chapter four

THE JUDICIARY AND HUMAN RIGHTS IN UGANDA

HISTORY, CHALLENGES AND PROSPECTS

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The Judiciary and Human Rights In Uganda: History, Challenges, and Prospects

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Chapter Four Uganda is an independent, non-partisan, non-governmental organization, established in 2013, to defend civil liberties and promote human rights for all. We provide bold and innovative legal response through strategic and public interest litigation, legal representation in first-line response cases, legal research, general counsel for civil society organizations, and strategic advocacy. We work with the most vulnerable and underrepresented sections of society.

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Contents

1. Introduction

Human rights are the fundamental entitlements inherent to every individual by virtue of their humanity. They are universal, inalienable, and interdependent, forming the cornerstone of a just and equitable society. Human rights transcend borders, applying to all without distinction or discrimination. Despite their universality, however, these rights are not self-executing. They require active enforcement by various actors, with the state holding the primary responsibility. Among the state's organs, the judiciary plays a critical role in safeguarding, promoting, and fulfilling these rights.

Under international law, the framework for human rights protection has undergone significant evolution since the adoption of the Universal Declaration of Human Rights in 1948. Yet, the mere existence of legal instruments does not guarantee the protection of rights. Their realisation depends heavily on institutional commitment and the broader political environment. In Uganda, this dynamic has often been fraught with challenges. Historically, the Executive, Legislature, and Judiciary have, at different times, been complicit in human rights violations. Each arm of government, however, has approached this complicity differently.

The Executive, as the custodian of the sword, has frequently resorted to overt brutality and repression to suppress dissent and curtail freedoms. In contrast, the judiciary, wielding the pen, employs a subtler, more sophisticated approach. Its contribution to the erosion of rights often comes through the deployment of complex legal doctrines and procedural technicalities. This dichotomy is reflected in Shakespeare's allegory of 'Julius Caesar', where, as the plotters conspire to kill Julius Caesar, Brutus argues for a calculated, seemingly honourable act of violence that greatly contrasts with Caius' crude and overt brutality. Brutus, the judiciary in our analogy, advocates for a method that masks and hides its ultimate goal in civility:

> Let's be sacrificers, but not butchers, Caius
> … Caesar must bleed for it. And, gentle friends,
> Let's kill him boldly, but not wrathfully.
> Let's carve him as a dish fit for the gods,
> Not hew him as a carcass fit for hounds[1]

Whether through calculated sacrifice or outright butchery, the result is the same: Caesar is killed. Similarly, whether rights are defeated through open violence or cloaked in the veneer of legal reasoning, their violation remains undeniable. This paper explores the judiciary's role in

[1] W. Shakespeare Julius Caesar (Oxford University Press 2001) Act 2, Scene 2.

shaping human rights in Uganda from 1894 to 2024. It traces the colonial judiciary's preoccupation with state preservation, the post-independence judiciary's continuity in this regard, and the post-1995 judiciary's resurgence of technicalities. This study aims to illuminate the judiciary's complex legacy in the enforcement—and at times, the erosion—of human rights in Uganda.

2. A Journey Back in Time

2.1. The Age of Colonial Subjugation

Uganda started as a commercial asset of the Imperial British East African Company (IBEACo). When the company ran bankrupt, it handed over control of the territory to the British Government to make it profitable. It was in 1893, that the Union Jack was raised for the first time in Uganda (at Fort Lugard in Old Kampala), and one year later, the territory was declared a British Protectorate. That is, it was brought under the 'protection' of Her Majesty Queen Victoria. But this 'protection' had never been desired and was imposed by both force and fraud.[2] The intention of the 'protection' was to impose a commercial system of exploitation and subjugation.

In this age of colonialism, African territories were looked at as vacant 'possessions' available for the taking. Some 'possessions' were valuable, fertile, and useful, while others were regarded as useless and barren. General Charles Gordon is reported to have described the Sudan as:

> [A] useless possession, ever was so and ever will be so. Larger than Germany, France and Spain together, and mostly barren it cannot be governed except by a dictator who may be good or bad... No one who has ever lived in the Sudan can escape the reflection, "What a useless possession is this land!"[3]

Such a characterisation is morally reprehensible. But while territories like the Sudan were demeaned and degraded, others, such as Uganda, were considered 'pearls' of the British Empire. The British colonialists (read businessmen) looked at Uganda as a possession of endless

[2] Chinua Achebe wrote concerning this theory of colonial protection that 'it is a gross crime for anyone to impose himself on another, to seize his land and his history, and then to compound this by making out that the victim is some kind of ward or minor requiring protection. It is too disingenuous." See C Achebe *The education of a British-protected child: Essays* (2009); See also HH Johnston *The Uganda protectorate; an attempt to give some description of the physical geography, botany, zoology, anthropology, languages and history of the territories under British protection in East Central Africa, between the Congo Free State and the Rift Valley and between the first degree of south latitude and the fifth degree of north latitude* (1902) 277.

[3] J Bowden *The Puritan: An Illustrated Magazine for Free Churchmen* (1899) 8.

commercial possibilities and opportunities. Uganda was rich in minerals, wildlife, and fertile soils. Sir Harry Johnston wrote in 1902:

> Turning to vegetable productions, we have, in the first place, coffee. Whether originally introduced or not from Abyssinia, coffee is at any rate native now in a semi-wild form to the better forested regions of the Uganda Protectorate, its berries producing coffee of excellent flavour. Not only might the wild coffee be gathered and sold by the natives, but it would seem as though this country was singularly well adapted for coffee plantations, as the forested regions have a regular and ample rainfall, the soil is very rich and abundance of shade trees exist. Coffee could be grown on the lake shore all-round the northern half of the Victoria Nyanza. Steamers could carry the coffee to the railway terminus on Kavirondo bay, and it is probable that by steamer and rail, and steamer again from Mombasa, coffee could be landed at the European markets.[4]

The British thus had no goal of human rights but commercial exploitation. Uganda, was to be turned into nothing more than a 'large scale plantation and open-air prison'[5] intended to garner the greatest revenue for the colonial government at all costs.

Ironically, one of the justifications of colonialism was that it was meant to be a 'civilising mission' to bring civilisation to the 'savages' and 'primitive heathens' of Africa. Sir Harry Johnston justified colonialism in Uganda on claims that natives clobbered robbers to death.[6] He further argued that Uganda was 'a bloody country before it came under British Control' and that Kings executed their subjects for the most trivial reasons.[7] This is similar to the racist and inimical perspective of Joseph Conrad in Heart of Darkness, where he portrays Africans as beasts, cannibals, and savages.[8]

However, this colonial and eurocentric thought was not only unfounded but also misleading. Precolonial Africa espoused many communitarian aspects of human rights through the value system of ubuntu.[9] While abuses did exist, they were worsened by the coming of the colonial administration.[10] The whole idea of civilising Africans was a farce, and like Wole Soyinka's

[4] Johnston (n 2 above) 289.
[5] B Kabumba 'The case for federalism in Uganda: Part III' The Observer (Kampala) 10 October 2023. https://observer.ug/viewpoint/79438-the-case-for-federalism-in-uganda-part-iii (accessed 14 November 2024).
[6] Johnston (n 2 Above) 591.
[7] Johnston (n 2 Above) 279.
[8] J Conrad *Heart of darkness* (1996). For a criticism of the racist undertones of the work see C Achebe 'An image of Africa: racism in Conrad's Heart of Darkness' (2016) 57 *The Massachusetts Review* 14-27.
[9] A Kyomuhendo 'Public Interest Litigation in Uganda: History, Practices and Impediments' (2019) 1-4. See also H Taabu 'Ubuntu: Social Justice Education, Governance, and Women Rights in Pre-colonial Africa' in NW Njoki (ed) *Education, Colonial Sickness: A Decolonial African Indigenous Project* (2024) 43-57.
[10] GP Okoth 'The political economy of human rights crisis in Uganda, 1962-1985' (1994) *Transafrican journal of history* 144.

'Brother Jero': the colonialists came preaching a civilising gospel of respect for human rights, but they themselves became the greatest violators of those rights.[11] For instance, Captain Frederick Lugard remarked concerning Africans that 'on the first signs of insolence or even familiarity, kick them under the jaw (when sitting) or in the stomach. In worse cases, shoot and shoot straight, at once!'.[12] Similarly, Belgium turned the Congo into a 'high slave State, with such attendant horrors as even the dark story of the slave trade [had] never shown'.[13] Not to justify slavery, but by comparison, during the 'slave trade the victim was of a market value, and to that extent was protected from death or mutilation'.[14] However, in the case of the Congo, the colonial establishment was the sole 'owner of all [the people], so that if one was dismembered or shot, another was always available [to replace them].'[15]

The story was not so different in British Uganda. The role of the law was to make the protectorate economically profitable and not to uphold the freedoms of Africans.[16] Profit would be pursued even when it resulted in the violation of human rights. Uganda was to be developed as 'a planter and not a settler colony'.[17] This was efficiently done through the 1900 Buganda Agreement[18] which consolidated colonial domination in Buganda and opened the door for such other agreements.[19] Under this agreement, Buganda transferred all economic power to the British,[20] introduced exploitative taxation,[21] forced labour,[22] and gave autocratic powers to chiefs to run the colonial exploitative machinery. These were responsible for many atrocious acts against human dignity and other gross human rights violations.

When cotton was introduced in 1903, forced labour became the major means to boost production.[23] Every able-bodied man was to work on plantations unpaid for one month each year.[24] This was termed Kasanvu. Luwalo was another type of forced labour where the men had

[11] Wole Soyinka coined the satirical character, Brother Jero, a prophet who preached water but drank wine. See W Soyinka *The Trials of Brother Jero* (1969).
[12] F Lugard *The Rise of Our East African Empire (1893): Early Efforts in Nyasaland and Uganda* (2013) 20.
[13] 'England and the Congo', a letter written by Arthur Conan Doyle and first published in The Times on 18 August 1909, Available at https://www.arthur-conan-doyle.com/index.php/England_and_the_Congo_(18_august_1909)
[14] As above.
[15] As above.
[16] J Vincent 'Contours of change: Agrarian law in colonial Uganda, 1895-1962' (1989) *History and power in the study of law: New directions in legal anthropology* 153.
[17] Vincent (n 16 Above) 154.
[18] Native Agreement and Buganda Native Laws, Laws of the Uganda Protectorate, Revised Edition 1935 Vol. VI, pp. 1373–1384.
[19] Such as The Toro Agreement, 1900 in LAWS of the Uganda Protectorate, Revised Edition (Printed by C.F. Roworth Limited, 1935), 1419–22 and the Great Britain and Ankole, "Agreement between Great Britain and Ankole, Signed at Mbarra/Entebbe, 7 August/25 October 1901," 190 Consolidated Treaty Series 21, Oxford Historical Treaties (Oxford: Oxford University Press).
[20] Article 2 Buganda agreement.
[21] Above, Article 12.
[22] Above, Article 14.
[23] Okoth (n 10 above) 145.
[24] Vincent (n 16 above 161.

to work for the chief, unpaid for a month, on any tasks he desired.[25] These men could be called up to work anytime and were often whipped and brutalised in the process. For those natives not subjected to forced labour, a tax was introduced and calculated to forcefully compel them to seek wage employment by working in the cash crop plantations. People were made to work so much in cotton plantations to feed the Lancashire textile mills that they had no time to plant their local food crops. It was feared that famine would come.[26] But the colonial administration continued with its policy because the 'protectorate needed more from its agriculture than subsistence farming'.[27] Worst of all, the revenue from these exploitative acts was used to enrich the metropole and run the colonial administration's 'law and order' system as opposed to realising the social and economic rights of Ugandans.[28]

The Judiciary of Uganda, for its part, was created under Section 15(1) of the 1902 Order in Council. The High Court was styled 'Her Majesty's High Court of Uganda' and had unlimited civil and criminal jurisdiction within the protectorate. This Court consisted of only white expatriate judges,[29] who were appointed by Her Majesty the Queen and served at her pleasure.[30] At the onset, it had no independence and was a mere extension of the colonial machinery created to maintain law and order. There were lower courts manned by magistrates who were appointed and dismissed at the will of the commissioner.[31] In these lower courts, there was no separation between judicial and executive functions. Due to a shortage of actual judges,[32] district commissioners doubled as magistrates[33] and meted out 'justice' on behalf of the colonial administration. Thus, by character, the judiciary was an extension of the colonial administration, an institution created by the colonial state to guarantee law, order and its ultimate preservation. It was an 'integral part of the oppressive apparatus of the state',[34] and existed to protect, promote and fulfil the interests of that colonial state as opposed to the indigenous peoples.

But such a 'court of law' cannot function without laws. It was therefore agreed that under the 1902 Order in Council, the British Commissioner would have both executive and legislative

[25] As above.
[26] V Bellers *A speck in the ocean of time* (2014) Chapter 16.
[27] R Frost *Enigmatic Proconsul: Sir Philip Mitchell and the Twilight of the Empire* (1992) 80.
[28] Okoth (n 10 above) 145.
[29] RW Cannon 'Law, Bench and bar in the Protectorate of Uganda' (1961) *10 International & Comparative Law Quarterly* 879.
[30] Cannon (n 29 above) 888.
[31] W Kanyeihamba *Constitutional and Political History of Uganda: From 1894 to Present* (2010) 9-10.
[32] JH Jearey 'The structure, composition and jurisdiction of courts and authorities enforcing the criminal law in British African territories' (1960) 9 *International & Comparative Law Quarterly* 403.
[33] These were classified into Class I, II or III Magistrates. See Bellers (n 26 above) Chapter 15; Cannon (n 29 above) 880.
[34] J Oloka-Onyango, Joe 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View' (2015) 47 *George Washington International Law Review* 770.

powers.[35] In exercise of this power, he enacted into law arbitrary pieces of legislation (termed ordinances) which were intended to preserve the colonial administration at the expense of the human rights of Africans.[36] The most notorious of these would be the Deportation Ordinance[37] that had ripple effects past the era of colonialism (as we shall see). During the colonial period, this ordinance was used to deport 'undesirable persons' such as the Bataka agitators to exile during the disturbances of 1945.[38] Deportation was not subject to judicial review and had no prescribed time limit.

As the judiciary and the colonial state were bedfellows, these actions faced no judicial resistance and were instead met with approval. Many cases demonstrate this. In *Mukwaba v Mukubira*, the arbitrary power of deportation was implicitly challenged in court when the Kabaka was deported by Governor Andrew Cohen.[39] But the protectorate courts would not entertain the challenge. The High Court held that the act of deporting the Kabaka was an act of state that could not be challenged or inquired into by Her Majesty's courts. In another case of *Re G L Binaisa,* which concerned a habeas corpus application, the court held that there was no time limit to deportation and a person could be detained pending deportation for such time as the governor thought fit.[40] They were not entitled to habeas corpus as it was an act of state.

During this period, human rights litigation was short-circuited, and there was no human rights-based approach to colonialism. The courts were an extension of the colonial administration and its exploitative enterprise. Thus, the majority of the cases entertained were on commercial transactions[41] and not human rights or fundamental freedoms. But even the few cases that touched on human rights and managed to squeeze through to the courts were frowned upon. Judges were immorally legalistic. The law was the law, however unjust or inhuman it was. The law was applied in a blanket manner with no regard for individual circumstances. In one case in Fort Portal, a certain Bwamba man who had killed a witch was sentenced to death by hanging for murder, although he did not have the *mens rea*. His right to a fair trial was also violated as

[35] The Uganda Order in the Council (1902) Uganda Official Gazette. Vol. 7, No. 10. Sections 4-5.
[36] Such as the Uganda Removal of Undesirable Natives Ordinance 5 of 1907, Uganda Deportation Ordinance 15 of 1908, Collective Punishment Ordinance 1 of 1909, Uganda Vagrancy Ordinance 2 of 1909, Native Authority Ordinance 17 of 1919 and others.
[37] The concept of deportation had been introduced by sections 24-25 of the 1902 Order in Council.
[38] House of Commons Hansard 'Uganda (Deportations)' Debate 07 November 1945 vol 415 cc1410-1W1410W Available at https://api.parliament.uk/historic-hansard/written-answers/1945/nov/07/uganda-deportations (accessed 14 November 2024)
[39] *Mukwaba & Ors v. Mukubira & Ors* (1952-6) ULR 74. In other cases, the act of state doctrine was used to defeat cases that sought to uphold human rights. See *R v Besweri Kiwanuka* [1937] HCCA No. 38 of 1937, *The Katikiro of Buganda v The Attorney-General of Uganda* [1959] 1 EA 382.
[40] *Re G L Binaisa* [1959] 1 EA 997.
[41] Cannon (n 29 above) 880.

the proceedings were conducted in English - a language he did not know - without an interpreter.[42]

Further, the protectorate courts lacked independence from the colonial establishment, and even in the one case when they stood up for the right thing, they were immediately brought into submission by the administration. One particularly interesting case from the colonial judiciary, the case of the murder of Harry Galt, demonstrates this. The British sub-commissioner Harry St George Galt was murdered by natives in the Ankole District in 1905. Although the actual murderer Rutaaraka, committed suicide, the British arrested two chiefs and charged them with murder before the Entebbe High Court.[43] It is important to note that the appropriate court with jurisdiction was the native court since the two accused persons were natives, however, the British commissioner issued a proclamation suspending the Ankole agreement and gave the High Court jurisdiction because the murder was of a white man.[44] While at the trial, the prosecution failed to adduce any credible evidence, and the proceedings were described as being 'childish' and marred with grave irregularities. The Judge GFM Ennis nevertheless convicted them and sentenced them to death by hanging.[45] He did so because this was what the colonial administration desired.

In a display of judicial courage, the Court of Appeal for East Africa at Mombasa overturned the conviction and freed the appellants. This infuriated the British, who argued that the return of the two chiefs would be granting them a hero's welcome and would arouse a native uprising against the colonial administration.[46] They described the decision of the Court of Appeal as 'judicial tyranny' and refused to accept it.[47] The Commissioner, Sir Hesketh Bell, then rearrested the men who had been freed and exiled them to Kismayu on the East Coast, from where one of them unfortunately died.[48] In order to teach Ankole a lesson, he also fined the Omugabe a hundred heads of cattle and levied a special tax for the construction of a hall in memory of Galt.[49] The courts kept silent and continued business as usual.

The colonial judiciary was therefore nothing more than another arm of oppression. It 'viewed itself much more as an appendage to the goals of achieving colonial (in)justice than as a bastion

[42] P Mitchell *African Afterthoughts* (1954) 184-185.
[43] E Steinhart *Conflict and Collaboration: The Kingdoms of Western Uganda, 1890-1907* (2019) 217.
[44] JT Mugambwa 'The legal aspects of the 1900 Buganda agreement revisited' (1987) 19 *The Journal of Legal Pluralism and Unofficial Law* 249-250.
[45] C Kirkland *Some African Highways: A Journey of Two American Women to Uganda and the Transvaal* (1908)180-18.
[46] J Willis 'Killing Bwana: peasant revenge and political panic in early colonial Ankole' (1994) 35 *The Journal of African History* 379-400.
[47] A Forward 'Setting the record straight' British Empire (Web Blog) available at https://www.britishempire.co.uk/article/settingtherecordstraight.htm (accessed 14 November 2024).
[48] As above.
[49] H Bell *Glimpses of a Governor's Life: From Diaries, Letters, and Memoranda* (1946) 148-149.

for the protection of the indigenous population.'[50] This was reminiscent of what Alexander Hamilton had stated more than a century earlier, that a judiciary separated from the other branches would have the least opportunity to injure the rights of the people. However, if the judiciary were to be joined with other branches, the life and liberty of the citizen would be exposed to arbitrary control, violence, and oppression. He wrote:

> It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.[51]

Indeed, due to its union with the other departments of the colonial state, the judiciary became complicit in the violation of human rights during the colonial regime. One of the ways was through the repugnancy test that extinguished indigenous customary values. Section 20 of the 1902 Order in Council had provided that indigenous customary law could only be enforced where it was not repugnant to justice, morality, or inconsistent with any other written law. The problem with this test was that it was applied according to colonial standards. The standard was that of the man on the Clapham omnibus. Thus, African customs, which enunciated various rights and had a manifest sense of goodness through the value system of ubuntu, were cast on the wayside and trampled on. In the well-known case of *R v Amkeyo*, Justice Hamilton refused to recognise an African customary marriage on the ground that it could not fit into marriage as understood by 'civilised peoples'.[52] The accused in this case could not benefit from the evidential rule of spousal privilege; as a result, the evidence of his wife was used against him, and he was convicted, leading to a violation of his right to a fair trial.

Further, in *Mwenge v Migadde* the African custom of communal land ownership premised on the philosophy of ubuntu was also declared to be repugnant to British standards of justice.[53]

As if to temper down the effects of the repugnancy test and 'recognise' African customs, the British introduced native courts. Native courts were to administer native law according to custom.[54] However, just like the protectorate courts, they were a bifurcated system intended

[50] Oloka-Onyango (n 34 above) 771.
[51] A Hamilton & others 'Federalist No. 78' in A Hamilton & others (eds) *The Federalist Papers* (2009).
[52] *R v Amkeyo* (1917) KALR 14.
[53] *Mwenge v Migadde* (1932-5) ULR 97.
[54] Native Courts Ordinance No. 10 of 1905.

to maintain the security and order of the colonial state, and not to protect human rights as such. It is important to note at the onset that these courts should not be confused with the indigenous native courts (which often operated under the principles of ubuntu). The British native courts were a colonial creation and had 'supervisory powers' over the indigenous courts.[55] While in Buganda they were under the Kabaka, outside the Kingdoms, for instance in the districts of Busoga and Bukedi, the British native courts were presided over by an administrative officer at the district headquarters.[56]

The native and protectorate courts had a separate jurisdiction on the basis of race. Cases between white people or those of a mixed nature between Whites and Africans were subject to the absolute jurisdiction of the protectorate courts. On the other hand, cases between Africans and Africans were subject to the jurisdiction of native courts.[57] For instance, the case of *Nasanairi Kibuuka v Bertie Smith*, - a case that concerned African customs – was heard in a British court simply because one of the parties was a European.[58] Similarly, in *Katosi v Kahizi*, the British High Court dismissed an appeal between two natives for lack of jurisdiction.[59] This two-tier court system entrenched a separate but equal regime based on race, but it was inherently unequal, discriminatory, and amounted to a denial of the equal protection of the law (as we shall see).[60]

But first, the concept of what 'native law' meant deserves some fair comment. This native law was a colonial creation and not autochthonous. Indigenous African customary law had been extinguished by the repugnancy doctrine, and what replaced it was a colonial customary law invented by the British. These courts, therefore, applied British law disguised as 'native law'. In 1926, the British started writing a code of native customary law,[61] but this turned out to be a 'a confused mixture of local native laws and tribal custom tempered by British ideas.'[62] Thus, the customary law that British native courts applied was not autochthonous but an extension of colonial subjugation.[63]

The very structure of these native courts was also bound to violate the rights of Africans. First, there was initially no written code of native law, and common sense was the ultimate source

[55] Native Courts Ordinance No 15 of 1909.
[56] HF Morris 'Two early surveys of native courts in Uganda' (1967) 11 *Journal of African Law* 159.
[57] See for Instance, Buganda agreement, Article 8.
[58] *Nasanairi Kibuka v. A.E. Bertie Smith* (1908), 1 U.L.R. 41.
[59] *Katosi v. Kahizi* (1907), 1 U.L.R. 22.
[60] On the Separate but equal doctrine, see *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[61] Morris, (n 56 above) 166-167.
[62] As above 168.
[63] Vincent (n 16 above)164. See generally, D Dennison 'The Resonance of Colonial Era Customary Codes in Contemporary Uganda' (2019) *Potchefstroom Electronic Law Journal* 22.

of law in native courts.[64] Second, native court members had little or no knowledge of the principles of natural justice and did not even distinguish between civil and criminal cases.[65] They were presided over by non-qualified chiefs.[66] There was a fusion of legislative, executive, and judicial functions as these chiefs exercised all of them. They were also powerful and could impose various penal sanctions with little oversight.[67]

To worsen matters, punishments were often unjust and disproportionate to the offence since the courts had no written code of punishments.[68] This colonial penal system 'placed a great deal of power in the hands of a single individual'[69] and the power was often misused. For instance, in *R v Yowasi K Pailo and 2 Others*, the Lukiiko, a native court convicted the accused of defamation, but interestingly, the court acted as the complainant, prosecutor, judge, and executioner, resulting in a miscarriage of justice.[70] On review, the High Court held that the procedures of native courts did not have to be the same as those in British courts. In effect, human rights were not universal, as one set applied to Africans and another to whites in the protectorate. Therefore, native courts became an engine of human rights violations as opposed to human rights protection.

The right of appeal was also limited, for instance, a person could not appeal a sentence of corporal punishment.[71] In the cases where there was a right of appeal to say the District Commissioner, these commissioners, as a matter of policy and convenience, refrained from overturning the decisions of chiefs even when they violated human rights. The rationale was that it was more important to maintain the public order and security of the colonial state than to uphold human rights. The District commissioner was 'always wary of upsetting the chief's sentence, for if he undermined the authority of the Paramount Chief in his own Chiefdom, he could bring disorder [to the protectorate].'[72] Thus, the power of the commissioner to overturn a sentence he found to be 'inconsistent with humane principles'[73] was rarely used. Further, the native court system also discriminated against women. A wife could not sue her husband.[74] A

[64] Morris (n 56 above) 165. Native law was argued to often merely reflect the political or public opinion prevailing at the time. See Cannon (n 29 above) 883.
[65] Morris, (n 56 above) 168.
[66] Cannon (n 29 above) 879.
[67] For instance, corporal punishment such as whipping in cases of adultery, theft, using indecent language, disobedience to orders and causing discontent among labourers. See Morris (n 56 above) 162.
[68] The only written punishments were borrowed from English law, yet these courts were to apply 'native law'. See Morris (n 56 above)162.
[69] K Henderson & D Druitt *Set Under Authority* (1987) 46.
[70] *Rex v. Yowasi K. Pailo &2 Ors* (1920-19) ULR 98.
[71] Jearey (n 32 above) 407. A sentence of less than 5 years imprisonment or a fine less that £100 was also not appealable. See Morris (n 56 above) 159.
[72] Bellers (n 26 above) Chapter 15. One commissioner stated that 'powers of appeal should be given sparingly, as if allowed too lavishly they detract from local prestige and authority' See Morris (n 56 above) 169.
[73] Morris (n 56 above) 159.
[74] Morris (n 56 above) 165.

wife could not also be the sole witness for her husband, he had to have some other witnesses.[75] She could, however, be the sole witness against her husband[76] and was compellable because the system always eased the path to a conviction but looked the other way when the question touched upon the rights of the accused.

In conclusion, during this period, there were no human rights that the colonial judiciary was ready to uphold. Africans were not entitled to any human rights. Just like the infamous holding by the US Supreme Court in *Dred Scott v Sanford*, africans during colonialism were regarded as 'beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far, inferior, that they had no rights which the white man was bound to respect.'[77]

2.2. A Constitutional Republic?

After a Ugandan nationalist and liberation movement, in August 1962, the British passed an Act that granted Uganda Independence effective from 9th October 1962.[78] Uganda was also to get a new constitution and would be governed along constitutional principles. The Uganda (Independence) Order in Council,[79] provided for the establishment of the new constitution.[80] However, this order also provided that while the constitution came into force on 9 October 1962, the fundamental rights and freedoms enshrined in the constitution would only be effective from 9 October 1963.[81] This was intended to ensure continued British oppression during the transition period.

This notwithstanding, the Constitution was promulgated as a schedule to the Uganda Independence Order in Council and would be the supreme law of Uganda. But this 'supremacy' was subject to the power of parliament, which could alter it at its will (including its human rights provisions).[82] Further, while Chapter III of the Constitution protected fundamental rights and freedoms,[83] these were only civil and political rights with no mention of any social economic rights or collective rights. Besides, the constitution granted human rights with one hand and

[75] As above.
[76] As above. While in English courts, white people were protected by the doctrine of spousal privilege in evidence, this was not the case for african marriages. The evidence of an African wife carried the same weight as if she had no connection to the accused.
[77] *Dred Scott v. Sandford* 60 U.S. 393 (1857).
[78] Uganda Independence Act, 1962, 10 & 11 Eliz. 2 Ch. 57. See also Kanyeihamba (n 31 above) 13.
[79] Uganda (Independence) Order in Council 1962.
[80] Above, Section 3.
[81] Above, Section 9.
[82] Section 1, Constitution of Uganda, 1962.
[83] Above, Sections 17 – 31.

took them away with the other, as it was filled with claw-back clauses that restricted the full enjoyment of rights.

It is also worth noting that the High Court was clothed with the jurisdiction to enforce these rights.[84] Again, however, there was a claw-back clause that prohibited the High Court from enforcing human rights where a person had an alternative remedy available under another law.[85] In addition, while there was a general right of appeal to the court of appeal (which was to be established in the future by parliament), no right of appeal existed where an application for enforcement of human rights had been dismissed by the High Court on the technical grounds of being frivolous and vexatious.[86] The Spirit of the 1962 Constitution was thus not towards the enjoyment of human rights but its limitation. For this constitution, the limitation of human rights was its primary objective, and the enjoyment of the same rights only came secondary. For example, it restricted access to the courts and codified a strict doctrine of locus standi (only the victim of the human rights violation had the ability to petition the court).[87] It also excluded members of the armed forces from the application of the bill of rights.[88]

Concerning the institution that was charged with the enforcement of human rights, it should be observed that it was still steeped in colonial tradition. Upon the attainment of independence, Uganda had to reexamine all the institutions that it inherited from the colonial regime (including the judiciary), but it did not do so. As a result, it failed to make the judiciary an organ of the people that exercised judicial power according to the aims and objectives of Ugandans.[89] The judiciary was still dominated by a controlling influence of non-African expatriate judges who represented a manifest lack of decolonisation within the institution.[90] Picho argued that the judiciary needed to become a 'a dynamic and revolutionary institution, and not a body interpreting laws in the exact manner as if the colonial regime [was] still in full control in Uganda'.[91]

It is important to note, however, that the problem was not the existence of foreign judges (in and of itself) but how they interpreted the law in Uganda. There was a clear trend in the decisions that the foreign expatriate judges handed down.[92] This pattern was also evident in the decisions of the few indigenous judges on the bench (who had all received training from

[84] Above, Section 32. See also Civil Procedure (Fundamental Rights and Freedoms) Rules 1963, Legal Notice No. 13 of 1963.
[85] n 82 above, Section 32(2).
[86] Above, Section 32(4).
[87] Above, Section 32(1).
[88] Above, Section 33(3-4).
[89] A Picho 'Ideological Commitment and the Judiciary' (1968) 36 *Transition* 47.
[90] Picho (n 89 above) 49.
[91] As above, 49
[92] Oloka-Onyango (n 34 above) 772.

the United Kingdom or India).[93] Their judicial ideologies did not change from those of the colonial era, although the Ugandan state had attained 'independence'.[94] Oloka-Onyango posits that these judges:

> [W]ere consequently steeped in English jurisprudence and the norms and principles of English Common Law, with all its strictures of stare decisis (the doctrine of precedent), supremacy of parliament (even when there were written constitutions), and the subordination of the judicial power to the other two arms of government.[95]

As a result, the colonial and post-independent judiciary were not any different. In post-colonial Uganda, the first judicially sanctioned human rights violation was an offshoot of the colonial state and came from the judicial institution itself and how it was structured. Independent Uganda had retained the colonial relic of native courts, now styled 'African Courts'.[96] While the Constitution prohibited discrimination on the grounds of race,[97] the very foundational fabric of these courts was discrimination on racial grounds as they institutionalised a racist system of 'separate but equal'. An African had no audience before the High Court (in the first instance) because of the colour of their skin. Thus, while the Ugandan constitution was 'colour blind', the judicial institutions were not.[98]

The operation of these racist courts was itself a manifestation of judicial tyranny. African courts continued to have jurisdiction in civil cases where both parties were Africans and in criminal cases where the accused was an African.[99] And while the constitution enshrined the principle of legality, Africans could be found criminally liable under unwritten customary law, while Europeans and Asians were not.[100] This unwritten and vague criminal customary law was used to punish Ugandans in violation of their constitutional rights.[101] But not only was this customary law vague, it was also imprecise and unascertainable. This was shown in the case of *Mathias Kitimbo alias Matyansi Ngobi v Busoga* where the court convicted the accused of an offence unknown in customary law. On appeal, it was held that:

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[93] As above.
[94] As above.
[95] As above, 773.
[96] African Courts Ordinance of No 1 of 1957. See also Buganda Courts Ordinance No 4 of 1940.
[97] Constitution of 1962, Section 29.
[98] See US Supreme Court Justice Harlan's dissent in *Plessy v. Ferguson* 163 U.S. 537 (1896) at 559 that 'But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.'
[99] Cannon (n 29 above) 883.
[100] Section 24(8) of the Constitution provided that 'No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law'.
[101] Cannon (n 29 above) 883-884.

> [A]lthough the judges of the Busoga District African Court may be presumed to be the repository of customary law and therefore of customary offences, there was no evidence whatsoever that the offence of obtaining money by false pretences was known to customary law; it was highly unlikely that there existed such an offence under customary law.[102]

These Courts also violated many fair trial guarantees. Often, criminal cases were withdrawn from the High Court and filed in the African Court by the prosecution because it was easier to secure a conviction in the African Court than in the High Court.[103] Defence advocates were not allowed to appear in African courts, and the rules of evidence did not strictly apply.[104] These courts did not keep a record of proceedings.[105] In *Bunyoro Kingdom Government v Mukebu Aguda*, the accused had been convicted to a severe sentence without being given the opportunity to be heard or to even defend himself.[106]

In other instances, where an African filed a case in the High Court, it would be forcibly transferred to an African court because the High Court lacked jurisdiction. This happened in many cases.[107] Thus, many cases involving African parties were transferred to the African Courts simply because they were Africans. Cannon realised this absurdity when he wrote that there was a lack of uniformity in the field of law, for '[a] commercial transaction between an African and Asian [was] governed by the general commercial law of the [State] while the same transaction between Africans [was] governed by ''customary law''.'[108] This customary law was uncertain and vague, and in many cases it was merely the 'opinion of the more vocal and politically active section of the community'.[109] It was not until the enactment of the Magistrates Courts Act in 1964 that these African courts and unwritten criminal law ceased to exist.[110]

Turning back to the constitution, the judiciary killed the 1962 constitution in its infancy. In the same year it was promulgated, the High Court of Uganda held that the constitution was to be interpreted as if it were a mere statute. In *Re an Application by Muhamudu Kasumba*, Justice Slade held that:

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[102] *Mathias Kitimbo alias Matyansi Ngobi v Busoga* [1965] 1 EA 162.
[103] Cannon (n 29 above) 884.
[104] As above.
[105] *Martino Judagi and others v West Nile District Administration* [1963] 1 EA 406.
[106] *Bunyoro Kingdom Government v Mukebu Aguda* [1963] 1 EA 539.
[107] *Isaka Mayambala v The Buganda Government* [1962] 1 EA 283; *Flora d/o Ayuya Agoya v Danieri Kasigwa* [1962] 1 EA 304; *Deziderio Kiddombo v Kikutebude Growers' Co-operative Society Ltd and another* [1963] 1 EA 220; *Matiya K Wamala v Samusoni Sebutemba and others* [1963] 1 EA 631.
[108] Cannon (n 29 above) 884.
[109] As above, 883.
[110] Magistrates Courts Act No 38 of 1964. See also HF Morris 'Uganda: Changes in the structure and jurisdiction of the courts and in the criminal law they administer' (1965) 9 *Journal of African Law* 67.

> Now the Constitution is contained in the Second Schedule to the Uganda (Constitution) Order-in-Council, 1962, which was made in exercise of powers conferred by the Foreign Jurisdiction Act, 1890. It is to be interpreted by reference to the same rules of construction as if it were a statute.[111]

Therefore, the 1962 Constitution did not have a *sui generis* character. It was not a special document in a class of its own. While the constitution shouted 'I am the Supreme Law', the Judiciary shouted back 'mere statute', and its bill of rights was considered worthless. This was absurd because a document guaranteeing fundamental rights should not be taken lightly. It has to be interpreted in a liberal and progressive way and not narrowly according to literal, golden, or mischief rules. This kind of interpretation would have far-reaching effects on constitutionalism and the human rights of Ugandans, as constitutions were supplanted and replaced by dictatorial regimes as if they were mere words, not worth the paper that they were written on. Sadly, other judges followed the reasoning of Justice Slade in the Muhamudu case, and by 1965, it had become 'trite law'.[112]

Under such a subservient judiciary, it was easy for the government to violate human rights. Thus, when political differences arose between President Muteesa and Prime Minister Obote in what would be known as the kabaka crisis and which resulted into the overthrow of the president and the vice president by Prime Minister Obote. Obote found no problem in abolishing the 1962 Constitution, replacing it with the pigeonhole constitution of 1966 (which was also replaced in 1967).[113] Upon the adoption of the 1966 constitution, a state of public emergency[114] was declared, and the Emergency Powers (Detention) Regulations 1966 were enacted.[115]

The Lukiiko condemned the overthrow and attack on President (Kabaka) Muteesa and it was in these circumstances that Matovu a *pokino* chief and member of the *Lukiiko* was arrested under the emergency regulations. He filed an application for habeas corpus before the High Court in *Uganda v Commissioner of Prisons, Ex Parte Matovu*.[116] He argued that the new 1966 Constitution was invalid and that the emergency regulations and detention order served on him were also invalid, as they had received their efficacy from the 1966 Constitution. Although the application was defective and did not name a correct respondent, the court nevertheless

[111] *Re an Application by Muhamudu Kasumba* [1962] 1 EA 519. See also *Attorney-General v Godfrey Katondwaki* [1963] 1 EA 329.
[112] *The Attorney General of Uganda v The Kabaka's Government* [1965] 1 EA 395.
[113] HF Morris 'The Uganda Constitution, April 1966' (1966) 10 Journal of African Law 112.
[114] Legal Notice No. 4 of 1966.
[115] Emergency Powers (Detention) Regulations 1966, Statutory Instrument No. 65 of 1966.
[116] *Uganda v Commissioner of Prisons, Ex Parte Matovu* [1966] 1 EA 514.

entertained it because it concerned the liberty of a citizen.[117] On the question of the validity of the 1966 Constitution, the court found that it was valid as it had been birthed through a *coup d'etat*, a recognised way of changing government in international law. The Court thus opened the door to militarism, unconstitutional changes of government, and the attendant human rights violations that would follow.

The applicant had also argued that the Emergency Powers Act and the Regulations made thereunder were ultra vires the Constitution because they gave the minister broad, unfettered, arbitrary, unlimited, and unrestrained powers to detain anyone. The minister only needed to be satisfied that it was necessary to detain a person. The court disagreed with them, reasoning that because parliament had passed the regulations, then they were justified in the circumstances, however high-handed. The Court also rejected an objective test (yet it was the test prescribed in the constitution) of what amounted to reasonably justifiable, and instead held that the test was a subjective one and depended on what was justified in the circumstances. Further, the court went on, that because the unfettered powers of detention were granted to the minister by parliament, then an exercise of such powers was not subject to judicial review. This case demonstrated a classical example of judicial submission to executive power, in the face of a citizen seeking protection of their fundamental rights.

But perhaps the most alarming act would be the subsequent finding of the court. While it found that the detention order furnishing the reasons for the detention of the applicant, as served by the minister, was insufficient as it did not clearly state and lay out the grounds of the detention, and held that the government had not complied with the constitution in its failure to specify the grounds as to why Matovu was detained. Interestingly, even when it found that there had been a violation of the constitution, it refused to release the applicant and instead directed that the minister could cure this by serving the applicant with an improved statement specifying the grounds of detention! This Court, in the sight of liberty and human rights, showed itself to be more executive-minded than the executive. And cared not for the freedoms of the individual. This trend would continue in other cases.

In *Grace Stuart Ibingira and others v Uganda*, the five applicants, who were former cabinet ministers who had been detained and deported to Karamoja by the Obote government, filed a habeas corpus application that challenged the colonial Deportation Ordinance as being contrary to the bill of rights of the Constitution.[118] The High Court dismissed their case and held that deportation was constitutional and did not infringe on the right to personal liberty or on

[117] Above, 519.
[118] *Grace Stuart Ibingira and others v Uganda* [1966] 1 EA 306.

the freedom of movement. On appeal, the Court of Appeal overturned the judgment of the lower court and found that the deportation ordinance was inconsistent with the freedom of movement under the Constitution, and any order made under it would be unlawful. The Court remitted the case back to the trial judge, who granted a writ of habeas corpus.

But then, things became dramatic. After the court ordered that they be freed, they were airlifted by police officers from Karamoja and brought into Buganda, where the emergency regulations applied. The Minister informed them that pursuant to a court order, they were free to go; however, the moment they stepped out of the airport, they were each served with detention orders under the emergency regulations and rearrested. On petition to the Court, it cowered in fear and changed its stance, holding that the detention was now valid and that the government had not acted in bad faith when it unlawfully kidnapped them from Karamoja to Buganda (where the emergency regulations applied) in order to detain them.[119] The court held that it could not infer bad faith in the action of the minister because it 'trusted' that the ministers of Uganda would not take such wrong action!

The Court did not stand up to defend its order, which had been violated with impunity. It instead opted to keep the bond of 'trust'. The judiciary was beholden to the government of the day and was always willing and ready to do its bidding. It could not challenge executive excess and overreach. Instead, it continued to create an autocratic, powerful, and imperial president who was above the constitution. Thus, in *Opoloto v Attorney-General* where an army officer challenged what he termed as his unfair dismissal from the armed forces, the Court of Appeal argued that the action would not succeed since the 'president [was] the embodiment of the state' and that the president had inherited the prerogative powers of the British crown to dismiss military officers at will.[120] Such a right could not be fettered.

This trend of judicial submissiveness continued even when courts found that detentions were unlawful. In *Re Ibrahim and others*, the High Court found that there was no justifiable reason for the detention of over 78 foreign nationals; however, because their detention was made under the emergency regulations, the Court had no power to free them. The Judge held that the Court:

> Could not look behind a valid Detention Order, as it must be assumed that a Minister ought to be, and is deeply concerned, about the liberty of the subject, and only issues a Detention Order after considering all the information before him. In coming to a conclusion, he weighs all the

[119] *Grace Stuart Ibingira and others v Uganda* [1966] 1 EA 445.
[120] *Opoloto v Attorney-General* [1969] 1 EA 631. This idea of an unrestrained 'presidential prerogative' continued in other subsequent cases years later such as *Wycliff Kiggundu v Attorney General* [1993] UGSC 22.

> evidence and acts (not merely on the advice of a police officer only). In particular he has the interests of the State in mind, and he is assumed to have acted judicially in arriving at the conclusion.[121]

Therefore, the rights of Ugandans were subjected to the 'good will' of the executive. The courts also dismissed human rights cases on the grounds of technicalities such as the failure to bring a claim through the right procedure. In *Odongkara and others v Kamanda and another*, where the plaintiff sought damages for a violation of his right to personal liberty, the court dismissed the claim on the technicality that he had used the wrong procedure to bring the claim.[122]

However, in the years towards the end of the Obote government, and in a few less political cases, some judges stood up to the executive to protect the rights and freedoms of the individual.[123] In *Ochieng v Uganda*, the Judge condemned the actions of the police to detain a witness against his will and treat him like he was a suspect. He held:

> This procedure appears to show a complete disregard of a citizen's right to his personal liberty. This right had always existed in Uganda but it is now entrenched in the Constitution of Uganda. Article 19 provides that no person shall be deprived of his personal liberty save as may be authorized by law. This Article then proceeds to set out the various cases in which this can be done. These cases do not include a right to take a witness into custody pending an investigation into a crime. If witnesses are to be kept at a police station then it must be done with their consent and not by force.[124]

Further, in *Edward Walimbwa v Uganda*, the High Court upheld the freedom of movement when it held in a case of the accused who had been forcefully repatriated from Buganda to Bugisu, that the Repatriation of Undesirable Foreigners Law of Buganda was unconstitutional as it violated the right of every Ugandan to freely move and reside in any part of Uganda.[125]

Also, since criminal customary law had ceased to exist, the High Court held in *James Onyango v Bukedi District Administration,* where an applicant had been arrested and severely punished for not doing communal work as ordered by the Gombolola chief, that the unwritten custom could not amount to a crime since it violated the principle of legality under the Constitution.[126]

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[121] *Re Ibrahim and others* [1970] 1 EA 162.
[122] *Odongkara and others v Kamanda and another* [1968] 1 EA 210.
[123] Such as the right to legal representation in *Muyimba and others v Uganda* [1969] 1 EA 433.
[124] *Ochieng v Uganda* [1969] 1 EA 1.
[125] *Edward Walimbwa v Uganda* Miscellaneous Application No 68 of 1967.
[126] *James Onyango v Bukedi District Administration and 3 others*, Civil Suit No 28 of 1968. See also *Uganda v Solomon Tanga and Another*, Criminal Appeal No 384 of 1970 on the principle of legality.

The right to property was also enforced. In *Shah v Attorney General*,[127] the applicant had obtained a judgment decree which the government refused to pay. The government enacted a law that was intended to retrospectively deprive the applicant of the fruits of his litigation.[128] The Court struck down the legislation as unconstitutional since it sought to nullify a judgment of the court and to deprive the applicant of his proprietary rights. These were enforced by the Court.[129]

2.3. A Decade of Strongmen

Things, however, worsened when the government was overthrown. The struggle for human rights went from the frying pan into the fire. General Idi Amin overthrew Obote through a coup in January 1971. Through a proclamation, Legal Notice 1 of 1971, he suspended certain parts of the 1967 Constitution and ruled by decrees. The constitution and its human rights provisions were no longer the supreme law. Just like the Court in Ex Parte Matovu had done, the High Court also granted legal cover for the act of Amin suspending the constitution. In *Uganda v Alfred James Kisubi*, the Court held that by virtue of Legal Notice 1 of 1971, the 1967 constitution was subject to the decrees of Amin and that if there was any inconsistency or conflict between the provisions of the constitution and the provisions of any decree, the provisions of the decree prevailed and the constitution would be null and void to the extent of the inconsistency.[130] As a result, the Bill of Rights was rendered meaningless.

Amin abolished parliamentary government and vested all powers in himself as the military head of state.[131] He began to issue decrees that manifestly violated the human rights of Ugandans. He granted broad and unrestrained powers of arrest and detention to security forces,[132] virtually outlawed the right to bail,[133] provided for long periods of detention without trial,[134] provided for the indiscriminate killing of 'robbers' who had to be shot on sight,[135] and made

[127] *Shah v Attorney-General* (No 2) [1970] 1 EA 523.
[128] Section 2, The Local Administrations (Amendment) (No. 2) Act, No. 31 of 1969.
[129] *Shah v Attorney General* (No 3) [1970] 1 EA 543.
[130] *Uganda v Alfred James Kisubi* [1975] HCB 173.
[131] Legal Notice No 1 of 1971.
[132] Armed Forces (Power of Arrest) Decree, (No. 13 of 1971).
[133] Trial on Indictments Decree No 26 of 1971. This Decree was also deemed to apply retroactively.
[134] Detention (Prescription of Time Limit) Decree No 7 of 1971. However, the situation was so bad that 'At a later stage, little or no use was made of the powers of detention. People on whom suspicion fell simply disappeared.' See A study by the International Commission of Jurists 'Violation of Human Rights and the Rule of Law in Uganda' S-1343, 1974 at 16. (herein after ICJ Report).
[135] Robbery Suspects Decree, No. 7 of 1972. Anyone suspected of being a robber (kondo) had to be shot on sight. The ICJ stated that this was one of the most sinister Decrees under which individuals suspected to be participating in political activities were also to be treated like Kondos (armed robbers). It is estimated that over 10,000 people were killed through this anti-Kondo operation; ICJ Report (n 134 above) 19.

the government absolutely immune from legal sanction.[136] His army became an arbitrary engine of violence and gross human rights violations due to these powers. It was involved in brutal killings, torture, and assassinations.[137]

The Judiciary at this time was undermined to the core and had no voice. After the abduction and disappearance of Chief Justice Kiwanuka who was 'outspoken and courageous jurist and particularly concerned with the protection of individual human rights', the judiciary entered a mode of fear.[138] The judiciary abandoned its independence as 'judges and magistrates [were now] very cautious about making legal rulings which may hurt the Government's interests.'[139] Lawyers were also in great fear as a defence counsel could be in serious trouble with the army if they successfully defended an alleged criminal.[140] If these suspects were acquitted by the court, they would be immediately rearrested or shot dead the moment they left the courthouse.[141] This wantonness was depicted in *Efulayimu Bukenya v Attorney General*, a High Court Judge condemned the wanton disregard for human life by the government. He held that

> There appeared to be a widespread but mistaken belief that the police, soldiers or private citizens were lawfully entitled to arrest persons whom they reasonably suspect of having committed or being about to commit designated offences by shooting them in cold blood. Such was unlawful.[142]

In 1973, the members of the Judiciary wrote a memorandum to Amin that decried the widespread interference of the security forces in the legal process. The memorandum protested that 'members of the Security Forces [would] turn up in court and demand that someone be sent to jail, or that someone be prosecuted.' And that 'when called to give evidence, fail to turn up and no explanations are given. At times when they do turn up, they refuse to answer questions put to them'[143] Instead, the government responded by expanding the powers of the military tribunal to try civilians, with appeals going to the Defence Council, where Amin was the final Arbiter.[144] The Military Tribunal eroded the powers of the judiciary and could pronounce a sentence of death. The accused had no right to counsel, there were no

[136] Proceedings Against the Government (Protection) Decree No 8 of 1972. This decree particularly eliminated all legal means of controlling the armed forces and absolved them from any legal responsibility for the arrests, murders, ill-treatment and despoliation. The armed forces were placed outside the law. ICJ Report (n 134 above) 19. See also Proceedings Against the Government (Prohibition) Decree No 19 of 1972.
[137] ICJ Report (n 134 above) 14.
[138] Above, 20
[139] Above.
[140] As above.
[141] As above.
[142] *Efulayimu Bukenya v. Attorney-General* (1972) HCB 87.
[143] ICJ Report (n 134 above) 21.
[144] Trial by Military Tribunals Decree No 12 of 1973.

rules of evidence, the members of the tribunal had no iota of legal knowledge. In its first ten days, it convicted and sentenced over ten men to death by firing squad.[145]

It was at this point that the judiciary threw in the towel and was left with no option but to be subsumed by the executive and defeat fundamental human rights and freedoms. As the Constitution had been in effect suspended, many litigants who hoped to enforce their rights elected to use the law of torts to enforce their rights and be granted remedies. But there was a challenge. In 1969, the Obote government had enacted the Civil Procedure and Limitation (Miscellaneous Provisions) Act which placed limitations on certain actions.[146] Section 2(1)(a) of this Act provided that actions for tort against the government could only be brought within 12 months from the date that the injury arose. The judiciary immediately embraced this statute of limitations to defeat human rights claims that were brought under tort.

In the decision of *Suwali Kidimu v Attorney General*, where the plaintiff had been unlawfully arrested by the police and detained for over a year, the court held that his action was statute-barred because it had not been filed within 12 months.[147] Further, even if he had been under disability to bring the action (as he had been under detention), court would dismiss the plaint as defective because he did not plead disability. The court based on a technicality to dismiss the claim for human rights. Ignorance of procedure was no defence, the courts exclaimed.[148]

Attempts to challenge this law proved unsuccessful. In *Nassali v Attorney General*, an applicant argued that the 1969 Act violated his right to be protected from discrimination, but the court dismissed the argument and held that there was nothing discriminatory in the Act and the plaint would be struck out as it was statute-barred.[149] This law was used to defeat human rights litigation for many years to come. In *Kedi v Attorney General*, where the plaintiff sued for false imprisonment, unlawful arrest, and torture by the army, it was stated that such an action would be barred if not brought within 12 months.[150]

Detention without trial continued during Amin as it did during Obote. Under the Public Order and Security Act, the president had the power to detain anyone, and an order made under the Act could not be questioned by Court.[151] This law, enacted during the Obote regime, would continue to haunt and extinguish the right to personal liberty. Just like the judiciary during

[145] ICJ Report (n 134 above) 23.
[146] Civil Procedure and Limitation (Miscellaneous Provisions) Act 20 of 1969.
[147] *Suwali Kidimu v Attorney General* [1975] HCB 86.
[148] *Sirasi Bitaitana and 4 others v Emmanuael Kanarura* [1977] HCB 37.
[149] *Nassali v Attorney General*, Civil Suit No. 568 of 1972.
[150] *Kedi v Attorney General* [1992] UGHC 52.
[151] Public Order and Security Act 20 of 1967. Section 13.

Obote, judges continued to hold that there was no right to Habeas Corpus for a person detained under a presidential order. In *Kamadi Mwanga v Uganda*, where the accused had been released by court and rearrested by the military on the same day, he made an application for habeas corpus but the High Court held that it had no jurisdiction to look into the question of the legality of his detention as it was made under a presidential order.[152] Similarly, in *John Katabalawa v Uganda*[153] and in In *Re Sevumbi*,[154] courts dismissed habeas corpus applications on the basis that no detention order was subject to judicial review. However, during Amin's reign of terror, where actions did not involve the central government or big political actors, the courts enforced some human rights.[155]

Amin was overthrown in 1979 by militant Ugandan forces under the Uganda National Liberation Front (UNLF) assisted by forces from Tanzania. But this new government did not last long as its 60-day president Prof. Yusuf Kironde Lule, was also overthrown and replaced by Godfrey Lukongwa Binaisa, who was also in turn overthrown and replaced by a Military Commission of Paulo Mwanga that organised the 1980 presidential elections.[156] Milton Obote ran and won the elections. But amidst national violence, he was once again overthrown by Brig. Bazilio Olara Okello and Gen. Tito Okello Lutwa. In 1986, these were overthrown by Yoweri Museveni's National Resistance Army (NRA) that holds power to date.[157]

The laws and precedents that Obote and Amin left behind would long haunt the pursuit of human rights in Uganda. For instance, the thinking that the government was immune from civil suit in certain aspects. Thus, in *The Attorney General v Silver Springs Hotel Limited & 9 Others*,[158] the case sought to enforce the right to property against the government. The Supreme Court held that under the Government's Proceedings Act (a law first passed during the colonial period and subsequently modified by Amin),[159] no injunction could be issued against the government. Interestingly, the court in reaching this conclusion asked, 'What is the law in England?' and relied on the law in England to resolve the case. It reasoned that just as the English crown, the government had a prerogative and injunctions could not issue against it to enforce constitutional rights. This was regrettable because, unlike England, which has no written constitution and the courts adjudicate matters in the name of the crown, Uganda had a written

[152] *Kamadi Mwanga v Uganda* [1979] HCB 235.
[153] *John Katabalwa v Uganda* [1980] HCB 6.
[154] *In Re Sevumbi* [1980] HCB 36.
[155] *Odeke Odolo v Teso District Administration* [1975] HB 60 (Unlawful detention by chief); *Mary Kamabati v Uganda* [1975] HCB 209 (right to legal counsel); *Yasani Alaka v West Nile District Administration* [1975] HCB 325 (torture by chiefs); *Uganda v Ocilage s/o Eragu* [1977] HCB 16 (principle of legality).
[156] Kyomuhendo (n 9 above) 10.
[157] Above, 11.
[158] *The Attorney General v Silver Springs Hotel Limited & 9 Others* [1989] UGSC 10.
[159] Government Proceedings Act 58 of 1958, Section 15.

constitution that prohibited discrimination, and judicial power was to be exercised in the name of the people. The government was not an absolute sovereign.

During these dark years, the executive was placed above the law and could violate human rights as it wished. The effects of Obote and Amin entrenched a judicial culture in Uganda. The Judiciary became an institution that was subservient to the other arms of government and was willing to always do their bidding. It became 'the weakest of the three departments of power and could never attack with success either of the other two.'[160] When it came to matters concerning human rights, it sheepishly deferred to the judiciary and the executive. Uganda descended into anarchy and constitutional chaos.

3. Grappling with Human Rights under the 1995 Constitution

On 8 October 1995, Uganda adopted a new constitution under the NRM government. In its preamble, the people of Uganda recalled their history, which had been characterised by constitutional instability and the forces of tyranny, oppression, and exploitation. The people, in their sovereign name, committed to build a new nation based on 'the principles of unity, peace, equality, democracy, freedom, social justice and progress'.[161] The Constitution is the main engine to achieve this as it is the 'supreme law' and is intended to have 'binding force on all authorities and persons throughout Uganda.'[162] All citizens of Uganda have the right and are under the duty at all times to defend and ensure the observance of the constitution.[163] Within this constitution, the people of Uganda enshrined a bill of rights titled 'protection and promotion of fundamental and other human rights and freedoms'.[164]

The human rights included in the Constitution are inherent and not granted by the state.[165] Importantly, all organs of government (including the judiciary) and all people have a tripartite obligation to respect, uphold, and promote the constitutional bill of rights.[166] The Constitution protects civil and political rights, and some economic social, and cultural rights, including the rights of minorities.[167] But this list is no way exhaustive as the 'human rights and freedoms

[160] Federalist 78.
[161] Preamble to Constitution.
[162] Constitution of Uganda, Article 2.
[163] Article 3.
[164] Chapter Four.
[165] Article 20(1).
[166] Article 20(2). In Article 221, security organisations such as the police and the armed forces are specifically mandated to observe and respect human rights.
[167] See Articles 21 - 42.

specifically mentioned in [the constitution are] not to be regarded as excluding others not specifically mentioned.'[168]

While some rights mentioned in the Constitution are absolute and others may be limited in the public interest, any limitation of the enjoyment of human rights and freedoms must be acceptable and demonstrably justifiable in a free and democratic society.[169]

Any person can enforce the Ugandan bill of rights in a competent court with no restrictions as to locus standi.[170] In adjudicating these cases, the judiciary must ensure that justice is done to all irrespective of their social or economic status,[171] justice is not delayed,[172] adequate compensation is awarded to victims,[173] reconciliation between parties is promoted[174] and substantive justice is administered without undue regard to technicalities. [175] While the Constitution provides for a comprehensive framework to protect and enforce constitutional rights, it is the obsession of the judiciary with technicalities and its failure to follow Article 126(2)(e) of the Constitution that has prevented the enforcement of human rights claims.

3.1. Present Challenges: Undue Regard to Technicalities

At the onset, because the judiciary was still preoccupied with the mantra that 'ignorance of procedure was no defence', Article 126(2)(e) was interpreted narrowly and restrictively, and this posed a great risk to the judicial protection and enforcement of human rights. In *Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank*, the Supreme Court held that Article 126(2)(e) was subject to the law and is not a licence for ignoring existing procedural law, and that the constitution did not intend to wipe out the rules of procedure. The Court went on to say that:

> [A] litigant who relies on the provisions of Article 126(2)(e) must satisfy the Court that in the circumstances of the particular case before the Court it was not desirable to pay undue regard to a relevant technicality. Article 126(2) (e) is not a magic wand in the hands of defaulting litigants.[176]

168 Article 45.
169 Article 43.
170 Article 50.
171 Article 126(2)(a).
172 Article 126(2)(b).
173 Article 126(2)(c).
174 Article 126(2)(d).
175 Article 126(2)(e).
176 *Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank* [1997] UGSC 8. See also *Ayub Sulaiman v Salim Kabambalo* [1998] UGSC 5. Some judges however interpreted Article 126(2)(e) liberally see *Prof. Syed Huq v Islamic University in Kampala* [1997] UGSC 3; *Eriasafani Mudumba v Wilberforce Kuluse* [1997] UGCA 2.

While this interpretation appears reasonable at first glance it would have devastating effects on human rights litigation because subsequent courts entirely ignored the word 'undue regard' and simply picked the flowery phrase 'Article 126(2)(e) is not a magic wand in the hands of defaulting litigants' to dismiss all claims where the applicants did not follow the procedure to the book.

The first of these would be the bar on the time to bring human rights actions. In 1992, the Chief Justice made rules to provide for a procedure to enforce human rights.[177] In 1996, these rules were modified and a new rule was inserted, which set a time limit in which a petition would be lodged to the constitutional court. It required that a petition must be lodged within 30 days after the date of the breach of the Constitution.[178] In *Serapio Rukundo v Attorney General,* the Constitutional Court dismissed a human rights petition because it had not been filed within 30 days.[179] The application in *Uganda Journalists Safety Committee and Anor v Attorney General* that sought to uphold the freedom of expression and access to information also suffered the same fate.[180] Similarly, in *James Rwanyarare and Anor v Attorney General*, the Court held that a petition not brought within 30 days of the human rights violation complained of would be struck out with costs for being time-barred as the rule on limitation was mandatory.[181] The court also erroneously held in this case that the applicant had no locus standi to bring a case on behalf of a group of persons, yet Article 50(2) permitted public interest litigation. The same 30-day rule also defeated the petition on *Serugo v Kampala City Council and Another* at the Constitutional Court.[182]

On appeal in the *Ismail Serugo* case, the Supreme Court expressed its misgivings with this 30-day rule and called on the relevant parties to take action. Justice Mulenga was of the view that:

> Before leaving this case, I am constrained to express concern about the rule on limitation of time for the lodging of petitions for declarations under Article 137 of the Constitution… The most conspicuous difficulty is in respect of petitions alleging that an Act of Parliament or other law, is unconstitutional. Apart from the question of the starting day for computing the thirty days, there is the high probability of the inconsistency of such law being realised long after the expiry of the thirty days after enactment. In my view the problem should not be left to be resolved through applications for extension of time, as and when need arises. The appropriate

[177] Fundamental Rights and Freedoms (Enforcement Procedure) Rules, Statutory Instrument No 26 of 1992.
[178] Rule 4(1) Modifications to The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, Legal Notice No.4 1996.
[179] *Serapio Rukundo v Attorney General* [1997] UGCA 6.
[180] *Uganda Journalists Safety Committee and Anor v Attorney General* [1997] UGCC 8.
[181] *James Rwanyarale and Anor v Attorney General* [1997] UGCC 1.
[182] *Serugo v Kampala City Council and Another* [1998] UGCC 2.

> authority should review that rule to make it more workable, and to encourage rather than appear to constrain the culture of Constitutionalism.[183]

Justice Oder was also dismayed that a person whose cause of action is a breach of contract has more time to bring his action than the one who seeks for redress under Article 137 of the Constitution.[184] The Supreme Court led the charge to relax this 30-day rule. In the appeal of *Attorney General v James Rwanyarare and Ors*, the court held that the 30 days would begin to run from the date that the petitioner perceived breach of his rights and not from the date when law was enacted.[185] The Constitutional Court also picked this up. It firstly held that every case would have to be determined on its facts and time would begin running from the perceived breach[186] and then in *Uganda Association of Women Lawyers and Ors v Attorney General* declared the 30-day rule unconstitutional because it denied Ugandans an effective remedy for human rights violations.[187] These rules would be revoked and replaced in 2005.[188]

Just as that one was done, another technicality reared its head, this time at the High Court. Article 50(4) of the Constitution had provided that parliament shall make laws for the enforcement of human rights and freedoms. But parliament had made no law, and the rules being used predated the constitution. On this basis, the Judiciary quickly jumped on this to defeat human rights claims. In *Jane Frances Amamo v Attorney General*, the High Court dismissed a claim under Article 50 by stating that:

> The Constitution clearly and in no uncertain words said Parliament was to make laws for the enforcement of the rights and freedoms under the said Constitution. In my humble opinion this means that Courts can no longer apply the Rules passed in 1992. That would mean to me that until Parliament makes laws under Article 50(4), Article 50(1) is in abeyance.[189]

This decision however remained isolated,[190] and was soon overturned by the supreme court in *Bukenya v Attorney General* where the court reasoned that abeyance in the absence of the laws envisaged under Article 50(4) is, unfounded because when the Constitution was promulgated and came into force, it came into force as a whole document and not in parts.[191]

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183 *Serugo v Kampala City Council & Another* [1999] UGSC 23.
184 As above.
185 *Attorney General v James Rwanyarare and Ors* [2004] UGSC 2.
186 *Joyce Nakacwa v. Attorney General*, [2002] UGCC 1.
187 *Uganda Association of Women Lawyers and Ors v Attorney General* [2004] UGCC 1. This was affirmed in *Fox Odoi & Another v Attorney General* [2004] UGCC 7.
188 Rule 24 of the Constitutional Court (Petitions and References) Rules, 2005 Statutory Instrument 91 of 2005.
189 *Jane Frances Amamo v Attorney* General High Court Misc. Application No. 317 of 2002.
190 P Karugaba 'Public Interest Litigation in Uganda Practice & Procedure Shipwrecks and Seamarks' (2005) *Judicial Symposium on Environmental Law* 7.
191 *Bukenya v Attorney General* [2017] UGSC 18. See also *Zaake v Attorney General & 7 Others* [2021] UGHCCD 269.

This was not the last time technicalities would crop up to defeat human rights actions, however. Another technicality came through the Government Proceedings Act. It was held that *Serapio Rukundo v Attorney General*[192] No action could lie against the government for the actions of judges because of the concept of judicial immunity.[193] Because judges were immune from civil suits, no person could found a cause of action against the attorney general for the actions of a judge. Even when the judge violated human rights. This problematic trend continued in many other cases.[194] While the constitution guarantees judicial immunity, this is in person and does not mean that the Attorney General cannot be sued for the action of a judicial officer. The Constitution also guarantees absolute presidential immunity, but the Attorney General has been sued for the illegal acts of the president.[195] Immunity should not be interpreted broadly so as to defeat rights. There is, however, a general indifference when it comes to enforcing human rights in regard to judicial proceedings. The Constitutional Court would not stay criminal proceedings, even where an applicant argued that such proceedings violated human rights. Instead, it would stay the constitutional case until the criminal proceedings were done.[196] There was no way to protect against a threat to infringe on the rights of an individual.

Technicalities became the stumbling blocks to human rights applications and always reared their ugly heads. In *Abdu v Attorney General*, an applicant sought to enforce the right to personal liberty and the freedom from torture, but his application was dismissed by the High Court Judge, Sebutinde, because he did not serve a statutory 45-day statutory notice on the Attorney General and did not annex a summary of evidence and list of witnesses to his application!.[197] But this requirement to serve a statutory notice was not mandatory in human rights cases.[198] In *Greenwatch v Uganda Wildlife Authority & Anor*, the court reasoned that no statutory notice was required to be served on the government in human rights cases because to do so would result in absurdity, as the effect of it would be to condone the violation of the right and deny the applicant the remedy.[199] This is because after serving the notice, an applicant had to wait for 45 days before filing the case to enforce their rights.

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192 *Serapio Rukundo v Attorney General* [1997] UGCA 6.
193 Section 4(5) Government Proceedings Act.
194 *Maliam Adekur and Anor v Joshua Opaja and Anor* [1997] UGCC 4; *Charles Mubiru v Attorney General* [2001] HCB 102; *Serugo v Kampala City Council & Another* [1999] UGSC 23.
195 See *Tinyefunza v Attorney General.*
196 *Charles Onyango and Anor v Attorney General* [1997] UGCC 7; *Arutu v Attorney General* [1997] UGCC 12; Compare with *James Isabirye v Attorney General and IGG* [2007] UGCA 3.
197 *Abdu v Attorney General* [2004] UGHC 96.
198 *The Environmental Action Network Ltd. v. the Attorney General and NEMA* M. A. No.39 of 2001.
199 *Greenwatch v Uganda Wildlife Authority & Anor* [2004] UGHCCD 5; See also *Francis Tumwekwasize & 2 Ors v Attorney General* [2010] UGHC 36.

Further, it was held in *Abdu v Attorney General*, the human rights application would be time-barred as it was filed after two years, and the law provided that actions in tort had to be brought within two years.[200] But this was not an action in tort, it was a petition for the enforcement of human rights brought under Article 50 of the Constitution, which had no time limit. A similar trend has been followed in recent cases, where actions brought under Article 50 of the Constitution are forcibly converted by court into other causes of action so that they are made subject to the statute of limitation. For instance, in *Omunuk v Attorney General*, a claim under Article 50 was interpreted by court to be a disguised claim for breach of contract and was dismissed for being statute-barred. The Court stated that:

> The plaintiff is only hiding under the Constitution to enforce a claim which is barred by Section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, cap 72. He seeks, thereby, to evade or avoid the repercussions of the full force of the law. The Court will not lend its hand to a litigant who seeks to circumvent the law, yet he is the one who sat on his rights.[201]

Further, in *Aisu Tom (Retired) v Attorney General*, the High Court in similar fashion held that since the applicant had opted to run away from the strict rules of procedure for ordinary suits which give a shorter limitation period by 'baptising' his claim as an enforcement of rights, the court would dismiss the claim as it would not allow a litigant to run away from stricter timeframe under the ordinary civil procedure.[202] Such a trend has continued in other recent cases which have been dismissed on the basis that they would better be resolved under another procedure such as an ordinary plaint or judicial review, instead of Article 50.[203] The court will not enforce human rights if the applicant has an alternative remedy (whether legal or administrative).[204] Human rights applications have also been dismissed because they did not specifically disclose a right that was violated in the Constitution. An applicant has to cite a specific article and failure to do that, the case will be dismissed.[205] The nature and kind of violation cannot be deduced from the pleadings by court.

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[200] Section 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Statute, 1969

[201] *Omunuk v Attorney General* [2014] UGHCCD 67.

[202] *RA/153458 Aisu Tom (Retired) v Attorney General* [2021] UGHCCD 63.

[203] *Kafumba Vs Attorney General & 3 Ors* [2015] UGHCCD 149; *Seguya (acting through his recognised agent Male H. Mabirizi K. Kiwanuka) v Attorney General* [2020] UGHCCD 105; *Legal Brains Trust (LBT) Ltd v Attorney General* [2022] UGHCCD 260; *Vamee Industries Limited v Commissioner Land Registration & Another* [2024] UGCA 91; *Kato v Makerere University* [2024] UGHCCD 165; *Isingoma v Law Development Centre* [2024] UGHCCD 123.

[204] *Opio v Attorney General* [2022] UGHCCD 57; *Center for food and adequate living rights v Attorney General of Uganda and Another* [2022] UGHCCD 87.

[205] *Kimpi v Attorney General & Anor* [2018] UGHCCD 92; *Pastor Martin Sempa vs Attorney General* High Court Miscellaneous Application No. 71 of 2002; *Ogago Brian Abangi vs Uganda Communications Commission* High Court Miscellaneous Application No. 267 of 2013; *Human Rights Network for Journalists & Another vs Uganda Communications Commission* Miscellaneous cause No. 219 of 2013; *Aboneka Michael & Another V Attorney General* [2019] UGHCCD 188; *Mbabazi v Kabale Municipal Council and Another* [2023] UGHC 80; *Enforcement of Patients and Health Workers Rights and Another v Marie Stopes Uganda and 2 Others* [2024] UGHCCD 163.

All these reasons that courts are basing on to defeat human rights actions are not in line with the spirit of the constitution or Article 50. The Article provides that a person can bring a claim for human rights without prejudice to any other action lawfully available. That means an applicant should not be forced to bring a claim under tort when they opted to bring it as a human rights action. Courts should enforce human rights claims as they are brought.

The High Court has also dismissed human rights cases because they were not brought under the right procedure. Since the inception of the 1995 Constitution, the procedure had been by notice of motion.[206] However, in *Charles Harry Twagira v Attorney General*, the Supreme Court had brought confusion that if a party seeks damages under Article 50, then the procedure should be by plaint, but if they sought declarations, then it should be by notice of motion.[207] *Karugaba* explains that this confusion was mostly caused by an error and mix-up in printing the 1992 rules by the government printer.[208] This caused a lot of confusion to the lower courts.[209]

However, in 2008, the Chief Justice enacted rules which provided that the procedure for the enforcement of human rights is by notice of motion.[210] Hopefully, the matter has now been put to rest. Another technicality that has hopefully been put to rest is the political question doctrine, which initially defeated the enforcement of the right to health in the case of *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General*.[211] The Constitutional Court held that the enforcement of the right to health in this case was ' of purely a political character, or it would involve an encroachment upon the Executive or Legislative powers." This decision was, however, overturned on appeal.[212] When the matter was heard again, the Court agreed with the petitioners and upheld their right to health.[213]

Further, the other major issue that continues to hinder human rights litigation is the trial of civilians in the court martial. The Supreme Court has held that the court martial is subordinate to the High Court.[214] Nevertheless, the judiciary has stood by as civilians are tried and convicted in the court martial and are subjected to a procedure that wantonly deprives them of their rights.

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[206] *National Association of Professional Environmentalists (NAPE) v. AES Nile Power Limited*, HCMA No. 268 of 1999; *The Environmental Action Network Ltd. v. the Attorney General and NEMA*: M. A. No.39 of 2001; *Pastor Martin Sempa vs Attorney general* High Court Miscellaneous. Application No. 71 of 2002; *Greenwatch v. Attorney General and NEMA* (Misc. Application No. 140 of 2002).
[207] *Charles Harry Twagira Vs Attorney General and Two Others* [2008] UGSC 10.
[208] Karugaba (n 190 above) 9.
[209] *Mwesigwa Hannington and 3 ors vs Attorney General* [2009] UGCA 17.
[210] The Judicature (Fundamental Rights and Freedoms Enforcement Procedure) Rules, 2008 (Statutory Instrument No 55/2008).
[211] *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General* [2012] UGCC 13.
[212] *Center For Health ,Human Rights & Development (CEHURD) & Ors v The Attorney General* [2015] UGSC 69.
[213] *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General* [2020] UGCC 12.
[214] *Attorney General v Uganda Law Society* [2009] UGSC 2.

Many applications brought under Article 50 that sought to find that the trial of accused persons before the court martial violated their fundamental rights have been dismissed by courts on this pretext.[215] But the court martial has no business trying civilians, as such an act is unconstitutional. Turning to the rights of marginalized groups, the judiciary has been receptive to and upheld the rights of persons with disabilities,[216]of women,[217] and other communities. However, the rights of sexual minorities have been blatantly abused by the Judiciary.[218] There are also still various challenges in enforcing social and economic rights, such as judicial reluctance to enforce them.[219]

Another obstacle that has hindered human rights litigation is the evidence in human rights litigation. This has been particularly major in cases of torture and other inhuman acts. While initially courts took a liberal approach, as was in *Magezi Raphael v Attorney General*, that torture can be inferred from acts 'such as removing shoes, and being undressed at a police station.'[220] However, the standard of torture has recently been raised by the judiciary. It has been held that:

> The courts should apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman or degrading treatment. Only worst examples are likely to satisfy the test.[221]

In *Kyagulanyi T/a Bobi Wine Vs Kampala Metropolitan Police Commander & Anor*, where the applicant sued the defendants for violation of his rights when they banned his music concerts, the court held that Section 101 of the Evidence Act is applicable in human rights cases and that the rules of evidence apply to human rights proceedings in the same way as they apply to all civil proceedings. This means that the burden of proof is on the Applicant who alleges violations, and the standard of proof is on a balance of probabilities.[222] The Court then went on

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[215] *Okumu v Attorney General* [2014] UGHCCD 89; *Agasiirwe Karuhanga Vs Attorney General* [2018] UGHCCD 82; *Kitata v Director of Public Prosecutions & Another* [2019] UGHCCD 25; *Bazibu v Attorney General and 2 Others* [2022] UGHCCD 38; *Kabuleta v Attorney General* [2023] UGHCCD 414.

[216] *Legal Action for People with Disabilities v Attoney General Anor* [2014] UGHCCD 76; *Candia v Attorney General* [2024] UGHCCD 40.

[217] *Mifumi (U) Ltd & Anor v Attorney General & Anor* [2015] UGSC 13; *Uganda v Nakoupuet* [2019] UGHCCRD 14; *Namatovu v Jjagwe and 2 Others* [2023] UGHCFD 51.

[218] *Nabagesera & 3 ors v Attorney General & Anor* [2014] UGHCCD 85.

[219] *Center for Food and Adequate Living Rights (CEFROHT) v Attorney* [2020] UGHCCD 157; *Center For Health, Human Rights and Development (CEHURD) and Others v Uganda National Health Research Organization (UNHRO) and Others* [2023] UGHCCD 288;*Turyamuhika Geofrey Tumwine v Attorney General* [2023] UGHCCD 383; *In the matter of An Application for enforcement of human rights by Kalali* [2024] UGHCCD 38*; Center for Health, Human Rights & Development (CEHURD) v Attorney General & Another* [2024] UGHCCD 121,

[220] *Magezi Raphael v Attorney General* [2009] UGHC 150.

[221] *Agaba v Attorney General & 3 Others* [2019] UGHCCD 226. See also *Kifampa & Another v Attorney General* [2020] UGHCCD 129.

[222] *Kyagulanyi T/a Bobi Wine Vs Kampala Metropolitan Police Commander & Anor* [2019] UGHCCD 113. On the standard and burden of proof, see also *Dr. Stella Nyanzi v Attorney General* [2019] UGHCCD 221; *Mwesige & Another v Kampala Capital City Authority & Another* [2023] UGHCCD 396; *Twine v Attorney General* [2024] UGHC 478.

to arbitrarily dismiss each of the claims based on 'lack of evidence'. It held that affidavit evidence was not enough and the applicant had to adduce more evidence to the satisfaction of the court. Many other human rights cases have suffered the same fate.[223]

But the basis that human rights cases should be proved by the applicant to such a high degree should be revisited. Early on in *Dr. James Rwanyarare and Ors v Attorney General*, the Constitutional Court spoke of the standard of a 'prima facie' case. It held that in human rights litigation:

> The onus was on the petitioners to show a prima facie case of violation of the petitioners' constitutional rights. Thereafter, the burden shifts to the respondent to justify that the limitations to the rights … were justified within the meaning of Article 43 of the Constitution.[224]

The African Court on Human and Peoples' Rights, the leading judicial body in human rights litigation in Africa, has also adopted a similar standard in some cases. In *Armand Guehi v Tanzania*, the court was of the view that 'that the ordinary evidentiary rule that he who alleges must prove may not apply rigidly in human rights adjudication. The burden of proof will shift to the Respondent State as long as the Applicants make a prima facie case of a violation.'[225] This standard should apply to majorly torture cases. In torture cases, a particularly high test has been embraced, some judges have held that a party has to produce medical evidence, witness statements, photographs of scars, x-rays, among others, before a claim of torture can be believed.[226] But this is problematic because 'where one is arrested and tortured mercilessly, where is the opportunity to take photographs of torturers, get medical reports to show the injuries inflicted and where is the opportunity to call eyewitnesses?'[227] Justice Egonda-Ntende touched on this in *Wanyoto v Sgt Ouma and Another,* where the trial judge had dismissed a claim of torture on the basis of a lack of medical evidence. The learned judge held that;

> The requirement for medical evidence to prove torture has no legal basis. It should be noted that it is rare to have direct evidence of torture because of the nature of the crime. Most of the

[223] *Mukoda alias Naigaga v International Aids Vaccine Initiative & 11 Others* [2020] UGHCCD 88; *Kifampa & Another v Attorney General* [2020] UGHCCD 129; *Esoko & 3 Others v Attorney General & 4 Others* [2020] UGHCCD 79; *Mackay v Attorney General and 3 Others* [2022] UGHCCD 104; *Dr. Lagu Charles and 3 others vs Attorney General* [2023] UGHCCD 10; *Niwabine v Attorney General* [2023] UGHCCD 393; *Ulrich and Others v Attorney General* [2023] UGHCCD 97; *No. 64861 PC Atusasiire v ACP Okalany and Others* [2024] UGHCCD 10; *Nakamatte v Uganda* [2024] UGHCICD 11; *Namuganza v Uganda* [2024] UGHCICD 12; *Kakwenza Rukirabashaija v Attorney General* [2024] UGHCCD 161.

[224] *Dr James Rwanyarare and Ors v Attorney General* [2004] UGCC 5.

[225] *Armand Guehi v Tanzania* ACtHPR, Application 1/2015, Judgment (7 December 2018) paras 132-134; See also EK Murimi 'Fluctuating standards of proof at the African Court: a case for principled flexibility' (2023) 7 *African Human Rights Yearbook* 172.

[226] *ASP Mugarura Steven v CP Herman Owomugisha and Anor* [2021] UGHCCD 64; *RA 65008 W011 Atunga Bantu and 7 Others v Director Public Prosecutions and Story* [2021] UGHC 49.

[227] *Jennifer Muthoni Njoroge & 10 ors vs AG* [2012] eKLR as cited in *RA 65008 W011 Atunga Bantu and 7 Others v Director Public Prosecutions and Story* [2021] UGHC 49.

> torture cases are carried out in secret while the victim is in detention making it difficult to obtain a medical report.[228]

It is important to note that torture is usually practiced in secret by 'experienced interrogators who are skilled at ensuring that no visible signs are left on the victim.' Therefore, to insist on physical or medical evidence can only 'promote acts of torture rather than check them.'[229] This makes it hard to prove torture, and as such, the standard of proof should be relaxed.

There has also been a recent animosity towards public interest litigation. While the constitution collapsed the locus standi doctrine and opened up the gates to public interest litigation, judges have begun to close the gates through dubious judicial interpretations, and this is dangerous. In *Aboneka Michael & Another V Attorney General*, Justice Sekaana, in dismissing the human rights application, held that:

> The courts should restrict the free flow of cases in the name of public interest litigation since it is time consuming and mainly indulges courts in taking administrative and executive functions instead of dispensing with justice which is their primary role. It is only when there is gross violation of fundamental rights by a group or a class action or where basic human rights are invaded or there are complaints of such acts which shock judicial conscience the only such matters can be heard and the Court should extend its jurisdiction for remedying the hardships and miseries of the underdog and the needy.[230]

Public interest litigation will not be allowed for those who use it to gain fame, and will only be permitted in the worst cases of human rights violations. This is certainly not in line with the spirit of the constitution, which allowed any spirited individual to bring a claim for human rights enforcement. The judge went on that 'public interest litigation has been abused and is increasingly used by advocates for publicity and or seeking prominence in the legal profession, and it is now 'Publicity Litigation'.[231] Just because courts are wary of floodgates is not a sufficient reason to restrict access to the courts in such an arbitrary manner.

[228] *Wanyoto v Sgt Ouma and Another* [2022] UGCA 185.
[229] *Asiimwe and Another v Attorney General and 2 Others* [2022] UGHCACD 6; *Turyamuhika Geofrey Tumwine v Attorney General* [2023] UGHCCD 383.
[230] *Aboneka Michael & Another V Attorney General* [2019] UGHCCD 188.
[231] As above

4. The Future of Human Rights Litigation in Uganda

4.1. Enforcement of Human Rights

However, not all is lost, and courts have also been able to enforce various rights. The spirit of the 1995 Constitution was to provide for greater enjoyment and protection of human rights.[232] In *Attorney General v Salvatori Abuki*, the court held that it would interpret human rights liberally and statutes which purported to restrict rights were to be construed narrowly. The freedom from torture was stated to be a 'birth right' and went on to quash sections of the Witchcraft Act for violating the freedom from torture and the right to property of the petitioner.[233]

Various constitutional rights have been enforced in numerous cases. These include the right to fair hearing in administrative decisions,[234] protection from torture and inhuman treatment,[235] unlawful detention,[236] right to life,[237] freedom from discrimination,[238] right to bail,[239] assembly,[240] expression,[241] freedom of movement,[242] forced evictions,[243] prisoner rights,[244] land rights,[245] personal liberty,[246] privacy,[247] migrant worker's rights,[248] citizenship,[249] environment,[250] equality,[251] and many more.

[232] *Attorney General v Ssengomwami Ssemanda Dick* [2007] UGHC 33.
[233] *Attorney General v Salvatori Abuki* [1999] UGSC 7.
[234] *Lawrence Okae v Uganda Post & Telecommunication* [2000] UGHC 31; *Kaggwa Andrew & 5 Others v Hno Minister of Internal Affairs* [2002] UGHC 21; *Issa Wazembe V Attorney General* [2019] UGHCCD 181.
[235] *Kyamanywa v Uganda* [2000] UGSC 25; *Ssegonja Paul v Uganda* [2002] UGSC 10; *William Abura v Attorney General* [2008] UGHC 40; *Ikonero and Another v Wagagai Minining Limited and 3 Others* [2024] UGHC 984.
[236] *Robinah Sajjabi V UCB* [2002] UGHC 58.
[237] *Susan Kigula & 416 Ors v Attorney General* [2005] UGCC 8; *Okupa v Attorney General & 3 Ors* [2018] UGHCCD 10; *Health Equity and Policy Initiative (HEAPI) v Hon. Dr. Jane Ruth Aceng Ocero , Minister of Health & Attorney General of Uganda* [2024] UGHCCD 24.
[238] *Sharon and Others v Makerere University* [2006] UGSC 10.
[239] *Foundation for Human Rights Initiatives v Attorney General* [2008] UGCC 1; *Hon Sam Kuteesa & 2 Ors v Attorney General* [2012] UGCC 2; *Wanyenze v Uganda* [2021] UGHCCRD 114.
[240] *Muwanga Kivumbi v Attorney General* [2008] UGCC 34; *Human Rights Network Uganda & 4 Ors v Attorney General* [2020] UGCC 6.
[241] *Mwenda and Another v Attorney General* [2010] UGCC 9; *Karamagi and Another v Attorney General* [2023] UGCC 2.
[242] *Lugonvu & 3 Ors v Attorney General* [2015] UGCC 15.
[243] *Muhindo & 3 Ors Vs Attorney General* [2019] UGHCCD 2; *Sekajja and Others v Attorney General and Others* [2024] UGHCCD 16.
[244] *Yahaya Lukwago & 4 Others v Aiso & 3 Others* [2019] UGHCCD 232; *Kalali v Attorney General & Another* [2020] UGHCCD 172.
[245] *Olum Vs Bongomin & 4 Ors* [2019] UGHCCD 84.
[246] *Kiiza Besigye v Civil Aviation Authority & Anor* [2019] UGHCCD 39; *Sserunkuma and Another v Attorney General* [2024] UGHCCD 119.
[247] *Kifampa & Another v Attorney General* [2020] UGHCCD 129.
[248] *C & 11 Others v Attorney General & Another* [2020] UGHCCD 55; *Namale & Another v Horeb Services Uganda Limited & Another* [2024] UGHCCD 152.
[249] *Abucar and 7 Others v Attorney General* [2022] UGHCCD 49.
[250] *The Environment Shield Limited & Another v Jinja City Council & Another* [2024] UGHC 345.
[251] *Osotraco Limited v Attorney General* [2002] UGHC 5.

Courts have also relied on comparative jurisprudence and international human rights law to expand the content and scope of Uganda's Bill of Rights. In the case of *Carolyne Turyatemba & 4 Ors Vs Attorney General & anor*, the Court cited both treaties that Uganda is a party to, and those that it is not a party, to broaden and interpret the rights in Uganda's Constitution.

These included the Universal Declaration of Human Rights 1948, the European Convention on Human Rights and Fundamental Freedoms, 1950, the African Charter on Human and Peoples' Rights, The International Covenant on Civil and Political Rights, American Convention On Human Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. The trend of incorporating international human rights law jurisprudence to expand Uganda's human rights jurisprudence has continued in many cases.[252]

4.2. The Human Rights (Enforcement) Act, Cap. 12

The Human Rights (Enforcement) Act, Cap. 12 was enacted to give effect to Article 50 (4) of the Constitution by providing for the procedure of enforcing human rights under Chapter Four of the Constitution. This very progressive piece of legislation portends a bright future for human rights litigation in Uganda, if the courts of law interpret it correctly and the executive abides by the court orders and directives.

Under the Act, any person, group or organisation who claims that their right has been violated or threatened may petition a competent court for redress.[253] The Act has a wide array of public interest litigation and does not require that a person proves that a case has been brought in the public interest or that they have public interest status. Any person may bring a claim to a competent court. A competent court under the Act is either the High Court or a Magistrate Court.[254]

[252] *Agaba v Attorney General & 3 Others* [2019] UGHCCD 226; *Yahaya Lukwago & 4 Others v Aiso & 3 Others* [2019] UGHCCD 232 (soft law treaties); *Issa Wazembe V Attorney General* [2019] UGHCCD 181; *Kifampa & Another v Attorney General* [2020] UGHCCD 129.
[253] Section 3(1).
[254] Section 2.

The Act also allows a person to sue as many people as possible, where they are in doubt as to who violated their rights, and let the court determine who is liable for the violation.[255] The Court can also admit *amicus curiae* to enable it to properly determine the matter.[256]

The Act specifically provides that a statutory notice is not required in human rights cases,[257] and that no suit shall be rejected or otherwise dismissed by a court merely for failure to comply with any procedure, form, or on any technicality.[258] Unlike Article 126(2)(e) of the Constitution bars courts from dismissing human rights claims on matters of procedure. The provision is couched in mandatory terms and leaves no discretion to court. No provision found in any procedural law may be used to defeat a human rights claim.

The Act gives primacy to human rights and where any question of human rights arises during the proceedings of a court, the court must stay the proceedings and first resolve the human rights question.[259] Rights are no longer secondary and gone are the days when courts instead stayed human rights petitions to allow the continuance of illegal trials. Human rights are now supreme and sacred, and courts must interpret and enforce them as such.

The Court is empowered to grant various orders that are aimed at ensuring the victim gets full redress.[260] These include compensation, restitution, rehabilitation of the victim, including medical and psychological care, satisfaction which includes cessation, verification of the facts, full and public disclosure of the truth, restoring dignity and reputation, public apology, criminal sanctions, and guarantees of non-repetition. A party must comply with the orders made under this act within six months.

Concerning remedies under the Act, it was held in *Agaba v Attorney General & 3 Others*, that under Article 50 (1), a court does not exercise any discretion in determining the remedy to grant. A person who claims and proves that his fundamental right or freedom has been violated is entitled to full relief, i.e., redress, which may include compensation. The person is entitled to all the reliefs he seeks, including declaration, special, exemplary, general, and aggravated damages.[261] However, courts should be cautioned not to award low sums that encourage human rights violations rather than deter them.[262]

[255] Section 6(2).
[256] Section 6(3).
[257] Section 6(4).
[258] Section 6(5).
[259] Section 7.
[260] Section 9.
[261] *Agaba v Attorney General & 3 Others* [2019] UGHCCD 226; See also *Issa Wazembe V Attorney General* [2019] UGHCCD 181.
[262] *Asiimwe and Another v Attorney General and 2 Others* [2022] UGHCACD 6.

The Act creates a system of personal liability for public officers who violate human rights, notwithstanding that the state may also be vicariously liable.[263] A public officer found personally liable must pay part of the compensation ordered by the court.[264]

Previously, courts did not allow officials such as military officers who violated human rights to be sued in their individual capacity.[265] The proper party to sue, courts held, was the Attorney General. A party had to demonstrate a clear nexus that they were operating in an individual, and not an official capacity, when the violations occurred.[266]

In *Yahaya Lukwago & 4 Others v Aiso & 3 Others*, where the torturers were various prison warders, the court ordered that all of them be added as parties before the case proceeded.[267] Courts have ensured that damages are shared between the Attorney General and other perpetrators.[268] This is a great deterrent to prevent the abuse of human rights and a good and progressive step in the right direction.

The Act also makes it an offence (punishable by 15 years) to derogate from non-derogable rights, which include freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair hearing, and the right to an order of habeas corpus. In criminal proceedings, if it comes to the attention of the court that a non-derogable right of the accused has been violated, the court is required to declare the trial a nullity and acquit the accused person.[269] Courts have, in pursuance of this provision, declared trials a nullity where it was found that the non-derogable rights of the accused were violated.[270]

[263] Section 10(1).
[264] Section 10(2).
[265] *Rene Rutagungira V Attorney General & 3 Others* [2018] UGHCCD 140.
[266] As above.
[267] *Yahaya Lukwago & 4 Others v Aiso & 3 Others* [2019] UGHCCD 232. See also *Zaake v Attorney General & 7 Others* [2021] UGHCCD 269; *Nsereko V Attorney General and 15 Others* [2023] UGHCCD 192.
[268] *Agaba v Attorney General & 3 Others* [2019] UGHCCD 226.
[269] Section 11.
[270] *Stella Nyanzi v Uganda* [2020] UGHCCRD 1; *Wanyoto v Sgt Ouma and Another* [2022] UGCA 185; *Kawesa Ivan v Uganda* [2022] UGCA 283; *Asiimwe and Another v Attorney General and 2 Others* [2022] UGHCACD 6; *Uganda v N.E* [2024] UGHC 511; *Taremwa & 3 Others v Uganda* [2024] UGHC 941.

5. Conclusion

The historical relationship between the judiciary and human rights in Uganda has been complex, marked by both progress and setbacks. From the colonial era's prioritization of state preservation to the post-independence judiciary's entrenchment of procedural technicalities, the path has often skewed toward limiting rather than expanding rights. However, the post-1995 judiciary has shown signs of a shift, albeit gradual, toward a more rights-conscious approach.

Recent judicial pronouncements suggest a growing awareness of the judiciary's critical role in safeguarding human rights. *Rights Trumpet & 2 Others v AIGP Asan Kasingye & 5 Others* and *Mucunguzi Abel & 9 Others v Attorney General & 2 Others*, the court emphasised this urgent need for judicial activism in upholding fundamental freedoms. The learned judge's call for the judiciary to "reclaim its mantle" and rigorously apply the law to protect citizens' rights reflects a renewed commitment to its constitutional mandate.

> The time is near for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance, and protect the fundamental rights and freedoms of [Ugandans]... If the Uganda Judiciary is to remain relevant, it has to rise to the occasion and reclaim its mantle by accepting its responsibility for the maintenance of the rule of law that embraces the willingness to check executive action.[271]

While challenges remain, these developments offer a glimmer of hope. The judiciary, equipped with its independence, has the potential to transform from a passive observer to an active guardian of human rights. Its relevance in Uganda hinges on its ability to check executive overreach and uphold the rule of law. The journey is far from over, but with bold and principled judicial leadership, the judiciary can indeed rise to the occasion and fulfil its pivotal role in the protection and promotion of human rights.

[271] *Rights Trumpet & 2 Others v AIGP Asan Kasingye & 5 Others and Mucunguzi Abel & 9 Others v Attorney General & 2 Others* [2020] UGHC 42.

chapter four

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DEFENDING FREEDOMS

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