liberation du Rwanda) defence within the park and the increase of deforestation and poaching which are their daily activities.

III.3 The FDRL impact on the Virunga National Park.

The FDLR (Force Démocratique pour la Liberation du Rwanda) is the most influent armed group in the Virunga National Park which was created by Rwandan former combatants after the refugees crisis caused by the genocide

[35] Ibid

[36] Ibid

[37] Ibid

[38] Hart, T. ,and R. Mwinyihali (2001) "Armed Conflicts and Biodiversity in Sub-Saharan Africa: The Case of the Democratic Republic of Congo", *Biodiversity Support Program,* Washington DC .

in 1994. Apart of FDLR, others armed group are doing illicit exploitation of natural resources in Virunga park, but the FDLR is the most supported and the park territory under its control is bigger than others armed groups.

An illegal charcoal cartel is helping to finance one of the most prominent militia in central Africa and destroying part of Africa's oldest national park. Nursing alliance with Congolese army and the Democratic Forces of Liberation of Rwanda (FDLR) is a kingpin in Africa's great lake regions organized crime network and continuing to threat human security. For years, the group has helped sustain its activities by exploiting valuable natural resources, including minerals, ivory, fish, and marijuana. But one of the FDLR successful revenue generating businesses is the illicit charcoal trade in Democratic republic of Congo's cherished Virunga National Park.[39]

By doing this illicit charcoal trade, the increase of deforestation is evident in the Park and it constitute immediately an imbalance into the ecosystem since some species are becoming endangered and the flora also threatened.

Headquartered deep in the remote southern sector of Virunga, the illegal charcoal trade is lucrative. Some have estimated it has an annual value of up to $35 millions. The FDLR and it collaborator have developed tremendous busness acumen, increasingly motivated by profit incentives and enabled by high-level state cover. As one park ranger told enough, "armed group have turned Virunga into their sanctuary". The FDLR is under sanction by both the United State and the United Nations, and it charcoal trafficking activities constitute an ungoing violation of both sanction regimes.[40]

The deforestation of the park have been used by FDLR as a mean of financing the war into the park, they have established a crime network by protecting their charcoal trade business. Unfortunately, some local and national politic authorities are implicated in this illegal charcoal trade, that why the eradication of the FDLR in Virunga National Park have taken time.

[39] The mafia in the Park, a charcoal syndicate is threatening Virunga, Africa's oldest National Park, available on https://enoughproject.org/reports/mafia-park-charcoal-syndicate-threatening-virunga-africas-oldest-national-park[accessed 20 May 2018]

[40] Ibid

The corruption of politicians by these rebels has created an obstacle to the cessation of deforestation in the park.

The illegal charcoal trade is also a serious threat to regional human security. By providing to the FDRL and other armed groups, including Congolese State actors it help sustain patterns of corruption and violence. "It's not just FDLR", a source who requested to remain anonymous told enough. "Its police, policiticians and businessmen. It's a big mafia"[41]

III.4 Impact of others armed groups

- **The Allied Democratic Forces(ADF)**

ADF is a Ugandan Rebel group based along the Ruwenzori Mountain of eastern DR Congo. They have been living also in the savannas north of Lake Edward and in the rainforest of the lower Semuliki river for several decades[42]. Most of its members are Islamists who want to establish shari'a law in Uganda. The ADF was formed around 1998 by a merger of various streams of discontented sectors of Ugandan society which felt alienated after the overthrow of Idi Amin. The group appear to be receiving external funding from unknown sources. [43]

The presence of the ADF in Virunga National Park is a threat to the conservation and the protection of the environment since they operate by kidnapping some tourist, killing park rangers and doing illegal exploitation of natural resources into the Park.".

- **Mai-Mai**

The Mai-Mai is mixed groups that fight among themselves as much as they fight with the government forces. The movement has it origin in the 1960 s war, but only really come together after the beginning of the second Congolese civil war in 1998. The main groups that affect rangers in the

[41] Ibid

[42]Militia Groups, Virunga National Park, available on https://virunga.org/archives/militia-groups/[accessed April 5 2018]

[43] Militia Groups, Virunga National Park, available on https://virunga.org/archives/militia-groups/[accessed April 5 2018]

Virunga National park are the Mai Mai Pareco, Mai Mai mazembe, Mai Mai Cheka, which members have been killing park rangers since 1998.[44]

The most frequent activity that is done by Mai Mai in the Virunga National Park is poaching and illegal exploitation of natural resources. Up till now, the real purpose of these groups is not well defined since they can fight any other armed group and sometime support the government. Their presence is prejudicial to the conservation of the biodiversity in the Park since they still doing illegal exploitation of natural resources.

- **Mouvement du 23 Mars (M23)**

In the South, the M23 was born of the CNDP which used to be under the leadership of the rebel General Laurent Nkunda, currently under house arrest in Rwanda. It came into being in April when former members of the CNDP mutinied under pretext that the march 23 2009 agreement that ended the CNDP war of 2007 and 2008 were not respected. Although there are rebellions against the government, there is an understanding on all sides that the park need to be protected and that the park's rangers must continue their work in the area that are controlled by the M23. This is fairly unique, partly as a result of Virunga s status as a Word Heritage site offering legitimacy to rangers claims to be neutral in the current, because park is gradually being rebuilt as a government institution genuinely trying to fulfil it role.[45]

M23 operations have also made a negative impact on the Virunga National park for they occupied a part of the virunga national Park for about three years. Even though this armed group is already dissolved, traces left by it are still visible in the north Kivu province especially the Virunga National Park. They participated also in the deforestation of the park by doing illegal trade of charcoal and killed some animal in poaching for their daily food.

IV. Challenge faced by the government in the protection and the conservation of VNP

[44] Idem

[45] Militia Groups, Virunga National Park, available on https://virunga.org/archives/militia-groups[accessed April 5 2018]

As written above, the duty of protection, conservation and control of World Heritages Sites is primarily attributed to the State in which they are located. Nevertheless, the Democratic Republic of Congo is facing too many challenges for to ensure the protection and the conservation of virunga National park such as :

- The invasion of the park by Rwandan genocide refugees;
- The establishment of FDLR headquarter into the Park;
- The illegal exploitation of natural resources by FDLR and others armed groups;
- The corruption of some high paced politicians dealing with armed groups ;
- The business of weapons exchanged with some natural resources such as ivory and some pelts.
- The support of armed group by both national and foreigner's politicians.
- The reduced number of rangers in the Park and
- The lack of ranger's equipments since they are facing to armed groups in the park.

V. International community and DRC government actions for the conservation of the Virunga National Park.

The management of the Virunga national park is done by ICCN (Institut Congolais de la Conservation de la Nature) which is directed by Emmanuel de Merode. Through this institution, the duty of conservation and protection of World heritages Sites in RDCongo by the government is supposed to be undertaken.

The Congolese Institute for the Conservation of the Nature (ICCN) is dealing with some United Nations agencies such as the united nation Economic Social and Cultural Organization (UNESCO) and the United Nation Environment Program (UNEP) for the implementation of international environmental law rules in the protection and conservation of World Heritages sites in DRC.

Some Non Governmental Organizations are also dealing with the ICCN in it mission of nature conservation by ensuring the protection and conservation of some rare species and endangered species in the Virunga National Park such as the mountain gorilla which are protected by the World Wild Found .

As cited above, both the United Nations and the United States have provided sanctions to the FDLR for it charcoal trafficking activity which constitute an ongoing violation of both sanction regimes.

The European parliament resolution 2015/2728(RSP) of 17 December 2015 on the protection of Virunga national Park in the Democratic Republic of Congo, provides at it article 10 that " The European Parliament commends the management authorities within the park for their effort to ensure a sustainable income from natural, solar and hydro energy generation, which improve the income of much of the local population without destroying the natural area and which is within the permitted development activities for a world Heritage Site.[46]

By the implementation of this resolution which has started on the ground with building of some hydroelectric barrage into the park, the charcoal traffic will decrease and it will be so for the illegal deforestation in the park.

The article 11 of the European parliament resolution cited above stipulate that: " The European parliament points out that, since 1990, conflict with armed guerrillas who lives inside and around the park have resulted in serious breaches of human rights and much of the violence; point out that the Democratic Forces of the Liberation of Rwanda, a group of guerrilla accused of committing atrocities during the genocide that took place in Rwanda in the spring of 1994 and that also spread to eastern DRC, has been living in the park since 1996 and it still hiding outcross the border in Virunga while Mai Mai militia are also reported to have killed, raped and injured many people and to have destroyed villages within the boundary of the park; urges the DRC government to disarm the rebel and to restore security in the park region, regret furthermore that the repression of human right activists and journalists in the DRC has increased; calls once more on the DRC

[46]Article 10 of European Parliament Resolution, 2015/2728 (RSP),

government, to recognize and respect freedom of the press and media and uphold the rule of law and human rights."[47]

The DRC government have launched some military operation for to disarm armed group which are established in the Virunga national park such as :

- Operation Kimya
- Operation Sukola I
- Operation Sukola II
- Operation rwenzori ,...

But thus far, the FDLR , the ADF, the Mai Mai are still invading the Virunga National Park and human rights are still being violated by them in this region. Efforts of the DRC government in the protection and conservation of this World Heritage Site are facing to the support of armed group by some corrupted national authorities and foreigners governments.

VI. Multilateral environmental agreements and State's responsibility in the protection of environment and world heritages sites

VI. 1 Multilateral Environmental Agreements

The State of DRC is part of most of Multinational environmental agreements relative to the protection of environment. The duty of implementation of these rules is primarily to the State government which unfortunately have failed to ensure the integrity of it territory invaded by both foreigns and nationals armed groups in Word heritages sites such Virunga National Park.

Despite of the proliferation of relevant environmental conventions and the DRC's participation in them, environmental destruction continues in Virunga park. Corruption has undoubtedly played a role, but the near-collapse in governance has been brought about in part by chronic local and refugee population, its habitats destroyed by overfishing and charcoal production, its animal killed for meat and ivory. Conflict has significantly

[47] Article 11 of European Parliament Resolution, 2015/2728 (RSP),

contributed to the fact that the UN's environmental conventions are not able to achieve their stated objectives in the park.[48]

The issue of corruption is an obstacle to the eradication and the disarmament of rebel groups in the virunga National park since some political authorities are dealing with them in the illegal exploitation of natural resources such deforestation and illicit charcoal business.

The principle 17 of Stockholm declaration provides that "Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources.[49]

According to the principle 24 of the Rio Declaration (1992), "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflicts and co-operate its further development, as necessary.[50]

The development and the peace are two complementary factors which cannot be separated in the State issue of protection and conservation of environment. The government issue of protection of national integrity depend the most to the peace and security on the national territory.

This is the reason why, the principle 25 of the Rio Declaration provides: " Peace, development and environmental protection are interdependent and indivisible."[51]

Under the Convention on Biological Diversity, government are required to develop national biodiversity strategies and actions plans, and integrate them into broader national plans for environment and development. Plans are centered on key sectors; each relevant to VNP and each impacted by conflict: forestry, agriculture, fisheries and energy. Increasingly, biodiversity conservation is being understood as a critical dimension of national security, especially where the illegal exploitation of biodiversity resources is fuelled by

[48]A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, , available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

[49] Princple 17 of the Stockholm Declaration, 1972

[50] Principle 24 of the Rio Declaration, 1992.

[51] Principe 25 of the Rio Declaration

conflict and conversely, where the sustainable management of the resource base can be an important tool for building peace and cooperation.[52]

These element highlighted above are reconfirming the role of the national government in the biodiversity protection. The great issue faced by the DRC is the security within protected sites and the lack of dialogue between belligerent with the state government for to ensure the respect of International environmental law within the protected sites.

The DRC ratified the Convention of Migratory Species of Wild Animals in 1990 (CMS), and the convention is important to Virunga National Park given the park's position. Its birdlife is rich primarily due to the park's position at the confluence of central and east Africa birdlife, with any migratory species either wintering in the park or stopping there during their migrations.[53]

Migratory species are still threatened since the illegal traffic of charcoal is increasing deforestation which makes difficult the guaranty of a good environment to migratory species.

The CMS has proven itself as a vital tool for the protection of the mountain gorillas (listed in the appendix 1 of the convention as an endangered species, and subject of the gorilla agreement), which are listed as appendix 1 species, meaning that signatory countries must work to conserve and restore their habitat. [54]

In DRC, the World Wildlife Found Program is dealing with the State government in the protection of the mountain gorillas that are inscribed on the list of endangered species in the World despite of challenges due to insecurity in the Virunga Park.

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[52] A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

[53] Languy M. And E. de Merode (eds) 2006 *Virunga :Survie du premier parc d'Afrique.*Lanoo, Tielt, Belgique. 352p.p

[54] A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, p.35, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

The illegal trade in endangered species worth an average of US$20 billion each year is now the third largest contraband business in the word, after the trade in illegal drugs and weapons.[55] The UN Convention on the Illegal Trade in Endangered Species of Wild Fauna and Flora (1973, CITES), was established to curb this trade.[56]

In the DRC, a collapse in anti poaching enforcement and significant increases in corruption after two decades of conflict have meant that the illegal trade in animals and products like ivory is typified by the high return, the relative low risk of capture, and weak, if not non-existent, enforcement. While CITES has helped to raise awareness regarding to impact of illegal trade in endangered species, it still has shortcomings, which are relevant to the DRC.[57]

The implementation of the above cited convention is facing to issues of corruption in the country that makes problematic the eradication of illegal trade of rare species. In addition to the corruption, the traffic of rare species is most frequently gained by armed group that are still having control of some spaces within the Virunga national Park.

Adopted in 1971, the Convention on Wetland of International Importance, also known as the Ramsar Convention, promote the conservation and wise use of wetland through local, regional and national actions and international cooperation. Under the convention, contracting parties are required to designate at least one wetland at the time of accession for inclusion on the list of Wetland of International Importance (the "Ramsar

[55] Giovanini, Dener(2006) "Taking Animal Trafficking Out of the Shadows: RENCTAS Uses the Internet to Combat a Multi-Billion Dollar Trade", Vol.1, n°2,Pages 25-35, http://www.mitpressjournal.org/doi/abs/10.1162/itgg.2006.1.2.25?journalcode=itgg[accesssed September 29, 2008] quoted in Multilateral Environments Agreements: Case Study of the Virunga National Park,2008,p.36 , available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

[56] Ibid

[57] A. Craford& J. Bernstein, 'Multilateral Environments Agreements: Case Study of the Virunga National Park', international institute of sustainable development, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

List") and to promote it conservation. The DRC ratified Ramsar in 1996, and in that year Virunga National Park was designated a Ramsar Site.[58]

As a Ramsar site, Virunga National Park deserves a specific attention on challenges that are making obstacles to the conservation and the protection of it biological diversity.

In its second paragraph, the European parliament resolution 2015/2728 RSP on the protection of the Virunga National Park in the Democratic Republic of Congo; "Deplore the fact that Virunga National Park has also became one of the most dangerous places in the world when it come to wildlife conservation, note with deep concern threat armed groups have been involved in illegal exploitation of park's natural resources through mining activities and charcoal productions used both to sustain their military operations and for personal gain; deplore; also, the fact that armed groups have been involved in large scale poaching for food purposes and for war sustaining trade in ivory and bush meat; note with concern furthermore, that poor discipline, irregular pay and lack of food have resulted in military personnel becoming increasingly involved in illegal activities, including artisanal mining, charcoal production and wildlife poaching; note that while the park is in an area of great wilderness, its two million acres (790 000 hectares) have huge protections problems, especially with limited government funding; note that on 15 April 2014, the Chief Warden, Belgian prince Emmanuel de Merode, was seriously injured by three gunmen and that more than 140 rangers have been killed in the Park on active service in the past decade,"[59]

For conservationists working in the region, the MEAs hold little practical value on the ground. Consultation in the area indicate that in many cases, people working and living in the area have limited or no knowledge of environmental laws, both domestic and international; this extend to local, provincial and international authorities; ICCN; guards; and magistrates,

[58] Ibidem

[59] European parliament résolution 2015/2728 RCP available on http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0475

lawyers and judges.[60] For those aware of the MEAs, they are seen useful in theory, but the practical ability to implement them on the ground is lacking, as the State and ICCN have little capacity to meet MEA conservation objectives. Conservation lobbyists working on the ground in VNP to identify and report infractions on domestic and international law also have a hard time working with the convention. Oftentimes they face an uphill; chronic corruption has meant to be protecting against them particularly with regard to trade in animal and their product[61]

This is not to suggest that multilateral environmental agreement have had no impact on park. The 1979 designation of VNP as a World Heritage Site brought international attention and tourism to the park and it unfortunate placement on the list of World Heritage Sites in Danger in1994 brought more international attention to the environmental crisis. Trilateral initiative surrounding transboundary resource management, particularly with regard to mountain gorilla conservation, have helped protect the species while building relationship and trust between DRC, Rwanda and Uganda. However the conventions themselves drafted and signed before policy makers and researchers had started to link about environmental impact and drivers of conflicts, can and should do more to protect VNP against the threats posed by conflicts.[62]

VI.2 DRC's government responsibility on the protection of natural World Heritages.

Implementation and enforcement is important for the effectiveness of national environmental legislation. Where national environmental legislation calls for further regulation it is important for the government to enact the required regulations and to ensure enforcement mechanisms are in place. It is also expected that the government would put in place the right structure, system and tools, skills, incentives, strategies, coordination and partnership for all stakeholders, and assign roles and responsibility to competent staff

[60] Personal interview, Goma, April 2008 in Multilateral Environments Agreements: Case Study of the Virunga National Park, at 23, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

[61] Ibidem

[62] Multilateral Environments Agreements: Case Study of the Virunga National Park, p. 24, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

members to enforce laws and strengthen the legal and institutional framework for environmental management. It is equally important for the government to promote and to monitor compliance, and evaluate the effectiveness of national legislation to ensure that enforcement requirement are in place, laws are enforceable, and they do deter violations.[63]

As written above, armed conflicts impacts on the conservation and protection of biodiversities in the Virunga National park in DRC are numerous and constitute the biggest issue in the environmental protection in this country. The government have shown his inability to ensure its territorial integrity over the two past decades.

The article 52 of the constitution of the RDC provides that: "All Congolese have right to peace and security both nationally and internationally. No individual or group of individual may use the portion of the national territory as a base of subversive or terrorist activities against the Congolese State or any other State"[64].

In addition on this article above, the article 53 stipulates: "Everyone has the right to a healthy environment conductive to their full development. She has the duty to defend it. The State ensures the protection of the environment and the health of the people."[65]

Unfortunately, the implementation of these constitutional provisions is not noticeable on the territory of DRC. More than 15 armed groups have been invading the Virunga National Park since about three decades. They are threatening the protection of environmental biodiversities into the park by poaching, deforestation, fisheries and others activities that are illegal in this natural world heritage inscribed in 1979 on the list of UNESCO's world heritages.

[63] Nicholas A. Robinson *Traning Manual on International Environmental Law,* in "Pace Law Faculty Publications",Pace University, 2006, p.18.

[64]Arcticle 52 of the Constitution of DRCongo 2006

[65] Ibid Arcticle 53

According to the article 59 of the some constitution: "All Congolese have the right to enjoy the common heritage of Humanity. The State has a duty to facilitate its enjoyment."[66]

Virunga National Park in North Kivu, an eastern DRC's province, is among more dangerous zones for travelers and tourists because of rebel groups which are still operating within. Either civilians or guardians are attacked and some of them are killed into the Park. The most recent attack against rangers was in April 2018 when six rangers were killed during an ambush in the central sector of the park.

The article 69 of the Democratic Republic of Congo constitution provides: "the president of the republic is the head of State. He represent the Nation and he is the symbol of national Unity. It ensures the respect of the constitution. It ensure, by it arbitration, the regular functioning of the public authorities and the institution as well as the continuity of the State. It is the guarantor of national independence, territorial integrity, national sovereignty and respect for international treaties and agreements."[67]

The national integrity of the DRC have been violated for about three decades now, the State's government has proved it inability to ensure the territorial integrity by disarming rebel groups who are invading world heritage sites such as Virunga national park. This is the reson why five UNESCO's world natural sites are in danger on its territory. This is an obstacle to the biodiversity protection and the sustainable ecosystem management.

VII.Recommendations

- The DRC government should resolve the crisis of leader ship for to establish leaders who are able to eradicate corruption and to plan armed mission that can disarm rebel groups in the Virunga National Park.
- The government should focus it priority to finance security forces for to ensure the territorial integrity of the State and

[66] Ibid Arcticle 59

[67] Arcticle 69 of the Constitution of DRC (2006)

therefore to protect and conserve World Natural heritages which are many on it territory.

- There is also a need to enlarge the number of rangers in the Virunga National park, to increase the budget for the conservation mission since they are still facing to equipments' deficiency.
- There is a need to launch a military operation against FDLR which constitute the most dangerous threat on the Virunga National Park.
- There is a need to finance more projects for the building of hydro electrical barrages for to avoid the deforestation in the region of virunga national park.
- The government should ensure it State territorial integrity by riposting to any tentative of invasion or the slightest presence of illegal armed group on it territory for to protect World heritages sites and to prevent violations of human Rights.
- There is a need to respect the liberty of media which are still reporting violation of international environmental law rules within the Virunga National Park.

Conclusion

Armed conflicts in the Democratic Republic of Congo have been threatening environmental biodiversities in the Virunga National Park since about two decades and the State government's duty to protect this natural world heritage have not been assumed because of invasion of both foreigners and national armed groups which are exploiting illegally this site's resources.

Presently, five of the 31 sites on the list of World Heritages in Danger are found in DRC: Garamba National park, Kahuzi-Biega national Park, OkapiWildlife Reserve, Salonga National Park and Virunga National park. All are on the list because of threat posed by armed conflict. With 16 percent of the world's sites in danger, the DRC therefore has more threatened, globally important heritage area than any other country. This should position

the country as one of particular interest for UNESCO and the Convention Secretariat, and one where their energy and attention should be focused.[68]

By proving its inability to protect the Virunga National park biodiversities and to ensure the right to a healthy environment to all citizens, the Congolese government is violating both Congolese constitution and the Convention concerning protection of World Heritages. The article 4 of the Convention concerning the Protection of World Heritages:" Each State party to this Convention recognize that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to article 1 and 2 and situated on its territory, belong primarily to that State. It will do all it can to this end, to the utmost of its own resources and , where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain"[69], and the article 53 of the DRC's constitution provides "Everyone has the right to a healthy environment conductive to their full development. She has the duty to defend it. The State ensure the protection of the environment and the health of the people"[70]

According to principle 24 of the Rio declaration, "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further necessary".[71]

The States government of DRC has a great part of responsibility in the protection and conservation of this site which is first part of it territory before being inscribed to the list of UNESCO's natural world's heritages. The eradication of illegal armed groups is a government duty because the territorial integrity of the State must be respected and ensured by the government of every sovereign State.

[68] Multilateral Environments Agreements: Case Study of the Virunga National Park, p.30, 2008, available on http://www.iisd.org/pdf/2008/meas_cons_conf_virunga.pdf[accessed April 10 2018]

[69] Article 4 of the Convention for Protection of World Heritages

[70] Article 53 of the DRC constitution

[71] Principle 24 of the Rio Déclaration

The ratification of multilateral environmental agreements by a state doesn't suffice when the state government is not making effort for a good implementation of provisions of multinational agreements in it domestic law.

MODELS OF PETROLEUM OWNERSHIP IN UNITED STATES, NIGERIA AND UGANDA

SAWABA ABDULHADI AHMAD*[1]

Abstract

The article conducts a jurisprudential examination of the various petroleum ownership models with particular reference to Uganda, United States of America and Nigeria with reference to relevant legal and policy instruments..

INTRODUCTION

Natural resources, worldwide are gifts of nature and an endowment of comfort that makes the existence of mankind complete. As nature's priceless gift to man by God and, because nature's endowment of these resources are without reference to people or nations, the subject of ownership and control of these resources has been the remote, if not the immediate, cause of great wars and human tragedies. The scramble for partition of Africa at the Berlin Conference of 1884, the Boer wars of South Africa, the institution and sustenance of the obnoxious apartheid system of South Africa, even Hitler's Second World War, apart from its much-vaunted desire to create a master Aryan race, had it sole motivation in mind of these mighty Nations which is of course the economic domination.

Unfortunately, these resources have been identified as playing key roles in triggering conflicts, and, all through history, the struggle for possession and in contemporary times, the desire of the industrialized North in continuing to do business with developing countries, apart from finding sales outlets (markets), is to exploit and take the natural resources of these countries to their maximum benefits. The possession of mineral resources is therefore crucial to a nation's wealth and well-being. Thus, the ownership and control of such resources are issues that cannot be taken for granted.

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Definition of Ownership

Ownership, is the right or state of being an owner. His business interest include ownership of a county newspaper.[2] Legally, ownership connotes the rights or interest of an owner.[3] Ownership within the meaning of petroleum refers to the "exclusive rights to explore, search, and drill for produce store, transport, and sell petroleum within the designed acreage for a specified number of years.[4] Ownership of petroleum, within its conceptual meaning refers to the totality of rights to use or control a mineral resources.[5] Historically, in the colonial era, oil companies operated and were allowed to exploit mineral resource without due regard to the rights of indigenous Africa. The exploited countries raised their concern to the United Nations sometimes around 1960s. In response to this, various instruments were passed, by the United Nations General Assembly (UNGA).[6]

The above instrument was passed on the 14th December, 1962 which recognized the countries Permanent Sovereignty over Natural Resources. This, was as a result the Commission on Permanent Sovereignty over Natural Resources which the United Nation mandated it to make a full survey of the status of permanent sovereignty over natural wealth and resources as the basic of self-determination.[7]

The Commission came up with recommendations that, due regards should be given to the rights of and duties of states under international law and to the importance of encouraging international co-operation in the economic development of developing countries.[8] Another Instrument was the UNGA Resolution of 3201 of IST May, 1974 which adopted and recognized New

[2]. https://dictionary. Cambridge.org >available at www. Wikipedia.wiki.org. accessed on the 13/11/2018 around 12:35 am.

[3]. https:/www.merriam-webster.com > own available at www.wekipedia.org./wiki/ accessed on 13/11/2018 around 12:48 pm.

[4]. Abu Dhabi Concession agreement art 34 reprinted in International petroleum Agreement at 1-18-1-19 in Taxes International Law Journal (vol. 24:13)

[5] Ernest E. Smith; International Petroleum Transaction; Rocky Mountain Law Foundation;9191 Sheridon; (2010) 3rd edition Page 72.

[6] Resolution 1803 of 1962.

[7] UNGA Resolution 0f 12 December, 1958.

[8] Ibid.

International Economic Order based, on equity, sovereign equality, interdependence, common interest and cooperation among all states, irrespective of their economic and social systems which shall correct inequalities and redress existing injustice. [9]

The above instruments have shaped the then existing nation of use and control of natural resources which in it the IOC ere not paying any royalties to the Host Countries even where they paid such payments were minimal. This provision is in line with Article 2 of the United Nations Charter which recognized that, every people and states have the inalienable rights to disposed freely their natural resources in accordance with the United Nations Charter and for respect of the economy of their state.[10]

Challenges of Ownership of Natural Resource

An owner is a person that have control over a particular thing, and the control is recognized by a formal instrument.[11] To obtain a permit an investor must use skill in search for an owner to give a permit to do an act. An investor must take all necessary step to prevent force majeure before commencing exploration he needs a permit from the original owner. So that an investor may not find he or itself on a disputed land on the aim for exploration 0f petroleum which may likely to lose his investment.[12]

Virtually, nearly all countries of the world, the sovereign own the mineral resources except, with few countries where private ownership was recognized.[13]

Ownership of petroleum in the United States of America

In United States, is a country consisting of 50 states, a Federal district, five major self-governing territories, and various possession.[14] In the United

[9] UNGA Resolution of 1974.

[10] United Nations Charter of 1945.

[11] See 1803 Resolution on permanent sovereignty over natural resources.

[12] Ernest E. Smith; International petroleum transaction; Rocky Mountain Mineral Law Foundation 9191 sheridon (2010) 3rd edition page 72.

[13] Ibid.

[14] . " US census Bureau QuickF acts selected; United States – Quick Facts , US Department of Commerce July 1, 2016. Retrieved September 11, 2017 available at Wikipedia.org.wiki. accessed on 13/11/2018 around 5:34 pm.

States, ownership of petroleum rights to a particular parcel of land may be owned by the government or private individual, corporations or by local or state governments.[15]

Oil and gas rights offshore are owned by either the state or federal government and leased it to oil companies for development.[16] Oil laws in the US varies from one jurisdiction to the other.

Prior to and at extraction field

Oil and gas are fluids, they may flows to another person's land or in the surface across boundaries. In this way, an operator may lawfully extract fuel in another's person land where the extraction is lawfully carried out.[17] They recognized legal Doctrines of Rule of Capture, and the correlative rights Doctrine. Which doctrines apply depending on the particular state.

The rule of capture gives landowner an incentive to pump out oil and gas, as quickly as possible by accelerating operations or drilling multiples wells to capture the oil of another. State Laws often limit the rule of capture to protect correlative rights of neighboring owners.[18] Government agencies and State oil and gas Conservation Commission was formed to address the issue such as the Texas Railroad Commission and were able to develop Laws protecting the landowners from such activities and to prevent economic and physical waste.[19] The states that were practicing this qualified theory were Taxes, California and in some part of Canada.

Ownership of petroleum resource in Nigeria

Ownership in Nigeria was different from that of US, in Nigeria ownership mineral resource was vested exclusively to the federal Republic of Nigeria.[20] The Mineral Act expressly provide:

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[15]. https://en.wikipedia.org/wiki//oil-gas-law-in-the united-stattes#jurisdiction available at Wikipedia.org.accessed on the 13/11/2018 around 5:45 pm.

[16]. Ibid.

[17] Kelly vs.Ohio oil co, 57 ohio 87, 3tur 17, 49 N E 399(1879).

[18] John and Lowe; Oil and Law a nut shell (5th edition 2009) available at Wikipedia.org.aceessed on 13/11/2018 around 5:13 pm.

[19]. Ibid.

[20] Mineral Act of 1962.

The entire ownership and control of all petroleum in, under, or upon any land which this section applies shall be vested in the State [State here means the Nigerian State]. This section applies to all land (including land covered by water) which– (a) is in Nigeria; or (b) is under the territorial waters of Nigeria; or (c) forms part of the Exclusive Economic Zone of Nigeria.[21]

The current legislations are:

1. The Federal Republic of Nigerian Constitution 1999;
2. The Land Use Act 1978;
3. The Mineral Act and Mining Act , 2007; and
4. The Petroleum Act 1969 Cap 10 Laws of Federation 2004

A. Constitution of the Federal Republic of Nigeria of 1999, as Amended

The Constitution of the Federal Republic of Nigeria (CFRN) of 1999, as amended, confers exclusive power on the Nigerian State to own, control and regulate the activities of minerals, mineral oils and by-products. This power is firmly provided for in Section 44(3) of the Constitution and specifically states:

Notwithstanding the foregoing provision of this Section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon territorial waters and the Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.56

In addition to the above provision, mines and minerals—including oil fields, oil mining, geological surveys and natural gas—were included in Part I of the Second Schedule of the Exclusive Legislative List in respect of which only the National Assembly have legislative power. The inclusion of this subject matter in the Exclusive Legislative List follows the same pattern in both the Republican Constitution of 1963 and the 1979 Constitution. [22]

B. The Petroleum Act, 1969

[21]. Ibid.

[22] Section 44 of the Federal Republic of Nigeria, 1999 as Amended; Emmanuel Uduagham, *Solving the Niger Delta Problem; The law and the people- An over view of Legislations Impending on socio- economic development of South-South Region;* The Land Use Act 1978.

The Petroleum Act is described in its preamble as:

An Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resource derivable therefrom in the Federal Government and for all other matters incidental thereto.[23]

A combined reading of both the preamble and the provision of section 1(1), which stated that, "the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the state," is clear and unequivocal as to whom ownership is vested.[24] Specific description of the extent of coverage was also provided for in section 1(2) as follows:

> a) [all lands, including land covered by water] is in Nigeria; or b) is under the territorial waters of Nigeria; or c) forms part of the continental shelf; or d) forms part of the Exclusive Economic Zone of Nigeria.[25]

C. The Nigerian Minerals and Mining Act, 2007

The Nigerian Minerals and Mining Act of 2007 repeals the Minerals and Mining Act of 1999:

The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and watercourses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zones is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.[26]

Consequent upon this provision, the Act in Section 1(2) provided that all lands in which minerals have been found in commercial quantities shall, from

[23] Nigeria Mineral, Mining Sector and Business Guide, 82 (1990).

[24] Ibid.

[25] Nigeria Mineral, Mining Sector and Business Guide, 82 (1990).

[26] Nigerian Minerals and Mining Act, The Complete Laws of Nigeria, Mar. 29, 2007, available at https://wikipedia.org./wiki/ accessed on 15/11/2018 around 3:32 am.

the commencement of the Act, be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act.[27]

> However, by virtue of Section 3, some lands are excluded from mineral exploration and exploitation and, as such, no mineral title can be granted in respect of such land. The lands referred to in Section 3 includes:
> land set apart for, or used for, or appropriated, or dedicated to any military purpose except with prior approval of the president; land within fifty meters of an oil pipeline license area; land occupied by town, village, market, burial ground or cemetery, ancestral, sacred, or archaeological site; land appropriated for a railway, public building, reservoir, dam, or public road; and land that is subject to the provisions of the National Commission for Museum and Monument Act, Cap. N19, Laws of the Federation of Nigeria, 2004 and the National Parks Service Act, Cap. N65, Laws of the Federation of Nigeria, 2004.
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> Perhaps due to the importance attached to mining, Section 22 of the Act provides that the use of land for mining operations shall have a priority over other uses of land and shall be considered for the purposes of access, use and occupation of land for mining operations as constituting an overriding public interest within the meaning of the Land Use Act.[28]

Even though the ownership of mineral resources is entirely vested in the federal government, certain rights and customs of host communities— such as preservation of salt, soda, potash and galena from any land other than land within the area of the mining lease or land designated by the Minister as security land—are still preserved.[29]

D. Land Use Act

The significance of the land ownership and tenure system in Nigeria and its impact on ownership of natural resources makes any discussion on the ownership of natural resources incomplete without an appreciation of the country's land ownership and tenure system. Prior to the coming into force of

[27] Ibid.

[28] Nigerian Minerals and Mining Act (note 21) page 97-(1).

[29].Ibid.

the Land Use Act, Nigeria's land ownership and tenure system had undergone historical development in three distinct stages—the pre-colonial, colonial and post-colonial—such that what one obtains in the country before the introduction of the Land Use

Act was a dual system of land ownership. The pre-Land Use Act structure was such that in the Southern States—comprising of the former Western Region, Eastern Region, Midwestern Region and Lagos—the communal system of land ownership held sway and it was from this system, according to Professor Ajomo,[30] that private ownership of land evolved through grants, sales and partition. Whereas in the Northern Region, the system of land ownership was governed and regulated by the Land Tenure Law that was enacted in 1962 by the regional government to replace Lord Lugard's Land and Native Rights Ordinance of 1916.[31]

It is noted that the Land Tenure Law replaces Lord Lugard's Land and substantially reaffirms the principles and philosophy underlying the Land and Native Rights Ordinances to the extent that, under the Land Tenure Law, the only interest available to an individual throughout the Northern Region is a right of occupancy.[32] The effect of this enactment is that it operated to divest the natives of ownership of their land and facilitated easy dispossession by the authorities.

It can be submitted that the structure that existed prior to the introduction of the Land Use Act reflects a basic tenet of an ideal federalism. Also, it would appear that the unitary configuration sought to promote uniformity in the country through the Land Use Act and brought an end to the duality in Nigeria's land tenure system. The Land Use Act of 1978 was, therefore, promulgated and became applicable all over the federation as evident in its preamble and Section 1, which vests all lands comprised in the territory of

[30]. M.A. Ajomo, *Ownership of Mineral Oils and the Land Use Act*, Current L. Dev. 335, 335 (1982) available at Wikipedia.wiki.org. accessed on 15/11/2018 around 4:10 am.

[31]. M.A. Ajomo, *Ownership of Mineral Oils and the Land Use Act*, Current L. Dev. 335, 335 (1982) available at Wikipedia.wiki.org. accessed on 15/11/2018 around 4:10 am.

[32]. Ibid.

each state in the federation in the Governor of the state, who in turn shall hold it in trust and administer it for the use and common benefit of all Nigerians.[33]

The Land Use Act was specifically entrenched in the 1979 Constitution and was equally retained in the 1999 Constitution, as amended, thus making its repeal cumbersome and tedious. The Land Use Act introduced an entirely new dimension into land ownership in the country by abolishing the ownership rights of communities and individuals to land and turning their interests into rights of occupancy only.[34]

It is, therefore, clear that land ownership and tenure in Nigeria is a qualified one in which absolute title is vested in the Governor. However, it must be mentioned that, notwithstanding the vesting of title in the Governor's land in the respective state, one cannot exercise rights over lands that belong to the federal government and its agencies.[35] This includes lands that contain mineral deposit or land used for related purposes. Hence, none of the states that are component units of the federation have any direct control over the exploration and exploitation of minerals.

It is equally noted that, apart from legislation, case law has also acceded to the fact that ownership and control of mineral resources is vested in the federal government. This was confirmed by the Supreme Court of Nigeria in the case of Attorney General of the Federation v. Attorney General Abia State (No. 2) where it was held that "the federal government alone and not the littoral states can lawfully exercise legislative, exclusive and judicial powers over the maritime belt or territorial waters and sovereign rights over the Exclusive Economic Zone subject to universally recognized rights."[36] The court went on to decide that the mere fact that oil rigs bear the names of indigenous communities on the coastline adjacent to such offshore area does

[33]. [33] Nigerian Minerals and Mining Act, (note. 25) page 1-(1).

[34]. Ibid.

[35] S. 49 Land Use Act 1978, Cap L5 LFN, 2004.

[36]. Attorney General of Federation V. Attorney General of Abia State (2002) 4. NSCC, 51.

not prove ownership of such offshore areas.[37] There is no doubt from the pronouncement of the Supreme Court that ownership and control of mineral resources—whether onshore, offshore, in Nigeria's territorial waters, the exclusive economy zone[38] or the continental shelf[39]—is vested in the Federal Government of Nigeria.

Ownership of Petroleum in Uganda

The discovery of petroleum in Uganda, came a lot of confusion and hope by the host communities, with expectations to rifts the benefits therefrom. Legislations were enacted to regulate the vast petroleum industry. These various legislations in particular, the constitution devolve the ownership of land from the hands of citizens in whose land the petroleum was found and place them in the care of the government as trustee.[40] Under these arrangement expectedly, the revenue of these resources would utilized for national development are mismanaged.[41]

However, it can be argued that, the concept of national ownership as operated both in Uganda and Nigeria which embodies the above opinion is not the single answer to the proper utilization and control of these resources. When compare the above concept and what was obtainable in the United States of America, which recognized both the national and private ownership of petroleum.[42] United States and Canada also recognized national ownership and private ownership in both Federal, States and the Local Government levels.[43]

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[37]. The Exclusive Economic Zone Act, No. 28, (1978) available at Wikipedia.org. accessed on 15/11/2018 around 4:15 am.

[38]. Petroleum Act, Laws of Federation, 2004.

[39]. Ibid.

[40] Abdulkareem Azeez, *Understanding petroleum in Uganda; Environmental & Energy Law Forum; Kampala International University; Ist edition 2016; page 55.*

[41]. Ibid.

[42]. Abdulkareem Azeez, *Understanding petroleum in Uganda; Environmental & Energy Law Forum; Kampala International University; Ist edition 2016; page 55.*

42. Ibid.

43. Ibid.

44. Ibid.

As without doubt, national ownership is being practiced in Uganda, it advocate the vesting of ownership of mineral resource on the government as the sole owner.[44] This theory attract foreign companies to come and invest where sometime the state participate in the arrangement.[45] The countries that are practicing this type of arrangements were Uganda, Nigeria, South Africa, Bolivia, Venezuela and China. In ACODE V. AG,[46] though the matter was on the forest reserve, the court in alluding to the national ownership of the natural resources in Uganda made reference to the Article 237(2) (b) of the Federal Republic of Uganda, 1995 which states:

> "The Government or a Local Government as determine by law, shall Hold in trust for the people and protect, natural lakes, rivers, Wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourist purposes for the Common gold of all citizens".

The above provision has operational efficacy by S. 44 of the Land Use Act 1998 provide that: (1). The Government or local government shall hold in trust for the People and protect national lakes, rivers, ground natural ponds, Streams, wetlands, forest reserved for ecological and tourist Purposes for the common good of all citizens.

Similarly, Section 4, upstream Act[47] provides that in accordance with Article 244, Ugandan Constitution, the entire property in, on or under any land or water in Uganda is vested in the government on behalf of the Republic of Uganda.

Similarly, section 3 of the Kenyan Act,[48] provides that, all petroleum existing in its natural condition in strata lying within Kenya and the Continental Shelf under part 5 and 6 of the law of the sea, on the Exclusive Economic Zone (EEZ) and continental shelves is vested in the government, subject to any

45. MISCELLANIOUS CAUSE NO. 0100 OF 2004.

46. Petroleum (Exploration Development and production) Act 2013

48. Petroleum (Exploration and Production) Act 1985.

rights in respect of thereof which by or under any other written law, have been or are granted or recognized as being vested in any other person.

The above provisions cited, are pointing to a single direction that petroleum resources are vested in the hand of the government for the common good of its citizens.

In Nigeria, the Supreme court in AG federation V. AG of Abia state & ors [49] That court held that, the ownership, control and management rights of the Federal Government of Nigeria over mineral resources located in the offshore areas of Nigeria, was recognized to the exclusion of the states.[50] The gist of the matter was whether ownership of mineral resources in the eights littoral states of Akwa- Ibom, Bayelsa, Cross- Rivers, Edo, Ondo, Delta State, Lagos and Rivers States are in hand of Federal OR States Government? The Supreme Court affirmed the exclusive resource control and ownership rights are that of the Federal Government and not a state government by virtue of section 44 of the 1999 Constitution.

The situation in Uganda is similar to that of Niger Delta in Nigeria, save managed professionally, it will yield a bad result. Because, villagers around lake Albertine region (which serves as the host communities) had high hopes on how oil will transform their lives. [51] While the host communities might be having exaggerated expectations, the government equally, is not helping matters by refusing to educate the host communities on the they will handle or working on an oil industry and the nature of the agreement to be entered between the government and international oil companies.

Ownership of petroleum challenges

Sometime dispute may arise as a result of boundary as who is the owner of a particular area covering or adjacent of two or more countries. In such a situation countries may resort to General Principles of International law in resolving their differences. Where they cannot settled their differences alternatively may use some devices.

[49]. No. 2, (2005) 12 NWLR (PT.940) 452.

[50]. Abulkareem Azeez, at page 70.

[51]. Abdulkareem Azeez cited May Jeong *," Uganda oil brings quick cash, Deshed Hope*" at page 71.

1. **Unitization**, is a response to the common law rule of capture, under this title to petroleum resources are in the hand of the owner or physical owner. But where it migrate, the other person can claim it, and sometime people are using systematic technology cause migration. As in Onaiho V. Bernard, they make it a unit and developed it. Unitization minimize dispute and waste. It is called international unitization or cross border, this can be seen in border dispute between U K v. New Zealand of 1965. Article 1 of the Agreement provide that the two countries should work together. This also happened between UK V. Norway in 1965.[52]

2. Joint Development

A joint Development occurs where each Country lay a claim on a particular boundary and the two countries may form a joint agreement to develop the area. It is an intergovernmental agreement to develop and dispose the mineral resource. It has a future where the two countries would have an arrangement within the disputed area pending the boundary limitation between the two countries.

Model

1. One country may country may develop the place and share the proceed with the other. For example Saudi V. Bahrain
2. Where each country, may nominate it contractor and the two contractor may exploit the area. For example Japan V. South Korea, Nigeria V. Santo mea.
3. Where the two countries joint a body called Joint Development Commission. As in the case of Uganda V. Kenya.

   It is advisable countries to take cognizance of the of the United Nations delimitation rule of the law of the sea.[53]

Conclusion

[52]. Daniel Kahneman, *Thinking, Fast and slow* (New York: Faarar , straus and GIROUX, 2011).

[53]. Vasco Becker weinberg, *Joint Development of hydrocarbon Deposit in the Law of the Sea*; (Heidelberg: springer, 2014)

In concluding this concept of ownership, one may different understanding of the concept but the reality is that ownership varies in terms of conceptual. National ownership is the most prevalent and widely accepted, sometime the confirmation of the sole rights to state may yield to unrest as in Nigeria. Whereas vesting ownership of mineral resource in the hand of private ownership may resulted to a dispute where a neighbor may extract petroleum by means of systematic technology as in rule of capture. But in my opinion vesting ownership of mineral resources would be better as in private ownership as have experience in the United States of America. Where as a result of that, the citizens there are more far better than those in a countries who are practicing National ownership.

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AN ANALYTICAL OVERVIEW OF ASPECTS OF MARRIAGE AND DIVORCE BILL 2017

SSERWANIKO BONIFACE

Abstract

The paper takes an overview of the Ugandan Marriage and Divorce Bill which seeks to consolidate the diverse laws relating to different categories of marriage. The paper takes on aspects such as property rights, cohabitation among others

1.1 Introduction

Marriage in the civil point of view is the union of man and woman in love and in covenant as long as they are alive to set up their own family the subsistence of which, neither of them is at liberty to contract any form of marriage. This reasoning was fortified by **Hyde vs. Hyde (1863) LR P & D 130** which was noted with approval in the case of **Alia vs. Uganda (1967) EA 416** as a voluntary union of one man and woman to the exclusion of all others. However contrary to the civil point of view of the institution of marriage, which considers it to be monogamous, in the perception of the African tradition and between persons professing the Mohammedan religion marriage is considered to be polygamous.

The Marriage and Divorce Bill consolidates the law relating to Civil, Christian, Hindu, and customary marriages in Uganda, also intends to provide for marital rights and duties, recognition of cohabitation in relation to property rights, and consequences of separation and divorce. It intends to reform and redress the gender imbalance that has existed in the marriage and divorce acts in Uganda, both dating from 1906. Its aim is to ensure equal rights for men and women at marriage, separation and divorce. It also seeks to protect property rights of persons in cohabiting relationships

1.2 Back Ground

The history of the Marriage and Divorce Bill of 2017 stretches back from 2003 where the Bill was referred to as the **Domestic Relations Bill** and later on referred to as the **Marriage and Divorce Bill of 2009**. In the year of 2013

this Bill faced rigid confrontation from Parliamentarians, men and religious groups and consequently it was passed into law.

Following the rigid confrontation from various stake holders, several clauses that were considered problematic were dropped and now the Bill is referred to as the **Marriage Bill** and before long it will be re assembled in Parliament. The Marriage Bill emanates from an ample study by the Uganda Law Reform Commission due to the pressing call for of a systematic analysis or and review in the Ugandan family law regime to reflect current day realities and shifting social, economic and cultural trends. These changes demand a responsive modification in the law and come up with a unified and comprehensive law governing domestic relations in Uganda. The national wide research undertaken by the Uganda law reform commission also stretched back from a commission of inquiry into marriage, divorce and status of women commonly referred to as the **(Kalema Report) of 1965**. [1]

The present day family realities that the Bill intends to put into consideration notably include inter alai, the Court rulings such as the highly celebrated **Constitutional Court Petition Number 2 of 2003[2]** in which Constitutional Court judges, their lordships unanimously well thought out and decided through a declaration that Section 4(1) of the current **Divorce Act (Cap 249)** contravenes and is inconsistent with Articles 21(1) and 2 and 31(1) and 6 of the Constitution.[3]

The Bill in its current state provides for several types of marriages notably Customary, Hindu Bahai, Civil and Christian marriages and it leaves out the Islamic type of marriage since consultations are still under way from the Muslim community about this intended law.

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1. W.W Kalema (1965) Uganda Commission on Marriage, Divorce and Status of Women (the Kalema Commission Report) available on www.worldcat.org. Accessed on 30th December, 2019

2. Uganda Association of Women Lawyers & Others Vs. Attorney General Constitutional Court ruling Petition Number 2 of 2003

3. The 1995 Constitution of the Republic of Uganda as amended

1.3 Traditional Practices and the Current Marriage Bill

There are a number of problematic clauses in the bill and the legal implication of these clauses will outlaw a number of traditional practices and also make property sharing mandatory in a divorce and gives cohabiting partners property rights.[4] This might be interpreted to encourage African tradition violations in the institution of marriage yet **Article 37 of the 1995 Constitution of the Republic of Uganda** accords all Ugandans the right to enjoy and practice their culture.

It must be noted however that the customs should not be contrary to the principles of natural justice and morality. This is the spirit of the law apparent in **Section 14 of the Judicature Act Cap 13** which enjoins courts of judicature to apply customary law ipso facto in adjudication of matters before it provided the customs are not repugnant to natural justice and morality. Similarly **Article 33 (6) of the Constitution** prohibits laws, cultures, and customs or traditions that are against the welfare or interest of women or that undermine their rights. The same legal proposition was also forfeited by the Court of Appeal of Eastern Africa in Kenya. Civil appeal No.17 of 1965: **Kinyanjui Kimani vs. Muiru Gikanga and another [1965] EA 735** where it was vehemently stated that repugnant customs should not be up held in the society

1.4 Arguments in support of the Marriage Bill 2017

Having looked at the brief back ground of the Bill I now turn to advancing my arguments in support of the Bill over some of the African traditions that are considered to be outdated and deserve no attention in the present society

1.4.1 Marriage gifts (Bride Price) not mandatory

[4]. Clause 118 enables spouses/cohabiters to make agreements during marriage or cohabitation with respect to the ownership and distribution of property on dissolution of the marriage or cohabitation.

I agree with the Marriage Bill of 2017 because it stipulates that Marriage gifts are not an essential requirement for any marriage in Uganda. [5] The term pride price was defined in the case of **Mifumi (U) Ltd and 12 Ors v AG Constitutional Appeal No. 2 of 2014** Court held inter alia as follows:

a) Bride price and dowry refer to payments made at the time of marriage in many cultures.
b) It is usually paid by the groom or the groom's family to that of the bride.
c) Any payment of bride price must be conditioned upon voluntary consent of the two parties to the marriage and not a third party.

Traditionally, the payment of bride price is notorious and time-honored. It is argued that it is given on the basis that the wealth received compensates the bride's family for the time, money and trouble taken to raise a daughter who is later sent off to live with another family. This implies that bride price is an indispensable requirement of marriage as was demonstrated again in the case of **Uganda V Eduku (1975) HCB 359** Court in this case held that since bride had not been paid in full, there was no subsisting

Marriage between the complainant and the adulterous woman for they were not considered as husband and wife.[6]

However it must be noted that African custom is not uniform among all ethnic groups in Uganda. According to the **Uganda Law Reform Commission Report[7]** states that bride price varies from tribe to tribe, clan to clan and family to family depending on one's economic status. That in ***Ankole,*** opinion leaders estimated it to consist, on average, of four heifers and some goats, and in ***Teso*** the number of cows used to range from 18-25 but after

5. Clause 14 (1) of the Marriage Bill 2017 demands that marriage gifts are no longer an essential requirement for any marriage, any gifts given shall not be non refundable hence its an offence to demand the return of bride price.

6. This has been the reasoning in other cases like Amulan Orwang V Edward Ojok, Florence Kemitungo Vs. Yolamu Katuramu

7. Uganda Law Reform Commission Consultative Meeting on Gender Related Legislation for MPS, held from 17th-19th and 24th—26th September 2009

insurgency it stands at 2-7 heads of cattle and cash money. The report goes on to say that in **Buganda,** the mandatory items are ***kanzu*** (long white tunic for men) for the father-in-law, ***gomesi*** (dress) for mother-in-law, ***mwenge bigele*** (local brew), a cock which is given to the brother-in-law and "***mutwalo"*** (a specified sum of money). Other writers such as **Dr. Peter Atekyereza** in his Article ***"Bride Wealth in Uganda: A Reality of Contradictions"*** The Uganda Journal, November 2001, include meat or a cow among items in the bride price of the *Baganda.*

In light of the above, it is my humble submission that payment of bride price, puts a woman in a vulnerable inferior position and reduces her to a chattel and not equal to her husband and in many instances it implies that a man has purchased the wife to provide labour and hence this African tradition deserves no attention and preservation in the current society since it against rules of equity, good conscience and contrary to the constitution.

1.4.2 Demand for return or bride price at dissolution of marriage.

Turning to the return of bride price, it is considered to be unconstitutional and now an offence under Clause 14 (2) of the Bill.[8] This provision is intended to put into consideration of the jurisprudence established in **Mifumi (U) Ltd anor Vs A.G 2 others Constitution Appeal No. 02/2014** where it was observed that husbands can no longer demand that bride price be returned in the event of dissolution of a customary marriage. It is contrary to the constitution regarding equality in contracting during marriage and its dissolution.[[9]] The lead justice Jotham Tumwesigye said that it was unfair for the parents of the woman to be asked to refund the bride price after years of marriage, saying it was unlikely they would have kept the property that had changed hands

It must be noted that this kind of practice has been so notorious in the *Bakiga* (a tribe in the south western part of Uganda) and the negotiations over

[8]. Clause 14 (2) of the Marriage and Divorce Bill 2017

[9]. Article 31 (1) (b) and 33 (1) of the 1995 Constitution of the Republic of Uganda

payment take place between male representatives of the two families and women are not allowed to take part. This kind of custom makes woman subjected to abuse, making it difficult for her to leave, especially where her family cannot afford to return the bride price or is unwilling to do so. Consequently this has contributed to domestic violence.

It is my considered view that this custom of payment of bride price and return of bride price at the dissolution of marriage is repugnant to natural justice, equity and good conscience and we must do away with it.

Article 32 (2) of the Constitution prohibits customs, cultures and traditions that are against the dignity, interest or welfare of women. **Article 5 of the Convention on the Elimination of all Forms of Discrimination Against Women** (**CEDAW**),[10] affirms the same principle when it urges states to modify social and cultural patterns of conduct of men and women with a view to achieving elimination of prejudices, customary and other practices which are based on the ideas of inferiority or superiority of either of the sexes.

1.4.3 Widow Inheritance

The term "Marriage" in the civilized society's insight, it is a legally sanctioned contract between man and woman who have the capacity to enter into such an agreement, mutually promise to live together in the relationship of husband and wife in law for life, or until the legal termination of the relationship.

Traditionally we have a custom in Uganda practiced by some ethnic tribes which allows men to inherit widows the moment their husbands are dead. This kind of custom is considered repugnant to the provisions of the constitution and need not to be protected as was stated in the case of **Ebiju & Anor V Echodu**.[11]In the new proposed legislation, Marriage through the

[10]. (CEDAW) was adopted on 18th December 1979 by the United Nations general assembly, it however entered into force as an international treaty on 3 September 1981

[11]. Ebiju & Another V Echodu (Civil Appeal No. 43 of 2012) [2015] UGHCCD 122 (17 December 2015)

practice of widow inheritance is prohibited,[12] and this protects the constitutional rights of a person to marry upon a free consent hence making the custom of marriage through inheritance of women unnecessary and we need not preserve it.

1.4.4 Ownership of Property

The Bill recognizes separate property which is not subjected to division,[13] which includes property acquired before marriage. Ancestral property and family land cannot be shared.[14] In the African tradition a woman is regarded as a property of the man and totally incapable of holding property of her own independently of man. However the new proposed legislation sets up an avenue in line with **Article 26 of the Constitution** which grants every individual a right to own property in their individual capacity or in association with others.

The issue of owning individual property by spouses came out clearly in the case of **Julius Rwabinumi V Hope Bahimbisomwe** [15] where the court held that a spouse can own individual property as per Article 26 or jointly with his or her spouse. Further it was held that **Article 31 (1) (b)** of the Uganda Constitution 1995 guarantees equality in treatment of either the wife or the husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases, be shared equally upon divorce, it was concluded that the question whether it should be divided equally on divorce depends on the facts of each individual case

[12].Clause 13 of the Marriage and Divorce Bill of 2017

[13]. Dr. Specioza Kazibwe Naigaga Vs. Eng. Charles Nsubuga Kazibwe Divorce Cause No. 03/2003. Court held that where property is in the name of the party that is entitled to exclusive ownership at dissolution

[14]. Julius Rwabinumi Vs. Hope Bahimbisomwe (Civil Appeal No. 10 Of 2009) [2013] UGSC 5 (20 March 2013) court held that ancestral grounds cannot be shared

[15]. ibid

When it comes to the issue of how Court should determine a contributing spouses share in joint property came up in the case of **Kagga V Kagga, High Court Divorce Cause No. 11 of 2005 (unreported)** for example where, **Mwangusya J**. observed that our courts have a principle which recognizes each spouses contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services…when distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent".

1.4.5 Grounds for Divorce

The clause on the breakdown of marriage in the old law the grounds were flimsy and would make it easier to divorce but in the new proposed legislation you must prove why you want to walk away. For instance the Bill demands that a spouse shall not petition for divorce before the expiry of two years from the date of marriage and a spouse must prove that he or she is suffering exceptional hardship in marriage. Further the grounds of divorce have been made uniform available to either spouse as it was held in the case of **Uganda Association of Women Lawyers & Others V Attorney General Constitutional Petition No.2 Of 2003**[16]

Therefore I find no reason to fault the new proposed legislation governing marriage since it is intended to put into consideration most of the judicial finds which are in conformity with the 1995 Constitution of the Republic of Uganda.

1.5 African traditions preserved by the Bill.

Without prejudice to the above to a small extent the Bill preserves some African tradition customs. For example marriage cannot take place when the

[16]. Uganda Association of Women Lawyers & Others Vs. Attorney General, Constitutional Petition No.2 of 2003

parties are under the prohibited degrees of marriage whether natural or legal.[17] This African tradition came out very clearly the case of **Bruno KiwuwaVs. Ivan Sserunkuma High Court Civil Suit No. 56 of 2006** Remy Kasule J**;** held that the intended marriage was illegal, null and void because of the Baganda custom, both parties to it being of the same clan which is prohibited by the *Kiganda* custom

I entirely agree and support this African tradition that is totally in line with the existing marriage laws and the new proposed legislation where marriage between relatives is totally discouraged and categorized as falling under the prohibited degrees of marriage.

1.6 Conclusion

It is only justifiable that we reform and make a law that is only consistent with the 1995 Constitution of the Republic of Uganda. The laws we are operating under some were made in 1904. The Constitution prohibits laws and cultures which undermine the status of women yet the current laws on marriage enforce superiority of men and inequality which contravene the constitution. African tradition which is contrary to equity and good conscience such as marriage through inheritance of widows, return of bride price at dissolution of marriage and should be totally disregarded, abandoned and no need to preserve them. To a large extent I support the Bill over some African traditions

[17]. Clause 17 of the Marriage and Divorce Bill of 2017

ISLAMIC LAW AND THE MOVEMENT FOR THE ABOLITION OF DEATH PENALTY: A COMPARATIVE PERSPECTIVE

KASOZI EDIRIISA SINAANI[1]

Abstract

The adverse effects of the 2nd World War led to the international call for the universalisation of democracy and respect for human rights. Human rights and civil society groups singled out death penalty as cruel and inhuman practise which the member states of the United Nations were still practicing. There has been a political global trend rather than social, religious and economic that calls for the abolition of the death penalty. This drive has been inconsiderate of the different diversities that are prevalent within the indiviudal states most especially the Muslim World that it could not be implemented without trespassing on Islamic law. There is need for mutual cooperation between the retentionists and abolitionists countries in their areas of convergence and respect for each other's' beliefs in their areas of divergence. This paper therefore analyses the international move to have the world free of death penalty in relation to the teachings of Islam.

1.0 Introduction:

The irreversible effect of the death penalty makes it like no other punishment[2]. Once it is imposed the person's life can never be restored[3]. It is for this reason that there is wide discontentment for its continued existence in many countries of the world mainly from the civil society and human rights groups, criminologists, and political parties both within and often outside the country applying the death penalty[4].

After the Second World War, the United Nations General Assembly adopted resolution 217 A (III) of December 1948 to ratify the Universal Declaration

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[2] Neumayer Eric (2008) Death Penalty: the political foundations of the global trend toward abolition. Human rights review. 9 (2). Pp. 241-268. ISSN 1874-6303. Available at http://eprints.lse.ac.uk/2600/ page 2 Accessed on 18/6/2019.

[3] Ibid

[4] Ibid

of human rights (UDHR) to be part of the United Nations international instruments[5]. Article 3 of the UDHR provides for the Universal right to life whereas Article 6 of the same provides for the universal right to freedom from torture, inhuman and degrading treatment or punishment[6]. The above provisions became the corner stone for which the abolitionists to call for other member states to desist from applying death penalty[7]. The Universal Declaration of Human Rights was later reinforced by the International Covenant on Civil and Political Rights (ICCPR) which was adopted by the United Nations General Assembly by resolution 2200A (XXI) on 16 December 1966 and came in force from the 23 March 1976 in accordance with Article 49 of the Covenant[8]. The Covenant commits its member states to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and fair trial[9].

Article 6 of the International Convention on Civil and Political Rights calls for all member states to restrict the imposition of the death penalty to the *most serious crimes* in accordance with applicable law at the time of the commission of the crime and pursuant to a final judgment rendered by a competent court. This provision was a positive step towards the abolition of the death penalty as member states were urged as a first step to limit the imposition of the death penalty to the most serious crimes. These crimes vary from one country to another as in countries such as Uganda, murder is a very serious crime[10] in relation to countries like Philippines, China, Singapore and

[5] Micheal Mumisa, "Shariah and the Death Penalty: Would the abolition of death penalty be unfaithful to the message of Islam?" University of Cambridge, Penal Law Reform 2015. Pg 20 Available at Penalreform.org Accessed on 17/6/2019.

[6] Cataclysm and World Response in Drafting and Adoption: The Universal Declaration of Human Rights. Available at udhr.org Accessed on 17th/6/2019.

[7] Ibid

[8] Paul SIeghart, The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights, Oxford University Press, 1985.

[9] Articles 1-6 of the International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966.

[10] See: Section 189 of the Penal Code Act Cap. 120 Laws of Uganda.

Malaysia where drug trafficking is a very serious crime that would attract a death sentence[11].

Other international conventions that made a milestone in as far as abolition of the death penalty is concerned included; the second optional protocol to the International Convention on Civil and Political Rights adopted by the United Nations General Assembly in 1989. Article 1 of the Protocol prohibits the implementation of the death penalty within all the member states. The second Protocol to the American Convention on Human Rights, adopted by the General Assembly of the Organization of American States in 1990 abolished the death penalty and the Protocols No. 6 and No. 13 to the European Convention on Human Rights, adopted by the Council of Europe in 1983 and 2002, respectively also abolished the imposition of the death penalty[12]. However, of these international treaties, the Protocol No. 13 to the European Convention on Human Rights is the only one that demands abolition of the death penalty for all crimes, whereas the others allow parties to retain the penalty in time of war[13].

We should however note that the Muslim countries had criticized the 1948 Universal Declaration of Human Rights for its failure to take into account the cultural and religious context of non western countries[14]. In response to the Universal Declaration of Human Rights, the member states of the Organisation of Islamic Cooperation (OIC) on 5th August 1990 adopted the Cairo Declaration on Human Rights in Islam (CDHRI)[15]. The Declaration among others forbids discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.

[11] Eric Neumayer, Death Penalty: The Political Foundation of the Global Trend Towards abolition. Human rights review., 9 (2). Pp 241-268. ISSN 1874-6306. Available at https://eprints.Ise.ac.uk/6200/ Accessed on 10/7/2019.

[12] Ibid

[13] See: Article 2 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

[14] National Review Online, Human Rights and Human Wrongs, David G.Littman, January 19, 2003 accessed on 17/6/2019.

[15] Brems, E (2001). "Islamic Declarations of Human Rights". Human rights: universality and diversity: Volume 66 of International Studies in human rights. Martinus Nijhoff Publishers. Pp.241-84 ISBN 90-411-1618-4.

It goes on to proclaim the sanctity of life, and declares the preservation of human life to be a duty prescribed by the Shariah[16].

The CDHRI was adopted as a living document of human rights guidelines prescribed for all member states of the OIC in response to the Universal Declaration of Human Rights which the OIC member states termed as a secular understanding of the Judeo-Christian tradition which could not be implemented by Muslims without trespassing Islamic law[17].

The purpose of this paper is to examine the Islamic perspective on the death penalty in view of the abolitionist approach at the international arena.

2.0 The Legal Framework of the Death Penalty under International Law

International Law refers to the body of rules established by custom or treaty and recognized by nations as binding in their relations within one another[18]. The international bill of rights positively impacted on the move to abolish the death penalty in the following manner;

Article 3 of the Declaration guarantees a universal right to life, whereas Article 5 of the Declaration guarantees the universal right to freedom from torture, cruel, inhuman or degrading treatment or punishment. The aforementioned provisions, formed the basis for which civil society groups and abolitionists states to call for the abolition of death penalty[19]. Article 6 of the International Covenant on Civil and Political Rights provides for the inherent right to life of every human being and that in countries where death penalty has not been abolished, it may be only imposed for the most serious crimes and after following the due process of the law.

The 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights was adopted by United Nations General Assembly on December 29 with fifty nine votes in favour, twenty six votes against and

[16] Article 2 of the Cairo Declaration on Human Rights in Islam

[17] Ibid

[18] Bentham Jeremy (1789), An Introduction to the Principles of Morals and Legislation, London: T.Payne, pg. 6

[19] Eric Neumayar, Death penalty: The Political Foundations of the global trend towards abolition, Human Rights Review, 9 (2). Pp. 241-268. ISSN 1874-6303 page 11 Available at https://eprints.lse.ac.uk/6200/ Accessed on 9/7/2019.

thirty four countries abstaining[20]. Article 1 of the protocol provides for the abolition of death within the member state countries. During the voting time, almost all Arab states voted against the protocol[21]. However, as of September 2018, the second optional protocol has 86 state parties of which Angola had signed but did not ratify the protocol[22].

On 20th December 2012, the United Nations General Assembly passed Resolution 67/176, Moratorium on the Use of the Death Penalty. Article 4 of the resolution calls upon all states to progressively restrict the use of the death penalty and not to impose capital punishment for offences committed by persons below 18 years of age[23]. It also calls on reducing number of offences for which death penalty may be imposed; to establish a moratorium on executions with a view to abolishing the death penalty. Article 5 there from calls upon states which have already abolished the death penalty not to reintroduce it and encourage them to share their experiences in this regard. This move has been successful to a large extent as Countries that have abolished the death penalty both within the law and practice have reached 142 including countries like South Africa, United Kingdom, Sweden among others compared to 56 countries who are still retaining the same including Afghanistan, Bahrain, Saudi Arabia, Somalia among others[24].

3.0 The Road to Abolish Death Penalty on the African Continent:

Africa is the second largest continent with 54 fully recognized sovereign states[25]. The international wave for the abolition of the death penalty has been most positively received by most of the African states[26]. Currently in Africa, more than 80% of countries have abolished the death penalty including South

[20] William A. Schabas, "Islam and the Death Penalty" William & Mary Bill of Rights Journal Vol. 9 Issue 1 Article 13 page. 228.

[21] Ibid

[22] United Nations, Treaty Series Vol. 1642 pp. 414 Reg No. 14668.

[23] General Assembly of the United Nations Resolutions A/RES67/176. Available at https://www.un.org/resolutions. Accessed on 7/9/2018.

[24] Abolitionist and Retentionist Countries. Available at https://www.Penaltyinfo.org. Accessed on 7/7/2019

[25] FIQH, "Triggers for Abolition of the Death Penalty in Africa: Southern Africa Experience" October 2017 pp. 5

[26] Ibid

Africa, Burundi, Rwanda, Ivory Coast among others. Only 10 of the African countries have executed within the past decade[27].

According to Amnesty International, at least 1,032 people were put to death worldwide in 2016[28]. The majority of these executions took place in just three countries: Iran, Pakistan and Saudi Arabia[29]. In the whole of Africa, at least 64 people were executed in Botswana, Egypt, Nigeria, Somalia, South Sudan and Sudan[30]. This really shows the positive strides Africa has achieved in as far as abolition of death penalty is concerned.

In order to work towards abolition of the death penalty across the continent, below are some of the continental conventions and resolutions that have registered a milestone in that line;

The African Charter on Human and People's Rights adopted in Nairobi on June 27, 1981[31]. Article 4 of the Charter recognizes the inviolability of human life and it prohibits the arbitrary deprivation of right to life. This was a positive stride in fast tracking the abolition of death penalty in Africa.

The African Commission on Human and Peoples' Rights Resolution 42 of Kigali Rwanda in 1999[32].The resolution calls on to State Parties to limit the imposition of the death penalty only to the most serious crimes; and to consider establishing a moratorium on executions; and consider the possibility of abolishing the death penalty. At the time of passing this resolution there was only 19 African countries that had at the time de facto or de jure abolished the death penalty[33]. As of today 80% of the African states have abolished the death penalty which is a great achievement for the abolisitionists[34].

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[27] These countries are; Botswana, Chad, Egypt, Equatorial Guinea, Gambia, Libya, Nigeria, Somalia, Sudan and South Sudan. See: Death Penalty World Wide Data base, http:// www.deathpenaltyworldwide.org/search.cfm

[28] Death Sentence and Execution 2016, Amnesty International.

[29] Ibid

[30] Ibid

[31] The African Charter on Human and Peoples Rights. Available at https://www.humanrights/se/Africa/pdf. Accessed on 9/7/2019.

[32] Human Rights Library-ACHPR/Res.42(XXVI)99. Available at hrlibrary.umn.edu>Africa.rec47. Accessed on 7/9/2019

[33] ibid

[34] Ibid

The African Commission on Human and Peoples' Rights Resolution 136 (2008)[35]. This resolution calls on State Parties to observe a moratorium on executions "with a view to abolishing the death penalty" and to ratify Second Optional Protocol to the ICCPR and lastly the African Commission on Human and Peoples' Rights General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (2015). This general comment offers interpretation and application of the right to life under Article 4 of the African Charter, which includes provisions on the abolition of the death penalty.

The abolition of the death penalty on the African Continent has been achieved by employing the following mechanisms;

1. **Legislative Amendment;**

African states have engaged in intensive amendments of the existing legislation in a bid to abolish the death penalty[36]. They include countries like Burundi (2008), Côte d'Ivoire (2000), Djibouti (1995), Gabon (2010), Guinea-Bissau (1993), Rwanda (2007), Senegal (2004) and Togo (2009) and Madagascar (2014)[37].

2. **Constitution reform**

African states have managed to abolish death penalty through adoption of new constitutions. This has been effectively done by countries such as; Republic of Congo (2015), Mauritius (1995), Namibia (1990), Seychelles (1993), Säo Tomé and Principe (1990), Namibia (1990), Mozambique (1990) and Angola (1971)[38].

3. **Constitution Petitions;**

Courts of law have been used to challenge the constitutionality of the death penalty within the African Continent. The land mark decision of the South

[35] The African Commission on Human and Peoples' Rights, at its 44th meeting on the 10th to 24th November 2008 in Abuja Nigeria. Available at http://www.achpr.org>sessions>136. Accessed on 7/9/2019.

[36] Fiqh, "Triggers for the Abolition of the Death Penalty in Africa: A South African Experience" October 2017 pg 23

[37] Ibid

[38] Ibid

African Constitutional Court in State vs. Mukwanyane was the first to outlaw the constitutionality of death penalty[39]. In Malawi, the case of Kafantayeni and others v. The Attorney General of Malawi[40] struck down the mandatory death penalty for murder in 2007 on the basis that it violated the right to life and amounted to inhuman punishment. In Kenya, the case Mutiso v. Republic[41] successfully challenged the death penalty punishment much as it is still available in the Kenyan statute books. In Uganda, the case of Attorney General vs. Suzan Kigula & 417 Others[42] of which the mandatory death sentence for particular crimes under the Ugandan Penal Code was outlawed.

4.0 Arguments for and Against the Death Penalty

Deterrence; Those in favour of the death penalty argue that by imposing the death penalty, it would deter the commission of crime by the would be offenders[43]. This argument is also held by ***Sir James Stephens*** where he said in support of the death penalty that: ***'No other punishment deters men so effectually from committing crimes as punishment for death…….The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some results'[44].*** On the other side abolitionists argue that this is not conclusive in fact in United States Supreme Court case of ***William Henry Furman vs. State of Georgia[45]***where the US supreme court held that the imposition of the death penalty violates the 8th and 14th amendments to the US constitution, different studies were referred to indicating instances where countries that employ capital punishments but still having higher instances of homicides as opposed to the abolitionist[46].

[39] State vs. Mukwanyane (1995) ZACC 3.

[40] Constitutional case No. 12 of 2005.

[41] Criminal Appeal No. 17 of 2008.

[42] Constitutional Civil Appeal No. 3 of 2006.

[43] Micheal Mumisa, "Sharia Law and Death Penalty: would the Abolition of death penalty be un faithful to the message of Islam?" University of Cambridge, Penal Reform Commission, 2015 Available at www.penalreform.org pp. 13 Accessed on 28/6/2019

[44] Great Britain, Royal Commission on Capital Punishment, Report (1949-1953) Pg. 19

[45] 408 U.S. 238

[46] Ahiraf Ali, Abolition of Death Penalty in Pakistan, Available at https://www.academia.edu/Aboilitionofdeath penalty in Pakistan/pdf. Accessed on 10/7/2019.

Retribution; The supporters of death penalty hasten to add that the family members of the dead are more contented if the killer is also made to pay for his crime by causing his death[47]. That in fact Allah supports this argument where He said;

> *".....There is life for you, men of understanding, in this law of just retribution, so that you may remain God-fearing.(Quran 2:178-9) (emphasis added)*

Prevention; This is also known as "Theory of disablement" as it aims at preventing the crime by disabling the criminal[48]. That by killing the killer it permanently incapacitates him from killing other people in the future. To the abolitionist they argue that this purpose can be served even when the killer is given a custodial sentence.

To the Moslem countries, the imposition of the death penalty is a divine right specifically provided for within the holly Quran and its abolition will result into a total violation of the Islamic teachings[49]. Abolitionists states argue that only small part of Islamic criminal law is being regulated by the Quran and Sunah under the heads of Qisas, and Hudood and in fact Muslim countries hide under this religious pretext to keep on imposing the death penalty even in instances where Islamic Law does not provide for it[50].

5.0 ISLAMIC TEACHINGS ON DEATH PENALTY.

Islamic criminal law being a universal law revolves around the following five fundamental points which are; (1) protection of religion; (2) protection of life; (3) protection of sanctity of family; (4) protection of property and (5) protection of reason/or intellect[51].

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[47] Ibid

[48] M.Ssekaana, "Criminal Procedure and Practise in Uganda" Law Africa Publishing (U) Ltd, 1st Edition 2010 pg. 349.

[49] William A. Schabas, "Islam and the Death Penalty" William & Mary Bill of Rights Journal Vol.9 Issue 1 Article 13 page 11.

[50] Ibid

[51] Abu Hamid al-Ghazali, al-Mustasfa min 'Ilm al-Usul, Vol. 2 p66

The purpose of punishment in Islam is to deter the commission of crimes and ensure social justice and the well being of the people[52]. On this Allah says;

Whoever works evil, will be requited accordingly [4:123]

The above verse maintains that those who transgress within the society, they should be made to equally suffer for their wrong doings by way of punishment.

In Islam the human life is so sacred and inviolable to the extent that however kills a human soul is considered to have extinct the whole human race and whoever saves a human soul is considered to have saved the whole human race. Allah says;

> *"That if any one slew [killed] a person, Unless it be for murder, Or for spreading mischief [creating disorder] in the land,* ***It would be as if he (slew) the whole people; And if anyone saved a life, It would be as if he saved the lives of all mankind." [5:32]***

The prophet also affirmed the inviolability of human blood during his sermon in his farewell pilgrimage. The prophet (PBUH) said;

> *"O People! Your blood, property and honour is made completely forbidden upon one another. The respect for these things is such as it is the respect of this (Day of Pilgrimage), and the respect of the month of Dhul Hajjah , and the respect of this city (Mecca). Beware, let it not happen after me that you begin to take each others lives and be in the category of unbelievers"*[53].

Therefore, for Islam to prescribe the death penalty for intentional killings, it is in such away acknowledging the inviolability of human blood.

5.1 Crimes Punishable with Death Penalty under Islamic Law:

There are three categories of crimes under Islamic Law and they are;

(1) Qisas and Diyat (Crimes of retaliation and Blood Money) (2) Hudud Crimes 'Claims against God' (Mandatory) (3) Ta'zir crimes 'Claims of the state/Society' (Discretionary)

[52] M. Ershadul Bari, "Capital Punishments in Islam" Journal of Islamic Law Review Vol. 6 (2010) page 2.

[53] Sahih al-Bukhari note, 23 at pg. 39.

5.1.2 Qisas Crime (Murder)

Qisas (retaliation or retribution) crimes follow the principle of an 'eye for an eye'. These crimes aim at seeking justice by way of its equivalence. They are administered under strict conditions to fit with the sanctity of human life in Islam, and involve the following offences against the person:

(1) Intentional or premeditated murder (first-degree); (2) Quasi-intentional murder (second-degree); (3) Unintentional murder (manslaughter); (4) Intentional injury (battery); and (5) Semi-intentional/unintentional injury.

In Islam therefore the punishment for intentional/premeditated murder is death. On this the Quran says;

> *"**Believers, just retribution is prescribed for you in cases of killing: a free man for a free man, a slave for a slave, and a female for a female.** If something [of his guilt] is remitted to a person by his brother, this shall be pursued with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is an alleviation from your Lord, and an act of His grace. He who transgresses thereafter shall face grievous suffering".*
>
> *There is life for you, men of understanding, in this law of just retribution, so that you may remain God-fearing.(Quran 2:178-9) (emphasis added)*

Under the conventional law, punishments are prescribed to achieve objectives such as; retribution, rehabilitation, reformation, and deterrence[54]. In case of premeditated death, the Uganda Law prescribes the death penalty also in form of retribution. Section 189 of the Penal Code Act Cap. 120 provides that any person convicted of murder shall suffer death.

Important to note, much as Islam provides for a death sentence to a person convicted of murder, it provides for other safe guards upon which the death penalty can be waived as a mode of Qisas;

1. Islam allows the family of the deceased to forgive the killer either for free or in return of financial compensation known as 'diyat' as an alternative to the infliction of the death penalty to the killer. This

[54] M.Ssekaana, "Criminal Procedure and Practice in Uganda" Law Africa Publishing (U) Ltd, 1st Edition 2010 page 352.

practise has been encouraged mostly in Moslem countries such as Saudi Arabia, Pakistan and Yemen[55]. On this the Allah says;

"And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. ***But whoever gives [up his right as] charity, it is an expiation for him****. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers". (Quran 5:45) (emphasis added)*

The prophet (PBUH) also guides Muslims that forgiveness of the aggressor is the better option. The prophet said:

"Whoever forgives the retaliation from the killer, would enter in to paradise. No man would remit from any injury inflicted upon him, but Allah would elevate his position and forgives his sins"[56].

There are however different views of Moslem Scholars on whether after the victim's family forgiving the killer, the payment of blood money by the killer should be mandatory or not?.

Imam Abu-Hanifah and Malik Ibn Anas maintain that once the victim's family has waived the imposition of the Qisas penalty, the victim's family has an option to chose on whether to request for blood money or not[57]. The spirit behind their reasoning is that by the deceased family going a head to forgive the killer and then maintain the demand for payment of blood money, it would be an implication that they have not forgiven the killer. Imam Shafie and Hanmbal are of the view that once the family of the deceased waives the imposition of the death penalty, the killer must compulsorily pay blood money[58].

However, all that said, the provision for the forgiveness of the killer is not available within the Ugandan penal system so is at the international arena which makes Islam a class of its own.

[55] M. Ershadul Bari, "Capital Punishments in Islam" Journal of Islamic Law Review Vol. 6 2010 pg. 49

[56] Muhammad Ibn Yazid Ibn Majah, Sunan Ibn Majah, Kitab AL-Diyat, (Ihya al-Thurath-cArabi n.d) Vol. 2 pg.877

[57] Badiriyah Abdul Munie'm Hasuuna, "Jaraimu al Qatl Amda wa Shibuhu Amda Wal Qatl Jaraimu Al hudud fi Sharieyat Wal Qaanuni" page 48.

[58] Ibid

There are however criticisms raised by the western countries that the act of forgiveness is discriminatory in nature because different offenders would be treated differently upon conviction over the same crime[59]. However, for one to claim to have been discriminated against, the discrimination should be based on colour, sex, religion, race, descent, place of birth, language and birth place[60]. Therefore one cannot claim to have been discriminated against in case the family of the deceased forgives the killer and he or she is not forgiven because it does not arise as of right[61].

Islam also provide for other instances that can lead to the waiver of the death penalty. They are;

(a) Where a father kills his son/daughter;

Islam takes a son or daughter as one half of his/her own father. Therefore where the father kills his son/daughter he cannot be killed under Shariah law.

> *"In the hadith narrated by Jaabir Ibn Abdallah he narrates that a man said, "O Messenger of Allah, I have wealth and children, and my father wants to take all my wealth and leave nothing. The prophet Peace Be Upon Him said. "You and your wealth belong to your father" [Ibn Majah no. 2292]*

In another tradition narrated by Suraqah bin Malik bin [Ju'shum]:

> *"That the holly prophet judged that the son is to suffer retaliation for killing his father, but the father is not to suffer retaliation for killing his son" [Jami'at- Tirimidhi 1399]*

(b) A freeman killing a slave;

During the pre and post Islamic Arabia people were free to own slaves until it has been recently abolished internationally in 1927[62]. In line with the circumstances of that time, a slave was not considered to be equal to a

[59] M.Ershadul Bari, "Capital Punishments in Islam" Journal of Islamic Law Review Vol. 6 2010 page. 49

[60] See: Article 21 (3) of the Constitution of Republic of Uganda 1995 (as amended)

[61] Ibid

[62] Slavery Convention, Signed at Geneva on 25 September 1926. Available on http://www.ohchr.org>Slavery/pdf. Accessed on 5/7/2019.

freeman and as such a freeman would not be killed for killing a slave while a slave would be killed for killing a freeman. On this Allah said;

> *"Believers, just retribution is prescribed for you in cases of killing:* ***a free man for a free man, a slave for a slave****, and a female for a female……"[2:278]*

(c) A Muslim killing a non Muslim;

The prophet said;

> *"No Muslim will be killed in Qisas of an idolater" (Darmi: No.2356)*

However there are different opinions on the legality of this position. For imam Abu Hanifah a Muslim should be killed in case of pre-meditated death against the killing of a non Muslim[63]. Abu Hanifa base his position which I also concur with on the Quranic verse where Allah says:

> *"Believers, just retribution is prescribed for you in cases of killing: a free man for a free man and slave for a slave…." [Quran 2:278]*

5.1.3 Hudud Crimes 'Claims against God'

"Hudud" is an Arabic word its singular is *'hadd'* meaning 'limit'[64]. Hudud are crimes whose punishments are already fixed within the Quran and Sunah[65]. They are crimes against Allah and where it is established that they have been committed the judge is only bound to prescribe the said punishment against the offender. Of the six hudud crimes three of them carry the death penalty upon conviction of the offender[66]. They are;

1. Zina– adultery (2) Riddah– apostasy and (3) Hirabah– 'waging war against God and society' or brigandage/banditry

5.1.3.1 Apostasy

[63] Ibid

[64] Micheal Mumisa, "Shariah law and the death penalty: would abolition of the death penalty be unfaithful to the message of Islam" Penal Reform International . Available at: http://www.penalreform.org. Accessed on 7/7/2019.

[65] Ibid

[66] Ibid

This refers to the conscious abandonment of Islam by a Muslim in word or through deed[67]. It includes the act of converting to another religion, by a person who was born in a Muslim family or who had previously accepted Islam[68].

Allah says;

> *Make ye no excuses: ye have rejected the faith after ye had accepted it: if we pardon some of you, we will punish others amongst you for that they are in sin. [Quran 9:66]*

The prophet said that;

> *The blood of a Muslim who confesses that none has the right to be worshiped but Allah and I am his apostle, cannot be shed except in three cases: In Qisas for murder, a married woman who commits illegal sexual intercourse and* ***the one who converts from Islam (apostle) and leaves the Muslims***[69].

Under the Ugandan law, there is no crime which is described as apostasy however there is the offence of Insulting religion and disturbing religious assemblies contrary to Sections 118 and 119 of the Penal Code Act respectively both of which they are minor offences. This because conventional laws appreciate what is referred to as freedom of worship and freedom to belong to any religious denomination envisioned under Article 29 of the Constitution. Islam was the first to appreciate the freedom of one to belong to a particular religion. Allah says in **Quran 2:256** that;

> *"There is no compulsion in religion"*

It is for the above reason that Islam cannot compel a person to convert to Islam but when an individual out of his own will converts to Islam, he/she cannot thereafter denounce Islam.

However, according to shafi and Malik school of law where an apostate denounce that other religion or faith (recant) and expresses his regret or

[67] Peters & De Vries (1976), Apostasy in Islam, Die Welt des Islam vol. 17 pg. 12

[68] Ibid

[69] Sahih al-Bukhari 9:83:17

repents the punishment should then be waived[70]. On this note, Article 126 of the 1991 Sudanese Penal Code Act provides for death penalty for any person found guilty of apostasy[71]. However, the section goes on to state that where the apostate repents and recants his apostasy before the execution of the death penalty, the death penalty should be withdrawn[72]. In Sudan, the famous case Meriam Yahya Ibrahim a 27 year old woman was convicted on 11 May 2014 on account of apostasy and zina under the 1991 Sudanese Penal Code[73].

5.1.3.2 Adultery

According to Sharia law the crime of adultery (zina), includes both adultery (sexual relations between individuals, at least one of whom is married) and fornication (sexual relations between unmarried individuals)[74]. The Quran requires four male eye witnesses or four confessions on four separate occasions by the defendant in open court to sustain a zina conviction[75]. Married persons who commit zina are punished by stoning to death and unmarried persons by one hundred lashes.[76]

However, under the Ugandan law, section 154 of the Penal Code Act provides for the crime of adultery in following terms. The law says; *'any man who has sexual intercourse with any married woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred shillings; and, in addition, the court shall order any such man on first conviction to pay the aggrieved party compensation of six hundred shillings, and on a subsequent conviction compensation not exceeding twelve hundred shillings as may be so ordered'.*

The above section clearly makes adultery a misdemeanor for which a lesser punishment is laid. This is a true indication that the conventional laws

[70] Elizabeth Preiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria" William & Mary Journal of women and the law, Vol 11 Issue 3 Article 9 page. 511

[71] Sudanese Criminal Act 1991

[72] Ibid

[73] International Federation for Human Rights Sudan: Death Penalty pronounced in apostasy case, 20/ May/2014. Available at https://www.refworld.org/docid/5391b73e22. html Accessed 7/7/2019.

[74] Prof. Anwarullah, "The Criminal Law of Islam" KItab Bhavan Publishers, 1st Edition 2006 pg.125

[75] See: Quran 24:2.

[76] ibid

disregard the crime of adultery much as it causes disastrous effects to families the most fundamental units of this World. Adultery leads to confusion of lineage, child abuse, family breakups, and spread of diseases among other.

However, Islam has laid certain conditions that make the impositions of the death penalty very difficult. In fact certain Moslem scholars are of the opinion that the evidential requirement of Zina makes the implementation of its punishment very difficult[77]. They are;

There should be four eye witnesses who should testify that they saw the act being committed at the same time[78]. If the act is to be proved by way of confession, then the confession must be repeated in four clear and unambiguous words. The accused can any time withdraw his confession at anytime of which the death penalty would be withdrawn[79]. In addition the witnesses in the case of Zina must be Muslim, male of high moral standing with the society and of legal capacity[80]. Where one wrongfully accuses his fellow Muslim of zina, then he/she would be liable for another had known as Qazf and would be stripped eighty lashes for that[81].

Imam Malik maintains as an exception for the provisions of four witnesses that Zina can be proved by circumstantial evidence in case of unmarried woman becoming pregnant[82]. In Saudi Arabia for instance who are followers of Imam Ahmad Ibn Hanmbal, thy raise several defenses for this claim[83]. First, a woman who was married before can claim that the pregnancy is for his former husband under the 'sleeping fetus' doctrine that the pregnancy can last from four to seven years[84]; second the woman can claim that there was no penetration which is requirement for Zina; thirdly the woman can claim to

[77] Elizabeth Preiffer, "The Death Penalty in the Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria" William & Marry Journal of Women and the law Vol. 11 Issue 3 Article 9 page. 510

[78] Quran 4:15-16

[79] Prof. Anwarullah, "The Criminal Law of Islam" Kitab Bhavan Publishers 1st Edition 2006 pg. 161

[80] Ibid

[81] See: Quran 24:4

[82] Ibid

[83] Elizabeth Preiffer, "The Death Penalty in the Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria" William & Marry Journal of Women and the Law Vol. 11 Issue 3 Article 9 page. 511

[84] Ibid

have been coerced into the sexual intercourse[85]; fourthly a woman can claim that she engaged into the sexual act under a mistaken belief for example believing that they underwent through a valid marriage ceremony whereas not and lastly the woman can claim that the sexual intercourse took place while she was a sleep[86]. The last two defenses cannot be disproved except for the woman's claim.

Surely the evidential burden makes it next to impossible to prove the offense for Zina and as such the infliction of the death penalty under the head of Zina is most unlikely to occur.

5.2.1.3 Harabah (Dacoity and Highway robbery)

Harabah literally means to quarrel, to fight and in technical terms it means to take a way property from a person openly by using or threatening to use force[87]. Harabah includes highway robbery, bloodshed, high treason, decoity among others[88]. According to Imam Abu Hanifah for a person to commit harabah must be armed with something that can be used as a weapon arm or such a thing which is used as arm stick, stone, piece of wood etc. however according to Imam Malik and Shafi, harabah can be committed with personal capabilities of using force irrespective that the offender is amed or not[89].

Highway robbery is punishable by death, crucifixition, amputation and, banishment.[90]This offense interferes with commerce and creates fear among travelers.[91] The Quran states:

This is the recompense of those who fight against God and His Messenger, and hasten about the earth, to do corruption there: ***they shall be slaughtered, or crucified, or their hands and feet shall alternately be struck off, or they shall be banished from the land.***[92]

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[85] Prof. Anwarullah, "The criminal Law of Islam" Kitab Bhavan Publishers 1st Edition 2006 page 161

[86] The tradition of the prophet that the pen is lifted for three categories of people and one of the instance is a sleeping person until he/she wakes up. [Abu Dawud 4403]

[87] Prof. Anwarullah, "The Criminal Law of Islam" Kitab Bhavan Publisher 1st Edition 2006 page195.

[88] Ibid

[89] Ibn Qudaamah, al-Mughni, Vol. 10, page 262-64

[90]M. Siddiqi, the Penal Law of Islam 52 (1979), note 80, pg. 141.

[91] Ibid, pg. 140

[92] Quran: 33: 34.

This offence is also provided for within the Ugandan law specifically under section 285 of the Penal Code Act. The section provides that; *'any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.*[93] *The punishment for aggravated robbery is death*[94]*'.*

However, under Islamic law, there is an unanimous opinion of the jurists that if the offenders of harabah repent before their arrest by state, the 'hadd' shall not be implemented on them however they would be liable for restoration of property back to the owner and shall be liable for qisas where they committed murder or hurt[95]. In countries such as Saudi Arabia the offenders would also be liable under ta'zir[96]. The Quran relates to the punishment of the offenders of harabah:

> *"Except if those who repent before they fall onto your power; in that case, know that Allah is oft-forgiving, most merciful" [5:34]*

Basing on the above verse, where the offenders repent after being arrested, the ***hadd*** shall be implemented if their offence is proved by the testimony of two adult, sane and credible witnesses other than the victims[97].

Surely Islam is a most forgiving religion and the death penalty can be implemented during extreme circumstances.

For the third category of offences which is Ta'zir, (offences against the state) these are crimes whose punishments have not been fixed by the Holly Quran and the Sunnah of the prophet (PBUH)[98]. The punishments for these crimes are left on the discretion of the judge/ruler to fix in accordance with the

[93] Section 285 of the Penal Code Act Cap 120

[94] See: Section 286 (2) of the Penal Code Act Cap. 120.

[95] Prof. Anwarullah, "The Criminal Law of Islam" Kitab Bhavan Publishers, 1st Edition 2006 page 197

[96] Ibid

[97] Ibid

[98] Prof. Anwarullah, "The Criminal Law of Islam" Kitab Bhavan Publishers 1st Edition 2006 page 212.

prevailing circumstances much as the ruler would be free to prescribe death punishment for the aggressor if circumstances so demand[99].

5.2.2 Procedure before conviction of death penalty in Islam:

Islam emphasizes that before the imposition of the death penalty, the due process should be followed. These conditions make the convictions of the hudud and qisas crimes very difficult to the extent that Islamic states end up convicting the accused persons on the basis of Ta'zir[100]. Allah again says:

> *Do not kill a soul which Allah has made sacred except through the due process of law.[Surat al An'am 6:151]*

The following are some of trial procedures before sentencing the accused to death penalty;

1. The prosecution must prove its case beyond reasonable doubt. Islam considers it preferable to error in granting a pardon, than to error in inflicting punishment. On this the Prophet (PBUH) said:

   > *"Avoid applying legal punishment upon the Muslims if you are capable. If the criminal has a way out, then leave him to his way. Verily it is better for the leader to make a mistake forgiving the criminal than it is for him to make a mistake punishing the innocent"* ***Sunan al-Tirimidhi 1424.***

Therefore, for any offence that cannot be proved beyond a reasonable doubt, the court should find in favour of the defendant.

2. Circumstantial evidence cannot be admitted in hudud offenses[101]. Because of the gravity of the punishment associated with hudud punishment being death penalty, Islam requires that the evidence must be direct and conclusive[102]. However Imam Malik of the Maliki school of law makes an exception for Zina in case of un married woman becoming pregnant[103].
3. In the same line, Sharia law also requires that a minimum of two witnesses that are morally upright, sane male and Muslims who

[99] Ibid .

[100] Prof. Anwarullah, "The Criminal Law of Islam" Kitab Bhavan Publishers, 1st Edition 2006 page 36

[101] Elizabeth Peifer, "The Death Penalty in Traditional Islamic Law and as interpreted in Saudi Arabia and Nigeria" William & Mary Journal of the women and Law Volume 11 Issue 3 Article 9 page.55

[102] Ibid

[103] Ibid

must testify that they saw the offence take place for other hudud offences other than Zina. Allah says:

> *"……..and bring to witness from among your men……." [2:282]*

For conventional law even one witness is enough much as the court is required to take extra caution when convicting on the evidence of a single identifying witness. The case of ***Abdallah Nabulere and 2 others vs. Uganda***[104] where the court noted that where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, there is need for a special caution as a witness can be more convincing but mistaken.

4. Sharia law also has a strict requirement that a person cannot be accused of an offence if they are under the age of criminal responsibility known as bulugh. The prophet Peace be Upon Him said:

> *"The pen is lifted (prevented from writing the sins) of three groups (of people) that is, they will not be responsible for their actions: the insane until they become sane, those who are sleeping until they wake up, and the young until they reach puberty."[Recorded in Abu Dawud 4403 and Ibn Majah 2041]*

This is in line with the Constitution of the Republic of Uganda as the age of maturity is 18 years and a child would be criminally culpable upon retaining the said age[105].

There are no formal procedures that were laid by the holly Quran or the traditions of the prophet [PBUH] on how the trial process should be however they have been developed by Muslim scholars within the different Muslim countries.

In Pakistan Article 2 of the Constitution of Pakistan provides that Islam shall be the state religion of Pakistan. Parliament of Pakistan is not allowed to pass any law that is repugnant to the teaching of the holly Quran and the traditions

[104] Criminal Appeal No. 9 of 1978.

[105] See: Article 257 of the Constitution 1995 (as amended)

of the prophet[106]. This means that Pakistan is an Islamic state governed on the very teachings of Islam[107]. In Pakistan, a death penalty convict is a condemned prisoner[108]. A convict becomes a condemned prisoner after an additional district session judge condemns him to suffer death. This sentence must however be confirmed by the High Court of Pakistan for it to be executed[109]. Therefore a prisoner has a right to appeal to High court as of matter of law to vary or confirm his sentence. Where the High Court upholds the death sentence, the session judge will issue the execution warrant which bears the execution date. The convict has an automatic right to appeal to the Supreme Court of Pakistan[110]. If the Supreme Court does not issue an order for stay of execution before the date provided for in the execution warrant, the prisoner will only be left to send an appeal for mercy to the president of Pakistan who has the powers to pardon under Article 45 of the Pakistan constitution. If the prisoner's appeal before the president fails, he/she will have to be executed on the set date provided for within the execution warrant.

In Saudi Arabia, Article 1 of the Constitution of the Kingdom of Saudi Arabia provides that Islam is the state prison of the Arabic Republic of Saudi Arabia with Quran and the Sunnah of the prophet [PBUH] with Riyadh as it capital city. Article 38 of the Constitution of Saudi Arabia also maintains that there shall be no crime or penalty except in line with shariah. In Saudi Arabia it is the High Court of Saudi Arabia (kubra court) that has jurisdiction to try the case that would result into the imposition of death penalty[111]. The High court in the death penalty case sits with three judges who investigate, examines witnesses and issue its verdict[112]. The accused once convicted has a right to appeal to court of Appeal (cassation court) who sits with five judges once the

[106] Ibid

[107] See: Article 1 of the Constitution of the Republic of Pakistan [as modified on the 28/February/2012]

[108] Ashiraf Ali, "Abolition of Death Penalty in Pakistan" Available at https://www.academia.edu>Abolition of death penalty in Pakistan/pdf. Accessed on 7/8/2019 page 11

[109] Ibid

[110] Ibid

[111] Elizabeth Preiffer, "The Death Penalty in Traditional Islamic Law and as interpreted in Saudi Arabia and Nigeria" William & Mary Journal of Women and the Law. Vol. 11 Issue 3 Article 9 page. 521

[112] Ibid

sentence is confirmed, the file is sent to the Supreme Judicial Council that also reviews the prisoner's case[113]. If the sentence is confirmed the file is sent to the King of Saudi Arabia who has the review. Where the king confirms the conviction, the prisoner will have to be executed.

5.2.3 Execution of Death Penalty in Islam.

Under Islamic law, execution of a death penalty should be public in order to enhance its alleged effect of general deterrence[114]. This is derived from the hadith of Maiz who had confessed that he had committed adultery and the prophet ordered that he should be taken to Baqi' garqad (the grave yard of Medina) an open place for him to be stoned from there[115]. According to Imam Abu Hanifah and one view of Imam Ahmad in case of premeditated murder, the convict shall be beheaded with a sword or another similar weapon[116]. According to Imam Malik and Imam Shafi if possible the convict shall be killed in the same way as the victim was killed.

For the case adultery the punishment should be executed in an open place where the prisoner is made to stand into the hole half way of his body and then stoned up to his/her death.

In conclusion therefore by following the tenets of Islam, the implementation of death penalty is very difficult to realise to the extent that one can say there is almost no death penalty in Islam through the waivers and evidential safe guards provided and required under the law respectively.

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[113] Ibid

[114] William A Schabas, "Islam and Death Penalty" Willian & Mary Bill of Rights Journal (2000) Available at

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[116] Prof. Anwarullah, "The Criminal Law of Islam" 1st Edition 2006 page 90.

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29. M. Siddiqi, the Penal Law of Islam 52 (1979), note 80, pg. 141.
30. The Penal Code Act Cap 120

INTERNATIONAL LEGAL REGIMES ON THE CRIME OF GENOCIDE: PRESCIPTION FOR REINVIGORATION

DANIEL FRIDAY ATIDOGA PhD1

Abstract

Humanity for ages was caught in a paradoxical epoch of self destruction and reckless impunity, occasioned by man, to man of same human family. This grave impunity enjoyed and thrived on the wings of global ambivalence and tyranny of silence, as there existed no unified regulatory regime for prohibition, prevention and sanction. At the wake of a new era of awareness and globalization, the Convention for the Prevention and Punishment for the Crime of Genocide, 1948 was adopted. This was to put an end to reckless genocidal atrocities and sadistic fantacies of tyrannical rulers. No instrument of law was ever heralded and celebrated like the Genocide Convention. Pitiably however, the act of genocide became a reoccurring decimal for so many reasons, amongst which is the inherent loopholes in the law of genocide itself. These loopholes are the concern of this paper. Consequently, this paper examines the international legal regime on genocide, with a bird's eye view on the principal treaty, statutes of adhoc tribunals and statute of permanent international criminal court (ICC). This is with a view of identifying loopholes in the laws and making prescription for strengthening them. The paper observed that, the law only protects certain category of persons. Political groups, social groups and trade groups were not protected. It was also found that the law of genocide only emphasizes and envisages the happening of genocide events. No any provision in the entire laws contemplates preventive measures. The paper therefore, recommends that the laws of genocide should have a broader protective shield, which provides for protection of all groups. The paper also recommends that the laws of genocide should be invested with a legal teeth and fierce legal claws to pursue genocide prevention, rather than waiting for the tumultuous combat of curative measures.

Key Words: Genocide, International Law, crime, Court, Tribunal

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1.1 Introduction

For half a century now, genocide as a phenomenon has been subjected to increasing scrutiny from legal experts, scholars, states persons and citizens alike.[2] It is in the course of such thorough scrutiny that Winston Churchill called it "a crime without a name", the Genocide Convention described it as an "odious scourge" and numerous scholars styled it as "the ultimate crime, the pinnacle of evil".[3] Acts of genocide have doubtlessly assumed the status of a re-occurring malignant tumor. Its recent occurrences in states like Cambodia, Rwanda, Bosnia, Darfur, East Tumor, Iran, Kenya, and Uganda and contentiously in Nigeria have attracted further international attention and legal developments in addition to the existing ones. These past and present legal developments includes the establishment of legal regimes for combating the 'odious scourge' such as, the Genocide Convention of 1948, Statute of International Criminal Tribunal for Yugoslavia (SICTY), Statute of International Criminal Tribunal for Rwanda (SICTR), Statute of International Court of Justice (SICJ), Statute of International Criminal Court (SICC) etc. Corresponding executor institutions such as the International Court of Justice, International Criminal Courts and the ad hoc tribunals/special courts were also institutionalized for the purposes of combating genocide – "the ultimate crime".

The primary focus of this paper therefore, is a critical examination of contemporary legal regimes on genocide with a view of identifying their weaknesses and proffering practicable solutions. This is very necessary because, the frequency at which genocide occurs may just be an indicator of the failure of the existing legal and institutional regimes for it prevention and punishment. Consequently, this paper shall be devoted to the appreciation of the legal regimes on genocide encapsulated in the Genocide Convention, Statute of International Criminal Tribunal for former Yugoslavia (SICTY), Statute of International Criminal Tribunal for Rwanda (SICTR), Statute of

[2] Morton, J.S. and Singh, N.V., "The International Legal Regime on Genocide" *Journal of Genocide Research* (2003), 5(1), p. 47.

[3] Nersessian, D.L., "The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals" *Texas International Law Journal* (2002) Vol. 37, pp. 236-237.

International Court of Justice (SICJ) and Statute of International Court of Justice (SICC)

1.2 Legal Regime for Combating the Crime of Genocide

1.2.1 Convention on the Prevention and Punishment of the Crime of Genocide, 1948[4]

I. General Overview

The law of genocide is the prohibition of the ultimate threat to the existence of protected groups. The law which is fashioned from a criminal law perspective though aimed at individuals yet focuses on the activities of such individuals as state agents in pursuit of state genocidal policies. "The centerpiece in any discussion of the law of genocide is the Convention on the Prevention and punishment of the crime of Genocide, Genocide Convention adopted by the United Nations General Assembly on 9 December 1948",[5] which became operational in January 1951. Surprisingly, sixty-four years after its adoption and sixty-one years after it became operational, the ratification of Genocide Convention is minimal in comparison with other more recent human rights treaties, as less than one hundred and fifty nations are signatories to the treaty. It was rightly observed that, the reason for less enthusiasm by states on the ratification of Genocide Convention cannot be the existence of doubt as to the universal condemnation of genocide, such rather testifies to unease amongst some states because of the serious demand imposed on state parties to prosecute or extradict persons, including heads of states for trial.[6]

In its advisory opinion on the reservation to the Genocide Convention, the International Court of Justice states that:

The origin of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law, involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and resulted in great losses to

[4] (1951) 78 UNTS 277.

[5] Schabas, W.A., *Genocide in International Law* (2nd ed.) (Cambridge: Cambridge University Press, 2009) p. 3.

[6] *Ibid.*

humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from the conception is that the principles underlying the Convention are principles recognized by civilized nations as binding even without conventional obligations.[7]

The statement above may be a pointer to the judicial recognition of the crime of genocide as a prohibition in the light of customary legal norms from which no state can derogate from. It may therefore follow that, the prohibition of genocide is a customary international law which vest responsibility to prevent and punish all acts perceived as such by all civilized nations, irrespective of whether such civilized nations are parties to any treaty prohibiting genocide or not. This thinking was further emphasized in 2006, when the International Court of Justice observed that, the prohibition of genocide stands as a preemptory norm (*jus cogens*) in international law, being the first time it has ever made such declaration about a legal rule.[8]

The Genocide Convention is an international treaty at the general realm of public international law, which draws inspiration from elements of international criminal law, international humanitarian law and international human rights law.[9] The repulsive disposition to genocide is linked with right to life and dire the protection of the sanctity of life as provided in national law[10] and International Declarations and Conventions,[11] while these instruments concern themselves with individual rights to life, the Genocide Convention is primarily associated with the right to life of human groups. While states ensure the protection of the right to life of individuals within their jurisdiction by prohibition of murder in criminal law, the repression of genocide proceeds differently, the crime being directed against the entire

[7] Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) (1951) ICJ Reports 16, p. 23.

[8] Case concerning the Activities on the Territory of the Congo (New Application, 2002) *Democratic Republic of Congo v. Rwanda*, 3 February, 2006, para. 64.

[9] Schabas, *op. cit.*, n. 4, p. 7.

[10] For instance, section 33 Constitution of the Federal Republic of Nigeria, 1999.

[11] Art. 4 American Convention on Human Rights (1979) 1144 UNTS 123 OASTS 36; Art. 3, Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810; Art. 2, Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS 221, ETS 5; Art. 6, International Covenant on Civil and Political Rights UN Doc. E/CN.4/SR 310 & 311.

international community rather than an individual.[12] "It is a frontal attack on the value of human life as an abstract protected value in a manner different from the crime of murder".[13]

Much energy has been dissipated by legal researchers in situating what is today thought as the shortfalls of the Genocide Convention. It has been rightly argued that, the definition of genocide advanced by the convention seem too restrictive and narrow to accommodate acts that should fall within the purview of the crime of genocide. The Convention seem not to take into cognizance, in clear and unambiguous manner, many of the major human rights violation and mass killing perpetrated by dictators and their accomplishes.[14]

II. Provisions of the Convention

The preamble to the Genocide Convention reflects both the accomplishments of the prior General Assembly resolution and sets the normative stage for the convention's binding article.[15] The preamble to the Convention states:

The contracting parties having considered the declaration made by the General Assembly Resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by civilized world;

Recognizes that at all period of human history genocide has inflicted great loss on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Hereby agree as hereinafter provided

[12] Schabas, *op. cit.,* n. 4, p. 8.

[13] Kader, D., "Law and Genocide: A Critical Annotated Bibliography", (1988) 11 *Hasting International and Comparative Law Review*, p. 381.

[14] Schabas, *op. cit.,* n. 4, p. 8.

[15] Morton and Singh, *op. cit.,* n. 1, p. 54.

The preamble to the Genocide Convention is followed by nineteen (19) articles which can be divided into three categories, as follows: Substantive Articles (I-IV); articles that boarders on procedures (V-IX); articles that boarders on technicalities (X-XIX).

Article I

The contracting parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.[16]

The article clearly points to the fact that the obligation to prevent and punish genocide arises when genocidal activities are committed either at times of war or times of peace. It must however, be stated that the use of the word "in time of peace" is some how ambiguous because the existence of genocide of any nature does not depict peace. However, Zachariah may be right to have observed that "peace" in the context it was used in Article I of the Convention may be in contrast to "war" strictly so called.[17] Even though Genocide Convention has been criticized as merely reproducing crimes within the purview of domestic laws; while this may be true, Article I of the Convention however, re-situated such criminal conducts within the domain of international law, which consequently ignites state parties' obligation to prevent and punish such conducts. This therefore gives right of intervention by outside parties to pursue genocide, therefore piecing the shield of state sovereignty which often works against intervention.

Article II

In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;

[16] Art. 1 Genocide Convention.

[17] Zakariah, M., Genocide under International Criminal Law: Past, Present and Future Concern in Africa (2011) LL.M Thesis submitted to the Faculty of Law, University of Jos – Nigeria, p. 65.

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;
(e) Forcible transferring children of the group to another group.[18]

The above definitive elements constitute the *actus reus* and *mens reus* of the crime of genocide. The meaning ascribed to "genocide" by Article II of the Convention has sparked a very hot scholarly debate over its utility and completeness.[19] This heated debate has over the years brought to fore some seeming inadequacies of the Conventions definition. The definition was limited to the protection of only the groups specified in Article II. Political, economic and social groups were excluded from protection by the Convention. Also visibly omitted from the convention is "cultural genocide", which was very central to Lemkin's perception of genocide as a phenomenon. Furthermore, the intent requirement for the crime stipulated in Article II of the Convention is very ambiguous and evasive. Haven failed to furnish a proper framework for the extraction of the intent requirement of the crime. The Convention therefore dumps such heinous duty to the subjective opinion of judges and jury. Intent should simply be viewed, as intent of general criminal responsibility to avoid excessive technicality of special intent requirement which is gloomy and evasive.

Article III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;

[18] Art. II, Genocide Convention.

[19] Charny, I. (ed.), Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference of the Holocaust and Genocide Studies (Boulder, C.O: Westview Press, 1984) p. 65; Dadrian, V.N., "A Typology of Genocide" *International Review of Modern Sociology* (1975) Vol. 5, p. 123; Drost, P., *The Crime of State,* Vol.2 (Leyden: A.W. Sythoff); Feni, H., *Lives at Risk: A Study of Violation of Life Integrity in 50 States in 1987, based on the Amnesty International 1988 Report* (New York: Institute of Genocide Studies, 1990) pp. 23-25 all cited in Morton and Singh, *op. cit,* n. 1, p.56.

(e) Complicity in genocide.[20]

This Article did a very fundamental thing in the jurisprudence of the law of genocide – It enlarged the scope of the law of genocide by projecting further the purview of acts that fall within its legal parameters. The provision simply criminalized preliminary acts pursuant to genocide which may actually fall short of the commission of the actual offence of genocide. In the first ever verdict by an international court system handed down on the crime of genocide, delivered in 1998 against Jean Paul Akayesu, the International Criminal Tribunal for Rwanda (ICTR) found Akayesu not only guilty of genocide, but also of public incitement to commit genocide.[21] The ICTR also convicted Rwanda's former Prime Minister, Jean Kambanda of genocide, conspiracy to commit genocide, and incitement genocide.[22] Article III of the Convention has therefore expended the sphere of genocide prosecution into new areas of inchoate offences.

It must be observed that Article III is somehow in exhaustive, because it only mentioned the acts that will be punishable by the Convention, without stating the constituent of the acts. It therefore means that what constitutes conspiracy to commit genocide, attempt to commit genocide and complicity in genocide must be sought for else where and not in the convention, sadly left to the whims and caprices of the subjective opinion of a judges or jury. It is suggested that, the appreciation of the inchoate offences in genocide should be viewed from the general perception of inchoate offences in criminal law, in relation to the commission of genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.[23]

This article tends to erode the contentious doctrine of immunity of some classes of leaders and public officials from criminal prosecution. The

[20] Art. III, Genocide Convention.

[21] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR-96-4-T), Judgment of 2 September, 1998.

[22] *Prosecutor v. Jean Kambanda* (Case No. ICTR-97-23-S), Judgment of 4 September, 1998.

[23] Art. IV Genocide Convention.

provision seems very mindful of the historical antecedent of complicity of rulers in the perpetration of genocide and set out t downplay the defence of sovereignty advanced by rulers. By clearly stating in Article IV that criminal responsibility extends beyond private individuals to state functionaries, the Convention expands the range of culprits that can be held accountable for genocidal acts committed by them.[24]

Morton and Singh argued vehemently that, Article IV should have been strengthened by express stipulation rejecting the plea of superior command as a defence to actions or inactions that results in genocide.[25] It must be observed that the plea of superior command hold no weight, as such are only excusable only to the extent that the offender does not know that the command was illegal, and to a further extend that the command was not manifestly illegal.[26] In line with the suggestion and argument of Morton and Singh, to dispel any ambiguity on the place of the plea of superior command, the Charter of the International Military Tribunal for the Nuremberg excluded the defence of superior command altogether.[27]

Article V

The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.[28]

This fifth article of the convention only sets out to internalize and domesticate the prohibition of genocide in the domestic laws of state parties to the convention. It seeks to create a flourishing ground for domestic prosecution of the crime of genocide. The article tends to recognize the fact that genocide often takes place within state boundaries and that its

[24] Morton and Singh, *op. cit.,* n. 1, p. 57.

[25] *Id.*

[26] *R v. Finta* (1994) 1 SCR 701; Military *Prosecutor v. Melinki,* (1985) 2 Palestine Year Book of International Law, p. 69; all cited in Schabas, *op. cit.,* n. 4, p. 380.

[27] Art. 8, Agreement for the Prosecution of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279.

[28] Art. V, Genocide Convention.

criminalization by municipal laws of state parties is essential to the effectiveness of the legal regime on the crime of genocide.

Article VI

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted it jurisdiction.[29]

This article has jurisdictional limiting consequence for prosecution of the crime of genocide. It is not in tune with the original draft of the convention, which allows for universal jurisdiction in the prosecution of genocide. However, that was pushed out from the final convention after serious debate. Consequently, the first part of Article VI only recognizes the jurisdiction of the state in the territory of which genocide was committed, the second part of the article confers jurisdiction on international penal tribunals as long as the contracting parties have accepted that tribunal's jurisdiction.[30] The reference to international tribunals by Article VI was only activated in the 1990s when the ICTY and ICTR were established and the creation of International Criminal Court (ICC) in 2002, before these time it was not effective, since no such bodies were in existence.

Article VII

Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extraditions. The contracting parties pledge their laws and treaties in force.[31]

This article encourages the prosecution of genocide by eroding the possibility of falsely protecting culprits from extradition on the ground that, they are sought to be extradited on the basis of a political crime. This Article VII did well by clearly situating the act of genocide in Article II and other acts

[29] Art. VI, Genocide Convention.

[30] Morton and Singh, *op. cit.*, n. 1, p. 58.

[31] Art. VII, Genocide Convention.

enumerated in Article III outside political crime. By these, states that are complicit in genocide cannot rightly refuse the extradition of persons accused of genocide on the basis that genocidal acts are political crimes.

Article VIII

Any contracting party may call upon the competent organ of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.[32]

This article invest in contracting parties to the convention the power to ignite preventive and suppressive measures by the instrumentality of propelling a competent organ of the United Nations to action. It is respectfully opined that the use of the phrase "competent organ of the United Nations" in a convention that relates only to the crime of genocide is vague. The article will be better with more precision and definiteness, if the organ of the United Nations with such responsibility upon a call from a contracting party is clearly spelt out.

Article IX

Disputes between the contracting parties relating to the interpretation, application or fulfillment of the present convention, including those relating to the responsibility of a state for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the party to the dispute.[33]

This article gave International Court of Justice (ICJ) the power to interpret the applicability or otherwise of the convention at the request of any of the parties to a dispute. This article is a clarion call on the ICJ to adjudicate genocide cases and provide advisory opinion to the General Assembly of the United Nations and parties to the Convention. In 1951, the ICJ was requested by the General Assembly of the United Nations to give an advisory opinion on the consequences of reservation made by parties to the Genocide Convention, which was also objected to by parties to the Convention. The ICJ ruled that

[32] Art. VIII, Genocide Convention.

[33] Art. IX, Genocide Convention.

parties registering reservations, which are subsequently objected to by other parties to the convention remain parties to the convention.[34] On three instances in the 1990s, states explored Article IX of the Genocide Convention to initiate proceeding in the ICJ on the charges of genocide.[35] A good example is the case of *Bosnia Herzegovina v. Serbia Montenegro*[36] where the ICJ final ruling on 26th February, 2007 on the case instituted by Republic of Bosnia against the Federal Republic of Yugoslavia on March20th 1993 was given. The legal exploration and exposition by ICJ in this case was a milestone achievement in the law of genocide.

Articles X-XIX

These are articles that boarders on technicalities of the convention ranging from languages of the convention; last date of signature; request for the revision of the convention; life span of the convention; place of domiciliation of the original convention and the registration of the convention with the Secretary General of the United Nations on the date of its coming into force.

The articles of the Convention that boarders on technicalities have three important articles:

Article XIV states in unequivocal terms that the convention is not intended to be of a permanent nature, it is to be in effect for ten years after it became operational, followed by a subsequent five years term. Article XV provides that where states denounce the convention such that the membership becomes less than sixteen, the convention will cease to be in force; which is highly unusual of a multilateral treaty. The provision of Article XVI, decorated parties with the right to request for revision of the treaty's provision at any time. However, such request is subject to the action of the General Assembly

III. Genocide Convention: Some Matters Arising

It is a common slogan that, the promise of "never again" which heralded the emergence of the Genocide Convention of 1948, had been severally fettered by the calamitous onslaught of the ceaseless genocidal atrocities that characterized our human habitation after 1948. The level to which Genocide

[34] Morton & Singh, *op. cit.*, n. 1, p. 59.

[35] *Ibid.*

[36] Case concerning the Application of Genocide Convention, Judgment of 26th February, 2007.

Convention has contributed to the prevention of the acts of genocide was not impressive, even though by the 1990s there was a milestone achievement, at least at the interpretation of the concept of genocide in the context of some specific crisis situations.

The potency of the Genocide Convention was primarily weakened by the divergent state interest and individual state objectives at the time of drafting the convention, which undoubtedly led to a compromising situation, distantly away from what proponents of the Convention had envisioned.[37] Kuper emphatically states that, ''the compromises reached at the drafting stage jeopardized the convention's effectiveness and implementation''.[38] Indeed, about seven decades after the Genocide Convention, there was little reason to praise the convention for its contribution to either the prevention or punishment of the crime of genocide.

An effective assessment of the legal regime on genocide, midwife by the Genocide Convention requires a consideration of the two operative terms – prevention and punishment – found in the title of the 1948 Genocide Convention. While prevention shares an equal status with punishment in the convention's title, there are however, no direct prevention provisions in the treaty. The omission of preventive measures is said to be a reflection of the general lack of knowledge of the cause or causes of genocide, as the divergent political position of states during the drafting process.[39] The causes of genocide are thus; argued to include, human nature,[40] fear of death,[41] material deprivation and ethnic diversity,[42] economic system[43] and the presence of

[37] Kuper, L., *The Prevention of Genocide*, (New Haven: Yale University Press, 1985) p. 100.

[38] *Id.*

[39] See Generally: Morton & Singh, *op. cit*, n. 1, pp. 60-61.

[40] Lorenz, K., *On Aggression* (New York: Bantam, 1966); Kosler, A., Janus: A Summing Up (London: Hutchinson, 1978).

[41] Charny, I., (ed.) *Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide* (Boulder, C.O: Westview Press, 1984).

[42] Falk, R., "Comparative Protection of Human Rights in Capitalist and Socialist Countries" *Universal Human Rights* (1979) Vol. 1, pp. 3-29.

[43] *Ibid.*

war,[44] which serves as a cover for the elimination of individuals based on their common group features.

The absence of a compelling theory that uncovers the necessary and sufficient causes of genocide hinders the treaty from providing clear cut preventive measures. Therefore, the prevention of genocide deducible from the convention relies majorly on deterrence which is a form of threat of punishment on those contemplating the perpetration of genocide.[45] Morton and Singh argued that, 'for the prevention of genocide through the threat of punishment to be credible, a consistent record of bringing perpetrators of genocide to justice must be established'.[46] Thus, while prevention remains a central purpose of the Genocide Convention, it is however dependent on the effective accomplishment of the punishment goal, which is more directly addressed in the treaty.[47]

On punishment for genocide, the Genocide Convention is a forceful attempt to replicate the Nuremberg principle into time of peace, by which captured enemies were hold individually liable for acts of aggression and crimes against humanity. The problem here is that, while the Nuremberg Tribunal had physical custody of perpetrators for justice, the Genocide Convention provided for two judicial levels - domestic and international, as provided for in Articles V and VI of the Genocide Convention. The implication of these is that, punishment for genocide in domestic and international domain may vary considerably. It has been shown that, international prosecution of genocide seem to be more fruitful, as domestic prosecution is often hampered by complicity of the prosecuting state in the acts. This makes domestic prosecution of genocide much less likely. This certainly accounts for the unimpressive performance of national courts in the punishment of acts of genocide committed by their own citizens.[48]

[44] Markusen, E., "Genocide and Warfare" in Stragier, C.B. and Flynn, M. (eds.) *Genocide, War and Human Survival* (London: Rowman & Little Field, 1996) pp. 75-86.

[45] Morton and Singh, *op. cit.*, n. 1, p. 61.

[46] *Id.*

[47] *Id.*

[48] *Id.*

If domestic prosecution of genocide is rendered ineffective due to complicity of state in genocidal atrocities, the only punishment avenue will remain international prosecution, through the instrumentality of International Court of Justice (ICJ), as set forth in Article VI of the Genocide Convention. Since ICJ only enjoys jurisdiction on consenting states, the ICJ is limited in its ability to adjudicate in genocide cases, hence, international prosecution of genocide is dependent on either the creation of *ad hoc* tribunals for specific instances of genocide, like was done in the case of former Yugoslavia and Rwanda or the establishment of a permanent International Criminal Court.[49] It must be observed however, that the status of genocide as *urga omnes*, might have the potency of clothing ICJ with universal jurisdiction on prosecution of the crime, therefore eroding the limitation of consent of parties that is required for ICJ to activate its adjudicatory prowess.

1.2.2 Statute of International Criminal Tribunal for former Yugoslavia (SICTY)

II. General Overview

The International Criminal Tribunal for former Yugoslavia was established in 1993 by the instrumentality of its enabling statute (SICTY) for the prosecution of persons responsible for the serious violations of international humanitarian law in the former Yugoslavia.[50] The fall of the Soviet Union in 1989, was followed by emergence of a lot of independent Balkan States in Eastern Europe. This situation ushered in massive violation of human rights, wide spread catastrophic conflict and widespread and systemic humanitarian atrocities, which includes an unprecedented, genocidal "ethnic cleansing" policies, organized torture, murder, existence of concentration camps, rape and other atrocities of varying degrees.[51] The lists of acts punishable under the SICTY are:

- Grave breaches of the 1949 Geneva Convention;[52]
- Violation of Laws and Customs of War;[53]

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Art. 2 Statute of ICTY.

[53] Art. 3 *Id.*

- Genocide;[54] and
- Crimes against humanity.[55]

The crime of genocide which is the primary concern of this paper is provided for in Article 4(a)-(e) of the statute. The article provides for the crime of genocide and its associated elements. It also provides for preliminary offences in genocide or other acts of genocide. These include conspiracy to commit genocide; attempting genocide; inciting genocide and complicity genocide.

It must be observed however, that Article 4 of the Statute of ICTY is same, in wordings and import with the provision of Article II of the Genocide Convention of 1948 and the provision of Article 2 of the Statute of ICTR. It therefore follows that the strength and the weakness of the Genocide Convention examined earlier is also the strength and the weakness of the Statute of ICTY in relation to the crime of genocide as stipulated in Article 4 of the Statute, so the discussion on Genocide Convention also suffices here.

It must be noted however that, the Statute of ICTY vested on the Tribunal and the National Courts Concurrent Jurisdiction to prosecute persons for international crimes committed in the territory of former Yugoslavia.[56] Where there is conflict, the tribunal will have edge over the National Court.[57] By these, the International Tribunal is invested with legal teeth to masticate and override the jurisdiction of the national courts, and even demand that cases at the national court be referred to the tribunal at any stage of the proceedings.[58] A trial by the tribunal may not again be subjected to another trial before any national court. However, an accused person tried before a national court may be subjected to trial again by the tribunal, where the crime for which such an accused person is tried was characterized as an ordinary crime and/or where there is evidence of bias at the trial.

III. Major Cases on Genocide Decided under the Statute of ICTY

[54] Art. 4 *Id.*

[55] Art. 5 *Id.*

[56] Art. 9(1) *Id.*

[57] Art. 9(2) *Id.*

[58] *Id.*

There are some significant pronouncement dealing with the interpretation and application of Article 4 (genocide) of the Statute of ICTY. The trial chamber rulings in *Jelisic*,[59] *Krstic*[60] and *Sikirika*[61] and the appeals decision in *Jelisic*.[62] In the course of the judgments, the ICTY has made important pronouncement on the nature and character of genocide[63] in the context of the Yugoslavian crises, which gave a lucid appreciation of genocide in the light of the Statute of ICTY.

Prosecutor v. Radislav Krstic,[64] is a landmark case in which the ICTY handed down the tribunal's first genocide conviction in August, 2001, where the trial chamber held that, the 1995 Srebrenica massacres in which Bosnian Serb forces executed 7,000 – 8,000 Bosnian Muslim men constituted genocide.

The crises that engulfed Yugoslavia in the 1990s generated serious global outcry, consequent upon the scale of atrocities which was unprecedented in recent times. The Srebrenica massacre is core to the Yugoslavian calamity. Southwick rightly observed that, "the word 'Srebrenica' carries a pall of tragedy uttered with a mixture of historical import and regret; it has become a euphemism for un-speakable events."[65]

The decision in *Krstic* set forth a comprehensive account of the Srebrenica tragedy. The ICTY found that following the takeover of the town and the execution of Bosnian Muslims men of military age, the Serb forces further transported away from the area nearly all Bosnian Muslim women, children and elderly;[66] an act which the tribunal said resulted in "the physical disappearance of the Bosnian Muslim population in Srebrenica".[67] The *Krstic*

[59] *Prosecutor v. Jelisic, Case No*. IT-95-10T, Judgment of ICTY of 19th October, 1999.

[60] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment of ICTY of 2nd August, 2001.

[61] *Prosecutor v. Sikirica,* Case No. IT-95-8-T, Judgment of ICTY on Defence of Motion to acquit of 3rd September, 2001.

[62] *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Appeal Judgment of ICTY of 5th July, 2001.

[63] Schabas, W.A., "Was Genocide Committed in Bosnia and Herzegovina? First Judgment of International Criminal Tribunal for the former Yugoslavia" *Fordham International Law Journal* (2001) Vol. 25 (23) p. 22.

[64] *Krstic, op. cit.,* n. 2, p. 59.

[65] Southwick, K.G., "Srebrenica as Genocide? The *Krstic* Decision and the Language of the Unpeakable", *Yale Human Rights and Development Law Journal* (2005) Vol. 8, p. 189.

[66] *Krstic, op. cit.,* n. 59, para. 52.

[67] *Id*., para. 595.

trial chambers of ICTY concluded that, these act, perpetrated by Serb forces constituted genocide.[68] For actively participating in the killings, Radislav *Krstic*, the Serb officer was tried, convicted and sentenced to forty six years imprisonment, through the Appeal Chamber of ICTY, reduced the sentence to thirty five years in April, 2004.[69] The Appeal Chamber reduced *Krstic* sentence after establishing that *Krstic* aided and abetted genocide not as a co-operator, as initially determined by the Trial Chambers.[70] On 19th April, 2004, the ICTY Appeal Chamber Affirmed the Trial Chamber finding of genocide perpetrated by the Serb forces at Srebrenica.[71]

The finding of genocide in *Krstic* case by ICTY was based on a critical analysis of Srebrenican situation in the context of the law of genocide as encapsulated in the Statute of ICTY.[72] In arriving at a conclusion of genocide, the ICTY Chamber had to agree that, the atrocities were committed with the requisite specific intent set down in the laws of genocide,[73] particularly in line with the provision of Article 4(2) of the ICTY Statute. The ICTY found specific intent to destroy part of Bosnian Muslim group because of the clear imputation that, "the Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings[74] with the forcible transfer of women, children[75] and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica".[76] It is the further finding of ICTY that, "the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslim in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on the territory".[77] These observations were what informed the conclusion of ICTY

[68] *Id*.

[69] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Appeal Judgment, paras. 266-275.

[70] *Id*.

[71] *Id*., para. 38.

[72] Art. 4(2).

[73] Arts. II and III Genocide Convention, Art. 4(2) Statute of ICTY; Art. 2(2) Statute of ICTR and Art. 6 Rome Statute of ICC.

[74] Art. 4(2)(a) Statute of ICTY; Art. 4(2)(e).

[75] Art. 4(2)(e) *Id*.

[76] Krstic, *op. cit.*, n. 2, para. 595.

[77] *Id*. Para. 593.

that the activities of the Serb forces were within the meaning of Article 4 of the Statute of ICTY. Hence, that, genocide had indeed taken place at Srebrenica.[78]

In disagreeing with the finding of genocide arrived at by the ICTY, Southwick fiercely contended that, the ICTY failed to consider the defence substantial evidence which reasonably situate the Srebrenica massacre away from genocide, but as an effort to remove a military threat in one of the conflict's most hotly contested region.[79] She further contended that, "the chamber reached its questionable conclusion because it applied an overly broad standard of intent"[80] and that adequate consideration was not given to the possible motives underlying the execution. She stated further that, the chamber was too expansive in its interpretation of terms in the definition of genocide, thereby excessively broadening the circumstances under which genocidal intent may be inferred.[81]

In disagreement with the contentions of Southwick, this writer wish to humbly state that, the nature of the massacre that characterized the Srebrenica situation is depictful of nothing but an act of genocide. The contention that, the Serb forces only employ effort to remove a military threat in one of the conflict's hotly contested region could be anything but reasonable and intelligible argument in the light of the nature of atrocities perpetrated. It must equally be noted that, a conflict situation in a hotly contested conflict region is not a defence to genocide, because genocidal acts whether committed in time of peace or in time of war is a crime under international law.[82] Respectfully, it must be stated that, the heavy whether created by Southwick on the assertion that, the ICTY applied a broad standard of intent without giving adequate consideration to the possible motive underlying the killings, is tantamount to an argument in pursuit of a wild goose in a thick forest of a far-fetched technicality. Even though the standard of intent and the motive for the crime of genocide was not expressly stated in the Statute of ICTY or the

[78] Southwick, *op. cit.*, n. 64, p. 196.

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] Art. I, Genocide Convention.

Genocide Convention of 1948, basic principles of criminal law demands that intention and/or motive of an accused person, which caused the prohibited act is derivable more from conduct of the accused or circumstances surrounding the prohibited act which gives room for inference on the state of mind of the perpetrator at the time of the commission of the crime.[83] Consequently, this writer is in total agreement with the conclusion of ICTY in *Krstic* case on the finding of genocide in Srebrenica.

In querying the finding of genocide by the ICTY in *Krstic* case, Schabas is of the opinion that, where physical destruction is the intention of the Serb forces, the transportation of the women, children and the elderly to the more secured area would not have taken place. He states:

Would some one truly bent upon the physical destruction of a group, and cold-blooded enough to murder more than 7,000 defenceless men and boys, go to the trouble of organizing transport so that women, children and the elderly could be evaluated.[84]

With respect, this opinion held by Schabas seems far away from the intendment of Article 4(2) of the Statute of ICTY and Article II of the Genocide Convention. The killing of men and boys of military age, means taking away the potent and procreating population of a group, which offends the provision of Article 4(2)(d) of the Statute of ICTY and Article II(d) of the Genocide Convention. The act of transferring the women and children of a targeted group whose active male population have been destroyed, can not fall, short of offending the Statute of ICTY[85] and Genocide Convention.[86] The argument as to the intention and/or motive for the act of killing and forcible transfer should only be visualized and ascertained by the conduct and the circumstance created by the Serb forces. We certainly do not expect the Serb forces to disclose their true intention in the face of charges of genocide. This is only deducible from circumstantial evidence and the nature of recklessness

[83] Atidoga, D.F., "Analysis of Darfur Crisis in the Context of the Crime of Genocide", *Journal of Private & Comparative Law* (JPCL) 2010-2011 Vols. 4 & 5, p. 217. A Publication of Dept. of Private Law, Ahmadu Bello University, Zaria.

[84] Schabas, *op. cit.*, n. 5, p. 46.

[85] Art. 4(2)(e).

[86] Art. II(e).

in the conduct of perpetrator(s). It must be stated further that, Schabas in his opinion seem unmindful of the fact that the act of killing alone, without what he portrayed as the evacuation of women, children and elderly to safety, may simpliciter amounts to genocide if the requisite intent is established. The issue of intent and/or motive seems to have been driven too far to an illusory domain, distantly away from realities. Can a man in state of sanity who used an iron club and delivered several fatal blows on the head of his victim be said not to have the motive or intention to kill? It is therefore our humble opinion that, the issue of intent and motive in genocide cases should be appreciated and understood in the light of the most basic principles of criminal law, which in our opinion is just what the ICTY did in *Krstic* case.

Prosecutor v. Goran Jelisic[87]

In this case, the ICTY gave its first judgment in a genocide case in October, 1999. The accused person Goran Jelisic was a "low level" thug, who was personally responsible for the extermination of several dozen of Muslim victims in concentration camps in the Brcko region of Northwest Bosnia and Herzegovina. Upon arrest and arraignment before the ICTY, Jelisic pleaded guilty to counts of war crimes and crimes against humanity but pleaded not guilty to genocide.[88] Nevertheless, the prosecutor proceeded with the trial on genocide. During the trial, the chamber announced that it would enter an acquittal on the charge of genocide. Consequently, a summary judgment was issued on October 19, 1999,[89] which was followed two months later by a more substantial ratio on 14th December, 1999.[90]

The prosecutor appealed against the decision of the trial chamber of the acquittal on the charge of genocide contending that the prosecution was prevented from being heard by the trial chamber. In July 2001 ruling, the appeal chamber held that the trial chamber ought to have allowed the case to proceed since there was sufficient evidence on the charge of genocide for the defence to rebut. Even though the appeal chamber sustained the grievances of

[87] Case No. IT-95-10-T, Judgment of 19th October, 1999.

[88] Jelisic, *id*.

[89] Jelisic, *id*.

[90] Jelisic, *id*.

the prosecutor, Jelisic's acquittal for genocide was allowed to stand in the interest of justice.[91]

Prosecutor v. Sikirica[92]

This case deals with persecution in concentration camps, the Trial Chamber granted a defence to dismiss the charge of genocide, this time after the prosecution has been heard.[93] Within a few days of the dismissed of the genocide charge, the accused agreed to plead guilty to a charge of crime against humanity.[94]

Prosecutor v. Brdjanin[95]

In this case, the trial chamber of ICTY examined whether specific intent for genocide could be inferred, the court considered four factors: (a) the extend of the actual destruction; (b) the existence of genocidal plan or policy; (c) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; (d) the utterance of the accused. The trial chamber concluded that examination of these factors in the situation of the targeting of Bosnian Muslims and Bosnian Croats of the Autonomous Region of Krajina do not allow the trial chamber to legitimately draw the inference that the underlying offences were committed with the specific intent requirement for the crime of genocide.[96]

However, in *Prosecutor v. Stakic*,[97] the Trial Chamber of ICTY observed:

It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts, the concrete circumstances, or a pattern of purposeful action.[98]

This position in Stakic buttresses our earlier opinion that intent and/or motive in genocide cases should be logically inferred from circumstances of the

[91] Jelisic, *id*., para. 77.

[92] Sikirica, *op. cit.,* n. 60.

[93] *Id*.

[94] Schabas, *op. cit.,* n. 62, p. 29.

[95] ICTY (Trial Chamber) Judgment of 1st September, 2004.

[96] Sikirica, *id*., paras. 971-989.

[97] ICTY (Trial Chamber), Judgment of 29th July, 2003.

[98] *Id*., para. 526.

situation in question and general pattern of behaviour of perpetrator. It is a further call to eschew the baseless academic exercise and legal gymnastics often canvassed in the interpretation of the intent requirement of genocide *dolus specialis* and embrace primary interpretation based on the basic principle of criminal law.

1.2.3Statute of International Criminal Tribunal for Rwanda (SICTR)

I. *General Overview*

Ethnic violence was unleashed on Rwanda at the aftermath of the sudden death of Rwandan's President Habyarimana; as many as one million Rwandans were killed within 100 day. The ethnic division along which the violence took place between victim and perpetrators was indicative of the fact that the crimes of genocide were taking place. Having failed to prevent the destruction of lives, the UN Security Council took action to prosecute those believed to be responsible for the killings. In July 1994, the UN Security Council adopted Resolution 935, establishing the commission of experts to investigate human rights violations in Rwanda. Following the Yugoslavian model, the UN Security Council decided to establish the International Criminal Tribunal for Rwanda (ICTR),[99] by the instrumentality of its enabling statute, i.e. Statute of International Criminal Tribunal for Rwanda (SICTR).

The Statute of ICTR set out the category of crimes over which the tribunal has jurisdiction. These crimes include:

- Genocide;[100]
- Crimes against humanity;[101] and
- Serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977.[102]

The Statute of ICTR confers powers on the institution of ICTR to prosecute those responsible for the grave violation of international humanitarian and human rights law committed in Rwanda and the territory of neighbouring

[99] UN Security Council Resolution 995, Annex, Nov. 8, 1994.

[100] Art. 2, Statute of ICTR.

[101] Art. 3, *Id*.

[102] Art. 4, *Id*.

states committed between the period of 1st January and 31st December, 1994. Though the ICTR, aside from the crime of genocide, has jurisdiction to adjudicate on crimes against humanity and serious violation of Article 3 common to the Geneva Convention. These research is however concern only with the jurisdiction of ICTR on the crime of genocide.

As has been observed earlier, Article 2 of the Statute of ICTR seem to be a verbatim reproduction of the provision of Article II of the Genocide Convention which is still *in pari materia* with the provision of Article 4 of the Statute of ICTY and Article 6 of the Rome Statute of ICC. The provision is to the following effect:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such:

(a) killing member of the group;
(b) causing serious bodily or mental harm to member of the group;
(c) deliberately inflicting on the group a condition of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;
(e) forcibly transferring children of the group to another group.[103]

Above is the central provision for genocide under the Statute of ICTR. A thorough assessment of the above provision has already been considered in an earlier section. Since this provision seem to be a mere adoption of Article II of the Genocide Convention, it is therefore apt to state that all observations and commentaries on Article II of the Genocide Convention already done in this paper should also find a place in the construction of Article 2 of the Statute of ICTR.

Major Cases on Genocide Decided under the Statute of ICTR

On 9th January 1997, the ICTR held its first trial in the case of *Prosecutor v. Jean-Paul Akayesu*[104] a case that was regarded as one of the most momentous cases in international law.[105] During the 1994 Rwandan Genocide, Jean-Paul

[103] Art. 2, *Id*.

[104] *Akayesu, op. cit.,* n. 20.

[105] Scharf, M.P., "Statute of International Criminal Tribunal for Rwanda" *United Nations Advisory Library of International Law* (2008) p. 2 (obtained from www.un.org/law/avl (accessed on 26 October, 2012).

Akayesu was the Mayor of Taba, a city in which thousands of Tutsis were systematically raped, torture and murdered. At the commencement of the trial, Akayesu was arraigned on 12 count charges of genocide, crimes against humanity and violations of common Article 3 of the 1949 Geneva Conventions in the form of murder, torture and cruel treatment. In June 1997, the prosecutor brought three additional counts of crimes against humanity and violations of common Article 3/Additional Protocol II for rape, inhumane acts and indecent assault.[106] These additional counts marked the first time in the history of international law that rape was considered as a component of genocide.[107]

On 2nd 1998, the ICTR found Akayesu guilty of nine counts of genocide, direct and public incitement to commit genocide and crimes against humanity for extermination, torture, rape and other inhumane acts. This case marked the first in which an international tribunal was called upon to interpret the definition of genocide as defined in Article II of the Genocide Convention of 1948.[108] In interpreting the definition of genocide, the ICTR held that, the crime of rape was "a physical invasion of sexual nature, committed on a person under circumstances which are coercive".[109] The tribunal further emphasized that sexual assault could amount to "genocide in the same way as any other act as long as it was committed with specific intent to destroy, in whole or in part, a particular group, targeted as such".[110] Akayesu is now serving life imprisonment in Mali.[111]

In *Prosecutor v. Jean Kambanda,*[112] the ICTR also evolved two major precedents. The accused person was the Prime Minister of the Interim Government of Rwanda throughout the period of genocide. Kambanda was arraigned before ICTR in October 1997 on six counts of genocide conspiracy

[106] Report of ICTR (S/1997/868).

[107] *Id*.

[108] See: ICTR Fact Sheet No. 1, *The Tribunal at a Glance.*

[109] *Akayesu, op. cit.,* n. 20, para. 598.

[110] *Id*., para. 731, see also: Obote-Odora, Ant "Rape and Sexual Violence in International Law: ICTR Contribution" *New Eng. J. Int'l & Comp. L.* (2005) Vol. 12(1) p. 137.

[111] Scharf, *op. cit.,* n. 104, p. 3.

[112] Case No. (ICTR-97-23-S), Judgment of 4th September, 1998.

to commit genocide, complicity in genocide and crimes against humanity, which he pleaded guilty. Kambanda's plea of guilt and subsequent conviction was the first time in international law that a Head of Government acknowledge his guilt for genocide and was accordingly convicted. Like Jean Paul Akayesu, Jean Kambanda is serving a life imprisonment term in Mali.[113]

Prosecutor v. Nahimana & 2 Or,[114] in this case, the ICTR prosecuted Ferdinand Nahimana and Jean-Bosco Barayagwiza, leaders of Radio Television Libre Milles Collines (RTLM), and Hassan Ngeze founder and director of Kangura Newspaper. The ICTR consolidated the indictment of these three men into a single trial, commonly referred to as "The Media Case". The trial was the first time since Nuremberg, that the role of the media was considered as a component of international criminal law.[115] In 2003, the accused persons (Nahimana, Barayagwiza and Ngeze) were convicted on counts of genocide, and crimes against humanity. Nehimana and Ngeze were sentenced to life imprisonment and Barayagwiza was sentenced to 35 years on appeal, Nahimana's and Ngeze's sentences were respectively dropped to 30 and 35 years respectively.[116]

In a very recent development, precisely on 20th December, 2012 CNN News reported that, ICTR sentenced Rwandan former Planning Minister Augustine Ngirabatware to thirty five years imprisonment after being found guilty of genocide, incitement to genocide and rape as a crime against humanity by the provisions of the Statute of International Criminal Tribunal for Rwanda.

1.2.3 Statute of International Court of Justice (SICJ)

II. Powers of ICJ on Genocide

Although the Statute of ICJ is binding only on cases before the ICJ, it must however, be stated that, Article 38(1) of the Statute of ICJ "is generally

[113] Scharf, *op. cit.*, n. 104, p. 3.

[114] Case No. (ICTR-99-52-T).

[115] Scharf, *op. cit.*, n. 104, p. 3.

[116] *Id.*

regarded as a complete statement of the sources of international law".[117] The Article provides:

1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59 (which provides that ICJ decisions bind only the parties to the case before the court), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means of determination of the rule of law.[118]

The above provision of Article 38(1) (a)-(d) of the Statute of ICJ provides the basis and scope of the adjudicatory powers of the ICJ in relation to the crime of genocide. Sub-paragraph (a) of Article 38(1)[119] particularly gave very clear mandate to ICJ to adjudicate on and interpret the Genocide Convention, Rome Statute of ICC, Statutes of ICTR and ICTY on genocide and even other areas which the treaties dwelled on. Furthermore, if genocide as a crime is regarded as *orga omnes* and which prohibition is seen as a customary rule of international law or *jus cogen* from which no derogation is allowed; then, sub-paragraph (b) of Article 38(1)[120] might have enough momentum to activate the adjudicatory powers of the ICJ in favour of adjudicating on genocide. The foregoing argument may also suffice for the provision of sub-paragraph (c) of Article 38(1),[121] if the prohibition and punishment for genocide is recognized as a general principle of law by civilized nations.

[117] Brownlie, I., *Principles of Public International Law*3 (5th edn. 1998) cited in Nersessian, D.L., *op. cit.*, n.2, p. 237.

[118] Statute of ICJ, Art. 38(1) 59 Stat. 1055 (1945).

[119] Statute of ICJ.

[120] *Id*.

[121] *Id*.

III. Genocide Cases Decided under SICJ

The ICJ by the powers inherent in its enabling statute especially Article 38(1)(a) had delved into the domain of genocide in some of its decided cases:

Bosnia v. Yugoslavia Case[122]

This was the first case heard by ICJ on the crime of genocide, brought before the court by Bosnia and Herzegovina against Yugoslavia in 1993. In its application, Bosnia claimed that the effort of the Serbs to establish a "Greater Serbian State" resulted in the systematic bombing of Bosnian cities and the intentional targeting of its Muslim citizens. The application of Bosnia before the ICJ also contends that the Serbs policy of driving out innocent civilians of a different ethnic or religious group from their homes, so-called "ethnic cleansing" was indulged in by Serbian forces in Bosnia on a scale that dwarfs any thing seen in Europe since Nazi times. The application declared that the evidence discloses a *prima facie* case of genocide committed against Bosnia and requested that all appropriate actions be taken by the court in line with the stipulations and standards of the Genocide Convention.[123]

The ICJ in its ruling in 1994, did not issue a finding of genocide or otherwise in Bosnia. However, the court did asked the Federal Republic of Yugoslavia to ensure that any military, paramilitary or irregular armed unit which may be directed or supported…do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia or against other national, ethnical, racial or religious group.[124]

Yugoslavia v. NATO Cases[125]

The cases were instituted before the ICJ by the Federal Republic of Yugoslavia on 29th April, 1999. They are ten separate cases against Canada, Germany, France, United Kingdom, Belgium, United States, Italy, Portugal, Netherlands and Spain. The Republic of Yugoslavia accused each of these

[122] ICJ, Order on Request for the indication of provisional measure in case concerning the application on the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), April 8, 1993.

[123] *Id*., see generally, Morton and Singh, *op. cit.*, n. 1, p. 65.

[124] Morton and Singh, *Id.*

[125] Judgment of ICJ.

countries of bombing Yugoslavia territory in violation of their international obligation, including the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.[126] In two of the ten cases *Yugoslavia v. Spain* and *Yugoslavia v. United States of America*, the ICJ concluded that it manifestly lacked jurisdiction and it accordingly ordered that those two cases be removed from the docket. The reference to the "physical destruction of a national group" caused by NATO bombings constituted a charge by Yugoslavia of the commission of the crime of genocide.[127]

By a majority vote of eleven (11) to four (4), the ICJ ruled that, the threat itself amount to an act of genocide within the meaning of Article II of the Genocide Convention. The court further ruled that, it does not appear at the present stage of the proceedings that the bombings which form the subject of Yugoslavia's application indeed entail the element of intent, towards a group as required. Article II of the Genocide Convention.[128] This research considers the above ruling as very appropriate in the circumstance.

Croatia v. Yugoslavia Case[129]

On 2nd July, 1999 the Republic of Croatia instituted an action before the ICJ against the Federal Republic of Yugoslavia for alleged violation of Genocide Convention between 1991 and 1995. In its application, Croatia contended that, acts of genocide were committed in Croatian soil by Yugoslavian armed forces, intelligent agents and various paramilitary detachments. Croatia's application states further that, in "addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity, Yugoslavia engaged in a conduct amounting to a second round of ethnic cleansing".[130]

It must be observed that, while the ICJ did not give clear cut ruling in any of the cases that acts of genocide had been committed, its application of the provisions of the 1948 Genocide Convention further strengthens the

[126] Art. II(e), Genocide Convention.

[127] Morton and Singh, *op. cit.*, n. 1, p. 65.

[128] *Id*. pp. 65-67.

[129] ICJ, Application of the Convention of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Yugoslavia*), 2nd June, 1999.

[130] *Id*.

convention's standing in international law; as the ICJ did not at any time stray away from the legal definition of genocide provided in Article II of the Genocide Convention.

Bosnia – Herzegovina v. Serbia Montenegro[131]

In February 2007, the ICJ published its final ruling on the application of the Genocide Convention case, fourteen years after the commencement of the case. Notwithstanding the political happenings and changes that occurred during this period, the judgment was welcomed by many with much anticipation. In the judgment, the ICJ concluded that, the "undertaking to prevent" in Article I of the Genocide Convention is "normative and compelling",[132] unqualified[133] and bears direct obligation on states parties,[134] and that a referred to the Security Council does not absolve state parties of general obligation of prevention, the court observed.[135] The court further noted that, the obligation to prevent is not to mandatorily succeed, but to exercise "due diligence" by engaging all reasonable means available to them to prevent genocide.[136]

1.2.4 Statute of International Criminal Court (SICC)

II. Overview

The Rome Statute of ICC reflects states agreement over how to institutionalize a broad range of international criminal justice norms, while still protecting national sovereignty.[137] The Rome Statute of ICC established the International Criminal Court (ICC) as the first independent permanent

[131] ICJ, Case concerning the application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), February, 2007.

[132] *Id*., para. 427.

[133] *Id*., para. 162.

[134] *Id*., para. 165.

[135] *Id*., para. 427.

[136] *Id*., para. 430, see generally: Mayroz, E., "The Legal Duty to 'Prevent' after the onset of 'Genocide'" *Journal of Genocide Research* (2012) Vol. 14(1), pp. 79-98.

[137] Schiff, B.N., *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008) p. 68.

International Criminal Court with global jurisdiction as opposed to territorial jurisdiction.

The International Law Commission (ILC) was mandated by the UN-General Assembly to prepare a draft Statute of ICC, by which act, the legal machinery for the establishment of the court was let loose. By the year 1994, a draft Statute of the ICC was presented to the UN General Assembly by the ILC, with a recommendation that a conference of plenipotentiaries be convened to negotiate the treaty. Based on the foregoing, the General Assembly created *ad hoc* committees which midwife a conference that lasted five weeks in Rome. After intense deliberation with the representatives of 160 states, the Rome Statute of ICC was given birth to.[138] The Rome Statute of ICC was then adopted on the 17th July, 1998 by a total vote of 120 to 7, with 21 states abstaining.

The Statute of ICC is made up of 128 Articles accompanied by the 'Elements of Crimes' provisions. It was on the strength of the legal instrument that the institution of ICC emerged on 1st July, 2002.[139]

II. *Relevant Provisions*

The Rome Statute of ICC confers jurisdiction on the ICC to try cases that boarders on; the crime of genocide,[140] crime against humanity;[141] war crime;[142] and the crime of aggression.[143] It is very important to state that, this research shall predominately dwell on the provisions of the Rome Statute of ICC that boarder on the crime of genocide, the workings of the statute and the common aspiration of state parties. The preamble of the Rome Statute of ICC like in other treaties, sets out the common aspiration of its partakers and a

[138] *Id*., pp. 69-72; See also Zakariya, M., *op. cit.*, n. 16, p. 76.

[139] *Id*.

[140] Art. 5(1)(a), Statute of ICC.

[141] Art. 5(1)(b), *Id.*

[142] Art. 5(1)(e), *id.*

[143] Art. 5(1)(e), *id*, However, on the crime of aggression by Art. 5(2), the jurisdiction of the ICC will only be activated, at a later date on the fulfillment of certain acts.

normative stage for the bindingness of subsequent provisions of the Statute. The preamble to the Rome Statute of ICC provides:

The state parties to the statute, conscious that all people are united by common bound, their cultures pieces together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shook the conscience of humanity;

Recognizing that such grave crimes threaten the peace, security and well-being of the world;

Affirming that the most serious crimes of concern to international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international co-operation,

Determined to put an end to impunity for the perpetrators of those crimes and thus to contribute to the prevention of such crimes;

Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes;

Reaffirming the purposes and principles of the Charter of the United Nations, and in particular that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations;

Emphasizing in this connection that nothing in this statute shall be taken as authorizing any state part to intervene in an armed conflict or in the internal affairs of any state;

Determined to these ends and for the sake of the present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over must serious crimes of concern to the international community as a whole;

Emphasizing that the International Criminal Court established under this Statute shall be complimentary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows[144]

The foregoing stipulations of the preamble to the Rome Statute of ICC is a clear statement of the goals and aspirations of the statute and an echo of the obligation of state parties; and the bindingness of the provisions of the statutes on all parties thereto.

The basis of applicability of the Rome Statute of ICC is established in a clear hierarchy of the various evidentiary sources of international criminal law deducible from the provision of the statute. It provides:

The court shall apply:

(a) In the first place [its] statute, elements of crime (meaning the elements of the offences of genocide, crimes against humanity and war crimes that are agreed upon and adopted by the parties to the convention),
(b) In the second place, where appropriate, applicable treaties and principles and rules of international law of armed conflicts,
(c) Failing that, general principle of law derived by the court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the ICC's] statute and with international law and international recognize norms and standards.[145]

The Rome Statute of ICC further provides that, "the court may apply principles and rules of law as interpreted in its previous decision".[146] This development is a positive progression and a welcome development on the role of *stare decisis* in international law. This emerging position presupposes that,

[144] Preamble to the Rome Statute of ICC.

[145] Art. 21(1) Rome Statute of ICC.

[146] Art. 21(2), *id.*

a previous decision of the ICC can bind other parties before the court in subsequent trials, where issues to be resolved are identical or in fours. This position is at radical variance with the position of the Statute of ICJ, which is to the effect that legal rulings in ICJ decisions only binds the parties to the case before the court for which ruling proceeded.[147] The implication of this is that, the principle of *stare decisis* is unknown to the jurisprudence of ICJ. It must however, be observed that the bindingness of *stare decisis* evolved in the jurisprudence of ICC may only be limited to cases before the ICC.

By the provision of Article 21(1) of the Rome Statute of ICC, it is very clear that the Statute emphasizes primarily the application of its own provision, as a basis for assuming its adjudicatory powers.[148] It is equally to embrace applicable treaties and established principles and norms of international law[149] in relation to the violation of its provision concerning crimes which the ICC has jurisdiction. By subjecting the principles derived from national laws of state parties to inconsistency test,[150] the Rome Statute of ICC has visibly demonstrated its preference for existing international standards to take precedent over norms derived from domestic criminal justice system.

On the crime of genocide which is the central nerve of this research; the Rome Statute of ICC in Article 5, listed it as one of the most serious crimes of concern to international community, of which the court has jurisdiction to entertain.[151] The definitive provision, which encapsulates the elements of the crime of genocide and series of acts that may constitute genocide, is provided for in Article 6.[152] In identical wordings as the provisions of Articles II,[153] 2[154] and 4,[155] it provides:

[147] Art. 59, Statute of ICJ.

[148] Art. 21(1)(a), Rome Statute of ICC.

[149] Art. 21(1)(b), *id.*

[150] Art. 21(1)©, *id.*

[151] Art. 5, Rome Statute of ICC.

[152] Rome Statute of ICC.

[153] Genocide Convention of 1948.

[154] Statute of International Criminal Tribunal for Rwanda (SICTR).

[155] Statute of International Criminal Tribunal for Yugoslavia (SICTY).

For the purpose of this statute "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent birth within the group;
(e) forcibly transfer of children of the group to another group.[156]

This provision is a reproduction of statutes[157] earlier discussed in the previous chapter and even this chapter of the research. It must therefore be made clear that, its reproduction here in relation to the Rome Statute of ICC is for the purpose of emphasis. It follows therefore, that, all the earlier discussions on the elements of genocide discussed under other relevant laws applies here *mutatis mutandis.*

III Utility of Rome Statute of ICC

Laplante asked, "how do we evaluate the effectiveness of ICC?",[158] such an inquiry it is observed, may focus on the number of arrest warrants, indictments and prosecution credited to the court since it commences operation in 2002.[159] It was contended that such a criteria of assessment in so short a time is rather far fetched; and that the true test of assessing the success of ICC is whether the court has helped to combat impunity and deter future human rights atrocities across the globe.[160]

A culmination of work of over a century preceded the entry into force of the Rome Statute of ICC which gave the breath of life to ICC itself.[161] High aspiration is said to motivate the effort, with the emergence of the Rome

[156] Art. 6, Rome Statute of ICC.

[157] Art. 2, Statute of ICTR; Art. 4, Statute of ICTY; and Art. II, Genocide Convention.

[158] Laplante, L.J., "The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court Sphere of Influence" *J. Marshall L. Rev.* (2010) Vol. 43, p. 635.

[159] *Id.*

[160] *Id.*

[161] Burke-White, W.W., "Proactive Comprimentarity: The International Criminal Court and National Courts in the Rome System of International Justice" *HARV. INT'L L.J* (2008) 49, pp. 53-54.

Statute and the court representing "the hope of governments from all around the world, that the force of international law can restrain the evil impulses that have stained history with the blood of millions of innocent victims".[162]

The Rome Statute of ICC which creates the ICC differs from some of its sister laws like the Charter of the International Military Tribunal for the Nuremberg, Statute of ICTY, Statute of ICTR and the Statute of the Special Court for Sierra-Leone, because the Rome Statute of ICC created a permanent court with universal jurisdiction while these other statutes only created *ad hoc* tribunals/courts with limited territorial jurisdiction for a specific crises situation covering a specified period of time. Also, the Rome Statute of ICC is much more detailed than those of the *ad hoc* tribunals. As earlier observed, the statute is made up of 128 articles in addition to the Elements of Crimes provisions incorporated into it. While the Statutes of ICTY and ICTR have only 18 and 11 articles respectively. The Statute of ICC unlike the Statutes of ICTY and ICTR also obliged and urges state parties to incorporate relevant articles of the statutes into their own domestic laws, pursuant to the much talked about principle of complementarities entrenched in the Rome Statute.[163]

It is now over 10 years after the coming into force of the Rome Statute of ICC, with all its perceived advantages. The pertinent question to ask at this point is, "how has the Rome Statute fared so far?".

So far, the ICC has opened cases against twenty six individuals in connection with five African countries. Twenty five of these cases remained opened, while the twenty sixth against Darfur rebel leader Bashar Idriss Abu Garda was dismissed by the judges. The cases evolved from investigations into crises in Libya, Kenya's post-election violence of 2007-2008, rebellion and counter-insurgency in the Darfur region of Sudan, the Lord's Resistance Army conflict in Central Africa, civil conflict in Eastern Democratic Republic of Congo (DRC), and the 2002-2003 conflict in the Central African Republic. The Prosecutor is also examining a 2010-2011 violence in Cote d'Ivoire, a 2009 military crackdown on opposition supporters in Guinea, and an inter-

[162] Newton, M.A. (Lieutenant Colonel), "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of International Court" *MIL. L. Rev.* (2001) 167, 20, 23.

[163] See: Arts. 17-19 and the Preamble, Rome Statute of ICC.

communal violence in Jos – North Central Nigeria, but has not opened formal investigation with regards to the Guinea and Nigeria situations.[164]

Democratic Republic of Congo, Kenya, Nigeria, Guinea and Central African Republic are state parties to the ICC. Sudan, Libya and Cote d'Ivoire are not state parties. Assuming jurisdiction in Sudan and Libya stems from referrals by the UN Security Council to ICC, while jurisdiction in Cote d'Ivoire was granted by virtue of a declaration submitted by the Ivorian Government on October 1st, 2003, which accepted the jurisdiction of the court as of 19th September 2002.[165]

The German complementarily law allows crime against humanity as defined in Rome Statute of ICC to be prosecuted by German domestic courts even if they are outside the jurisdiction of the court. Consequently, in December, 2005 Uzbekistan activist filed a complaint against Uzbek Interior Minister Zokirjon Almatov in connection with the Andijan massacre. Almatov was visiting Germany at the time for hospital treatment. However, the Prosecutor did not act in prosecuting Almatov saying that, chances of successful prosecution were "non-existent" as the government of Uzbekistan would not co-operate in the gathering of evidence.[166] In May 2011 the trial of *Ignace Murwanashyaka* and *Straton Musoni*, both Rwandan citizens began in Stuttgart, Germany. They were arraigned for twenty six counts charge of crimes against humanity and thirty nine count charges of war crimes, allegedly committed in the Democratic Republic of Congo.[167]

In United Kingdom, in the year 2007, Corporal Donald Payne became the first British person to be convicted of a war crime. He pleaded guilty under ICC implementing legislation for inhumane treatment of Baha Monsa an Iraqi detainee following the 2003 invasion of Iraq. He was sentenced to one year in

[164] "International Criminal Court Cases in Africa: Status and Policy Issues" (July 22, 2011) *Congregational Research Service*, p. 6. www.crs.gov (Accessed on 1st December, 2012).

[165] ICC Office of the Prosecutor Weekly Briefing, 15-21 February, 2011.

[166] Germany: Prosecutor Denies Uzbek Victims Justice, *Human Right Watch*, 6/4/2006.

[167] "Rwanda: Ignace Marwana and Straton Masoni Tried" *BBC News*, 4May, 2011, http://www.bbc.co.uk/news/world-africa-13275795 (Last visited 5th May, 2011).

jail and dismissed from the army. Three other soldiers were acquitted of war crimes in the same trial.[168]

So far, the activities of ICC is predominantly in Africa.

Democratic Republic of Congo (DRC)

In the year 2003, ICC initiated investigation into war crimes and crimes against humanity allegedly committed in the Ituri region of DRC. War Lords and fighters surrounding the region, moved into the area terrorizing civilians. In 2004, with the atrocities ongoing and spreading, the DRC President recommended that ICC investigation should consider crimes committed all over the nation. The ICC issued four arrest warrants in its first DRC investigation. Three suspects are in custody while the fourth is at large. A second investigation dwelled on sexual crimes and other abuses committed in the Eastern provinces of North and South Kivu. One case has been made public in connection with Kivus investigation, and the suspect arrested in France and transferred to ICC custody.[169]

Central African Republic (CAR)

The government referred crimes within the jurisdiction of ICC, committed anywhere on the territory of CAR to the ICC prosecutor in January 2005.[170] In May 2008, the ICC issued a warrant of arrest for Jean-Pierre Bemba Gombo. A former DRC rebel leader turned politician and businessman. The warrant of arrest alleged that as a Commander of the Movement for the Liberation of Congo (MLC), one of the two main DRC rebel groups during its civil war between 1998-2003, Bemba had supervised systematic attacks on civilians in CAR.[171]

Bemba was subsequently arrested in May 2008 at Belgium and was handed over to ICC in July 2008. He was charged for war crimes and crimes against

[168] "UK Soldier Jailed over Iraqis Abuse" Channel 4, 30th April, 2007 cited in *International Criminal Court.* www.http://en.wikipedia.org/wiki/international-criminal-court-investigation-in-the-Democratic-Republic-of-the-Congo (Accessed on 21st December, 2012).

[169] *Op. cit.,* n. 163, p. 22.

[170] "Prosecutor Receives Referral Concerning Central African Republic" *ICC Office of the Prosecutor Press Release,* 7th January, 2005.

[171] *Op. cit.,* n. 163,p. 25.

humanity for alleged rape, murder and pillaging.[172] Bembas trial commenced on 22nd November, 2010.

Uganda

The government of Uganda a party to the Rome Statute of ICC referred the situation concerning the Lord's Resistance Army (LRA) to ICC in 2003.[173] In October 2005, the ICC issued arrest warrant for LRA leaders. The LRA was accused of a systematic pattern of brutalization of civilians, including murder, forced abduction, sexual enslavement, and mutilation, which constitutes crimes against humanity and war crimes.

Despite the fact that the atrocities of the LRA have been widely documented, ICC activities on Uganda have been accepted by some domestic and international opposition due to the heated debate on what may constitute justice for the war-turn communities of Northern Uganda and whether the ICC has helped or hindered the pursuit of peace agreement.[174]

Sudan

ICC assumed jurisdiction in Sudan by the instrumentality of UN Security Council since Sudan is not party to the Rome Statute of ICC. UN Security Council Resolution 1593 of 2005, referred the situation in Darfur to the ICC prosecutor.[175] Even though Sudan is not a party to ICC, it is however argued that the resolution of the UN is binding on all UN Members States, including Sudan.

In May 2007 Sudan former Interior Minister Ahmed Muhammed Haruna and Ali Muhammed Ali (Ali Kushayb) an alleged former Janjaweed leader in Darfur, were publicly issued warrants of arrest.[176] They were both accused of war crimes and crimes against humanity perpetrated in Darfur in 2003 and

[172] ICC Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the *Prosecutor v. Jean-Pierre Bamba Gombo*, of June 15th 2009.

[173] "President of Uganda refers to the situation concerning the Lord Resistance Army (LRA) to the ICC" *ICC Office of the Prosecutor Press Release*, January 29, 2004.

[174] Allen, T., *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, (London: Zeet Books, 2006).

[175] UN. SC/8351.

[176] "Warrants of Arrest for Minister of State for Humanitarian Affairs of Sudan and a Leader of Militia Iyanja-Weed". *ICC Press Release* 2nd May, 2007.

2004. Arrest was difficult because the Sudan government failed to comply with corporation obligation in relation to enforcement of warrants of arrests.

In June 2010, two rebel leaders fought by ICC prosecutor, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus voluntarily made themselves available for prosecution by the ICC, the both face charges of war crimes.[177]

On March 4, 2009, ICC issued an arrest warrant for Sudan President Omar Hassan al-Bashir for war crimes, crimes against humanity and genocide, referring to alleged attacks by Sudanese security forces and pro-government militia in Darfur region of Sudan.[178] However, most observers and analysts behave that Sudan will not handover their incumbent President to ICC.[179] True to type, up till now, Omar al-Bashir has not honoured the arrest warrant and he is still the President of Sudan.

Kenya

Upon approval by ICC judges, the office of the prosecutor opened an investigation in Kenya post election crisis of 2007-2008. This was the first time the ICC prosecutor opened up a case without referral from the state or from the UN Security Council.

On 15th December, 2010 the prosecutor of the ICC presented two cases against six persons for alleged crimes against humanity. The prosecutor applied for summons from the judges, which they issued and the six persons voluntarily appeared before the court, where the denied responsibility for the alleged crimes.[180]

Libya

On June 27, 2011 ICC judges issued an arrest warrant for Libyan Leader Moammar Qadhafi, his son Sayf Islam Qadhafi and intelligent chief Abdullah al-Sennusi for crimes against humanity, which includes murder and

[177] *Op. cit.,* n. 163, p. 13.

[178] *Id.,* p. 14.

[179] Worshop, P., "No Quick Way to Enforce ICC Warrant for Beshir" *Reuters,* March 5, 2009.

[180] *Op. cit.,* n. 163, p. 9.

persecution orchestrated by a plan to suppress any challenge to Qadhafi's absolute authority.[181]

It must be stated that, the prosecution in ICC tends to be very economical with the use of the word "genocide" in framing charges against suspect. This arguably may be borne because of the slippery and somewhat confusing nature of the concept act that should be visualized with cases of genocide are often subsumed into charges of crimes against humanity and/or war crimes. Perhaps, the prosecuting authority of the ICC is only desirous of playing safe in pursuit of conviction. Hence, not wanting to take risk of venturing into contentious domain of genocide.

1.2.5 Constitution of the Federal Republic of Nigeria, 1999 (as Amended)

The Constitution of the Federal Republic of Nigeria 1999 as amended is the grundnorm of the existing legal order in the geographical entity constituting the Nigerian state. The supremacy of the constitution was clearly echoed in the constitution itself, when it states:

This constitution is supreme and its provisions shall have binding force on all authorities and persons, throughout the Federal Republic of Nigeria.[182]

The foregoing provision is a clear pronouncement on the dominance and exalted position of the Nigerian Constitution and its potency in regulating and checking the activities of individuals and authorities in the Federal Republic of Nigeria. It follows therefore, that, all persons or authorities in Nigeria are subject to the supreme powers of the constitution.

The Constitution[183] further extends the frontiers of her powers beyond persons and authorities to the domain of other subsidiary laws or legislation made in pursuit of the objective of good governance. She states:

[181] *Id.,* p. 8.

[182] Supremacy of the section 1(1) CFRN, 1999 as amended.

[183] CFRN, 1999 as amended.

If any other law is inconsistent with the provision of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.[184]

The effect of this provision is that no law that contravenes any provision of the constitution can survive. It is a definite inconsistency test with the Constitution as the standard.

In relation to the crime of genocide, it must be stated that, the Constitution of the Federal Republic of Nigeria, 1999 as amended did not make any express stipulation in contemplation of the crime of genocide, neither did any of the subsidiary legislation regulating crime and criminality in Nigeria,[185] make any express reference to the crime of genocide its prohibition and sanction. However, some acts could technically constitute genocide, though not so stated, if the perpetration of such acts were done with the requisite intent. For instance, the constitution guarantees right to life, thereby, prohibiting unlawful deprivation of life. It provides:

Every person has the right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.[186]

Aside from this constitutional provision prohibiting the deprivation of life, the Nigeria criminal law also, in recognition of the sanctity of life vehemently prohibits the killing of a person.[187] It may therefore follow that, killing of members of a targeted group because of their group identity may only ignite

[184] Section 1(3) CFRN, 1999 as amended.

[185] The Legislations regulating crimes and criminality in Nigeria are: *The Criminal Code*, which finds application in Southern Nigeria; the *Penal Code*, which is applicable in Northern Nigeria; and the *Sharia Penal Code*, which is an Islamic criminal justice Code, which operates side by side with the *Penal Code* in some Northern States of Nigeria.

[186] Section 33(1) CFRN, 1999 as amended. Subsection (2) of same section provides further exceptional situation where one can suffer lawful deprivation of life, i.e. (a) self defence (b) effecting lawful arrest or escape of a felon (c) suppression of riot insurrection or muting.

[187] See: Sections 306, 308 and 316 of the *Criminal Code*; Sections 220, 221 and 223 *Penal Code* and Section 200 of the *Sharia Penal Code*.

prosecution for unlawful killing, but technically within the purview of the crime of genocide.

It may equally follow that, the violation of some other rights guaranteed by the constitution, which violation may constitute derogation of the dignity of human person,[188] if done to a targeted group, with the requisite intent, will only be a violation of constitutionally guaranteed right and not genocide even though such acts may seem clearly genocidal.

The fate of the Nigerian Constitution on the crime of genocide is like the fate of some global and regional human rights instruments which clearly guarantees numerous human rights and prohibit their violate, such violation with impunity may technically be characterized as "genocide" while such descriptive nomenclature is totally alien and not protected by the instruments. For instance, Universal Declaration of Human Rights,[189] International Covenant on Civil and Political Rights,[190] Covenant of the Right of the Child,[191] African Charter on Human and Peoples Rights,[192] all prohibits the unlawful deprivation of life and frowns against inhuman and degrading treatment, but such violations cannot suffice as genocide under these instruments, however genocidal such violations may seem.

The summation of all these is that, Nigeria does not have a specific domestic legislation prohibiting and punishing genocide in its strict meaning.

However, even though Nigeria is not a state party to the Genocide Convention, she is a signatory to the Rome Statute of ICC which criminalizes "genocide", "war crimes" and "crimes against humanity". The Rome Statute of ICC is therefore, the only life line capable of transmitting responsibility and vesting obligation concerning genocide on Nigeria. Efforts to domesticate the provision of ICC Statute on genocide, war crimes and crimes against humanity by the Nigerian National Assembly have not yet received the force of law.

[188] S. 34, CFRN, 1999.

[189] Art. 3, UDHR.

[190] Art. 6, ICCPR.

[191] Art. 6, CRC.

[192] Art. 4 ACHPR.

It must be noted however, that, Nigeria having ratified the Rome Statute of ICC on 27th September, 2001, has only the status of a signatory to the treaty. The non-domestication of the treaty makes it non-justifiable in Nigerian domestic court, because it is only by domestication that a treaty can be incorporated into Nigerian law as an act of the National Assembly.[193] This position of law was echoed in *African Reinsurance Corporation Case*[194]. The implication of the foregoing is that, one may not be able to invoke the jurisdiction of municipal court of directly enforce the provision of Rome Statute of ICC in Nigeria.[195] This disposition in Nigeria flows from the provision of section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It provides:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.[196]

The section further provides that:

The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the exclusive list for the purpose of implementing a treaty.[197]

The process of domestication of Rome Statute of ICC in Nigeria demands that the provision of Rome Statute of ICC be enacted into law by the operation of Rome Statute of ICC (Ratification and Enforcement) Act of a particular number and a stipulated year. This is however subject to religiously following the stipulations of subsections (2) and (3) of section 12, Constitution of the Federal Republic of Nigeria, 1999 (as amended), which was the method used

[193] See generally; Ladan, M.T., *Material and Cases in Public International Law*, (Zaria: A.B.U. Press, 2008) pp. 240-241.

[194] (1989) 3 NWLR (Pt. 31), p. 811 at 834.

[195] Ladan, *op. cit.*, n. 192, p. 240.

[196] Section 12(1) CFRN, 1999 (as amended).

[197] Section 12(2), *id.*

by the National Assembly in 1983 to adapt African Charter on Human and Peoples' Right as Cap. 10 Laws of the Federation of Nigeria, 1990.[198]

It is after the process of domestication is commenced and completed that the provision of Article 6 of the Rome Statute of ICC which dwells on "genocide" can be entertained in Nigerian court.[199] For now, genocide in Nigeria still remains a matter of international concern.

However, it is important to strongly note that Nigeria has already taken a very visible step in the process of domestication of Rome Statute of International Criminal Court, which as already observed, elaborately provided for the crime of genocide. The Federal Government of Nigeria has constituted a special working group of highly proficient experts. The membership of this group includes: Chief Joe-Kyari Gadzama (SAN), (Chairman), Professor Muhammad Tawfiq Ladan, Professor Adedeji Olusegun Adekunle, Professor Ademola Popoola and Professor Ademola Abass, other members includes representatives of Nigeria Bar Association, National Human Rights Commission etc.[200]

The special working group was commissioned by the Honourable Attorney-General of the Federation and Minister of Justice, Mohammed Bello Adoke (SAN) on the 22nd March, 2011. The objective of the special working group is to among others assess and proffer the best strategy for promoting the domestication of Rome Statute of International Criminal Court in Nigeria. The group completed its mandate and furnished the Attorney-General with a preliminary report on 14th day off September, 2011.[201]

1.3 Concluding Remark

The laws of genocide which on coming into operation were celebrate with high enthusiasm rarely associated with any instrument of law, did not meet the expectation of the yearning and wailing world. This is because the

[198] Ladan, *op. cit.*, n. 192, p. 241.

[199] *Id.*

[200] See preliminary report of the special working group on the implementation of the Rome Statute of International Criminal Court in Nigeria; submitted to the Honourable Attorney-General of the Federation and Minister of Justice, Muhammed Bello Adoke (SAN) on September 14th 2011.

[201] *Id.*, Detail of the preliminary report of the special working group, will be examined in the next chapter of this work, which shall dwell on the domestic implementation of the law of genocide in Nigeria.

monstrous and blood thirsty adventure of genocide continues unhindered. Humanity is still being treated as a helpless pond in a chase game of impunity. A lot of reasons may be postulated for this gross failure.

These reasons ranges from nonexistent strong institution, global look warmness on the acceptability of the treaty and the weakness of the law itself, amongst others. The later is the trust of this paper. The paper therefore examined the entire international legal machineries on the crime of genocide, from the Convention for the Prevention and Punishment of the Crime of Genocide to statutes of ad hoc tribunals and international courts, identifying the inherent loopholes.

The paper therefore, recommends that the laws of genocide should have a broader protective shield, which provides for protection of all groups. The paper also recommends that the laws of genocide should be invested with a legal teeth and fierce legal claws to pursue genocide prevention, rather than waiting for the tumultuous combat of curative measures.

PROTECTION OF FOREST RESOURCES UNDER INTERNATIONAL LAW: A CASE OF MABIRA FOREST IN UGANDA

AMINA WAHAB*

Introduction

Mabira forest is a tropical high forest resource within Uganda. Forestry biodiversity is the total variety of living organisms that exist in a forested area and includes plants, animals, fungi, and microbes among others. Uganda is blessed with diversity of natural habitats, species and genetic resources in its forests and it is one of the most diverse countries in Africa, with 11% among others. Uganda is blessed with diversity of natural habitats, species and genetic resources in its forests and it is one of the most diverse countries in Africa, with 11% and 7% of the world's bird and mammal species respectively.[1] The importance of these forests goes beyond the national jurisdictions. It benefits the globe. This pushes emphasis on sustainable forest management and development.

In the bid to ensure the protection of forestry biodiversity, Uganda has participated, signed and ratified a number of treaties which have been generated from a variety of different sources. Most of these treaties/ conventions have been a result of the efforts of institutions like the United Nations (UN), African union (AU), European Union (EU), Organization of American states (OAS), the United Nations Educational, Scientific And Cultural Organization (UNESCO) and the International Union for the Conservation of Nature (IUCN) among others. These institutions have played a very important role in the formation, adoption and implementation of the most of the relevant instruments for the protection of forestry diversity.[2]As seen above, the instruments on protection of forestry biodiversity have created a number of principles with obligations for the sustainable management and utilization of biodiversity with binding force, though others are not binding. Most of the obligations require states to take certain steps at the national level

• Lectuerer Islamic University in Uganda

[1] The National Forestry Policy 2001

[2] ibid

and this can only be done by ensuring that the laws and policies are compatible with the international instruments. The Constitution being the supreme law of Uganda gives room for the ratification and adoption of international instruments relating to forestry protection and management[3].

Non-Binding International Instruments

The major role of the non-binding agreements is to lay the foundation and provide the impetus for the individual countries to develop their own legal frame works in accordance with the deliberations in the conferences[4]. During the past half- century new legal norms have been shaped and promoted by a range of instruments that do not fall into traditional international law categories of treaties and conventional custom. The instruments are relevant to Uganda in shaping the development of new normative standards for appropriate and wise conduct in management of the forest resource although, the legal status of these of these instruments has been a major subject of discussion among international law scholars, one of whom has described soft law as "… either not yet or not only law[5]. Soft law represents a blurring between what has been traditionally understood as "law" and policy[6]. B. Twinomugisha notes that soft law instruments have been essential in the development of international customary law and international conventions.[7] According to him, a number of rules of international law which are emerging or have emerged or have originated from the resolutions of international organizations. The Stockholm declaration contains rules of customary law that have been validated by state practice since 1972.

[3] Article 152 of the 1995 Constitution of the Republic of Uganda

[4] N. Salafsky, et al (2000) "linking livelihood and conservation: a conceptual frame work and sale for assessing the integration of human needs and bio diversity." Vol. 28 no. 8 Washington dc: biodiversity support program. 1421-1438.

[5] A. Jeffrey (1995) "conserving diversity in mountain environment: biological and cultural approaches." invited paper presented at the international NGO consultation on the mountain agenda. Switzerland: the world conservation union programme.

[6] M. Zerilli, et Al, (2008) "soft law practices, anthropologists and legal scholars." EASA conference 2008 experiencing diversity and mutuality: United Kingdom; university of Bristol.

[7] B.K Twinomugisha, (1996) "The Development Of The Law Relating To The Protection Of The Ozone Layer With Particular Reference To Position Of Developing Countries." LLM dissertation; Uganda Makerere University.

Principle 21 of the declaration has now become a well settled binding obligation based on treaty law beyond the customary international law which inspired it.[8] Soft law principles are found in instruments such as declarations, resolutions, and codes of conduct. There is an array of soft law instruments that promote sustainable utilization and management of forest resources and they are discussed here below.

Stockholm Declaration, 1972

The 1972 Stockholm declaration resulted from 1972 UN conference on Human environment held in Stockholm.[9] The conference was the first major international conference, held under the auspices of the United Nations and designed to deal with questions surrounding the management and protection of the environment and its relation to human. The declaration calls upon governments and people to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity. To achieve this environmental goal, the declaration demands the acceptance of responsibility by citizens and communities, and by enterprises institutions at every level, all sharing equitably in common efforts therefore, individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future.[10]

Principle 1 of declaration gives man the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[11] It also stresses that human beings are entitled to healthy and productive life in

[8] Principle 1 of the Stockholm Declaration.

[9] E. Kasimbazi, et al, (2005 "Report On The Review Of Policies Of The Mt Elgon Ecosystem Management." In Mid Term review of Mount Elgon regional ecosystem conservation programme Switzerland: IUCN publication services Unit.

[10] C. Lue-Mbizvo, et al, (1993) "The Institutional and legal Framework for Natural Resource Management." Local Level Natural Resource Management Project: Makoni District. Working Paper 3, Stockholm Environment Institution and Zero.

[11] Principle 1 of the Declaration. See also B. K Twinomugisha (2007) "Some Reflections on Judicial Protection of the right to a clean and healthy Environment In Uganda." 3/3 Law, Environment And Development Journal, P. 248

harmony with nature. The declaration calls upon man to protect natural resources and preserve wild life so as to promote economic development[12] which is more crucial for sustainable utilization of Mabira forest resources.

Principle 2 is to the effect that though countries like Uganda have the sovereign right to exploit their own resources pursuant to their own environmental policies, they have the responsibility to ensure that activities with in their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[13] The second limb of principle 21 reflects the decision of the tribunal in the *Trail Smelter Arbitration*[14] and a number of decisions by the tribunal and courts which were decided later.

Cooperation trough multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce, and eliminate adverse environmental effects resulting from activities conducted in all spheres: in such a way that due account taken of the sovereignty and interests of all states. It is also stipulated under the declaration, that environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate measures be taken by states and international organizations with a view to reaching an on meeting the possible nation and international economic consequences resulting from the application of environmental measures.[15]

The Stockholm declaration is one of the most important initiatives taken towards the international environmental law in the past 30 years.[16] It is clear that participants of the conference did not intend to create s legally binding document. Whilst the instrument has some of the characteristics of a treaty, notably, it does not seek to impose legally binding obligations upon the parties and further it excludes elements regarding state responsibility for the

[12] Principle 2 and 4 of Stockholm Declaration.

[13] E. Kasimbazi, (1998) "The Environment as a Human Right: Lessons from Ugandan." In Power of Human Rights International Standard and Domestic Norms. Cambridge: Cambridge University Press.

[14] Trail Smelter Arbitration, (US V. Canada) United Nations 3 RIAA 1905, Reprinted In (1939)

[15] Principle 11 Stockholm Declaration

[16] Ibid, Principle 1-2 and 6-8

wellbeing of its citizens and for the harm caused by environment. It has acted as a catalyst for the development of further international law protecting the environment but failed to pay special sustainable management of forests. Nevertheless the results of the Stockholm conference[17] are highly visionary, emphasizing the close relations between environmental problems and development.

This Declaration is relevant for the sustainable utilization of forest resources since it has provisions compelling government and the people to preserve and improve human developments for sustainable management. The declaration also calls international cooperation in raising resources to support the implementation of all preservation and exploitation of natural resources.[18] With the available resources implementation of the policies intended to sustainably manage forest resources to quite easier. Uganda under this declaration has the obligation to make laws and policies that protect environment, which it has fully done though the implementation is still a great challenge.

The World Conservation Strategy (WCS) 1980

The world conservation strategy formulated by IUCN, UNEP and WWF (1980), attempted to establish a broadly based philosophical definition of conservation as a concept. The word "conservation" is defined in the document as " the management of biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining this potential to meet the needs and aspirations of future generations.[19] Conservation is conceived in positive terms, embracing preservation, sustainable utilization, restoration, and enhancement of natural environment. It stated a new message: that conservation is not the opposite of development but includes both protection and the rational use of natural resources, and is essential if people are to achieve a life of dignity and if the welfare of present and future

[17] Stockholm Declaration has been characterized as a watershed for global environmentalism. Over the past twenty years since the Stockholm conference, treaties and similar agreements and about nine hundred bilateral treaties and similar agreements have been concluded on the environment.

[18] B. D. Ogolla, (1990), Environmental Management Policy and Law. Vol. 22 No. 3; Nairobi: Acts Press. P.166

[19] Section 1 of the Startegy

generations is to be assured[20] drawing attention to the almost limitless capacity of people and destroy. It called for globally coordinated efforts to increase human well-being and halt the destruction of earth's capacity to support life.[21]

This strategy is based on the on the conviction that people can change their behavior when they see that it will make things better, and can work together when they need to.[22] It is aimed at change because values, economies, and societies different from most that prevail today are needed if we are to take care for the earth and build a better quality of life for all.

The World Conservation Strategy is divided into 3 parts. Part II, the principles for sustainable living[23], defines the principles of respect and care for the community of life. That is to improve the quality of human life, conserve the earth's vitality and diversity, minimize the depletion of non-renewable resources, keep within the earth's carrying capacity, change personal attitudes and practices, enable communities to care for their own environments, provide a national framework for integrating development and conservation, and forge a global alliance as guidelines to sustainable development.

Part II, additional actions for sustainable living[24], describes corresponding actions that are required in relation to the main areas of human activity and some of the major components of the biosphere. These chapters deal with energy; business, industry and commerce; human settlements; farm and range lands; fresh waters; and oceans and coastal areas. Each chapter begins with a brief survey of the issues with which it deals. This is followed by a series of recommended priority actions. The instrument further in part III further in dictates details on how the strategy can be implemented by different countries to meet their needs and capabilities and also sets out the proposed procedure

[20] R.Hamilton,et al, (2000) "Indigenous Ecological Knowledge and Its Role in Fisheries Research Design: A case study from Roviana Lagoon." Western province, Solomon Islands.SPC Traditional Marine Resource Management and Knowledge Information Bulletin, P.12-25

[21] Ibid, Section 15-20

[22] Ibid, Section 5

[23] Okoth-Ogendo, et al, (1999) "Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa." Nairobi: Centre For Technological Studies

[24] Sections 8-15 of the Strategy

for follow-up of the strategy which involves the community of users in its follow up. It also contains a listing of all the recommended priority actions and suggested targets.[25]

Underlying the WCS was the need to integrate conservation objectives with development policies.[26] One of the major weaknesses is that it is a non- legal binding instrument. With increasing marginalization of the communities living around the forest, WCS emphasizes the improvement of human life by conserving the earth vitality and diversity and the minimization of the depletion of non-renewable resources.[27] This should be pertinent in the national conservation strategy which must address the improved quality of life through preservation of Mabira forest resources.

World Charter for Nature 1982

The world charter for nature adopted by united nations general assembly resolution 37/7 28 October 1982 is based ,on the premise that mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients, and also that civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation.[28] It further asserts that every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition; man must be guided by a moral code of action.[29]

One of the provisions most relevant to Mabira forest is principle 3 which states that all areas of the earth both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, representative samples of all the different types of ecosystems and to the

[25] J. Hamner, (1997) "Patterns in International Water Resource Treaties: The Transboundary Freshwater Dispute Database." Colorado Journal of International Environmental Law and Policy, sup 157. See also section 20 of the Strategy.

[26] Okoth-Ogendo, et al (1999) "Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa." Nairobi: Centre for Technological studies.

[27] Section 8 of the strategy

[28] Principle 1-5 of the Charter

[29] Ibid, principle 3

habitats of rare or endangered species.[30] In line with this, Mabira forest was gazetted as a forest reserve so as to preserve the uniqueness of its ecosystem.

The charter urged its member states including Uganda to include its essential elements in planning, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities. All of these elements must be disclosed to the public by appropriate means in time to permit effective consultation and participation.[31]

The charter articulates the intrinsic value of nature, irrespective of its utility to humans. It emphasizes the link between human civilization and nature. The charter also reflects the beliefs of indigenous people because of their intimate relationship with nature, and the unique attributes of their regions might find support in the charter's recommendations in Article 3 that

> All areas of earth both land and sea shall be subject to these principles of conservation;
>
> Special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to habitat of rare or endangered species

Emphasis is placed on community involvement in decision- making on matters directly affecting their environment and in the protection and preservation of the same environment.[32]

To successfully implement the provisions of the charter, it calls for amalgamation of its principles into the laws and practices of Uganda, and also into the practices of the intergovernmental and non- government organizations and administrative structures should also be provided to give effect to the character. The gazzetting of Mabira forest as a forest reserve in Uganda is a commendable decision which is in line with the charter. More

[30] The Convention On The Law Of Treaties Between States And International Organization, (1986:543)

[31] Principle 11 of the World Charter for Nature (1982)

[32] Ibid, principle 12.

attention however, still needs to be focused on ensuring continued monitoring and the protection of Mabira forest resources.

Nonetheless, the charter has setbacks as an international legal document. Unlike the Stockholm declaration, it is barely known outside the circles with international cooperation and the rules of international law on environmental protection. As a result, the principles enunciated by the Charter lack international favour. The instrument does not directly impose obligations on Uganda. However, since the Charter was adopted by the General Assembly, many of its principles have been developed further in other international legal instruments and are reflected widely in municipal law. Such development is consistent with Article III of the Charter which provides that the principles set forth in the present charter shall be reflected in the law and practice of each state, as well as at the international level.

Despite its non-binding nature, the Charter declares that each person has a duty to act in accordance with the provisions of the present Charter.[33] The Charter further provides that each provision acting individually, in association with others or through participation in the political progress should strive to ensure that the objectives and requirements of the present Charter are met.[34]

The Brundtland Report (1987)

The Brundtland Commission, formally the World Commission and Development (WCED), known by the name of its chair *Gro Harlem brundt*, was convened by the United Nations in 1983. The commission was created to address growing concern "about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development." The commission also researched into environmental and economic issues before publishing its final report[35], *Our Common Future,* in 1987 which promptly became known as the Brundtland Report. The main drive of Brundtland Report was sustainable development,

[33] Ibid, Principle 12

[34] Ibid, principle 14

[35] G. Brundtland (Ed) (1987) Our Common Future: The World Commission On Environment And Development Oxford: Oxford University Press

although a lot of emphasis was put on how development that neglects the environment was short lived and self-destructive.[36]

The Brundtland report was primarily concerned with securing a global equity, redistributing resources towards poorer nations whilst encouraging their economic growth.[37] To this end, it stipulates that equity, growth and environmental maintenance are simultaneously possible and that each country is capable of achieving its full economic potential whilst at the same time enhancing its resource base.[38] The report also recognized that achieving this equity and sustainable growth would require technological and social change.

The relevance of this report to Mabira forest biodiversity is the fact that it highlights three fundamental components of sustainable development: environmental protection, economic growth and social equity.[39] The environment should be concerned and our resource base enhanced, by gradually changing the ways in which we develop and use technologies. If this is to be done in a sustainable manner, then there is a definite need for a sustainable level of population.[40]

Under the report, sustainable development is defined as:

"... development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."

The Report contains proposals for legal principles on environmental protection and sustainable development and the need to integrate development

[36] Chapter 10, Principle 258.

[37] E. Kasimbazi, (1998) "The Environment as a Human Right: Lessons from Ugandan." In Power of Human Rights International Standard and Domestic Norms. Cambridge: Cambridge University Press

[38] Chapter 2, principle 54

[39] Ibid, principle 56

[40] Chapter 4, principle 100

as an important step towards sustainable development. The legal principles emphasize conservation and sustainable use of natural resources.[41] An interesting provision under this Report is Article 3 which specifies that "states shall maintain ecosystem and ecological processes essential for functioning of the biosphere, to preserve biological diversity and observe the principles of optimum sustainability yield in the use of living natural resources and ecosystems".[42]

One of the major weaknesses of the Report is the need to support a global perspective and yet maintain the individual state uniqueness that establishes jurisdiction or political identity.[43] In addition, the interpretation of the proposal differs from one state to another with independent priorities at national level. Therefore, for it to have a global impact; the Report has to be developed into international rules that bind all members.

The Hague Declaration (1989)

This Declaration was as a result of a two day conference convened at The Hague in March 1989; initiated in France, Netherlands and Norway but attended by 21 states.[44]The first section outlines the range of principles which the states acknowledge and agree to promote and there were five agreed upon which expressly refers to the need to develop necessary legal instruments. The second part outlines four additional principles which the state agrees to promote to foster further international cooperation in environmental matters.

The relevance of the declaration to Mabira forest is that it obligates the government of Uganda to develop legal instruments intended to promote sustainable utilization of the forest resources. Uganda has enacted various laws interalia is the National Forestry and Tree Planting Act, the National

[41] Ibid, Principle 339.

[42] E Kasimbazi, Et Al, (2005) "Report on The Review Of The Policies Relevant To Theme. Elgon Ecosystem Management." In Mid Term Review Of Mount Elgon Ecosystem Conservation Programme. Switzerland: IUCN Publication Services Unit.

[43] Ibid

[44] The states that attended were, Canada, Brazil, Cotedivore, Egypt, France, Germany, Hungary, India, Indonesia, Italy, Japan, New Zealand, The Netherlands, Senegal, Spain, Sweden, Tunisia, Venezuela, Zimbabwe and Australia

Environment Act. It is due to that Declaration, Mabira Forest was declared a central forest reserve.

The Rio Declaration, 1992

The Rio Declaration on Environment and Development was passed by the United Nations Conference on Environment and Development, which met at Rio de Janeiro from 3rd to 14th June 1992. It reaffirms the Declaration of the United Nations Conference on Human Environment, adopted at Stockholm on the 16th June 1972. It seeks to establish a new and equitable global partnership through the creation of new levels of cooperation among states, key sectors of societies and people.[45]Its overall objective is working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system, at the same time recognizing the integral and interdependent nature of the Earth, our home.

The declaration emphasized that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[46]

The first principle points out sustainable development which revolves around human beings who are entitled to a healthy and productive life in harmony with nature.[47]As much as the citizens are guaranteed the right to healthy life, the same has to be realized with responsibilities attached to avoid over exploitation and/ or utilization of the ecosystem. The second principle gives the state the sovereign right to exploit their own resources as long as it does not infringe on the rights of other states with consideration of the

[45] Principle 7 of the Rio Declaration on Environment and Development, done at Rio de Janeiro, (1992).

[46] Ibid, Principle 10.

[47] Ibid, Principle 2.

environmental needs of both present and future generations as provided under principle 21 of the Stockholm Declaration.[48]

Mabira forest is partly inhibited by different communities and indigenous people thus principle 10 proves to be very vital in its sustainable management, as it indicates that environmental issues are best handled with participation of all concerned citizens, at the relevant level. Uganda should ensure that at all levels ; citizens shall have appropriate access to relevant information on hazardous materials and activities in their communities, and given the opportunity in decision-making processes.[49]

Full, accurate and up to date information is considered to be at the heart of sound environmental protection and sustainable development.[50] Therefore, should facilitate and encourage public awareness and participation by making information widely available and effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[51] In that vein, Uganda has enacted a framework of environmental legislation in line with Principle 11. However, there is need for effective implementation especially in cases of sensitive ecosystem such as that of Mabira Forest.

The Declaration constitutes a departure from the Stockholm Declaration in the sense that it emphasizes world partnership and further recognizes need for sustainable development and joint management but differentiating responsibility of the developed and developing countries.[52] On that note principle 7 is relevant to Mabira Forest ecosystem because it will provide a basis for harmonization of the national laws of Uganda on the basis of sustainable management of the ecosystem. Besides that, the declaration lacks a clear definition of sustainable development as compared to Brundtland

[48] Ibid, Principle 2

[49] Ibid, Principle 10.

[50] B. Twinomugisha, (2007) "Some Reflection on Judicial Protection of the Right To a clean and healthy environment in Uganda." 3/3 Law, Environment and Development Journal.3.

[51] M. Keating, (1993), Genda for change: A plain Language Version of Agenda 21 and othe Rio Agreements." Switzerland: Centre for our common future. See also Principle 10 of the Rio Declaration.

[52] Ibid, Principle 7.

Report, although it strikes a balance between developmental and environmental considerations.

Uganda has joined World Partnerships such as the World Bank's Forest Carbon Partnership Fund. The Forest Carbon Partnership Facility (FCPF) is a partnership of donors and developing countries which has a goal of reducing greenhouse gas emissions from deforestation and forest degradation, forest stock conservation, sustainable forest management and the enhancement of forest stock (REDD+). The partnership will pilot performance-based incentive payments for forest conservation. REDD+ is an international climate change mitigation mechanism under negotiation at the United Nations Framework Convention on Climate Change (UNFCCC). Uganda is one of REDD country participants in the FCPF, with in Africa. Thus Uganda has complied with the obligation of joining world partnerships to promote sustainable development of the Mabira ecosystem by submitting the Ugandas REDD- plus Readiness Proposal (R-PP) prepared by REDD National Focal Point and approved by Government of Uganda to the Forest Carbon Partnership Fund.[53]

Forest principles 2006

These principles emanated from the UNITED Nations Conference on Environment and Development which took place in Rio de Janeiro in June 1992. In particular, the principles recognize that national forest policies should recognize and duly report the identity, culture and rights of indigenous people, their communities and other communities and forest dwellers. These are non-legally binding authoritative statements of principles for a global consensus on the management, conservation and sustainable development of all types of forests. The guiding objective of these principles is to contribute to the management, conservation and sustainable of forests and to provide for their multiple and complementary functions and uses reflecting a first global consensus on forests.[54]

In addition, it was recommended that appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest

[53] www.forestcarbonpartnership.org, accessed on the 4/7/2014 at 11:03 am

[54] Preamble of the Forest Principle/CONF, 151/126 (Vol III)

use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being inter alia; those land tenure arrangements which serve as incentives for the sustainable management of forests. The principles is further sensitive to gender issues which will give women opportunity to participate in the sustainable management of Mabira Forest ecosystem and recognizes the full participation of women in all aspects of management, conservation and sustainable development of forests should be actively promoted.[55]

The significant role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognized.[56] Consequently, decisions taken on the management, conservation and sustainable development of forest resources like Mabira forest should involve the maximum participation of the communities around the ecosystem and facilities the sharing of benefits accrued form the ecosystem which can be promoted through joint tourism hence creating a balance between human development and economic growth.

Bali Declaration, 2011

The Bali Declaration on transitioning to low Global Warming Potential Alternatives to Ozone Depleting Substances was held by the parties to the Vienna Convention on Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer. Parties met at Bali, Indonesia from 21st to 25th November 2011. The parties recognize the fact that certain Ozone Depleting substances could contribute to the greenhouse gas emissions. The major objective of the declaration is to call upon members to carry out studies that will help reduce depletion of the Ozone layer and minimize its impact and its feasibility, technical feasibility, market availability and impact on human health and safety of such alternatives in

[55] Ibid, Principle 5(b).

[56] S.H.Brandon, (1994) "National Sovereignity and Global Environment Responsibility; Can Tension Be Reconciled For the Conservation of Biodiversity?" Vol; 33. Switzerland: IUNN.P.384

PARTICULAR with enhanced engagement with stakeholders, particularly the industry. Article 3 invites parties and others in a position to do so, to provide suitable and sustainable financial as well as technical assistance, including technology transfer and capacity building needed by parties, in particular parties operating under paragraph 1 of Article 5 for transforming to low global warming potential alternatives to Ozone depleting substances that minimize environmental impacts.

The Declaration provides a foundation for protection of the forest in Uganda on the basis of sustainable management of the ecosystem. The forest will be used to absorb the gaseous toxic in the atmosphere thereby reducing ozone layer depletion and its effects on the environment.

Copenhagen Declaration, 2012

The Declaration arose from the members of the committee of the regions at Copenhagen from 22-23 march 2012. The members recognized that 20 years on from the third earth summit in the Rio de Janeiro, the goals of sustainable development and reducing poverty have yet to be achieved and the Rio+20 summit will be an opportunity to review political commitment to global and joined up action to achieve sustainable development.

The relevance of the Declaration to Mabira forest is that it confirms the members' commitment to climate –neutral cities that are economical in their consumption and efficient in production and the same time preserving and enhancing natural areas and cultural heritage.

The declaration further points out that in promoting sustainable development it must be done by means of housing policy, urban renewal policy, resource management policy (including renewable energies, water and waste) and urban transport policies that give priority to public transport and "soft" transport measures. This is all intended to promote developing towns in an orderly manner that is proper building plans and roads which will not interfere with the natural resources.

Johannesburg Declaration, 2002

The Johannesburg Declaration on sustainable development 2002, the representatives of the peoples of the world assembled at the world summit on sustainable development in Johannesburg South Africa from 2-4 September

2002 to reaffirm their commitment to sustainable development.[57] The Declaration states that the children of the world challenged the representatives to ensure that the world is free of environmental degradation and pattern of unsustainable development.

The Declaration is relevant to Mabira forest since it recognizes the importance of building human solidarity by promotion of dialogue and cooperation among the world's civilizations and peoples irrespective of race, disabilities, religion, language or culture.[58] Articles 17 and 18 show the determination of promoting sustainable development and they respectively provide as hereunder;

> Recognizing the importance of building human solidarity, we urge the promotion of dialogue and cooperation among the world's civilizations and peoples, irrespective of race, disabilities, religion, language, culture or tradition.
>
> We welcome the focus of the Johannesburg summit on the indivisibility of human dignity and are resolved, through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, healthcare, food security and the protection of biodiversity. At the same time, we will work together to help one another gain access to financial resources, benefit from the opening of markets, ensure capacity-building, use modern technology to bring about development and make sure that there is technology transfer, human resource development, education and training to banish underdevelopment forever.

The declaration therefore aims at protecting the natural resources to establish sustainable development using the indigenous peoples and human solidarity. This will create a positive attitude of human race towards natural resources hence sustainable utilization of forest resources.

Rio Declaration, 2012

[57] Article 1 of the Johannesburg Declaration on Sustainable Development, 2002.

[58] Article 17

The Rio+20 United Nations conference on sustainable development which is considered as a new international milestone was held by the heads of state and government and high-level representatives who met at Rio de Janeiro was held from 20th to 22nd June 2012 with full participation of civil society. They met with the aim to renew their commitment to sustainable development and to ensure the promotion of an economically, socially and environmentally sustainable future for the planet for the present and future generations.

The parties recognized that poverty is the greatest global challenge and that sustainable development is an indispensable requirement. Further still, the parties recognized that people are at the centre of sustainable development and in this regard they strived for a world that is just, equitable and inclusive, and they committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all.

The Rio+20 Declaration establishes green economy goals[59] focusing on eradicating poverty and promoting sustainable development. They also focus the millennium development goals using it as a useful tool in focusing achievement of specific development gains.

The Rio+20 Declaration is relevant to Mabira Forest. The parties highlight the social, economic and environmental benefits of forests to people and the contributions of sustainable forest management. They also support cross-sectoral and cross-institutional policies promoting sustainable forest management. The parties reaffirm that the wide range of products and services that forests provide create opportunities to address many of the most pressing sustainable development challenges and call for enhanced efforts to achieve the sustainable management of forests, reforestation, restoration and afforestation. The parties also call for increased efforts to strengthen forest governance frameworks and means of implementation, in accordance with the non-legally binding instruments on all types of forests, in order to achieve sustainable forest management. To this end, they commit themselves to improving the livelihoods of people and communities by creating the conditions needed for them to sustainably manage forests, including through

[59] Article 3 of the Rio+ Declaration 2012

strengthening cooperation arrangements in the areas of finance, trade, transfer of environmentally sound technologies, capacity-building and governance, as well as by promoting secure land tenure, particularly decision making and benefit-sharing, in accordance with national legislation and priorities.[60]

This declaration thus aims at eradicating poverty in not only the communities surrounding the forests but also the entire communities in the third world countries. This will reduce over dependency of communities on the forests hence sustainable management of the forests. Uganda is obligated under the Millennium Development Goals which is referred to as a tool for sustainable development under the Rio Declaration 2012 to eradicate poverty. Uganda has achieved the goal of eradicating extreme poverty and hunger. Absolute poverty has declined from 56% in 1992/93 to 24.5% in 2009/2010.[61] However, despite this achievement it is reported by one of the respondents that communities around Mabira forest entirely depend on the forest for their livelihood.

Binding international legal instruments

There are binding international legal instruments governing sustainable management of natural resources and environmental issues at large. Uganda is signatory to most of them. They are international in nature and have legal implications in the management of forest resources. These include; the conservation on Biodiversity (CBD), Rio de Janeiro 1992, the UN Convention to combat desertification in countries experiencing serious drought UNCCD, 1994, Convention on international trade in endangered species of Wild fauna and Flora, Washington, 1973 (CITES), Convention on the conservation of migratory species of wild animals 1979, among others. These are hard law instruments with a very important role in efforts to ensure the conservation and sustainable development of ecosystems including Mabira Forest. Most of the conventions lay out the rights, responsibilities and obligations of the state parties and general parameters on environmental

[60] Article 63 ibid

[61] Millennium Development Goals Report for Uganda, (2013), "Divers of MDG progress in Uganda and implications for the post-2015 development Agenda", Ministry of Finance, Planning and Economic Development.

issues. Specific conventions and how they affect Mabira forest ecosystem are discussed here below;

The Convention on Biological Diversity (CBD) 1992

The drafting of the CBD was initiated in the late 1980s and finalized, at the 1992 Rio Earth Summit where it was signed by 150 government leaders dedicated to promoting sustainable development. It recognizes that biological diversity is about more than plants, animals, and micro organisms and their ecosystems- it is about people and our need for food security, medicines, fresh air and water, shelter and a clean and healthy environment in which we live.[62] It was the first global agreement on the conservation and sustainable use of biodiversity and serves as a blueprint for national action. The objectives of this convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.[63]

This convention is a practical tool for translating the principles of Agenda 21 into reality because it deals with the conservation and sustainable use of biodiversity, and with access to biological diversity and sharing of the benefits arising from this access.[64] In addition, it sets out the obligations of states to protect and sustainably utilize their biological diversity but makes explicitly clear that states have full sovereignty over such resources.[65] It encourages the development of national policies, plans and legal regimes designed to protect a country's genetic heritage as well as the exploitation of biotechnologies.

[62] The Preamble of CBD

[63] Ibid, Preamble and Article 1 and 2

[64] The Convention defines 'biological diversity' to include the variability among living organisms from all sources including among other things, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystem' (Art 2)

[65] Ibid, Article 4

Significantly, the government of Uganda has recognized the importance of biological diversity and reaffirmed its commitment to conservation and sustainable utilization of biological diversity. Uganda has put in place environmental measures to cover the above mentioned provision in the CBD which include the National Environmental Action Plan (NEAP) which involves a continuous review of existing institutional and legal frameworks so as to make them more effective in the conservation of the country's biodiversity.[66] The convention has led to the formulation of biodiversity plans and strategies, especially in countries where the depletion of tropical rain forests and the rapid disappearance of some animal species have attracted national and international attention.

The key criticism that has been leveled against the Convention on Biological Diversity is that its work has been dominated by a tendency to generate text rather than action.[67] Nevertheless, it promotes global cooperation for the conservation of biodiversity without forcing any given state to participate in this process. Like other international agreements, the convention does not specifically address the rights of communities apart from a cursory mention of indigenous and local communities in its preamble thus neglecting community level actors by adopting a state centered approach.[68] However, existing decision mechanisms provide important potential opportunities through which indigenous peoples and local communities may seek to secure respect for their rights and contribute towards sustainable management of Mabira forest.

It is important to recall that the convention on Biological Diversity is a legally binding instrument and its decisions are also binding. As such parties are obligated to comply with decisions under the convention. It affirms the right of states to natural resources within their jurisdictions and effectively debunks the common heritage concept, introducing the notion of common concern, which implies recognition of the global importance of biological diversity but does not diminish the ambit of the principle of permanent sovereignty over

[66] Ibid

[67] Ibid

[68] The Preamble of the Biodiversity Convention

natural resources.[69] Uganda's obligation under this convention is to uphold its sovereignty over natural resources but letting the indigenous community contribute towards the resources sustainable development. Uganda fulfills this obligation. It has made Mabira forest a central reserve forest regulated by NFA. Mabira forest is protected by the government but still there is failure in involving the community in the conservation of the forest resources. The only community based organization in Mabira forest is the MAFICO as was reported by a respondent.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 1973 (CITES)

CITES was signed in March 1972 and entered into force in 1975 with the objective to protect endangered species from extinction through over-exploitation[70]by putting in a number of checks and balances in terms of strict import and export permits, which severely limit the export of endangered species unless their export is deemed to be harmless to their survival. A list of what species should be considered was compiled by the conference of the parties placing the species in different categories according to the degree to which their existence is endangered.[71]

Appendix I includes all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances. Appendix II include all species which through not necessarily threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and other species which must be subject to regulation in order that trade in specimens of certain species referred to above may be brought under effective control.

Appendix III includes all species which any party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, as needing the co-operation of other parties in the control of

[69] ibid

[70] P.Kameri-Mbote, (2002) Property Rights and Biodiversity Management in Kenya: The Case of the Land Tenure System Wildlife Nairobi: Acts Press.

[71] Article II Para 3 and Art VIII of CITES

trade.[72] However, the convention does not address other factors that are equally threatening to the survival of species, which include local harvesting for domestic use.

The relevance of CITES to Mabira forest ecosystem is that it is the only global convention which aims at controlling international trade in endangered species of wild fauna and flora which is very necessary since international trade is the second major threat to the survival of species of wild animals and plants which are also part of Mabira forest.[73] Additionally, CITES secretariat provides permanent technical support to the parties which include advice on numerous matters, such as the drafting of national legislation for the implementation of the conservation or the validity of a permit.it further, offers training for personnel in the implementation and enforcement of the convention. Uganda has an opportunity to request for technical assistance from the secretariat of the CITES on capacity building programme on sustainable management of Mabira forest.

To this end, Uganda is a contracting party.[74] Although the Wildlife Act of Uganda has provisions that relate to preservation of rare, endemic, and endangered species, and CITES standard forms for permits and certificates are being used, however, no specific subsidiary legislation provides for implementation in Uganda. Relevant statutes such as the Fisheries Act and the Forests Act do not specifically mention CITES. Despite the fact that Uganda protects Mabira forest through the CITES it totally fails where permits and certificates are granted to wrong persons due to vices like corruption which is very rampant in the country.

United Nations Framework Convention on Climate Change (UNFCCC) 1992 and the Kyoto protocol

Uganda signed this convention on 13th June 1992 and ratified it on 18th September 1993. The major objective of the UNFCCC is to stabilize

[72] Ibid, Appendix I

[73] E Kasimbazi, Et al, (2005) " Report On The Review Of The Policies Relevant To The Mt.Elgon Ecosystem Management." In Mid Term Review of mount Elgon Regional Ecosystem Conservation Proramme. Switzerland:IUCN Publication Services Unit

[74] Part V of Uganda Wildlife Act of 1996

greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and enable economic development to proceed in a sustainable manner.

The convention emphasizes the precautionary principle. The convention imposes an obligation on state parties to take measures to prevent and minimize the causes of climate change and mitigate its adverse effects. This convention is relevant to Mabira forest, in that Uganda in its efforts to reduce dangerous emissions into the climate must protect forests that helps to absorb poisonous emissions into the environment. Mabira is one of the largest forests in Uganda and plays a big role in the reduction of dangerous emissions into the climate. However, the rate of deforestation in Mabira is too high that the objective of reducing dangerous emissions is bound to fail. The convention has also been criticized for being too general and not specific as far as emission reduction targets are concerned.

Uganda ratified the Kyoto protocol on the 25th March 2002. This protocol sets binding numerical targets for the limitation and reduction of greenhouse gas emissions i.e. carbon dioxide, methane, and nitrousoxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride for the industrialized and transition countries during the period 2008-2012.[75] However, no numerical targets for the reduction of emissions were set for the developing countries though they are required to report on their emissions.

International Tropical Timber Agreement, 2006

The International Tropical Timber Agreement , 2006 is a commodity agreement designed to promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests by contributing inter alia to sustainable development and to poverty alleviation.[76] The agreement seeks to promote and support

[75] Article 3 and Annex A to the protocol

[76] Article 1 (c) of the International Tropical Timber Agreement, (2006)

research[77] and development with a view of improving forest management and efficiency of wood utilization as well as increasing the capacity to conserve and enhance other forest values in timber producing tropical forests. The agreement encourages members to develop national policies aimed at sustainable utilization and conservation of timber producing forests and their genetic resources and at maintaining the ecological balance in the regions concerned, in the context of tropical timber trade.[78]

It is from this agreement, that the forestry department was made a fully fledged department within the ministry of lands and environment and later the creation of the National Forestry Authority. The agreement is relevant to Mabira forest because timber is harvested from Mabira thus the need of promoting and supporting research with the view of improving forest management and efficient utilization. The second objective of the convention is relevant to the study so as to provide an effective framework for consultation, international cooperation and policy development of all members with regard to all relevant aspects of the world timber economy.

Uganda is obligated to ensure that all people dealing in timber business carryout their business legally or to totally eliminate illegal timber harvesting. Uganda has gone ahead to mandate the NFA to issue licenses to persons dealing in the timber production business. Uganda's forest cover remains at risk since some timber harvesters use outlawed machines. Available statistics indicate that 90% of timber in Uganda is illegal, meaning it is harvested, transported and traded without licenses from government agencies as reported by the respondent. The national forest authority has been slow in granting timber licenses, meaning that most timber and charcoal entering Kampala is illegal.

It is important to note the NFA is also restricting pit swaing and has piloted the use of chainsaw sawmill in Mabira forest. Pitsawyers are selective in trees and species cut, and

Conclusion

[77] Ibid, Article 1 (f)

[78] Ibid, Article 1 (a)

The lack of sustainable management of forest resources is increasingly becoming a global concern since these activities have resulted in to a negative impact on the forests and the climate. As such, the international legal framework comprising of both binding and non-binding instruments have a role to play in the achievement of an effective legal framework for sustainable management of Mabira forest. The non-binding instruments are vital guidelines in the formulation of policies in Uganda. Although being a signatory to international conventions does not guarantee that a country will implement the legal provisions of such instruments still legal authority rests largely with nation states. The fundamental aspects of these international Legal framework is creation of an increased understanding on the need to strike a balance between the national laws of Uganda and the international conventions for equitable and sound use of the forest resources. Although one of the major drawbacks of international legal framework that impact on the environment directly is that many states are not party to them, thereby limiting the extent to which these instruments are being applied.

THE LAWS GOVERNING KADHIS' COURTS IN ZANZIBAR ,TANZANIA AND AREA COURTS IN KWARA STATE ,NIGERIA:

ISSA B OBA PH.D[1].

Abstract:

Islamic law is of great impact to adjudication process on Muslim personal matters in different regions of Africa. This legal system has been in usage among different peoples of Africa sub-regions since post-colonial era. This paper attempts to evaluate the issue of legal framework of Kadhis' Courts in Zanzibar and Kwara State of Nigeria. The term legal framework as well as the variations in the courts structure of the two regions of Africa will be examined in detail hereinafter. For the purpose of this discourse, our main concern will be on the hierarchal arrangement of the courts system with special focus on the Kadhis' Courts structure and the appropriate constitutional provisions for the existence of the Kadhis' Courts in these different regions of Africa. Essentially, this paper makes use of library research to evaluate the subject matter of the study. Also the paper examines the official jurisprudence of each region and its impact on adjudication process on Muslim personal matters in Zanzibar and Kwara State of Nigeria.

KEYWORDS: Kadhis' Courts; Area Courts; Islamic Jurisprudence; Zanzibar; Kwara State

Introduction

Islamic law or Sharia focuses on maintenance of law and order, and assists to safeguard peaceful governance and co-existence in nations with colonial legal system background.[2] Many nations with sizeable Muslim population have dual system in which the government is secular in nature but allows Muslim personal matters to be resolved in Kadhis' or Sharia Courts. These courts have jurisdiction on matters like marriage, divorce, inheritance, and guardianship. Notable examples of countries with such dual legal systems are

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[2]Okon, E.E., Islamic Jurisprudence and the Primacy of Sharia. International Journal of Asian Social Sciences. 3(3) 138-139, 2013, p. 149.

Nigeria.[3] The Constitution of Zanzibar recognizes the existence of Kadhis.[4]The peoples of Zanzibar and Nigeria are of sizeable number of Muslim population; belong to *Al-Shafii* and *Imam Maliki* schools of jurisprudence. *Al-Shafii* doctrine distinguishes between the spiritual and secular aspects of Islam. It follows precedent from non-Islamic law and focuses on the merits of individual cases.[5] The *Malik*i school of thought relies on precedents of the prophet Mohammad as supplements to clarification on the Quran, the divine document of Islam.[6]

Historical background of Justice System of Tanzania

The United Republic of Tanzania is a nation with two judicial systems since the post-colonial era.[7]The country is located along the east coast of Africa has a unique legal system. This country is bounded in the north by Uganda and Kenya in the south by Mozambique, Zambia and Malawi while in east by the Indian Ocean and in the west by Burundi, Rwanda and Congo.[8]The official languages of the nation are *Kiswahili* and English. In addition, many residents also speak Arabic. Essentially, the natives of what is now known as the United Republic of Tanzania are the peoples of Tanganyika and the indigenous people of Zanzibar.The apex court of United Republic of Tanzania is the Court of Appeal with jurisdiction to hear appeals from not only Tanganyika but also from Zanzibar.

Islamic Legal History of Zanzibar

The Zanzibar archipelago is part and parcel of United Republic of Tanzania though with slightly different legal system. Zanzibar, an Indian Ocean

[3] Johnson, T., & Aly Segie. Islam: Governing under Sharia. Sharia Council on Foreign Relations. http://www.cfr/religion/islam-governing-undersharia/pso. Accessed on 2nd March, 2016.

[4] Act No. 3, of the Kadhis Act, 1985.

[5] Khadduri, Majid (Trans) Al-Shafii's Risala, Treatise on the Foundation of Islamic Jurisprudence. Cambridge. The Islamic Texts Society, 1987.

[6] Baloch, Abdul Ghafoor., et al. Imam Maliki-His Dedication in Compilation of Hadith Book Motta an Outlook from Historical Review. British Journal of Humanities and Social Sciences. Vol. 6(1), 2012, pp.45-50.

[7] Norrie, K. M. Administration of Justice in Tanzania and Zanzibar: A Comparison of Two Judicial Systems in One Country. *International & Comparative Law Quarterly, 38, 1989, p.395-397.*

[8]www.infoplease.com/country/tanzania.htm?pageno=2

archipelago located off the eastern coastline of Tanzania contains three large islands and a number of smaller ones. In 1964 Zanzibar together with Pemba Island and some smaller Island joined with Tanganyika on the mainland to form the United Republic of Tanzania.[9] Moreover, in 1969 with the enactment of the People's Court Decree a separate court structure came into existence in Zanzibar. This arrangement made provision for the People's Area Courts, the People District Courts, the Kadhis's Courts, the High Courts and the Supreme Council. There were also legislative reforms on legal regime of Zanzibar in 1984 and 1985 which assisted to improve the legal system of the region by the termination of the People's Courts system and the introduction of Common law in the judicial system. And of recent another reform of the Kadhis' Court system. To this end, three types of courts system emerged in Zanzibar and include: the High Court of Zanzibar, the Kadhis' Courts and the Magistrates Courts. The apex court in Zanzibar is the High Court of Zanzibar with unlimited jurisdiction over civil and criminal matters. The Court of Appeal of Tanzania has jurisdictions in Appeals from the High Court of Zanzibar. On the other hand, district court has original and appellate jurisdiction with slightly greater powers on civil and criminal matters if compared with the former. The resident magistrate courts have original and appellate jurisdiction and also with jurisdiction in cases from the lower Magistrate courts.[10]

One of the greatest reforms in the legal history of Zanzibar was the constitutional recognition for the existence of the Kadhis' Courts. This singular Act made provision for every district in Zanzibar to have Kadhis' Court and the constitutional provision of the position of the Chief Kadhis' Court' for Zanzibar. The 1985 Act amended the Islamic law position to this end, credibility of all evidence before the Kadhis' Courts in Zanzibar is not necessarily upon the number of witnesses who have given evidence. This is a landmark reform of Islamic jurisprudence for other nations with dual legal system to emulate in other make the Kadhis' Courts meet the needs of the

[9]Allot, A. Development of the East African Legal System during the Colonial Period in History of East Africa. D.A Low and A. Smith. Eds. Oxford, Clarendon, 1976.

[10]Norrie, K. M. Administration of Justice in Tanzania and Zanzibar: A Comparison of Two Judicial System in One Country, op.cit, 404-406.

Muslims in contemporary era. The Chief Kadhis' Court has no original jurisdiction, but the Appeals from the Chief Kadhis' Court lies to the High Court of Zanzibar. In the High court the judge sits along with four *sheikhs* learned in Islamic jurisprudence. Cases at the High court are decided according to a majority vote and the decision of the court is final.[11]In United Republic of Tanzania though there is the statutory provision for marriage in the Law of Marriage Act, but the family law is not considered a Union matter therefore the Law of Marriage Act is applicable only in the mainland Tanganyika and is not in use in Zanzibar.

Historical background of Justice System in Nigeria.

Nigeria became independent from Britain in 1960 the nation had undergone tremendous reforms of its legal system. With the departure of the British in 1960, Nigeria had a democratically elected government on the British model, the parliamentary system of government. Nigeria is a multi - religious society, and its legal history is influenced by Islamic and Western jurisprudence.[12]

There are over two hundred and fifty different ethnic groups in the country, but English is the official language of the nation. According to the 1999 Constitution of Republic of Nigeria the country is made of thirty-six States. Kwara State is one of the thirty-six States.

Islamic Legal History of Kwara State, Nigeria

The area known as Kwara State was formerly under the Hausa States territorial control that existed in eighteenth century and was one of the emirates of the Sokoto Caliphate in the nineteenth century.[13] Kwara State is located in the north western region of the country. The judicial arm of government, headed by the Chief Justice. The Sharia Court of Appeal exists in the State in line with the constitutional provisions. Courts that have jurisdiction in Islamic matters particularly in terms of hierarchy are Area

[11]Stiles, E.E., A Kadhi and His Court: Marriage, Divorce and Zanzibar's Islamic Legal Tradition. Unpublished Ph.D. Dissertation, Washington, Washington University, August, 2002, p. 288- 90.

[12] Reads J.S. Indirect Rule and the Search for Justice. Oxford, Oxford University Press, 1992, pp, 20-35.

[13] Boahen, A. Topics in West African History. London, Longmans, 1966, pp, 70-75.

Courts, Sharia Court of Appeal, High Court, Court of Appeal and the Supreme Court.[14]

The Structure of Zanzibar Legal System.

The apex Court of the United Republic of Tanzania legal structure is the Court of Appeal of Tanzania. Formerly, the Court of Appeal for East Africa and its services were enjoyed by members of East Africa Community.[15] Other Courts include: High Court; Magistrate Courts and Kadhis' Courts.

Court of Appeal of Tanzania

The Court of Appeal Tanzania handles all matters from the High Court of Zanzibar except matters on Muslim family cases because family law is not considered as a Union matter.[16] The President of the United Republic of Tanzania appoints the Chief Justice of the Court of Appeal and other Court of Appeal Judges though also appointed by the President on the recommendations of the Chief Justice.[17] The Court of Appeal of Tanzania is one the unifying factor between Tanzania Mainland and Zanzibar because the United Republic of Tanzania share this court system.

High Court of Zanzibar

The Constitution of the United Republic of Tanzania recognizes the right of Zanzibar to have its own High Court. The Judiciary of Zanzibar main role is the interpretation of laws, adjudication of cases and administration and dispensation of justice in accordance to the country's laws.[18] The emergence of the Zanzibar Court system can be traced to 1964, immediately after the 1964 revolution. With the revolution a single uniform court structure was established for all the subjects. The court's nomenclature now became the High Court of Zanzibar. In addition, the 1964 revolution also abolished

[14]Oba, A. A. Towards Rethinking Legal Education in Nigeria. *Journal of Commonwealth Law and Legal Education*, 2000, pp.15-17.

[15] Established by Article 80 of the Treaty of East African Cooperation 1967.

[16] Habermas, J. Multiculturalism and the Liberal State *47 Stan Law Review*, 1995, pp 849-51.

[17] Article 118 (3) of the Constitution of United Republic of Tanzania.

[18] The Judiciary of Zanzibar. www.judiciaryzanzibar.go.tz

Subordinate Courts structure and the People Court of Zanzibar came into existence. In 1985 it was abolished and replaced with the present subordinate Courts and Magistrate Courts system came into being in Zanzibar.[19]According to the Zanzibar constitution the top most court in the hierarchy is the High Court of Zanzibar. The Judiciary system of Zanzibar comprises of High Court and Subordinate Courts and it includes the Kadhis' Courts. This comprise of district Kadhis' Courts and are court of first instance and the Appellate Kadhis' Court which is appeal court.[20]The High Court of Zanzibar is a superior court of record to hear and determine any civil and criminal matters. The High Court hears appeals from the subordinate courts and has supervisory powers over all subordinate courts. During civil or criminal trials as well as in appeal cases the High Court may call not more than four assessors to give assistance to the judge as the may be. The opinions of the assessors are of no binding effects on the judge. This provision does not apply to Muslim personal matters originating from the Kadhis' Courts.[21]The decision of the judge must be documented on courts' records. The language of the High Court of Zanzibar is *Kiswahili* or English. The Chief Judge may use his discretion on the language of the court. In Zanzibar Judges of the High Court are appointed by the President of the Revolutionary Government of Zanzibar in consultation with the Judicial Service Commission of Zanzibar.[22]

Magistrate Courts

The jurisdiction in Muslim Legal matters and the administration of justice under the present dispensation is based on 1985 legislation. To this end, the Magistrate courts are classified into three namely; the Primary Courts, District Courts, and Regional Courts.

Primary Courts

[19] Magistrate Court Act, 1985.

[20]Article 93(1) of the Constitution of Zanzibar, 1984 and Kadhis Court Act, 1985.

[21]Rutinwa, B. Constitution and Legal System of East Africa: The Court System and Conflict of Law in Tanzania. Dar es Salaam. The Open University of Tanzania, 1996, pp, 93-94.

[22] Section 94 (2) of the Zanzibar Constitution, 1984

A Primary Court is available in every district of Zanzibar. There is the constitutional provision for establishment of more than one court in each district of Zanzibar. The Judicial Service Commission appoints Magistrates for the Primary Courts. Magistrates presides over Primary Courts in Zanzibar.[23] The jurisdiction of the Primary Courts are on civil, criminal matters and on matters relating to money and financial issues. On the service of the lawyers in the courts, advocates or State Attorney are prohibited from appearing before the Magistrates. In Zanzibar litigants may be represented by *Wakyts*, and in matters before the Primary Courts.[24] The language of the court, in Primary Courts *Kiswahili* language.

District Courts

The District Court is established under the Magistrate Act. This court exercises appellate and revisionary powers over the Primary Courts below it. District Court is established in every District of Zanzibar. This provision of the law is yet to be fulfilled in Pemba and Unguja Districts of Zanzibar up till recent times. The District Magistrate is appointed by the Judicial Service Commission. On the service of the lawyer under the district court in Zanzibar, advocates have right of audience before the district courts of Zanzibar. District Courts in Zanzibar have both original and appellate jurisdiction in criminal and civil cases. The language of the District Court of Zanzibar is either Kiswahili or English as the Chief Judge may direct.

Regional Courts

The Magistrate Act makes provision for the establishment of a regional court in each region of Zanzibar. Resident Magistrates preside over regional courts. A Regional Magistrate is appointed by the Chief Judge. This judicial position is for holders of degree in law and not less than three years' experience. Regional Courts have criminal, civil, and pecuniary jurisdictions. And it performs supervisory functions over both district and primary courts.[25]The

[23] Sections 3(1) - Section 5(1) and Section 8(1) Magistrate Court Act, 1985.

[24] In Zanzibar Wakyts are not defined in the statute, but these are considered to be paralegal officilas who hold certificate or diploma in Law.

[25] Section 7- Section 32 of the Magistrate Act of 1985.

Chief Judge appoints resident magistrate for each region of Zanzibar. The Regional Court of Zanzibar is the same as the Resident Magistrates' Courts in Tanzania Mainland.

Kadhis'Court System in Zanzibar

One of the oldest court system in Zanzibar is the Kadhis Court system. Literarily, Kadhi is an Arabic word which means a judge in a Muslim environment whose decisions are based on Islamic jurisprudence.[26] From the classic era Kadhis traditionally had jurisdiction on Muslims legal matters applying Islamic law. Kadhis Courts had long historical antecedent from the time of the advent of the Arabs along the east coast of Africa.

Kadhis' Courts

Kadhis courts in Zanzibar are established by the Constitution of Zanzibar, the High Court Act. The courts are parallel to the Magistrates' courts under the current judicial structure of Zanzibar.[27]According to the constitutional provisions, there are two Kadhis' Courts in Zanzibar. These are the Kadhis' Courts and the Chief Kadhi court of Zanzibar. In addition, in accordance to constitution guideline the House of Representatives of Zanzibar is empowered to enact law for the establishment of other courts than the High Court of Zanzibar and the Court of Appeal.[28] Accordingly, pursuant to constitutional provisions the House of Representatives enacted the High Court Act and the Kadhis' Court Act in 1985.Hence, the establishment of Kadhis' Courts in each of ten Districts of Zanzibar, and each has jurisdiction within the District in which it is established. The Act makes provision for the qualifications for the position of Kadhis in Zanzibar. First such candidate needs to profess and practice Islam with good understanding of Islamic jurisprudence. Though Kadhis' Court are made up of Kadhis and are appointed by the Judicial Service Commission in consultation with the Chief Kadhis.[29]In Zanzibar

[26]Majamba, H.I. Possibility and Rationale of Establishing Kadhis Courts in Tanzania Mainland. *Paper presented at the 20th REDET RMC Workshop*. Held in Council Chamber, University of Dar Es Salaam on 10th November, 2007.

[27] Kadhis Court Act Nos 2- 3 of 1985.

[28] Article 100 of the Constitution of Zanzibar, 1984.

[29] Section 3 and Section 5(1) of Kadhis Court Act of 1985.

Kadhis are judicial officers for their appointment and promotion are based on the recommendations of Judicial Service Commission in accordance to civil service rules and regulations and belongs to the judicial arm of the government. In Zanzibar Kadhis' Courts are endowed with independent budget allocation according to the provision of the statute.

Chief Kadhis' Court

In Zanzibar, the Chief Kadhis' Courts are established by the Constitution of Zanzibar. At the apex of Kadhis' Court structure is the Chief Kadhi. Qualifications required is the same with that of other Kadhis except requisite experience is required of the office of Chief Kadhi. The Chief Kadhi is appointed by the president of Zanzibar. In Zanzibar, two offices of Chief Kadhis Courts are in existence, one established in Unguja the second one is located at Pemba. On the composition of the court, the Chief Kadhis Court is made of one senior Kadhi who assists the Chief Kadhi in adjudication process.[30]

Language of the Kadhis' Courts

Kadhis Courts' proceedings are not open to the public. The language of the court is *Kiswahili*. Parties involved in matters before the Kadhis' Courts make their address in *Kiswahili*. In some cases judgments of the courts are written in Arabic scripts. Kadhis' Courts are not courts of record. The jurisdictions of Kadhis' Courts are on Muslims' personal matters namely; marriage, divorce inheritance and other related matters. But the constitution is clear that all the parties involved in proceedings must profess Islam and the court may exercise territorial or subject matter jurisdiction within its area of jurisdiction. From the composition and qualifications of Kadhis' Courts officials, these courts are religious courts. The jurisdiction of Kadhis' Courts are limited to Muslims personal matters in Zanzibar. The court system have jurisdiction on matters of strictly Islamic civil nature provided all the parties involved are Muslims. Indeed, consent of the parties are vital in jurisdictional scope to this court type. In Zanzibar, there are Constitutional safeguards which guarantee the

[30] Omari, I. legal System in Tanzania Law and Courts. Mbeya, Penuel Printing, 2018, pp. 100-115.

protection the citizens' right to freedom of religion and right not to be discriminated against in whatever form and right to access the courts.[31] Kadhis' Courts in Zanzibar do adhere to doctrine of precedent. These courts are bounded only by doctrines of Islamic jurisprudence. These courts make use of the Quran and the tradition of the Prophet Mohammad. In Zanzibar Kadhis' Courts abide by the doctrine of *Shafii* jurisprudence.[32]

Jurisdiction of the Chief Kadhis Courts

The Chief Kadhis' Courts supervise the lower Kadhis' Courts and these courts have appellate jurisdiction on other Kadhis' Courts in Zanzibar. These courts hear and determine appeals for the matters that originated from the Kadhis' Courts. The Chief Kadhis' Courts in Zanzibar do not have original jurisdiction, but only act as an appellate court for decisions from Kadhis' Courts. In order for the Chief Kadhis' Court to perform its appellate jurisdiction the composition is made of the Chief Kadhi and one senior Kadhi in one appeal. On the other hand, the Chief Justice of Zanzibar has discretional power on composition of the court. Appeal on the decisions of Chief Kadhis' Courts lie to the High Court of Zanzibar. In cases of difference of opinions on Muslim personal matters there is the statutory provision for the office of *Mufti* who advised on jurisprudential matters of Islamic law.[33]For the High Court to exercise their appellate jurisdiction for appeals from the Chief Kadhis Court. The High Court is presided by a single judge in the presence of four *Sheikhs* who are learned in Islamic law. These experts are essential for proper composition on matters of appeal on Muslims' matters and are regarded as members. However, the High Court may require external experts to assist to interpret ambiguous matters in Islamic jurisprudence.[34] As in the Zanzibar case of *Masoud Ali Kombo and others versus Khalid Ali Kombo and others*. In the said case the Attorney General of Zanzibar functioned as *amicus curiae* for the purpose of application of Islamic law.[35]On issues of Muslims' personal matters the High Court's decision on such appeal is based

[31] Article 12 and 19 of the 1984 Constitution of Zanzibar.

[32]Omari, I. Legal System in Tanzania Law and Courts. Mbeya, Penuel Printing, 2018, pp100-115.

[33]Section 4(4) and Section 10 of the Kadhis Courts Act of 1985 and Mufti Act No. 9 of 2001.

[34]Omari, Issa. Legal System of Tanzania Laws and Courts, Mbeya, Penuel Printing, 2014, p.213.

[35] Civil Appeal No 16 of 1987, High Court of Zanzibar, (Unreported)

on the majority opinion of the members.[36]The decision of the High Court of Zanzibar is final on matters of Islamic Law and cannot be subject of appeal to the Court of Appeal of Tanzania.

Applicable Laws by the Kadhis' Courts.

Although Kadhis' Courts adhere to Islamic law in the determination of matters before the court, yet the constitution provides for applicable law in the Kadhis' Courts. All Kadhis' Courts including the Chief Kadhis' Courts are not discriminate on grounds of religion, sex or otherwise. In addition, Kadhis' Courts are to decide matters upon an assessment of credibility of all evidence before the court and not upon the number of witnesses who have given evidence.[37]

Procedural Aspects of Kadhis' Courts

The Constitution of Zanzibar makes reforms on the procedural aspects of Kadhis' Courts which differ from that of Islamic law practice. The law applicable in the Kadhis' Courts is not codified. There is an express provision in the general law would negate Islamic law to the extent of such inconsistency.[38] Moreover, Kadhis have discretional power to interpret Islamic law and pronounce judgments on matters brought before the courts. According to scholars for over two decades now the Kadhis' Courts have being existence without rules of procedure and practice as required by the law that established the court system. Despite the fact that the Chief Justice of Zanzibar is empowered to make rules and provides for the procedure and practice to be applied in the Kadhis' Courts. The Chief Justice of Zanzibar is yet to exercise this discretional power thereby creates lacuna of issue of practice procedure. To bridge this gap the Kadhis' Courts make use of Civil Procedure Decree. This development demonstrates the impact of Common law influence on adjudication process on Muslims' matters in Zanzibar. However, proceedings before any Kadhis' Court cannot be challenged the

[36] Rutinwa Bonaventura., Constitution and Legal System of East Africa: The Court System and Conflict of Laws in Tanzania. Dar es Salaam. The Open University of Tanzania, Faculty of Law, 1996, pp. 7-12.

[37] Section 10(3) and Section 7 of the Kadhis Courts Act of 1985.

[38]*Masoud Ali et el vs. Khalid Ali Kombo*. High Court of Zanzibar Civil Appeal No 16 of 1987.

ground that the law and rules of evidence applicable in the High Court are applied except that such an application resulted in miscarriage of justice.

Recruitment, Appointment and Promotion

The recruitment, appointment and promotion of Kadhis are guided by civil service rules and regulations. Therefore, Kadhis' Courts officials are civil servants and are on the pay roll of the executive arm of Government of Zanzibar. The Chief Kadhis is appointed by the President and has to be well versed in Islamic law. Such appointments are made on the recommendations of the Judicial Service Commission.

On the qualifications for the position of Kadhi, only a Muslim can be appointed. Since the requirements include mainly; that the person follow Muslim religion and must possess knowledge of Islamic jurisprudence applicable to any sect or sects of Muslims. Non- Muslims are not taken into consideration for the position of Kadhis in Zanzibar.[39]

The Structure of Courts in Nigeria

Nigeria is made up of the Federal Court system namely; the Supreme Court, the Court of Appeal, and the Federal High Court. In addition, the Courts in the Federal Capital Territory are also Federal Courts because the Federal Capital Territory is considered to be Federal Territory. However, in their operations the Courts of Federal Capital Territory have the same jurisdiction and characteristics with the State Courts. The Constitution of Nigeria makes provisions for Federal Courts and State Courts. Nigeria Federal law is based on English Common law.[40]

The Supreme Court System

The Supreme Court has exclusive appellate jurisdiction over all appeals from the Court of Appeal. The Court does not and cannot have original criminal jurisdiction. The Supreme Court has original jurisdiction to the exclusion of any other court in certain disputes, but does not have original jurisdiction on

[39] Section 9 (1); Section 4(1); and Section 5(3) of the Kadhis Act of 1985.

[40]Odinkalu, A. C. Justice Denied: The Area Courts System in Northern Nigeria, Ibadan Kraft Books Limited, 1992 pp. 23-25.

any on criminal matter, and it has jurisdiction to the exclusion of any other court in Nigeria to hear and determine any appeal from the Court of Appeal. At the Supreme Court there is no requirements as the number of its Justices to sit over Islamic civil causes.[41]

Court of Appeal.

The Constitution makes provision for the establishment of the Court. At the head of the Court is the President of Court of Appeal. In addition, subject to the provision of the Constitution the Court of Appeal has appellate jurisdiction to the exclusion of any other court of law in Nigeria. The Court of Appeal is divided into different judicial divisions and sits in certain states in Nigeria. The Court of Appeal consists of not less than forty-nine judges at all times. The Court of Appeal is constituted by three of its Justices learned in Islamic personal law when sitting over an appeal from the Sharia Court of Appeal. However, there is no such requirement for appeals from the High Court bordering on other aspect of Islamic law than Islamic personal law which form bulk of Islamic civil causes at the Sharia Court of Appeal.[42]

The Federal High Court

The Court is headed by a Chief Judge, for the number of Judges for the Federal High Court this is based on an Act of the National Assembly. The Federal High Court sits in Judicial Divisions and the jurisdiction of the Federal High Court is defined by the Constitution and the Federal High Court Act. The Federal High Court, unlike other Federal Courts has no appellate jurisdiction. But in the exercise of its jurisdiction, the Federal High Court has powers of a State High Court.[43]

The State Courts

The State under the authority of the Constitution have a discretion with respect to the creation of their own Court. Other than the High Court which is

[41] Abikan, A. I. The Application of Islamic Law in Civil Causes in Nigerian Courts. Journal of International and Comparative Law. 6, J I C L, June, 2002, pp. 88-115.

[42] Odinkalu, A.C. Justice Denied: The Area Courts System in Northern Nigeria, op.cit, pp, 23-25.

[43] Abikan A.I. The Application of Islamic Law in Civil Causes in Nigerian Courts, op. cit, pp. 88-115.

mandatorily required by the Constitution, the States do not have a duty to create any other Courts. One the outstanding features of the State High Court is that while the judges below the rank of the High Court judge are remunerated under the State civil service structure, salaries of the judges of the State High Courts and the Kadhis of the Sharia Court of Appeal and the Customary Courts are charged against the Consolidated Revenue Fund of the State.[44]

The High Court of Kwara State

There is only one High Court in each State. Like the Federal High Court, the State High Courts sit in Judicial Divisions of contiguous Local Government Areas. The High Court of Justice of Kwara State has unlimited civil and criminal jurisdiction over all matters unless its jurisdiction is validly and statutorily ousted. Above all, the Kwara State High Court hears all cases, Islamic civil causes inclusive, except as may be excluded by the Constitution. Though the power of appeal in cases involving questions of Muslim personal law is vested in the Shariah Court of Appeal and High Court in all other cases, yet, there is nothing in the constitution to suggest a division of jurisdiction. The High Court of Kwara State is empowered to apply principles of Islamic law handling it as a variance of native law and custom. The High Court in its exercise of the power would not have ignite any issue but for the re-appearance of the tripartite test in its application and competence of the High Court Judge to apply the law.[45]

Kwara State Sharia Court of Appeal.

The Constitution of Nigeria first recognized or established the Sharia Court of Appeal under the 1979 Constitution. Though this does not mean that Islamic law does not exist under the Nigerian Constitutions before 1979. The former Constitutions makes provision for the right to religious freedom and by extension means recognition of Islamic law. In fact, there was an attempt to establish a Court of Appeal which will stand next to the Supreme Court in

[44]Abikan, A. I. The Application of Islamic Law in Civil Causes in Nigerian Courts, op. cit, pp. 88-115.

[45] Section120; Section 253; Section 272; Section 275; Section 280 and of the 1999 Constitution of Federal Republic of Nigeria.

hierarchy to handle cases from Sharia Court of Appeal.[46] Islamic law is part of the sources of Nigerian law and the Constitution recognizes Islamic law of the *Maliki* School of jurisprudence in respect of Islamic personal law and it established the Sharia Court of Appeal. This provision categorically states that there shall be a Sharia Court of Appeal for every state that requires it.[47]

Magistrate Courts

The Magistrate and Districts Courts are parallel to the Area Courts, within the hierarchy of the State Courts in Kwara State. Both are subordinate to the High Courts in the hierarchal structure. Area Courts are not subordinate to the Magistrate Courts. The Magistrate Courts deal with criminal cases, the District Courts handle civil matters where the Common Law is applicable.[48]

Area Courts System in Kwara State.

The Constitution contains a saving provision preserving the legality of pre-existing laws to such extent that makes them consistent with the Constitution and the laws made under it. This provision saves the Area Courts that they created.[49] The Law for Area Courts system permits a system that would simultaneously administer Islamic Law and Ethnic Customary Law. The Area Courts are created by law, and the law also defines the limits of their powers and functions. The common law and some of its technicalities are unknown and foreign in Area Court system. In Area courts the Evidence Act is not applicable to judicial proceedings unless the Governor of the State shall by order confer upon it any of the provisions but it be guided by that Act.[50] Area Court is constituted under a warrant issued by the State Chief Judge who may vary or cancel the warrant based on his discretion. Area courts are courts of first instance with jurisdiction in civil cases relating to customary law and Islamic law. In addition, they also have criminal jurisdiction and administer

[46] Article 240 and 241 of the 1979 Constitution of Federal Republic of Nigeria.

[47] Oba, A.A. Kadhis of the Sharia Court of Appeal: The Problem of Identity Relevance and Marginalization within the Nigerian Legal System.*Journal of Commonwealth Law and Legal Education*, 2004.

[48] Obilade, A.O. Nigerian Legal System. Ibadan, Spectrum Law Publishing Company, 1998, pp, 202-206.

[49] Section 315 (1) of the 1999 Constitution of Federal Republic of Nigeria.

[50] Volume V111, Laws of the Federation of Nigeria 1990.

the Penal Code and are guided for this purpose by the Criminal Procedure Code. The Penal Code is ultimately the impact of English law of crimes on effective adjudication of this courts on criminal matters.[51] All Islamic and customary law crimes have been abolished by the Constitution.[52] The fusion of administration of customary law and Islamic law in one set of courts was based of colonial heritage of definition of native law and custom as including Moslem Law.[53] Appeals from the Area Courts go to the Sharia Court of Appeal in matters of Islamic personal Law, that is, matters of marriage, inheritance, custody of children and *wakf*. However, in all other Islamic matters, appeals go from the Area Courts to the High Court. More importantly, from both the Sharia Court of Appeal and the High Court, there are further appeals to the Court of Appeal from where appeal finally terminates at the Supreme Court.[54] Scholars argue they are creations of the statute and not religion.[55]The Supreme Court of Nigeria in *Alkamawa v. Bello* pronounced that Islamic law is not the same as customary law, that it is a complete system of universal law and more universal than the English common law. An Area Court may be constituted by single judges or by more than one. In practice all Area Courts other than the Upper Area Courts are constituted by one judge. The Area Courts Quorum Direction regulates the Constitution of the court for sitting in open court. This notwithstanding, does not in any way distract the significance of the courts in adjudication process of Kwara State. The Upper Area Court is the highest in hierarchy of Area Courts in Kwara State.[56]

Jurisdiction of Area Courts.

[51] Karibi-Whyte' A.G., History and Sources of Nigerian Criminal Law. Ibadan, Spectrum Books. 1993, p. 232.

[52] Section 36(12) Constitution of Federal Republic of Nigeria.

[53] Section 2 High Court Law, Cap H2, Laws of Kwara State, 2007

[54]Obilade, A.O., Nigerian Legal System. Ibadan, op.cit, pp. 170-192.

[55] Odinkalu, A.C., Justice Denied (The Area Courts System in the Northern States of Nigeria). Ibadan, Kraft Books Limited, 1992, p.29. Oba, A.A., Neither fish nor fowl: Area Courts in the Ilorin Emirate in Northern Nigeria. Journal of Legal Pluralism. Vol.58, 2008. http://commission-on-legalpluralism.com/volumes/58/oba-art pdf

[56] Odinkalu, A. C. Justice Denied: The Area Courts System in the Northern States of Nigeria, op .cit, pp. 30-35.

Jurisdiction is important for the exercise of judicial functions. A Court must have jurisdiction before it acts on any matter. Courts derive their jurisdiction from the either from the Statutes that creates them or direct from the Constitution. Furthermore, if without jurisdiction, a court or other judicial tribunal purports to act on any matter, the action or decision of the court will be liable to be set aside as illegal by a higher Court. Jurisdiction is the pillar upon which the entire case stands. Once a party, usually the defendant, shows that the court has no jurisdiction, the foundation of the case crumbles; then parties cannot be heard on merit and that puts an end to the litigation. The issue of jurisdiction, whether limited or otherwise is not new to Islamic Law. It has long been accepted as a valid functional aspect of Islamic jurisprudence and is therefore crucial, basic and fundamental to the adjudicatory process under Islamic law.[57]Thus, Islamic law provides for jurisdiction over territory, period, parties and subject-matter. Area Courts are courts of limited jurisdiction, the law restricts the jurisdiction in two respects. The law set ceiling of geographical location and persons. Not every person is subject to the jurisdiction of the Area Courts. Firstly, an Area Court is a State Court, it cannot adjudicate on a case that originates from facts or event outside the State that creates it. Secondly, Area Courts does not have jurisdiction in cases involving a person not of African descent unless that person consents. Similarly, the Statutes delimit the scope of matters that the Area Courts may inquire into or adjudicate upon. Area Courts have civil and criminal jurisdiction, but the scope of this jurisdiction varies according to the classification of the court, whether it is an Upper Area Court or an Area Court.[58]

On jurisdiction in civil claims, Area Courts Law delimits the scope since Area Courts are restricted to adjudicate upon matrimonial matters involving spouses married under the Customary Law and custody of the children of such marriage. Area Courts also have jurisdiction to handle cases involving debts, demand or damages that do not exceed the financial ceiling placed by

[57] Oba, A.A. Neither Fish nor Fowl: Area Courts in the Ilorin Emirate in the Northern Nigeria, op.cit.

[58] Odinkalu, A. C. Justice Denied: The Area Courts System in the Northern State of Nigeria, op. cit, pp. 30-35.

the Law on the different grades of Courts. Area Courts system are empowered deal with cases involving succession and inheritance of property under Customary Law.[59]

Non-compliance to provision of this scope amounts to illegality and such decision will be invalid. The Upper Area Courts in Kwara State like other States in Northern Nigeria have unlimited jurisdiction in terms of monetary value of subject of litigation. The Chief Judge of the State in the warrant creating the Area Courts or subsequently by and order may vary the limits placed on the jurisdiction of Area Courts.[60]

Upper Area Courts Jurisdiction.

The Upper Area Courts have unlimited jurisdiction of all cases falling within the categories that the Area Courts as recommended by the law. In fact, with the Upper Area Courts there are no monetary limits on cases they can handle. The Upper Area Courts in Kwara State like other State in Northern Nigeria have unlimited jurisdiction in terms of monetary value of subject of litigation. The Area Courts Laws of Kwara State makes provision for appeals within and from the Courts' system. The Law stipulates that so long as the aggrieved party can show to have a commonality of interest and grievance and a legitimate interest in the pursuit of the appeal.[61]In cases involving Muslim Personal Law,[62] Appeals lie from the decision of the lower Area Courts to the Upper Area Courts, then to the Sharia Court of Appeal. The Grand Kadhis heads the Kwara State Sharia Courts of appeal.[63] From the arrangement of courts system in the States in Kwara State, only Upper Area Courts have appellate jurisdiction. Such jurisdiction gives the Upper Area Courts the following powers; order the quashing of the decisions of the trial Area Court,

[59] Section 15; Section 18; and Section 20 of the Area Courts Laws. Cap A9, Laws of Kwara State, 2002.

[60] Oba, A.A. Neither A Fish nora Fowl: Area Courts in the Ilorin Emirate of the Northern Nigeria, op. cit.

[61] Section 18A; Section 53 of the Area Courts Laws. Cap A9, Laws of Kwara State, 2002.

[62]Court of Appeal of Northern Nigeria (Cap. 122 Laws of Northern Nigeria), 1963.

[63]Section 247 (1) (a) and Section 288 of the 1999 Constitution of Federal Republic of Nigeria.

vary such decisions or substitute it with a fresh decision within the limits of the jurisdiction of the trial Court.[64]

Language of the Area Courts

In order to keep records of events that transpires in the Court, keeping good Court records becomes inevitable in Area Courts. One peculiar characteristics of the Area Courts, unlike other Courts is the records of the Courts are kept in vernacular. The Court summons and other notices are made out in vernacular. However, for purposes of appeal or any other reasons such records are translated into English by the Court Registrar. For applicant to obtain these records a prescribed fee is paid to the Court. One the prerequisite duty of the registrar is to keep and manage the records of the Court.[65] The judge of the Area Court endeavors to control or verify the records kept by the registrar. Proper record keeping is one the grey areas of the court system.

Applicable Laws of Area Courts

In Kwara State Area Courts have Criminal and Civil jurisdiction. However, the Law provides for Area Courts to administer native law and custom in civil causes and matters. Furthermore, what is prevailing native law and custom is usually a question of fact to be proved by evidence. In addition, unless the fact has by frequent proof in the court becomes so notorious that the court has taken judicial notice of it. The Area Courts Laws provide that for adjudication the court has two alternatives, either to try the case by administering the native law and custom prevailing in the area of jurisdiction of the court or it may try the case by applying the native law binding between the parties. It may not be correct to say that Area Courts can only administer the appropriate customary law in force in their respective area of jurisdiction.[66]In any event, the default of custom under appropriate statute, the Law obviates any need for any quibbling over distinction.

[64] Section 58 and Section 59 (1) - (2), of the Area Courts Law. Cap A9, Laws of Kwara State, 2002.

[65] Order 27 (1), and Order 27(2) (Civil Procedure) Rules. A9, Area Courts Laws, Subsidiary Legislation, 2007.

[66] Section 18; Section 18A; Section 20 (1) (a) - (c) of the Area Courts Laws. Cap A9, Laws of Kwara State, 2002.

Also, for the custom to have this force, it must pass the tests prescribed under the statute. Scholars point out that the repugnancy test seems to have been inspired by the felt need of the colonial administration then, no more than now, eradicate customs that were considered barbarous, unjust or unfair.

Procedural Aspects of Area Courts

The law of procedure assists to safeguard the protection of rights. Accordingly, under principle of law it is explained that individuals shall be tried by ordinary Courts or tribunals using established legal procedures. Moreover, tribunals do use the duly known legal procedures of the legal process shall not be created to show case the jurisdiction belonging to the ordinary Courts or judicial tribunals.[67] The law of procedure is generally known as Adjectival Law. This is made of the law of evidence and the law of procedure. In Nigeria, evidence is on the Exclusive Legislative List of the Constitution. Whereas, the Federal legislation that regulates evidence in judicial proceedings in Nigeria is the Evidence Act.[68] The Civil Procedure entails procedure in civil cases where the claim usually relates to the assertion or denial of rights not resulting in the conviction and the sentencing of any person or persons. The rules of Civil Procedure in Nigeria varies from Court to Court and are regarded as legislation created under the enabling laws that establish the Courts. The Statute gives power to the Chief Judge of Kwara State to make rules prescribing and providing for the practice procedure of Area Courts in their original jurisdiction, on review and appeal.[69]In the exercise of that power, that in so far, they are not inconsistent with the enabling statute nor repugnant to the general law of the land but certain and not unreasonable. The technical procedural rule of the English law are not applicable under customary law and there is no necessity to observe the strict or technical rules of pleadings and practice as required in the High Court or Magistrate Court. They are not prisoners of cumbersome procedure and if their have rules of procedure, they are mainly to be guided by them percurian. On institution of causes the law provides for refusal of cause where no

[67] Odinkalu, A.C. Justice Denied: The Area Courts System in Northern Nigeria, op.cit.

[68] Cap. 112, Laws of the Federation 1992.

[69]Oba, A.A. Judicial Practice in Islamic Family Law and its Custom in Northern Nigeria. *Islamic Law and Society*. 2014, p. 10-14.

jurisdiction.[70] In Nigeria an action is commenced by an application for a summons to the Registrar of the appropriate court payment of prescribed fees. There are no provision for filing of pleadings in the Area Courts Rules, hence every civil cause is to be by a complaint made in person. The position of law on service and execution out of the jurisdiction of an Area Court is clear according to the statute.[71]

Continuation of hearing in Muslim causes is in accordance with Muslim Practice and Procedure. On pleas to the jurisdiction of the court where the defendant wishes to plead that the court has no jurisdiction, that the claims does not disclose a cause of action; or that the subject matter of the claim has already been adjudicate upon such plea is to be made any time after such defendant is asked what he has to say in answer to the and his answer in this regard is to be entered in the Civil Cause Record Book. It is the interest of natural justice that is raised in court during hearing are taken down.[72]On use of evidence and witnesses there are laid down rules. A court is not entitled to consider as evidence before it, the record of evidence given before another tribunal by a witness, who is, or could be made available to give oral testimony.[73]

In civil proceedings a judge lacks the power to recall a witness without the consent of the parties. Except for the purpose of throwing light on the case, the judge may with the acquiescence of the parties. As regards the practice and Procedure on default appearance of witness that a person who without just exercise, disobeys a witness summons requiring him to attend before any court shall be guilty of contempt. All exhibits tendered in the course of civil proceedings are kept by the court or tribunal which hears the case for the statutory period and later to be sent to the appeal court with other records of

[70]Ojukwu, Ernest. Making the Uniform Procedure Rules Impracticable. *Justice*. Vol. 2, No 5, May 1991, pp.3-5.

[71] Oba A. A. Judicial Practice in Islamic Family Law and its Custom in Northern Nigeria, op. cit, pp. 10-14.

[72] Ambali, M.A. Islamic Law Procedure: A Balance of Justice, Faith and Compassionate Magnanimity. Kwara State Law Review. Vol. 1, No 1, 1992, pp, 15-16.

[73]Order 11, Part 11, 3(a)-(c) and Order 13 (1) of the (Civil Procedure) Rules of Area Courts of Kwara State. 2007.

appeal when there is an appeal. A judgment of an Area court, is valid and binding between parties until it is set aside.

Recruitment, Appointment and Promotion

Scholars argue that Area Courts system are handled by judges that are not educated if compared to other court system. In recent era, only literate persons are appointed as Area Court judges but there are issues on their qualifications. All staff of Area Courts are public officers in the public service of the State. The appointment of Area Court judges are made on the recommendation of the Inspector to the Chief Judge and approved by State Judicial Service Commission. There are provisions on qualification of Area Court Judge, a waiver of such requirement means such officer of the court shall act in that capacity. In addition, Area Court Judge sits with assessors, who only act as advisory to the judge on peculiar customary relating to the case at hand. The promotion of Area Court Judges are done by the Judicial Service Commission in consultation with the Inspector of Area Courts.[74]

Similarities and Differences of Kadhis' Courts

Kadhis' Courts in both Zanzibar and Kwara State of Nigeria have quite a number of similarities and differences. In the regions the Kadhis' Courts were able to survive the European colonialism and the policy of the indirect rule. Though the colonial encountered reduced the jurisdiction of the courts system on the long run. In Zanzibar and Kwara state of Nigeria the Kadhis' Courts are creation of the statutes. The Courts are part and parcel of the hierarchal structure of the legal systems of the different regions. Similarly, the courts had undergone changes since the post-colonial era and survived different political regimes. The institutional frameworks of the courts are also similar; the Judicial Service Commission assists in the appointment, promotion and the discipline of the courts officials of the Kadhis' Courts. In both regions Kadhis' Courts officials are civil servants of the state. The research findings indicated that there are no provisions for job mobility from the magistracy bench to the Kadhis' bench and vice versa in Zanzibar and Kwara State of Nigeria.

[74]Oba, A. A. Judicial Practice in Islamic Family Law and its Custom in Northern Nigeria, op. cit, pp. 10-14.

Also, the there are no career prospects from the lower bench to the Superior Courts that is High Courts, Court of Appeal or any other Superior Courts as the case maybe. The paper observes that it is only in exceptional cases that the members to the lower bench moves to Superior Courts as it is the case with the sitting Grand Kadi of Kwara State Sharia Court of Appeal, Ilorin, Kwara State. Other areas of similarities include the use of vernacular in the courts' proceedings and lack of formal dress code either for the Kadhi or the Advocates appearing before the courts' system. Mode of appointment to the Kadhi bench is also similar since the minimum qualification required for such position is a diploma in Law. However, the mode of training of Kadhi courts' judges are similar, usually in service training are organized for them from time to time. This paper posits that this trend is gradually changing in both regions with the recruitment of graduates in Sharia and Common Law to the Kadhis' bench. The areas of jurisdiction of the courts are almost the same with limitations on subject matter, person and geographical scope. Another peculiarity of Kadhis Courts in Zanzibar and Kwara State is that the decisions of a court is not of binding precedent to other Kadhis Courts.

Although, the Courts' system lacked effective Law reporting since only matters that reached the High Courts as in the case of Zanzibar or Kwara Sharia Court of Appeal are in most cases reported. It has been found that the Kadhis' bench is faith oriented, hence the non-Muslims are not appointed as Kadhis in Zanzibar and Kwara State of Nigeria. This position negates the fundamental human rights of other members of the society that are not Muslims. The paper observes that the knowledge of Arabic language gives additional advantage to a prospective candidate for the position of Kadhis in the two regions. This is contrary to the mutli-lingual profile of the two regions. In Zanzibar and Kwara State Kadhis perform extra-judicial assignments like officiating during marriage ceremonies, sharing of the estate and conduct funeral service among others. The paper argues this amounts to a divided loyalty and that Kadhis must abide by their constitutional duties for the well-being of the society.

Kadhis' Courts in Zanzibar, and Kwara State differ in some areas of operations. The apex court on decisions on the Muslim personal matters by

the Kadhis Courts in Zanzibar is the High Court of Zanzibar. In the case of Kwara State of Nigeria, whereas, matters that originate from the Area Courts can move to the Kwara State Sharia Court of Appeal to the Court of Appeal and terminate at the Supreme Court of Nigeria. Adjudication process on Muslim personal matters such marriage and related matters take long rigorous process before they are decided in Nigeria. Thus, adjudication process is rather tedious and expensive. Other distinguishing features are the fact that in Nigeria the Constitution makes provision for the existence of the Sharia Court of Appeal solely to handle the Muslim personal matters. At the head of the Kwara State Sharia Court of Appeal is the Grand Kadhi. This position is parallel to the position of the Chief Justice of Kwara State. In Zanzibar, there is constitutional provision for the existence of the position of Mufti which assists to tackle the contentious matters in the Kadhis' Courts.[75] The paper posits on matters that relate to other jurisprudence, if brought before the Kadhis' Courts, the leave of the court must be taken for the court to prepare for experts of other jurisprudence to assist the court. The paper explains that this is an area of lacuna in the case of Kwara State of Nigeria simply because there is the statutory provision for the existence of *Malik*i jurisprudence. The Kwara State Sharia Court of Appeal publishes annually law reports on the decisions of the Kadhis' Courts system. The paper contends this measure would go a long way to assist the record keeping of cases.

Way Forward for Kadhis' Courts in Contemporary Era

This article suggests that there is the need for an overall review of the legal framework and institutional arrangements to meet the changing trends in the contemporary world. The present secular State profile a colonial legacy needs to be reviewed for better implementation of Islamic jurisprudence in Zanzibar and Kwara State of Nigeria. Proper legal training should be given to those that hold the position of Kadhis. In this regard acquisition Law School training should made a prerequisite to be on Kadhis bench. This may enhance job mobility within the judiciary. Kadhis' Courts are faith based adjudication mechanisms. Modern world is ever changing there is the need to open the doors to tolerate legal experts to be appointed as Kadhis provided the do not

[75]Section 1 Mufti Act No. 9 of 2000.

violate the principles of Islamic jurisprudence. Kadhis's Courts should therefore be used in the promotion of peaceful co-existence among the ethnics groups in Zanzibar and Kwara State of Nigeria. Decisions of Kadhis' Courts should endeavor to take into consideration of the demands of the modern world without mortgaging the position of Islamic jurisprudence. Adequate training programs on jurisprudential position in other regions should be packaged for Kadhis from time to time and they should be exposed international conferences and workshops on matters related to Islamic jurisprudence. This study recommends that fund should be made for research works on Islamic jurisprudence in order to expand the frontiers of knowledge for the well-being of the peoples of Zanzibar and Kwara State of Nigeria. There is the need to make available online published works on Islamic jurisprudence for the development of Islamic legal system in contemporary era. By and large, this paper suggests that Kadhis are given comprehensive computer training regularly to make them relevant to the modern times. In fact, their offices as a matter of urgency need to be connected to the internet services in order for them to have contemporary touch of development on Islamic jurisprudence in other Muslim regions of the world.

Also, the study recommends that women be appointed as Kadhis due their advancement in education in recent times. Gender disparity should be discouraged in line with the best practices under international law.

Conclusion

Islamic law legal regime had long historical antecedent and the application of *Shafii* and *Maliki* jurisprudence were adopted before the advent of the Europeans in these different regions of Africa. The legal framework and the institutional arrangements of the courts in Zanzibar and Kwara State of Nigeria had undergone reforms since independence. In both regions, the Courts were creations of statutes and were integral part of the hierarchical legal structure of the State. Similarly, the courts were under the supervision of the High Courts and therefore, Kadhis' Courts make annual returns of cases to higher courts. The Judge of High court hears appeal cases from the Chief Kadhi Courts in Zanzibar and the High Court functions as final appeal for cases on the Muslims personal matters. In Kwara State of Nigeria, Appeal

from Area courts go to the Upper Area Courts before advancing to the Kwara State Sharia Court of Appeal on matters relating the Muslims personal matters such as marriage. From the Kwara State Sharia Court of Appeal, further appeal may be made to the Court of Appeal and such matters terminate at the Supreme Court the final court of adjudication process in Nigeria. In this regard, the Area Courts file annual returns of cases to the Kwara State Sharia Court of Appeal, which publishes annual reports. With this arrangement most of the cases of the Area Courts are not just reported but published annually by the Kwara State Sharia Court of Appeal, Ilorin. Most cases are unreported in Zanzibar and few are published in Law report. In Nigeria, apart from the Kwara State Sharia Court of Appeal Annual Report, we also have the Sharia Law Reports of cases decided in different Courts that handle the Muslim Personal Matters such as marriage.

The Grand Kadhi heads the Kwara State Sharia Court of Appeal, parallel to the Chief Judge of Kwara State. Other cases from the Area Courts go to the High Courts, Court of Appeal and the Supreme Courts accordingly. Also, in the hierarchical structure, the Area Courts are parallel to the Magistrate Courts in both regions. With Kadhis' Courts jurisdiction strictly limited to Muslims personal matters in Zanzibar and Kwara State of Nigeria. There is no job mobility on this judicial positions, transfer service to magistracy or vice versa. In Zanzibar and Kwara State of Nigeria, the Judicial Service Commission, supervises appointment, promotion and discipline of the Kadhis. In Kwara State, the council of *ulamas* have no influence in such appointments. There is no statutory recognition of the Office of the *Mufti*. In Kwara State of Nigeria, *mufti* is a traditional title in the Muslim a society and the award of such traditional title in the custody of the Emir, traditional leader of the Muslims societies, particularly in Ilorin, Kwara State of Nigeria. The most outstanding transformation of the application of Islamic jurisprudence since independence in the two regions, was the constitutional provisions for the existence of the court systems and the institutional arrangements of the courts system. Other aspects of the legal provisions; the implementation of the enabling guidelines on the practice and the procedure for the Kadhis' Courts in Zanzibar and the Area Courts in Kwara State are yet to be reformed. The paper made an analysis on the differences and the similarities of the legal

framework of the Kadhis Courts in Zanzibar and the Area Courts in Kwara State of Nigeria.

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DISCRIMINATION, STIGMATISATION AND RIGHTS OF AUTISTIC CHILDREN TO HEALTH IN UGANDA

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Abstract

Autism spectrum is a neurodevelopmental disorder that has adverse effects on the development of an individual. This condition usually impairs an individual's ability to carry out ordinary day-to-day functions such as eating, bathing, socializing and communication. If detected early, some of these skills can be taught to improve the individual's quality of life as they grow into adulthood. However, autism is usually misunderstood and misdiagnosed as a mental disorder to the detriment of the autistic child. In fact, some societies in Africa attribute this condition to a curse, evil spirit possession, or sins of the parents which usually leads to discrimination and stigmatisation. Caregivers and parents often hide autistic children from society for fear of judgment or derison. As a result, some autistic children are only let out in the open when it is extremely necessary because of their underdeveloped social skills. Such concealment is detrimental to autistic children and prevents them from accessing life changing help required for their intellectual and social development. In addition, specialist autistic care is often too expensive for parents and guardians. These factors usually leave autistic children at the mercy of fate even where there is a willingness to seek help. This article seeks to establish an understanding of the autistic disorder and the effect it has on the development of an individual. The article also explores the problem of discrimination and stigmatization of autistic children in Uganda with particular emphasis on the right to healthcare..

1. Introduction

Autism spectrum which is sometimes referred to as Autism Spectrum Disorder (ASD) consists of a number of conditions that are categorized as neurodevelopmental disorders.[1] Autism is usually diagnosed at an early age of about one to two years and mainly manifests through communication deficiencies and repetitive behavioral patterns, for example stacking and lining up objects.[2] The prominence of these early signs of autism may vary based on the age and ability of a specific child.[3] Autism will usually have a lasting impact on an individual's ability to form and keep social relations as well as carry out simple daily activities.[4] The actual cause of autism remains elusive but it is generally accepted that there are certain environmental and genetic risk factors that make a child predisposed to this disorder.[5] These risk factors may include having a parent who is advanced in age, having an autistic sibling, low weight at birth, and other genetic

[1] C Lord, EH Cook and DG Amaral 'Autism spectrum disorders' (2000) 28(2) *Neuron* 355.

[2] U Frith and F Happé 'Autism spectrum disorder' (2005) 15(19) *Current biology* 786.

[3] *Ibid*, 789.

[4] See also: RJ Comer *Fundamentals of Abnormal Psychology* (2016) New York: Macmillan Learning, 456-7.

[5] I Rapin 'Searching for the cause of autism: A neurologic perspective' (1987) *Handbook of autism and pervasive developmental disorders*, 1.

conditions such as Down syndrome.[6]

The treatment for autism is specific to suit an individual's personal circumstances and should be commenced immediately after diagnosis to help minimize the individual's difficulties and teach them new skills.[7] Due to the diversity of ailments affecting people with autism, there is no particular sole treatment that may be administered, but a combination of different customized treatments that require close monitoring by a qualified professional health worker.[8] Autism is thought to affect at least one percent of the world's total population with male children being more prone to the disability than females.[9]

Autism is a disorder that may affect any individual regardless of personal factors like race, ethnicity, gender, religion or economic status, and presents a serious health concern especially among children and teenagers alike.[10] In fact, autism spectrum is also highly prevalent in developed countries such as the United States and the United Kingdom with almost one out of every sixty-eight children living with this condition.[11] This means that autism is not an exclusive third world problem although statistics of its actual prevalence on the African continent remain scanty.

Having said these, life for autistic children and their parents or guardians in Uganda remains a daily struggle with little to no support from the government.[12] Autistic children face a myriad of potential dangers for example getting burnt, electrocuted or sustaining accidents along the road

[6] RM Dardennes, NN Al Anbar, A Prado-Netto, K Kaye, Y Contejean and NN Al Anbar 'Treating the cause of illness rather than the symptoms: Parental causal beliefs and treatment choices in autism spectrum disorder' (2011) 32(2) *Research in developmental disabilities* 1137; C Betancur and JD Buxbaum *SHANK3 haploinsufficiency: A "common" but underdiagnosed highly penetrant monogenic cause of autism spectrum disorders* (2013) 2.

[7] National Institute of Mental Health *Autism Spectrum Disorder*. Available at: https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml (accessed 09 April 2018), Treatment and Therapies.

[8] *Ibid*.

[9] RJ Comer *Fundamentals of Abnormal Psychology* (2016) New York: Macmillan Learning, 456-7.

[10] L Boonzaier 'Autism in an African context' (10 October 2017) *University of Cape Town News.* Available at: https://www.news.uct.ac.za/article/-2017-10-10-autism-in-an-african-context (accessed 06 April 2018).

[11] Autism Speaks *Autism Prevalence.* Available at: https://www.autismspeaks.org/what-autism/prevalence (accessed 01 April 2018).

[12] N Riche *Research Study on Children with Disabilities Living in Uganda Situational Analysis on the Rights of Children with Disabilities in Uganda* (2014) UNICEF Uganda. Available at: http://www.anppcanug.org/wp-content/uploads/Resource_Center/Research_Reports/research_report_11.pdf (accessed 29 March 2018).

due to their underdeveloped judgement of situations.[13] As a consequence, most of those who are still under the care of a parent or guardian spend most of their days locked away in the confinement of their homes for their own protection.[14] This may be attributed to the fact that not many caregivers are willing to work with such children due to their conditions. Yet with all these challenges, autistic children and their caregivers still suffer all sorts of stigma, discrimination and shaming from members of the community who mainly attribute their situations to all sorts of superstitions.[15] It is considered a shameful condition which results in parents hiding their autistic children away from the community's prying eyes of judgment. Such children are almost never seen at social events or communal meeting places such as markets and playgrounds.[16] The discrimination and stigmatization suffered by such individuals therefore leads to a problem of concealment of the child who would otherwise have sought medical assistance that would facilitate their integration in society.[17]

2. Discrimination against Autistic Children in Uganda

Zeliadt noted that although many African children are living with autism, there was very little awareness on the condition that is in many cases ascribed to a curse or being possessed by an evil spirit.[18] The stereotypes and misconceptions surrounding this condition have therefore led to widespread discrimination of children living with autism and their parents who are often accused of having committed certain transgressions.[19] This section therefore examines discrimination from a legal perspective with reference to international as well as the national laws of Uganda prohibiting such treatment.

2.1. Prohibition of Discrimination under International Law

[13] New hope Uganda *World Autism Awareness Day* (20 April 2017) Available at: http://newhopeuganda.org/orphan-care/special-needs/autism-awareness/ (accessed 21 March 2018).

[14] *Ibid*.

[15] See also: The African Child Policy Forum *Children with disabilities in Uganda: The hidden reality* (2011), 26. Available at: http://afri-can.org/wp-content/uploads/2016/04/Children-with-disabilities-in-Uganda-The-hidden-reality2.pdf (accessed 05 April 2018).

[16] N Zeliadt 'Why many autistic children in Africa are hidden away and go undiagnosed' (14 December 2017) *Independent*. Available at: https://www.independent.co.uk/news/long_reads/autism-children-africa-hidden-diagnosis-autistic-mental-disability-a8106106.html (accessed 09 April 2018).

[17] A Masuda and MS Boone 'Mental health stigma, self-concealment, and help-seeking attitudes among Asian American and European American college students with no help-seeking experience' (2011) 33(4) *International Journal for the Advancement of Counselling* 266.

[18] Zeliadt (n 16 *Ibid*).

[19] *Ibid*.

The Universal Declaration of Human Rights (UDHR) proclaims that all individuals are equal and entitled to equal protection of the law without discrimination.[20] Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) places an obligation upon state parties to ensure that the rights protected therein are enjoyed by all individuals without any form of discrimination.[21] Based on the above provisions, it is clear that by constantly segregating, ostracizing and ridiculing autistic children, the community discriminates against such children. This in turn affects their enjoyment of other rights such as the right to participation in society, movement, association, education and health, and creates a hostile environment which is not conducive for their development.

This interpretation is supported by the definition of discrimination against persons with disabilities that was adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 5.[22] The Committee noted that discrimination on grounds of disability includes '…any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability…'[23] The same provision also places an obligation upon states to address all issues of discrimination such as exclusion from education and ensure accessibility to public places such as health facilities.[24]

Article 2 of the UN Convention on the Rights of Persons with Disabilities (CRPD) which came into force in 2008 also adopts the same definition of discrimination in CESCR General Comment 5.[25] The CRPD also observes non-discrimination as one of the principles that every state must enforce[26] and obligates parties to guarantee the human rights of all persons living with disabilities without regard to any discriminatory criteria.[27] This obligation

[20] Article 7 of the UDHR states as follows: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'

[21] Article 2(2) of the ICESCR.

[22] CESCR General Comment 5: Persons with Disabilities, para 15. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994 (Contained in Document E/1995/22). See also: CESCR General Comment 20: Non-discrimination in economic, social and cultural rights (2 July 2009) E/C.12/GC/20, para 28. Available at: http://www.refworld.org/docid/4a60961f2.html (accessed 09 April 2018).

[23] CESCR General Comment No. 5, para 15.

[24] *Ibid*.

[25] Article 2 of the UN Convention on the Rights of Persons with Disabilities.

[26] Article 3 of the UN Convention on the Rights of Persons with Disabilities.

[27] Article 4(1) of the UN Convention on the Rights of Persons with Disabilities. See also: Article 5 of the UN Convention on the Rights of Persons with Disabilities.

extends to the prevention of discrimination perpetrated by any other individual, organization or private enterprise against people living with disabilities.[28] Uganda is a signatory to the UN Convention on the Rights of Persons with Disabilities[29] and the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities which empowers the Committee to receive individual complaints from its citizens.[30] It therefore follows that Uganda is under an obligation to prevent discrimination against people living with disabilities and ensure their participation in society.

2.2. The Prohibition of Discrimination under Ugandan Law

The Constitution of the Republic of Uganda recognizes the right to equality before the law and freedom from discrimination.[31] The Constitution prohibits the discrimination of any person based on any criteria including gender, race, ethnicity, tribe, religion, economic and social standing.[32] It is commendable to note that under Article 21(3), the Constitution defines discrimination as differential treatment afforded to different individuals based on the aforementioned criteria including disability.[33] By prohibiting the discrimination of any person based on disability among other criteria, Ugandan law in principle protects autistic children from differential treatment that is harmful to their development and wellbeing. However, it must be emphasized that most of the discrimination suffered by autistic children and their guardians is largely on an informal scale and is mainly perpetrated by fellow children, neighbors and the community at large.[34] It is therefore difficult to prosecute such offenders because many of these cases

[28] Article 4(1)(e) of the UN Convention on the Rights of Persons with Disabilities.

[29] For the status of countries that have signed and ratified the UN Convention on the Rights of Persons with Disabilities, see: UN Treaty Collection: UN Convention on theRights of Persons with Disabilities. Available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en (accessed 09 April 2018).

[30] United Nations Human Rights Office of the High Commissioner *View the ratification status by country or by treaty*. Available at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=182&Lang=EN (accessed 05 April 2018).

[31] Article 21(1) of the Constitution of Uganda.

[32] Article 21(2) of the Constitution of Uganda.

[33] Article 21(3) of the Constitution of Uganda.

[34] United Nations Information Centre *Discrimination against autistic persons, the rule rather than the exception* (31 March 2015). Available at: http://un.org.au/2015/03/31/discrimination-against-autistic-persons-the-rule-rather-than-the-exception/ (accessed 09 April 2015); N Zeliadt 'Why many autistic children in Africa are hidden away and go undiagnosed' (14 December 2017) *Independent.* Available at: https://www.independent.co.uk/news/long_reads/autism-children-africa-hidden-diagnosis-autistic-mental-disability-a8106106.html (accessed 09 April 2018).

would for inadmissible for lack of evidence. Besides, most autistic children who are mainly the victims of discrimination do not have the capacity to testify in court against a perpetrator of discrimination due to their inhibited communication skills and underdeveloped cognitive processes. In addition, the manifestations of discrimination against autistic children are largely attributable towards societal misconceptions of this seemingly mysterious condition. As such, it might yield more appropriate results if this is treated as a social problem requiring awareness of the condition in order to overcome discrimination.

3. Stigmatization of Autistic Children

Stigma is a Greek word that is derived from an ancient practice of marking and tattooing the skins of criminals, traitors and slaves with a cut or a burn in order to visually categorize them as tarnished and adulterated individuals.[35] The result was that such persons were considered to be inferior members of the community whom ordinary members of the community did not associate with especially in public.[36] The aims and results of stigma in ancient Greece is what has shaped our understanding of the social problem today. In the world today, stigma can be defined as a label which links an individual to certain prejudicial characteristics that are stereotypical.[37] Stigma can also be referred to as the stereotyping, discrimination, loss of status, labeling and separation of one individual by another.[38] In order for stigma to have an impact on the disadvantaged person, the stigmatiser must exercise a degree of power and control over the victim in the form of social, economic, political and religious authority.[39] This power and control that the stigmatizer exercises over his/her victims is referred to as stigma power.[40] The end result of the stigmatization process is that the victim suffers a diminished status in society and does not have equal life opportunities such as access to housing, employment and healthcare.[41]

Stigma is a very powerful vice that has the capacity to negatively affect and

[35] CP Jones 'Stigma: Tattooing and branding in Graeco-Roman antiquity' (1987) 77 *The Journal of Roman Studies*, 139-155.

[36] E Goffman *Stigma: Notes on the Management of Spoiled Identity* (2009) New York: Simon and Schuster, 1.

[37] A Jacoby, D Snape and GA Baker 'Epilepsy and Social Identity: The Stigma of a Chronic Neurological Disorder' (2005) 4(3) *Lancet Neurology* 171.

[38] BG Link and JC Phelan 'Conceptualizing stigma' (2001) 27 *Annual Review of Sociology* 363-385.

[39] Link and Phelan (n 38 *Ibid*) 364.

[40] BG Link and J Phelan 'Stigma power' (2014) 103 *Social Science & Medicine* 24.

[41] Link and Phelan (n 38 *Ibid*) 363.

change the behavioral patterns, beliefs and emotions of its victims.[42] Individuals who fall within stigmatized groups often suffer depression and experience low self-esteem as they become aware of the different way the stigmatizer treats and perceives them in relation to other individuals.[43] It can even have more adverse effects on persons living with autism because while they struggle with their daily challenges, they are also predisposed to the prejudices emanating from misconceptions surrounding the condition of autism.[44] It ultimately leads to concealment of the condition which in-turn sabotages any governmental policies on treatment and social services.[45] Gofman who is one of the leading sociologists of the Twentieth Century, defined stigma as an occurrence where one individual with a certain distinct characteristic(s) is greatly discredited and rejected by mainstream society.[46] Goffman therefore divides individuals who are in a 'stigmatic relationship' into three distinct categories. These classes include the victims of stigma, the so-called normal people who are not stigmatized, and the wise among the normal.[47] To this end, there are two types of stigma namely public stigma and self-stigma (internalized stigma) which will be examined in the subsequent sections.

3.1. Public Stigma

Public stigma may be defined as society's prejudices and biases towards a certain individual who is different and has a unique set of characteristics, for example children living with autism.[48] Public ignorance of the causes and prevalence of the condition of autism have further fueled stigma against autistic children who are often considered as bearing a curse or possessed by an evil spirit.[49] The media and films have also contributed to these negative

[42] B Major and LT O'Brien 'The Social Psychology of Stigma' (2005) 56(1) *Annual Review of Psychology* 393.

[43] *Ibid*.

[44] PW Corrigan and AC Watson 'Understanding the impact of stigma on people with mental illness' (2002) 1(1) *World psychiatry* 16.

[45] See also: P Corrigan 'How stigma interferes with mental health care' (2004) 59(7) *American Psychologist* 614.

[46] E Goffman *Stigma: Notes on the Management of Spoiled Identity* (1963) 7.

[47] *Ibid*.

[48] PW Corrigan, BS Morris, PJ Michaels, JD Rafacz and N Rüsch 'Challenging the public stigma of mental illness: a meta-analysis of outcome studies' (2012) 63(10) *Psychiatric services* 963; PW Corrigan and JR Shapiro 'Measuring the impact of programs that challenge the public stigma of mental illness' (2010) 30(8) *Clinical Psychology Review* 907; G Bathje and J Pryor 'The relationships of public and self-stigma to seeking mental health services' (2011) 33(2) *Journal of Mental Health Counseling* 161.

[49] New hope Uganda *World Autism Awareness Day* (20 April 2017) Available at: http://newhopeuganda.org/orphan-care/special-needs/autism-awareness/ (accessed 21 March 2018).

perceptions by frequently depicting individuals with mental disorders as murderous individuals; mentally retarded people with reasoning capacities of children; and persons with poor character.[50] The result of these misconceptions is that individuals living with mental disorders are treated with: fear and segregation from mainstream community; oppression since they are perceived as incapable of making rational decisions; and they are often undermined and dismissed as children who must be taken care of.[51] Corrigan notes that amongst people living with disabilities, those with psychiatric disabilities tend to be stigmatized more than those with physical disabilities.[52] Members of the public are not likely to empathize with persons suffering from psychiatric disabilities but rather react with anger and resentment towards their incoherent conduct or behavioral patterns.[53]

Public stigma is even more pronounced against people who are suffering from mental illness, a group in which autistic children have been conveniently included. Public stigma leads to four main challenges especially when dealing with people living with mental disability which include depriving assistance, forceful handling, avoidance, and isolation from institutions.[54] The result is that members of the community tend to ostracize stigmatized people and avoid contact with them. One study in 1996 even revealed that a significant proportion of people dislike socializing, working with, or developing relationships with persons who have mental illness.[55] As has been mentioned earlier, autism is often mistaken as mental disorder which the Ugandan community largely frowns upon due to lack of understanding. Autistic children in Uganda have been subjected to segregation, deprivation of assistance, isolation and coercive treatment which all falls under the criteria for public stigmatization.[56] In order to protect autistic children and indeed children living with disabilities in general, there is a need to adopt some strategies that will effectively minimize public stigma and its negative effects.

Corrigan and Penn identified three approaches to counter public stigma

[50] PW Corrigan and AC Watson 'Understanding the impact of stigma on people with mental illness' (2002) 1(1) *World psychiatry* para 16.

[51] *Ibid*.

[52] *Ibid.*

[53] *Ibid*, para 10.

[54] Corrigan (n 50 *Ibid*), para 11. See also: B Weiner, RP Perry and J Magnusson 'An attributional analysis of reactions to stigmas' (1988) 55 *Journal of Personality and Social Psychology* 738.

[55] JK Martin, BA Pescosolido and SA Tuch 'Of fear and loathing: the role of 'disturbing behavior', labels, and causal attributions in shaping public attitudes toward people with mental illness' (2000) 41 *Journal of Health and Social Behavior* 208.

[56] *Ibid.*

which include protest, education and contact.[57] Often, individuals living mental disabilities are portrayed in a negative, helpless and distasteful manner by focusing on their behavioral outbursts and emphasizing their mental and physical inadequacies. Protests therefore become critical for challenging these stereotypes by sending a strong message to the media fraternity demanding an end to prejudicial reporting on these individuals, and to the community at large to stop internalizing such misconceptions.[58] Protests today manifest in form of Civil Society Organizations (CSO) and social media campaigns as well as government. It is therefore a process by which conscious society calls out prejudicial news coverage in one voice. Protest is therefore classified as a responsive or reactive approach which seeks to root out negative perceptions of mentally challenged persons.[59] While protest can prove effective in quashing any negative publicity on autistic children in Uganda, it must be noted that it almost always falls short of proposing ways in which positive attitudes may be promoted. This leads to the next strategy of education in an effort to eliminate public stigma.

As has been noted throughout this article, there are several misconceptions surrounding the condition of autism in children in Uganda. This has invariably contributed to the propagation of stereotypes against such children, falsehoods and illogical attributions to superstition amongst others. Education is therefore an important tool that can be used to enlighten the population at large on the condition of autism, what is known about the possible causes so far, the associated risk factors, and how they may be mitigated.[60] Education has been proven by researchers to directly combat stigmatization against people living with disabilities by disproving misconceptions associated with certain conditions.[61] Individuals who develop a deeper understanding of psychiatric conditions become less supportive of stigmatizations and stereotypes associated with such conditions.[62] In order to illustrate the potential power of education in fighting public stigma, we can refer to the societal misconception that autistic children are demon possessed. Members of the society who believe

[57] PW Corrigan and DL Penn 'Lessons from social psychology on discrediting psychiatric stigma' (1999) 54 *American Psychologist* 765.

[58] *Ibid.*

[59] OF Wahl *Media madness: public images of mental illness* (1995) Rutgers University Press.

[60] PW Corrigan and AC Watson 'Understanding the impact of stigma on people with mental illness' (2002) 1(1) *World psychiatry* para 16.

[61] I Brockington, P Hall and J Levings 'The community's tolerance of the mentally ill' (1993) 162 *British Journal of Psychiatry* 93; PM Roman, HH Floyd Jr 'Social acceptance of psychiatric illness and psychiatric treatment' (1981) 16 *Social Psychiatry* 16.

[62] Brockington (n 61 *Ibid*) 94.

in superstitions might dread coming within the proximity of autistic children for fear that the evil spirit may somehow transfer and possess them as well. When such stigmatizers understand that autism is but a medical condition that can affect anyone, they may reconsider their perceptions of the stigmatized child. Education therefore helps to breakdown stereotypes around autistic children which would otherwise prevail within society.

Education of a society on disabilities such as autism paves way for the third approach to ending public stigma which is contact with such individuals.[63] When people relate at arm's length, such a relationship is likely to be governed by scanty perceptions and generalizations/stereotypes that prevail about their origin, race, religion or even their disability.[64] However, when the two individuals relate closer and understand the person's personal circumstances, daily struggles and efforts to improve themselves, it is likely that such stereotypes begin to crumble. Therefore, when members of the community meet and have contact with autistic children, the preconceptions of public stigma will begin to decline.[65] Having discussed public stigma, we now turn our focus to self-stigmatization.

3.2. Self-stigmatization

Self-stigmatization which is also known as internalized stigma happens when a stigmatized individual accepts the stereotypes against them mentally and emotionally and begins to apply these prejudices on oneself.[66] By accepting and internalizing society's prejudices against them, stigmatized individuals become susceptible to bouts of depression, self-segregation, worsening of the psychiatric condition, low self-esteem, and disinterest in seeking medical assistance and support services.[67] Persons living with psychiatric conditions are at a greater risk of internalizing and endorsing stereotypes against them leading to self-discrimination.[68] Such stereotypes may include prejudices such as people living with mental disorders are violent and dangerous to themselves and society at large.[69] This leads to the

[63] Corrigan and Penn (n 57 *Ibid*) 765.

[64] *Ibid.*

[65] See also: PW Corrigan, A Edwards and A Green 'Prejudice, social distance, and familiarity with mental illness' (2001) 27 *Schizophrenia Bulletin* 219.

[66] AL Drapalski, A Lucksted, PB Perrin, JM Aakre, CH Brown, BR DeForge and JE Boyd 'A model of internalized stigma and its effects on people with mental illness' (2013) 64(3) *Psychiatric Services* 264.

[67] *Ibid*.

[68] PW Corrigan and D Rao 'On the self-stigma of mental illness: Stages, disclosure, and strategies for change' (2012) 57(8) *The Canadian Journal of Psychiatry* 464.

[69] *Ibid*.

stigmatized individual fearing him/herself and harboring harmful emotional feelings or reactions including low self-esteem and low self-worth.

The problem of self-discrimination which often manifests in self-isolation has several damaging effects such as deterioration in health, loss of interest in healthcare and a decline in the individual's quality of life.[70] As a result, the self-stigmatized person loses interest in life and ceases to look for opportunities such as jobs. This often leads to self-stigmatized individuals suffering in silence and isolation which renders any policies such as health, rehabilitation and skill training designed to improve such persons inapplicable.

It must be emphasized at this point that in order for self-stigma to take effect, the stigmatized individual must firstly accept the stereotypes against him/her and then internalize them.[71] However, some of the children who suffer autism have diminished cognitive processes and are oblivious to such stereotypes propagated against them. Based on this, a large number of such children still have some reasoning capacity and are capable of discerning these prejudices and internalizing them. These are the children who are mainly at risk of suffering the negative effects resulting from internalized stigmatization such as withdrawal from others, low self-esteem and the feeling of diminished self-worth. In order for disabled persons and in particular children living with autism to realize their full potential, there is a need to implement measures that seek to combat self-stigma.

As has been noted in the previous section, some children who suffer autism cannot discern the prejudices against them due to diminished reasoning capacities. For this group, they live life in their own small world while ignorant of the realities around them. However, for those who have an appreciation of stigmatization in its different forms, there is a need to empower them to minimize and cope with the effects of internalized prejudice.[72] Empowerment helps to counteract self-stigmatization by restoring hope in the individual that they still have the potential to rise above the stereotypes and be the best they can be no matter their disabilities.[73] The empowerment process therefore helps the individual to take back control of their lives and restores self-esteem, hope and the drive

[70] Corrigan and Rao (n 68 *Ibid*) 465; B Major and LT O'Brien 'The social psychology of stigma' (2005) 56 *Annual Review of Psychology* 393.

[71] See also: PW Corrigan, JE Larson and N Ruesch 'Self-stigma and the "why try" effect: impact on life goals and evidence-based practices' (2009) 8(2) *World psychiatry* 75.

[72] Corrigan et al. (n 71 *Ibid*) 76.

[73] *Ibid.*

to live again.[74] Empowerment can therefore prove a vital mechanism towards the counteraction of self-stigmatization within children living with autism in Uganda. This is very important because many of these children face internalized or self-stigma resulting from the prejudices from their peers, caregivers and the community at large. There is a need to devote more efforts towards raising awareness on autism in order to breakdown the prejudicial misconceptions that have led to stigmatization and discrimination of such persons.

4. Awareness on Autism in Uganda

Despite the high prevalence of autism in Africa, there is still lack of knowledge on the condition which in several countries is falsely attributed to superstitious causes such as demons and infidelity of a parent.[75] In Uganda, awareness on autism equally remains very low requiring rigorous sensitization right from community level if Government is to make any meaning progress on the welfare of autistic children.[76] This is critical because several communities in Uganda still misconceive autism as a spiritual ailment leaving children with the condition predisposed to all sorts of prejudices. This hinders any developmental efforts designed by government to assist autistic children.

Article 8 of the CRPD places an obligation upon state parties to raise awareness regarding persons with disabilities. This obligation also applies to autistic children in Uganda. The CRPD obligates states to raise awareness on disabilities at family level in order to protect their rights and ensure their dignity within the community.[77] The purpose of such awareness is first and foremost to breakdown stereotypes, prejudices and detrimental practices in relation to persons living with disabilities.[78] Emphasis must also be placed on the potential that disabled persons have in contributing to society.[79] This can be achieved by designing campaigns that encourage reception of the rights of disabled persons; promoting positivity towards persons with disabilities; and recognizing the achievements and

[74] JB Ritsher and JC Phelan 'Internalized stigma predicts erosion of morale among psychiatric outpatients' (2004) 129 *Psychiatry Research* 257.

[75] N Zeliadt 'Why many autistic children in Africa are hidden away and go undiagnosed' (14 December 2017) *Independent*. Available at: https://www.independent.co.uk/news/long_reads/autism-children-africa-hidden-diagnosis-autistic-mental-disability-a8106106.html (accessed 09 April 2018).

[76] Autism around the world 'Republic of Uganda: Entebbe Action on Autism Organization' available at: http://www.autismaroundtheglobe.org/countries/Uganda.asp (accessed 09 April 2018).

[77] Article 8(1) (a) of the CRPD.

[78] Article 8(1) (b) of the CRPD.

[79] Article 8(1) (c) of the CRPD.

contributions of disabled persons.[80] This measure will enable society's prejudices about autistic children to be broken down.

Another area of focus with regard to awareness on children living with autism in Uganda is the media and the central role that it plays in the community.[81] In every society, the media in all its forms plays a very important role of keeping the public informed of current affairs about diverse subjects. The media is also a conduit for the raising of awareness regarding certain occurrences in the community.[82] This serves the purpose of advocacy on topical issues of concern as well as keeping leaders and community members at large accountable for their actions by publicizing such wrongdoing.[83] In this regard, they have been referred to as watchdogs of society.[84] However, the media can also be used in a positive way to raise good publicity about for example the potentials of disabled persons and their contributions in community. By so doing, they end up breaking negative stereotypes and prejudices about autistic children, highlighting and condemning injustice and abuse against them, and portraying them in a positive light.

5. Autistic Children as a Vulnerable Group Requiring Protection

A vulnerable group (disadvantaged group or groups at risk) is any part or section of a community that is more susceptible to discrimination, violence, poverty, crime and natural disasters than other categories of individuals in the same community.[85] Groups like children, people living with disabilities, women and elderly persons are usually considered as vulnerable groups due to their predisposition to stereotypes and discrimination.[86] Children living with autism therefore constitute a vulnerable group in society because they

[80] Article 8(2) of the CRPD.

[81] *Ibid*.

[82] PB Lebo, F Quehenberger, LP Kamolz and DB Lumenta 'The Angelina effect revisited: Exploring a media-related impact on public awareness' (2015) 121(22) *Cancer* 3959.

[83] L Feldman, PS Hart, A Leiserowitz, E Maibach and C Roser-Renouf 'Do hostile media perceptions lead to action? The role of hostile media perceptions, political efficacy, and ideology in predicting climate change activism' (2017) 44(8) *Communication Research* 1099.

[84] CN Olien, PJ Tichenor and GA Donohue 'A guard dog perspective on the role of media' (2018) In *The Media, Journalism and Democracy* 21.

[85] Defined Term *Vulnerable groups.* Available at: https://definedterm.com/vulnerable_groups (accessed 08 April 2018).

[86] European Institute for Gender Equality *Vulnerable group definition.* Available at: http://eige.europa.eu/rdc/thesaurus/terms/1429 (accessed 11 April 2018).

are at risk of discrimination, violence and have a lesser ability to cope with natural disasters.[87]

One of the objectives of the human rights system is therefore to prevent the violation of the rights of individuals who are considered as vulnerable within the community. It must be recalled that the UN Convention on the Rights of Persons with Disabilities places an obligation upon states to ensure that the rights of children with disabilities are guaranteed just like any other children.[88] Vulnerable groups such as autistic children are repeatedly subjected to rights violations and would benefit from additional safeguards in order to ensure that they enjoy their rights. Chan rightfully argues that proper mental health is crucial for the development of every individual and is accountable for growth, productivity, adaptability and quality of life.[89] In the absence of positive mental health, the affected individual may not be able to realize their full potential.[90]

5.1. Mental Health Conditions and Vulnerability

The World Health Organization has noted that individuals living with various types of mental health conditions are a vulnerable group who require special attention to realize their development.[91] There are certain factors that have been used to classify individuals with mental conditions as a vulnerable group and these are: susceptibility to stigmatization and discrimination; prevalence of sexual abuse against them; constrained exercise of civil-political rights; inability to wholly take part in public activities; lack of access to healthcare; limited access to emergency services; and exclusion from school and employment.[92]

Children living with autism in Uganda cannot easily be classified under the broad categories of persons living with disabilities due to the peculiarity of their condition. They are otherwise conveniently bundled into the category

[87] M Chan *Mental Health and Development: Targeting People with Mental Health Conditions as a Vulnerable Group* (2010) World Health Organization. Available at: http://www.who.int/mental_health/policy/development/mh_devel_targeting_summary_2010_en.pdf (accessed 08 April 2018).

[88] Article 7 of the UN Convention on the Rights of Persons with Disabilities.

[89] Chan (n 87 *Ibid*) 1.

[90] *Ibid.*

[91] Chan (n 87 *Ibid*) 4. For further discussion on vulnerability, see: World Health Organization *Risks to mental health: an overview of vulnerabilities and risk factors* (27 August 2012) available at: http://www.who.int/mental_health/mhgap/risks_to_mental_health_EN_27_08_12.pdf (accessed 11 April 2018).

[92] Chan (n 87 *Ibid*) 2.

of persons living with mental illness.[93] In addition to being categorized as persons with mental illnesses, autistic children are often referred to as demon possessed and representing a bad omen in the community. Due to limited knowledge on the causes and implications of this condition, autism is usually misdiagnosed as a mental disorder and such persons are often committed to psychiatric institutions while others attempt to get help from religious establishments and traditional healers.[94] It is truly a difficult condition to deal with in light of the challenges faced by affected individuals and coupled with the prejudices that accompany it. These conditions highlight the plight of autistic children in Uganda who urgently require protection.

It must be noted that the Constitution of Uganda prohibits the deprivation of medical treatment of children[95] and mandates the state to provide special protections to vulnerable children.[96] The Constitution does not elaborate on what kind of special protections may be granted pursuant to Article 37(7). However, this provision is a commendable because it provides a basis for which laws and governmental policies on autistic children can be based upon. The Constitution also places an obligation upon every citizen to protect children and vulnerable individuals against all kinds of harassment, exploitation and mistreatment.[97] It therefore implies that perpetrators of stigma, discrimination, violence and abuse of autistic children in Uganda are in violation of this constitutional duty to refrain from such acts.

Although people with mental health conditions such as some children living with autism in Uganda clearly fall within the bracket of vulnerable groups needing special attention and additional safeguards, they still do not receive adequate attention from the state in order to address their specific challenges such as lack of healthcare, stigmatization, discrimination and various forms of exploitation. This situation highlights the need for the Government of Uganda to target these children through specific policies, laws and agendas that are aimed at protecting, empowering, developing and helping these individuals to realize their full potentials. Such measures usually involve concerted efforts between the government, CSOs and stakeholders whose

[93] R Nduhuura *Autism in Africa; Life saving awareness: while implementing Agenda 2030.* Statement by Permanent Representative of Uganda to the UN in New York (6 December 2016). Available at: https://newyork.mofa.go.ug/files/downloads/statement%20of%20autism.pdf (accessed 08 April 2018).

[94] *Ibid*.

[95] Article 34(3) of the Constitution of Uganda.

[96] Article 34(7) of the Constitution of Uganda.

[97] Article 17(1) (c) of the Constitution of Uganda.

aims and objectives are aligned towards empowering children living with autism.

5.2. How Vulnerable Groups Should be Handled

The discussion above reveals that a lot still needs to be done in order to ensure that autistic children as a vulnerable group receive the support and additional protection that they require in order to improve the standard and quality of their lives. To this end, most support for autistic children has come from CSOs and NGOs who are striving to raise awareness on these conditions and provide supports to these individuals.[98] Autism is a condition that requires a lot of resources, highly trained healthcare practitioners, and specialized facilities for treatment and rehabilitation of those living with the condition.[99] However, several African states and Uganda in particular are categorized as low-income countries where citizens do not even have access to basic healthcare let alone specialized required by autistic children.[100] There is therefore a great need for different stakeholders such as government, CSOs and international organizations to coordinate efforts to ensure that vulnerable autistic children in Uganda are protected.

It is essential to integrate support and treatment of autistic children into the primary healthcare system which will be accessible to all members of the community. Primary healthcare in Africa is traditionally designed for diagnosis and treatment of common ailments as well as the management of chronic and long-term conditions such as HIV and high blood pressure.[101] However, due to the prevalence of mental health illness in all communities, there is evidence that supports the inclusion of mental healthcare and management in primary healthcare.[102] Such inclusion would necessitate the addition of mental healthcare facilities at primary healthcare premises and recruitment of skilled personnel to manage such treatment and services. The result of this measure is that mental healthcare which is usually costly

[98] New hope Uganda *World Autism Awareness Day* (20 April 2017) Available at: http://newhopeuganda.org/orphan-care/special-needs/autism-awareness/ (accessed 21 March 2018).

[99] See also: MW Krauss, S Gulley, M Sciegaj and N Wells 'Access to specialty medical care for children with mental retardation, autism, and other special health care needs' (2003) 41(5) *Mental retardation* 329.

[100] SN Kiwanuka, EK Ekirapa, S Peterson, O Okui, MH Rahman, D Peters and GW Pariyo 'Access to and utilisation of health services for the poor in Uganda: a systematic review of available evidence' (2008) 102(11) *Transactions of the Royal Society of Tropical Medicine and Hygiene* 1067.

[101] A Bitton, HL Ratcliffe, JH Veillard, HD Kress, S Barkley, M Kimball and J Bayona 'Primary health care as a foundation for strengthening health systems in low-and middle-income countries' (2017) 32(5) *Journal of general internal medicine* 566.

[102] D Tilahun, C Hanlon, M Araya, B Davey, RA Hoekstra and A Fekadu 'Training needs and perspectives of community health workers in relation to integrating child mental health care into primary health care in a rural setting in sub-Saharan Africa: A mixed methods study' (2017) 11(1) *International journal of mental health systems* 15.

and unavailable for the poor would then become accessible to those who need it. Policies aimed at breaking down barriers that inhibit autistic children from exercising their rights such as accessibility should be adopted. It defeats the purpose where facilities are available but inaccessible to physical challenges and exclusion by society. There is also a need to strengthen the protection of human rights of autistic children in an effort to promote their development. It has been identified that mental healthcare is essential for the wellbeing of such children.

6. The Right to Healthcare of Autistic Children

Based on the provisions of the WHO Constitution, health is 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[103] For one to be considered healthy, it does not mean that an individual is completely free from any illness, but that the ailments that they suffer are under control. This therefore means that autistic children can also enjoy a descent level of health regardless of their disabilities. The right to health is indeed essential for the enjoyment of other rights.[104] This assertion follows from the consideration that if an individual is in a poor state of health, he/she is not in a position to exercise most of his/her rights such as freedom of movement, education and association. Moreover, good health standing is linked to the dignity of every person.[105] This is of particular importance to autistic children whose mental and social development can be greatly enhanced by medical intervention at an early stage.

6.1. International Framework for the Attainment of Healthcare

The Universal Declaration of Human Rights (UDHR) recognizes the right of every individual to standard of living that is satisfactory for their well-being as well as that of their families.[106] The right to health includes the provision of medical care, social services and the right to security from illness and disability.[107] The International Covenant on Economic, Social and Cultural Rights (ICESCR) also recognizes every individual's right to

[103] See the Preamble of the Constitution of the WHO. Available at: http://www.who.int/about/mission/en/ (accessed 02 April 2018).

[104] CESCR General Comment 14, para 1.

[105] *Ibid*.

[106] Article 25(1) of the UDHR.

[107] *Ibid*.

the highest attainable standard of physical and mental health.[108] States are therefore under an obligation to ensure the healthy development of every child,[109] the control of epidemics,[110] and ensuring the provision of medical attention during illness.[111] The obligation includes adopting special measures designed to protect disabled members of the community.[112] The Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 14 which elaborates on the right to health under Article 12 of the ICESCR.[113] In order for a state to meet its duty of ensuring the right to health, the Committee noted that healthcare must be available,[114] accessible (physically and economically),[115] acceptable,[116] and of a good quality.[117]

Uganda is also party to the Convention on the Rights of Persons with Disabilities (CRPD)[118] which came into operation in 2006.[119] The Convention was adopted to protect, promote and safeguard the human rights of disabled persons, and ensure their dignity.[120] This includes persons with mental or intellectual impairments such as autistic children. Autistic children are therefore entitled to the protections that are contained in CRPD. CRPD also places an obligation upon state parties to ensure that disabled persons have access to healthcare including health-related rehabilitation.[121] States are also under an obligation to provide rehabilitation and habilitation programmes to disabled persons to enable them reintegrate into the society and attain their highest possible potential.[122] These programmes need to be commenced as early as possible in order to foster their inclusion back into

[108] Article 12(1) of the ICESCR.

[109] Article 12(2) (a) of the ICESCR.

[110] Article 12(2) (c) of the ICESCR.

[111] Article 12(2) (d) of the ICESCR.

[112] Article 18(4) (a) of the ICESCR.

[113] CESCR General Comment 14.

[114] CESCR General Comment 14, para 12(a).

[115] CESCR General Comment 14, para 12(b).

[116] CESCR General Comment 14, para 12(c).

[117] CESCR General Comment 14, para 12(d).

[118] Convention on the Rights of Persons with Disabilities (A/RES/61/106). Adopted on 13 December 2006 and opened for signature on 30 March 2007.

[119] For the status of countries that have ratified the CRPD, please visit: http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.jpg (accessed 11 April 2018).

[120] Article 1 of the CRPD.

[121] Article 25 of the CRPD.

[122] Article 26 of the CRPD.

community. State parties are also obligated to train and continuously assess professionals providing rehabilitation and habilitation services.[123] States must also promote the use of technology and innovations that are designed to assist persons with disabilities to live a better and more independent life.[124]

It is worth noting that the African Charter on Human and Peoples' Rights (ACHPR) in Article 16 also recognizes the right of every individual to the best attainable physical and mental health.[125] The selected use of the words 'every individual' without doubt encompasses the rights of persons living with disabilities. States are also obligated to ensure that their citizens receive treatment when they are in need of medical attention.[126] This provision applies to every person including those children living with autism. There is therefore a need for African states to firstly recognize the right of children with autism to healthcare and secondly to take measures that will ensure that they have access to medical attention. This calls for the development of policies and laws on healthcare as well as the construction and development of adequately equipped facilities to be able to cater for their specific needs. The next section will therefore examine Uganda's degree of compliance to its international law obligations on the provision of healthcare for persons living with disabilities.

6.2. Healthcare System in Uganda

The Constitution of Uganda is the supreme law of the land from which all other laws derive their validity from.[127] The Constitution contains a Bill of Rights which stipulates several human rights and freedoms including the rights of persons with disabilities. By recognizing the rights of disabled persons, Uganda's Constitution embraces the diverse abilities of its people which is a very commendable position. Under Article 35, persons with disabilities are entitled to respect and dignity which the state and community must act upon to ensure that they realize their full mental and physical potentials.[128] In addition to this, Parliament is obligated by the Constitution to enact legislation that is aimed at protecting disabled persons.[129]

[123] Article 26(1) of the CRPD.

[124] Article 26(2) of the CRPD.

[125] Article 16(1) of the ACHPR.

[126] Article 16(2) of the ACHPR.

[127] Article 2(1) of the Constitution of Uganda.

[128] Article 35(1) of the Constitution of Uganda.

[129] Article 35(2) of the Constitution of Uganda.

These protections are very important for the development of persons living with disabilities and more importantly children with autism. This is because they are predisposed to prejudices which end up worsening their conditions. In addition, research has shown that in every five people in Uganda, one has a disability of some sort.[130] It is therefore important that laws and policies are formulated to enable such persons to have access to healthcare facilities, including rehabilitative services that they require in order to improve their qualities of life. However, therapy for children living with autism is not cheap and those who are poor are not likely to afford it. Some CSOs have stepped in to try and bridge the gap by providing some of the essential services to autistic children. However, due to their limited financing and over demand for their services, their output is often limited. There is a need for government to step up its role in ensuring that autistic children receive medical healthcare that they so desperately need in order to better their lives.

A quick survey of the state of the public healthcare system in Uganda reveals the dismal state in which the medical institutions are.[131] Some districts do not have properly functioning medical centers and several others lack basic equipment required for everyday medical procedures.[132] The state of healthcare in Uganda does not inspire confidence in its own leaders either who prefer to travel abroad for treatment leaving the poor reeling in an inadequate health system that they have failed to adequately address. It was reported that in 2017, the government hemorrhaged almost thirty billion Ugandan Shillings sponsoring abroad medical trips for cabinet ministers, Members of Parliament and senior state officials.[133] Following the report, the President announced a ban in January 2018 prohibiting state sponsored medical trips abroad noting that government officials must also seek treatment locally.[134] In addition, the largest referral hospital, Mulago, has for so long been in an appalling state often going long periods lacking medical personnel and supply of essential medical supplies. In July 2017, the hospital run out of reagents and the laboratory had to suspend its

[130] Uganda Demographic and Health Survey 2006

Uganda Bureau of Statistics Kampala, Uganda Macro International Inc. Calverton, Maryland, USA

August 2007 https://www.dhsprogram.com/pubs/pdf/FR194/FR194.pdf

[131] Kiwanuka et al. (n 100 *Ibid*) 1068.

[132] A Kelly 'Healthcare a major challenge for Uganda' (1 April 2009) *The Guardian.* Available at: https://www.theguardian.com/katine/2009/apr/01/healthcare-in-uganda (accessed 06 April 2018).

[133] K Kazibwe 'Museveni bans government officials from travelling abroad' (20 January 2018). Available at: http://nilepost.co.ug/2018/01/20/museveni-bans-government-officials-from-travelling-abroad/ (accessed 11 April 2018).

[134] Kazibwe (n 133 *Ibid*) para 11.

investigations.[135] The poor condition at the national referral hospital is attributed to budgetary shortages which manifested in the doctors' strike that took place in November 2017 due to poor pay and lack of medical supplies.[136]

The poor state of healthcare particularly in a national referral hospital which is supposed to be last resort for ordinary citizens is testament to the failure of the government to fulfil its obligations to provide adequate healthcare.[137] If a national referral hospital can run out of common medical supplies like reagents and oxygen, what is the probability of it handling more complex cases such as autism in children that requires specialist equipment and highly trained personnel? There is always an excuse that Uganda just like other low-income countries lacks resources to invest in healthcare. However, if Uganda's politicians can use nearly four hundred billion Ugandan Shillings annually on medical travels abroad,[138] it points more towards misappropriation off taxpayer's money as opposed to a lack thereof. There is therefore an urgent need to revisit government spending in order to properly appropriate funds to critical areas such as healthcare.

7. Conclusion

This article highlights the plight and daily struggles of autistic children in Uganda whose condition is often attributed to a curse of a result of sin by one of the parents. These prejudices are erroneously imputed on the parents who are blamed for the condition of their children. The result is that such children are kept hidden from the eyes of the community. Autistic children are as a result almost never seen at social gatherings and public places for fear of discrimination and stigmatization. The prejudices propagated by society invariably lead to self-stigmatization in which the stigmatized person internalizes the stereotypes against him/her leading to harm such as low self-esteem and self-worth. This would only be true for those children who have some reasoning capacity or they would be oblivious to the stigmatizations about them. But for those who have some understanding,

[135] E Ainebyoona and T Butagira 'Things fall apart at Mulago Hospital' (28 July 2017) *Daily Monitor.* Available at: http://www.monitor.co.ug/News/National/Things-fall-apart-Mulago-Hospital/688334-4036396-kndpgiz/index.html (accessed 09 April 2018).

[136] S Okiror 'Uganda brought to its knees as doctors' strike paralyses health service' (16 November 2017) *The Guardian.* Available at: https://www.theguardian.com/global-development/2017/nov/16/costing-lives-doctors-strike-health-service-uganda (accessed 28 March 2018).

[137] M Khasa 'Uganda: Mulago Hospital mirrors debate on poor, rich countries' (18 July 2013) AllAfrica. Available at: https://allafrica.com/stories/201307220659.html (accessed 11 June 2019).

[138] IS Ladu 'Government spends Shs380 billion on officials' treatment abroad' (24 April 2012) Daily Monitor. Available at: https://mobile.monitor.co.ug/News/2466686-1392598-format-xhtml-br4yuu/index.html (accessed 10 June 2019).

the realities of stigmatization can be a harrowing experience leading to self-isolation and feeling unwanted.

In order to overcome these prejudices, there is need to engage the public in education and awareness initiatives that effectively aim to deconstruct the stigmatizations and misconceptions about the condition of autism. By deconstructing such harmful perceptions, the community will become more accommodative of children with autism and assist them to realize their full potentials.

The government also needs to adopt laws, policies and programmes that are aimed at uplifting and developing the skills of autistic children in order to integrate them into the society. The areas of focus that need to be targeted may include:

- Focus and teamwork
- Enthusiasm for learning
- Communication and language skills
- Self-assistance and good sanitation (toilet)
- Recreational and playing skills
- Communal living
- Other rehabilitations like mobility

This list is by no means exhaustive but represents the magnitude of the work that remains to be done to assist autistic children to improve the quality of their lives. Uganda has a duty to protect these children from discrimination and stigmatization, and also has a duty to ensure that they have access to the health care that they require to better their lives.