POLITICAL QUESTION DOCTRINE IN UGANDA

An analysis of the technicalities on the realization of the freedoms of expression, association and Assembly in Uganda

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INTRODUCTION

Insofar as a great deal of the Law is concerned with access to and the delivery of Justice, it is something of a surprise how much of the Law is in fact devoted to its subversion. Nowhere is the subversion of Justice more apparent than in the use of technicalities by lawyers in order to prevent a matter from being fully heard by the courts of law. The same is true with the Political Question Doctrine (PQD)—a device used by courts to avoid engagement with an issue that might lead to punitive action taken against them by the Executive or the Legislature. Paradoxically, as with the challenge to the Anti-homosexuality Act (AHA) in 2014,[1] recourse to technicalities can provide an avenue for the speedy resolution of an issue in which there is an attempt to remove or suppress the expression of fundamental rights. Context, nuance and strategy become all-important in this regard.

The main goal of this position paper is to make an assessment of the impact of technicalities and the PQD on a range of linked human rights—the freedoms of Expression, Association and Assembly. Enshrined in Article 29 of the 1995 Constitution but enjoying a long history as a central component of the international Human Rights regime, this category of rights lies at the core of the political and civic life of an individual and of society at large. If those rights are ignored, curtailed or simply suppressed it is clear that the political life of the society is affected for the worse. Unsurprisingly, technicalities and the PQD have a long history of being used to stifle these rights.

While the struggle against technicalities and the PQD has been apace, every so often one sees their ugly heads emerge in a decision of a court which sets back the struggle for the realization of human rights by many years. Moreover, a spate of recent legislation, including the Public Order and Management Act (POMA), the Anti-Pornography Act (APA), the Anti-homosexuality Act (AHA), and proposed amendments to the law governing the operation of non-governmental organizations have sought to reinforce state control and restriction over the freedoms of expression, association and assembly.[2] Ultimately, this works to the detriment of civil and political society.

Against the above background, this think-piece offers some reflections of the impact of technicalities and the PQD on the realization and protection of this category of civil and political rights. It begins by reviewing the place of technicalities and the PQD in Ugandan jurisprudence in Part II, before turning to an examination of how the 1995 Constitution attempted to address the issue in Part III. In the sections which follow I specifically focus on how technicalities and the PQD have respectively impacted on the freedoms of Expression (including Media rights and Access to Information), Association and Assembly.

1 See *Prof. J. Oloka-Onyango & 9 Others v. The Attorney General,* Constitutional Petition No. of 2014
2 Amnesty International, *Rule by Law: Discriminatory Legislation and Legitimized Abuses in Uganda,* AFR 59/006/2014.

02

TECHNICALITIES AND THE PQD: THE GOOD, THE BAD AND THE UGLY

Technicalities fall within the broader framework of the procedures used by the courts of law during the process of delivering justice. In a nutshell, they are the procedural mechanisms by which the law is guided in order to arrive at justice. They form part of the procedures which bring order to the business of the courts and weed out matters that are frivolous or a waste of court time. In the words of Tanzanian Chief Justice Mohamed Chande Othman, "Without procedures, chaos would reign and litigation would be endless."[3] At the same time, the learned judge condemned the "tyranny of technicalities," or procedures that are "... cumbersome, excessive, onerous, obstructive and unnecessary."[4] He makes a passionate call for "substantive justice" to reign over "mechanical justice" such that the technical application of the rules of procedure does not eliminate the quest to do what is the correct thing for the parties to the suit.

With respect to human rights matters, the PQD could be described as the "mother" of all technicalities not simply because of the way in which it evades justice, but also through the chilling effect that its application has on the belief that courts of law should be the fountains of justice. The PQD has its roots in the 1803 US Supreme Court decision of *Marbury v. Madison,*[5] but has had a profound effect on Ugandan jurisprudence since soon after independence. The relevant decision in this regard is the case of *Uganda v. The Commissioner of Prisons, ex parte Matovu*.[6] Taken together, the PQD prevents a court of law from determining issues which are regarded to be essentially "political" and thus within the exclusive purview of the executive branch of government and not susceptible to judicial inquiry and review. In the words of Chief Justice John Marshall in Marbury, "... the province of court is, solely, to decide on the rights of individuals not to inquire how the executive or the executive officers perform duties in which they have discretion. Questions, in their nature political or which are by the constitution and laws, submitted to the executive, can never be made in this court."

In *Ex parte Matovu,* Chief Justice Udo Udoma reverted to the same principle in the following words:

> … any decision by the judiciary as to the legality of the government would be far reaching, disastrous and wrong because the question was a political one to be resolved by the executive and the legislature which were accountable to the constitution, but a decision on the validity of the constitution was distinguishable and with the court`s competence.

[3] Mohamed Chande Othman, "Access to Justice and Justice Delivery in Tanzania: Unblocking the Barriers," *Zanzibar Yearbook of Law*, Vol.1 (2013): 3-15, at 12.
[4] *Id.*
[5] 5 U.S 137 (1803).
[6] (1966) EA. 514.

The precedent set by *ex parte Matovu* was to continue to influence cases of a political nature in Uganda for a long time, with an obviously profound impact on human rights. As I have said elsewhere "... the Udoma panel in Matovu's case effectively provided legal cover for what was plainly a *coup d'état*. What followed was the emasculation of judicial power especially when confronted by executive excess."[7]

Matovu's case nevertheless represented the most explicit enunciation of the doctrine. More subtle manifestations of the PQD were present both before and after the decision and in many instances the PQD combined with the instrument of technicalities to displace or deny the protection of fundamental human rights. Thus in the case of *Grace Stuart Ibingira & Others v. Uganda*[8] which concerned the detention of several former Cabinet ministers in the Obote-1 government, the court ignored the many defects in a detention order and in the emergency regulations subsequently passed to validate it because of the fear of the repercussions from the Executive. In *Odongkara & Others v. Kamanda & Another,*[9] the court dismissed the application with costs simply because the notice of motion by which the action was brought did not sufficiently set out the grounds on which it was made. In the 1969 case of *Opoloto v. Attorney General*, the Court upheld the summary dismissal of the applicant as Commander of the Uganda Army on the grounds that the President enjoyed prerogative powers of the dismissal of civil servants and service officers without cause.

In post-Amin Uganda, the PQD was once again tested in the case of *Andrew Lutakoome Kayira & Paulo Ssemogerere v. Edward Rugumayo & Others*,[10] concerning the legality of the removal of Prof. Yusuf K. Lule from the presidency. There, the court upheld the supremacy of the 1967 Constitution and declared that the power to make ministerial appointments vested solely in the President. Consequently, the National Consultative Council had no valid powers to ratify and approve such appointments. Furthermore, the National Consultative Council (NCC) acting in its capacity as the legislature had no powers to remove the President from office. Despite making this bold pronouncement, the court held that even though there were irregularities in the manner in which the removal of Lule was effected, to make a judicial pronouncement to such an effect would have "dire consequences," coupled with the fact that the change in government had been "overtaken by events."

It should not be forgotten that Matovu's case also had a progressive element insofar as the issue of technicalities was concerned. The case opened with several technical objections from the Attorney General, who argued that the documents bringing the petition were defective and it should thus be dismissed. In response, the court agreed that the application was "indeed

[7] (1966) EA. 514.
[8] [1966] EA 306.
[9] [1968] EA 210.
[10] Case No. 1 of 1979 - 10/21/1980

defective" and that the court would have been justified in holding that there was no application properly before it. The court also observed that the title and heading of the application were defective; no respondent had been named against whom the writ was sought; the applicant appeared to be in some doubt as to who was actually detaining him and against whom the writ ought to issue; the affidavits were not accompanied by proper documents, a defect "so fundamental" said the court "as to be almost incurable."[11]

To make matters worse, applicant counsel's affidavit was "bad in law and should have been struck out." Indeed, the court declared that on examining the papers their first reaction was to "...send back the case to the judge with a direction that the matter be struck off as we were of the opinion that there was no application for a writ of habeus corpus properly before him."[12] Instead, the court observed,

> On further reflection, however, bearing in mind the facts that the application as presented was not objected to by counsel who had appeared for the state; and that the liberty of a Citizen of Uganda was involved; and that considerable importance was attached to the questions of law under reference since they involved the interpretation of the Constitution of Uganda; we decided, in the interests of justice, to jettison formalism to the winds and to overlook the several deficiencies in the application, and thereupon proceeded to the determination of the issues referred to us.[13]

The "jettisoning formalism" mantra came to be a crutch on which many subsequent cases involving political matters and human rights and freedoms were to lean, with varying degrees of success. Even where a case was defeated on the merits, Matovu's case provided precedent for the courts to overlook minor technical deficiencies in the pleadings of the aggrieved party.

The first chinks in the PQD armour were inflicted by the late-1980s court decision in the case of *Frederick Edward Ssempebwa v. the Attorney General*.[14] In that case, Justice Arthur Oder held that amendments which were made by the government that were not in accordance with the constitutional order that had been put in place following the NRM/A assumption of power in 1986 were null and void. The judgment in the case confirmed the need for the legislature to work within the bounds of constitutionalism and declared that retrospective legislation violated the principle of legality. In effect, the court adopted a position which departed from *Matovu* in both content and impact, representing a strong affirmation of the independence of the judiciary after many years of malaise and submission to the PQD. However, it was not until the enactment of the 1995 Constitution that the legacy of Matovu and the PQD were to be finally confronted head-on.

[11] *Ex parte Matovu*, at 519 and 520.
[12] *Id.*, at 521.
[13] *Id.*, at 521.
[14] See *E.F. Ssempebwa v. AG*, Constitutional Case No.1 of 1987.

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THE CONSTITUTIONAL FRAMEWORK AND THE MOVEMENT TOWARDS INCLUSION

Unsurprisingly—given its court-led origins—there is no mention of the PQD in the 1995 Constitution. Both a comparative and an historical approach is necessary to appreciate this point more deeply. While Article 1 of the 1967 Constitution proclaimed that it was the "supreme law," the 1995 Constitution went several steps further. A number of provisions in the instrument directly related to the impact of the doctrine—represented by the decision in *Matovu's* case—and more broadly to the negative consequences of judicial cowardice in the face of the extra-constitutional usurpation of power. Hence, the Preamble to the 1995 Constitution recalls our past history characterized by "political and constitutional instability." It recognizes the struggles against the forces of "tyranny, oppression and exploitation," and finally it underscores a commitment to "... building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress."

Moving on to the substantive parts of the instrument, Article 1 places all power in the exercise of sovereignty in the hands of the people. Article 2 of the Constitution not only declares the Constitution to be supreme but also to "... have binding force on all authorities and persons throughout Uganda."[15] The effect of this provision is to tie in all institutions and individuals regardless of position or power, and irrespective of their location within the make-up of the governmental machinery. The binding force of the Constitution has now become a staple element in Ugandan constitutional jurisprudence, and undergirds nearly every judicial pronouncement, even when a court makes a bad decision. Many cases begin with the preamble about the binding character of the Constitution on all persons in Uganda. In this respect, several cases have held that the President too is bound by the instrument, which marks a significant departure from previous law.[16]

However, the most important provision of the law with respect to the PQD is Article 3 which has several different components. Falling under the rubric of "Defence of the Constitution," the Article begins with a bar against the unlawful usurpation of governmental power except in accordance with the Constitution. It then proceeds to declare any attempts to do so as an act of treason. Clause 3 of the Article declares the continued validity of the Constitution even where there has been an illegal action against it. Finally, Clause 4 imposes a duty on all Ugandas to defend the Constitution and to resist any attempts at its overthrow. Taken together, Article 3 repudiates the

[15] Article 2(2).

[16] See for example, the case of *Ssekikubo & 4 Others v. Attorney General & 4 Ors.,* (Constitutional Appeal No.1 of 2015; UGSC 19 (30 October 2015): http://www.ulii.org/ug/judgment/supreme-court/2015/19/.

main elements of the decision in *ex parte Matovu*, namely that a revolution takes place in law where the old constitution is overthrown and replaced by a new one. In post-1995 Uganda this cannot happen, at least not as a matter of legal principle, especially given the interpretative power conferred by Article 137.[17]

Attempts have been made to use Article 3 as a means to address issues aside from the question of the illegal transfer of power. Thus, in the case of *Dr. Rwanyarare James and Anor v. The Attorney General,* the Constitutional Court adopted a narrow reading of the Article when it stated,

> We find that Article 3 very interesting. It was introduced in the Constitution for the first time in the history of this Country. It may have been put there in light of our sad and nasty past experiences of *coup d'états* (sic!) and other forms of illegal seizure of governments by some Ugandans. It is clearly intended to spur Ugandans to resist such illegal seizures of government in future and even empowers them to bring culprits to book as soon as the Constitutional order is re-established. In the instant case, it cannot be contended that the present government seized control of government illegally when actually [it was] elected in the general elections; and so Article 3 was wrongly evoked.[18]

However, the case of *Uganda Association of Women Lawyers & 4 Ors. v. Attorney General,*[19] demonstrated a greater willingness to read Article 3 in a more dynamic manner and thereby invoking the more liberal aspect of *ex parte Matovu*. This concerned the issue of deadlines for the filing of constitutional petitions, with the Attorney General arguing that the petition was time-barred for having been filed outside the period stipulated in the rules. In response to the specific invocation of Article 3 regarding this matter, Justice Twinomujuni stated:

> I am aware that the Attorney General has argued elsewhere that Article 3(4) of the Constitution only applies when the Constitution is threatened or has been violated through physical violence. With respect, I do not see any justification in giving the Article such a narrow interpretation. The people of Uganda have a duty at all times using all means available, peaceful or violent, Constitutional or unconstitutional to resist attempts to unconstitutionally suspend, overthrow, abrogate or amend the Constitution (Id.).

Justice Twinomujuni consequently held that in as far as Rule 4(3) of Legal Notice No. 4 of 1996[20] imposed restrictions on the right to access the Constitutional Court through

[17] See Oloka-Onyango, "Ghosts," *op.cit.* at 34.
[18] Constitutional Petition No. 11 of 1997.
[19] Constitutional Petition No. 2 of 2003.
[20] The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 (Legal Notice No. 4 of 1996).

the imposition of the limitation period which was not provided for in the Constitution, it sought to "vary" or "add" to the Constitution, thereby amending it without doing so through the constitutional provisions of amendment provided by the Constitution. This was against the spirit of the Constitution, inconsistent with Article 3 and therefore null and void.[21]

It is important to underscore the point that unlike with some of the earlier cases in which the Courts showed undue deference to the Executive arm of government and which have since been overruled, such as *Opolot's* case, *ex parte Matovu* remains good law in Uganda.[22] Moreover, the "jettisoning formalism" face of the case continues to be cited with approval in case after case in the various courts in Uganda. Indeed, the more humane face of Matovu has been buttressed by Article 43, which (following many other constitutions around the world) stipulates that any limitation to the enjoyment of rights and freedoms must not go beyond what is "...acceptable and demonstrably justifiable in a free and democratic society." According to Grace Mukubwa, this formulation in the Bill of Rights imposes a duty on the courts to directly engage political questions without excuse, since they must now at least engage in an assessment of the meaning of the words "democratic society."[23] Indeed, nothing could be considered more political than an election. Given that the judiciary is now empowered to question not only parliamentary but even presidential elections demonstrates that there is virtually nothing beyond the purview of judicial scrutiny under the constitutional dispensation introduced in 1995. Of course, this is still a highly contested proposition.[24]

The letter of *ex parte Matovu* may have been overtaken by the provisions of the 1995 Constitution. This point was eloquently stated by Justice Egonda Ntende in the case of *Osotraco v. AG*:

> If the constitutional theory that courts in this country exercise judicial authority on behalf of the (British) Crown and subsequently, the successor to the Crown, whether this was the President or even the state of Uganda held sway in this country, this constitutional theory was shattered by the 1995 Constitution of Uganda that made a fundamental break with the previous constitutions that had existed in this country.[25]

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[21] See also *Fox Odoi and another v. The Attorney General,* Constitutional Petition No. 8 of 2003.

[22] Coel Thomas Kirkby, "Exorcising Matovu's Ghost: Legal Positivism, Pluralism and Ideology in Uganda's Appellate Courts," Unpublished Master of Laws (LL.M) Thesis, McGill University, October 15, 2007.

[23] Grace Patrick Tumwine Mukubwa, "Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa," in J. Oloka-Onyango (ed.), *Constitutionalism in Africa: Creating Opportunities, Facing Challenges,* Fountain Publishers: Kampala, 2001, at 299.

[24] Brian D. Dennison, 'The Political Question Doctrine in Uganda: A Reassessment in the Wake of CEHURD,' accessed at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441873.

[25] High Court Civil Suit 00-CV-CS-1380/86, at 11-12.

Such judicial pronouncements give heart to the struggle against the PQD. However the PQD's spirit (or "ghost") remains resilient, as was apparent in the Constitutional Court decision in *CEHURD and others v. Attorney General*,[26] and in the recent High Court decision not to allow a challenge to the government attempt to "export" several medical personnel to Trinidad & Tobago.[27]

On the issue of technicalities, Article 126(2) represented a sea-change in the approach of Ugandan Constitutional Law to the issue. Referring explicitly to the exercise of judicial power by the courts of law, among the five core principles which are to be applied in the administration of justice, the provision states that, "... substantive justice shall be administered without undue regard to technicalities."[28] Unfortunately, in the early years of the application of the provision following the 1995 Constitution, the courts of law were still reluctant to give full effect to the provision. This resulted in a series of cases which in effect gave more prominence to technicalities than to substantive law.[29] In several instances cases were dismissed on such flimsy grounds as an Advocate's lack of a practicing certificate, unsigned affidavits and missed deadlines.

A turning-point came by with the decision in *Major General David Tinyefuza v. AG*,[30] in which Justice Manyindo addressed the preliminary objections of the Attorney General to the case and stated that it would be "highly improper" to deny the petitioner a hearing on technical or procedural grounds. The judge stated: "I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all."[31] Thus, Tinyefuza was allowed to proceed with his claim that being compelled to remain in the Army by the Act of the President refusing to accept his resignation amounted to forced labour. Later decisions have been much more flexible in dealing with technicalities. Most recently, in the 2016 presidential election petition in *J.P. Amama Mbabazi v. Yoweri K. Museveni & 2 Others*,[32] the Supreme Court referred to Article 126 to allow an amended petition to be filed after the deadline.

[26] Constitutional Petition No. 16 of 2011.
[27] See *The Institute of Public Policy Research (IPPR) (Uganda) v. The Attorney General,* (Miscellaneous Application No.592 of 2014, arising from Miscellaneous Cause No.174 of 2014).
[28] Article 126(2)(e).
[29] For an account of that history see Mohmed Mbabazi, "The Interpretation and Application of Article 126(2)(e) of the 1995 Constitution of Uganda: Desecration or Consecration?" *East African Journal of Peace & Human Rights,* Vol.7, No.1 (2001): 101-135.
[30] The judge stated that the Court should "…readily apply the provision of Article 126(2) (e) of the Constitution in a case like this and administer substantive justice without undue regard to technicalities."
[31] *Id.*, at 12.
[32] Presidential Election Petition No.1 of 2016.

Thus, the position in Uganda today is that insofar as the law is concerned, technicalities will largely not hold up the substantive hearing of a matter unless they are of such a nature as to extend to the root of the matter. That position should be contrasted to the matter in the *Oloka-Onyango* case which turned on the issue of quorum in Parliament, and to many was regarded as a mere "technical issue." The difference is significant. The technicalities referred to in Article 126(2)(e) refer to those which relate to the immediate filing of the case before a court of law. Where a technicality is imposed by the Constitution—as was the case with respect to quorum in Parliament—it is unlikely that the Courts will simply overlook its application. Hence, the *Oloka-Onyango* Court *en banc* declared:

> Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. The Speaker ignored the Law and proceeded with the passing of the Act. We agree with Counsel Opiyo that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of Coram.

The analysis above demonstrates that considerable distance has been travelled in marking a conceptual departure from the early negative impacts of the PQD and technicalities. However, the real taste of the pudding can only be found in the eating: how has this history and experience impacted on the freedoms of expression, association and assembly?

04

FREEDOM OF EXPRESSION, MEDIA RIGHTS AND ACCESS TO INFORMATION (A2I)

Freedom of expression is guaranteed by several international and regional human rights instruments to which Uganda is party. Consequently, these international standards form part of Uganda's legal framework on freedom of expression and the consequent media rights thereunder. Within the domestic legal framework, Article 29(1)(a) provides for every person's right to "freedom of speech and expression which shall include freedom of the press and other media." This provision needs to be read with Article 41(1) which states that every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any person.

The provisions of Article 41 have been furthered elaborated in the Access to Information Act (2005) and the Access to Information Regulations of 2011. Limitations to both freedoms are preserved under Article 43 of the constitution. Other laws affecting the freedom of expression are; the Press and Journalist Act 2005, the Anti-Terrorism Act of 2002, the Penal Code Act, Cap 120, the Public Order Management Act, 2013 (POMA), the Regulation of Interception of Communication Act 2010, the Uganda Communications Act 2013, the Anti-Pornography Act 2014, and the Referendum and Other Provisions Act, 2005 among others. All these laws have provisions with serious implications for the protection of the freedom of expression in the country. A number of them have been challenged in the courts of law with varying degrees of success. To understand how and why this is so, let us begin with an examination of the manner in which the PQD has impacted on freedom of expression and Media rights.

4.1 Expression and Media Rights

Even as *ex parte Matovu* seemed to have cast a long shadow over the realization of this category of human rights, the 1969 case of *Uganda v. Abubaker Kakyama Mayanja & Rajat Neogy,*[33] offered a glimmer of hope. Otherwise known as the "Transition Case," it involved charges of Sedition brought against the two who were respectively author and editor of the-then *Transition* magazine in Kampala for an article which criticized the Obote government over judicial appointments. Decided in a context of growing autocracy and hostility to the Media,[34] Chief Magistrate Mohamed Saied rejected the charges against the two, stating:

[33] See "The Judgment (in the Transition Sedition Trial in Uganda),' Transition No.38 (Jun-Jul, 1971), at 47, accessed at: http://www.jstor.org/stable/2934311?seq=7#page_scan_tab_contents.

[34] For a comprehensive examination of the state of press freedom in early post-independence period, see Bernard Tabaire, "The Press and Political Repression in Uganda: Back to the Future?," Reuters Fellowship Paper, Oxford University (2007), accessed at: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/The%20Press%20and%20Political%20Repression%20in%20Uganda%20-%20Back%20to%20the%20Future.pdf.

> In all conscience and in view of what has already been said about the law of sedition the farthest I can go, putting myself in the position of an ordinary intelligent reader of the magazine, is to say that the accused Mayanja undoubtedly used a very inept expression in advancing what he thought was one of the main reasons for the delay; that this was manifestly ill-advised and certainly intemperate, reckless and defamatory language which he used in emphasizing his point of view, but I can go no further than this. I cannot bring myself to interpret this passage in a strict and narrow sense forgetting about the general tendency and drift of the article as the prosecution would have this court to hold. Any other construction would, in my humble opinion, tend to stifle this freedom of expression and tend to create a servile press which is not contemplated by the exception to section 41.

Despite his fairly low ranking in the judicial hierarchy, the magistrate was not afraid to strongly speak out in protection of a fundamental human right.

The 1970s and 1980s were not very bright days for journalists or for Media freedoms in Uganda.[35] Aside from the almost total disappearance of independent media in the country, journalists in both the print and broadcast spheres of the industry were subjected to the same forms of suppression and violation as the other actors in Uganda political and civil society. Court cases involving journalists and media freedoms were few and far between, having been substituted by violent harassment, disappearance, murder and exile.

The emergence to power of the NRA/M in 1986 changed the situation somewhat as fairly deliberate efforts were made to both protect freedom of expression and to revive media freedoms. Nevertheless, the period was not free of problems.[36] This stemmed from the use of the numerous laws inherited from its predecessors which were not reformed, and the liberal use of the Penal Code to charge journalists with offences such as Sedition and incitement, coupled with threats of de-registration and criminal libel.

A number of cases have been decided on freedom of expression since enactment of the 1995 Constitution. In sum, they reflect a back-and-forth dance with legal technicalities and the influence of the PQD. The first of these was the criminal case of *Uganda v. Haruna Kanaabi*,[37] editor of the *Shariat* newspaper prosecuted for Sedition for referring to Rwanda as Uganda's 40th district. In the view of the court, "The law of sedition and that under S.50(1) of the Penal Code Act epitomizes the restriction imposed by the state

[35] Zie Gariyo, *The Media, Constitutionalism and Democracy in Uganda*, Working Paper No.32, Centre for Basic Research, Kampala: 33-34.
[36] Id., at 35-45.
[37] Criminal Case No.U. 977/95.

on the fundamental rights and freedoms of the individual as recognized internationally, and as clearly set out in Uganda's New Constitution. In the case before this court, we are dealing with a newspaper so what is at stake herein is the freedom of the press."[38]

The court cited Article 29(1) on freedom of the press and the media, and went on to state, "But there are restrictions that are set by the same constitution. Thus under Article 43(1) and (2), in the enjoyment of the rights and freedoms prescribed in that chapter no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest."[39] After citing the provision defining the term "public interest" the court considered the evidence and then sentenced the accused. In her concluding observations, the court then said,

> This court is not a Constitutional Court. It therefore lacks the capacity to interpret the provisions of the Constitution beyond their literal meaning. As such, I am of the view that where a state having regard to its supreme law keeps on its statute books a law that makes it an offence to do a certain act and hence to limit the enjoyment of a specified freedom, this court shall accept that restriction as lawful and shall go ahead to punish any transgression of the same according to the existing law until such a time as the state deems it fit to lift such restrictions after realizing that such restriction violates a certain right.[40]

While the magistrate was acutely aware of the problematic nature of the offence, she was unable to grasp the problem by its neck. Thus, she stated,

> One can also comment that the law of sedition as it stands does not augur well with the provisions of the Constitution but since what is demonstrably justifiable in a free and democratic society has not yet been established in Uganda, court takes the existence of the Constitution and an individual's right to freely express himself as a point in mitigation.[41]

In a *per curiam* statement, the Magistrate ended her judgment with the following observation: "There is need for matters like this one to be referred to a Constitutional Court to determine what is demonstrably justifiable in a free and democratic society and put Uganda in line with the position in other jurisdictions." Although she expressed doubts about the constitutionality of the law on Sedition, she refused to make a reference of the case for interpretation and instead convicted the Accused of the offence. Quite clearly, her failure to refer the case to the Constitutional Court reflected the over-riding influence of the PQD.

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

Although the case was appealed, the judge in the High Court merely observed that the magistrate should have referred the issue to the Constitutional Court.[42] While expressing some criticism of the lower court's handling of the matter, then-Justice Edmund Lugayizi found no problem in upholding the conviction, stating,

> It is apparent that by their character and timing, the contents of the publication by the appellant that alleged that Rwanda was the 40th District of Uganda and that the President had visited it at that material time for votes, that the contents were seditious. The people of Uganda were being told that their money was being squandered on Rwandans who were also likely to participate in the impending elections in Uganda.[43]

Ekirikubinza makes several critiques of both judgments, lamenting the missed early opportunity for the development of progressive jurisprudence in the aftermath of enactment of a new constitution in the area of human rights and democratic freedoms.[44]

The same reluctant approach of the Bench continued in the Constitutional Court in the 1997 case of *Uganda Journalists Safety Committee and 2 Others v. Attorney General.*[45] The petition challenged several provisions of the Press and Journalists Statute of 1995. In a classic display of the influence of the PQD and technicalities, the Court refused to allow the petition proceed to a substantive hearing, citing defective affidavits and the failure to follow a number of rules of procedure as sufficient grounds for dismissal: "We think that the principle stated by the Supreme Court in that case *(Kasirye Byaruhanga)* that Rules of Procedure must be adhered to equally apply to Constitutional cases. Therefore the Rules contained in Legal Notice No.4 of 1996 had to be complied with."[46] The Court also distinguished *ex parte Matovu* because, the irregularities overlooked in that case "... did not include proceeding under the wrong provisions of the law."[47]

Some light began to shine through as journalists began to continuously challenge the adverse provisions of the law which affected freedom of expression and the right to information. Thus, in *Charles Onyango Obbo & Anor v. Attorney General*,[48] Justice Solome Bbosa declared that a bail of UGX.2,000,000/= imposed on two journalists charged with the offence of publishing false news was excessive.

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[42] *Haruna Kanabi v. Uganda*, Criminal Appeal No.72 of 1995; High Court of Uganda at Kampala on November 13, 1996)
[43] Judgment of Justice Edmund S. Lugayizi in *Haruna Kanabi Id.*
[44] See LillianTibatemwa-Ekirikubinza, "The Judiciary and Enforcement of Human Rights: Between Judicial Activism and Judicial Restraint," *East African Journal of Peace & Human Rights*, Vol.8, No.2, (2002): 145-173, at 147-150
[45] Constitutional Petition No.7 of 1997; accessed at: http://www.ulii.org/node/15772.
[46] *Id.*
[47] *Id.*
[48] High Court of Uganda at Kampala; (S.B Bossa J.H.C), December 22, 1997 Criminal Miscellaneous Application No.145/97.

A major advance in the recognition of rights of free expression came with the decision of the Constitutional Court in *Tinyefuza*'s case (op.cit.). Referring to the testimony General Tinyefuza gave before the Parliamentary Committee, Justice Egonda Ntende stated,

> The Parliamentary Committee was engaged in an inquiry into the causes of the war in the north and possible solutions. This was a matter of substantial public interest and importance. It needed the assistance of all actors in this tragic situation. Assistance by the Petitioner, n the form of his testimony to the Committee was an exercise of the fundamental freedom of expression including the freedom to impart ideas. These may have been viewed as balanced or imbalanced criticism. Nevertheless … the exercise of this freedom of expression should not be attended by the subsequent penal sanctions based on the ideas so imparted. To do so would run counter to the establishment of a just, free and democratic society.[49]

By underscoring the undesirability of recourse to penal sanctions for the expression of political ideas, *Tinyefuza*'s case marked the first tentative steps to removing the protection of human freedoms from the backlash of the PQD.

The case of *Andrew Mujuni Mwenda & East African Media Institute v. The Attorney General*[50] added more fuel to the stoked fires of free expression. Following remarks made on radio about public holidays announced to mourn the late South Sudanese president John Garang, Mwenda was charged with Sedition. The petitioners challenged both the offences of Sedition and that of Sectarianism in the Penal Code. While finding that the charge of Sedition offended the provisions of the 1995 Constitution on freedom of expression, the Constitutional Court held that,

> … the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right under Article 29(I)(a)…. It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one's right of expression of thought. Our people express their thoughts differently depending on the environment of their birth, upbringing and education. While a child brought up in an elite and God fearing society may know how to address an elder or leader politely, his counterpart brought up in a slum environment may make annoying and impolite comments, honestly believing that, that is how to express him/herself. All these different categories of people in our society enjoy equal rights under the Constitution and the law. And they have equal political power of one vote each…. We find that, the way the impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1)(a).[51]

[49] Judgment of Justice F.M.S. Egonda-Ntende in *Major General David Tinyefuza v. Attorney General* (Constitutional Petition No.1 of 1996), at 23.
[50] Consolidated Constitutional Petitions Nos.12 of 2005 and 3 of 2006.
[51] *Id.*, at 23-24.

The case marked only a partial victory since the court refused to find that the offence of Sectarianism—an offence that is both nebulous and vague—similarly offended the Constitution.[52] Nevertheless, it was a robust, vigourous defence of the right to free expression and a movement away from the colonial privileging of governmental authority.

The most important decision on freedom of expression since the enactment of the 1995 Constitution is that of *Charles Onyango Obbo and Andrew Mujuni Mwenda v. The Attorney General*,[53] in which the Supreme Court struck down the offence of publishing false news contrary to section 50 of the Penal Code. Justice Mulenga pointed out that such a charge was not only inconsistent with the freedom of expression of the press, but it did not meet the requirements of a law seeking to limit or restrict human rights in terms of Article 43(2) of the Constitution.

A final note on the issue of free expression needs to be made concerning the decision of the Supreme Court in the case of *Brigadier Henry Tumukunde v. The Attorney General*, which involved the forced resignation of the petitioner as a UPDF Member of Parliament. Although the issue in contention was the circumstances in which an MP could resign, the case was linked to the issue of free expression and the PQD because it concerned utterances made by the MP concerning the President which led the Army Council (chaired by the President) to compel him to resign. Although the Constitutional Court initially dismissed the petition, when the matter went up to the Supreme Court on appeal, the learned judges were very clear on how such a forced resignation impacted on an MP's freedom of expression. According to Justice Kanyeihamba,

> A Member of Parliament, the supreme legislative organ of the land should never have to resign under the threat or directive of anyone but only in accordance with the provisions of the country's Constitution and laws made by Parliament and do so voluntarily. I see the letter as constituting a soldier's obedience to superior orders under protest. It is a desperate appeal to the Speaker of Parliament who is the guardian and protector of members' rights, immunities and privileges which are clearly defined and enshrined in the Constitution of Uganda, its laws and in the Parliamentary Rules, Conventions and Practices.[54]

Despite all these progressive decisions, the Executive arm of government has acted with impunity when it comes to interactions with the media houses and others regarded to have crossed the line. During the 2006 elections, both the *Daily Monitor* newspaper and KFM radio were stopped from publishing the results as they came in.

[52] *Id.*, at 24.
[53] Constitutional Appeal No. 2 of 2002.
[54] *Id.*, judgment of Kanyeihamba, J., at 11.

The encroachment on the freedom of expression has extended to social media. Several social media platforms were blocked by the UCC during the 2016 elections.[55] While courts of law have in some instances been petitioned over such unilateral state action, usually they are reluctant to intervene or take such an inordinate length of time to address the issue that what was an emergency is simply overtaken by the passable of time.

4.2 Access to Information

A key element in the right to free expression is the right of access to information. The first major case in this regard was that of *Major General David Tinyefuza Munungu v. Attorney General*.[56] Here, the Supreme Court held that Section 121 of the Evidence Act which rendered unpublished official records relating to affairs of state inadmissible in court except with the permission of the head of the department offended Article 41 of the 1995 Constitution. In *Paul Ssemogerere and Zachary Olum v. Attorney General,* the Supreme Court declared Section 15 of the National Assembly (Powers & Privileges) Act which was formulated in similar terms as section 121 as unconstitutional. In the words of Justice Kanyeihamba,

> … since under Article 41(1), information in possession of the state is freely available to a citizen except where its release would be "prejudicial to the security or sovereignty of the state or interference with the right of privacy of any person" I can find no constitutional or legal grounds to prevent the release and use of Hansard or stop members of parliament from giving evidence in courts of law....

Following the enactment of the A2I Act of 2005, two cases have invoked the provisions of the law in order to secure increased access to documentation in the hands of State officials.[57] In *Charles Mwanguhya Mpagi & Angelo Izama v. The Attorney General*,[58] the two journalists sought copies of agreements made between the government of Uganda and various companies involved in the prospecting and exploitation of oil in the country.[59] Although the Permanent Secretary of the Ministry of Energy did not directly reject the request, he responded by stating that more time was needed to consult other

[55] Derrick Kiyonga & Siraje Lubwama, 'Kayihura ordered social media shutdown,' The Observer, March 16, 2016, at: http://www.observer.ug/news-headlines/43165-kayihura-ordered-social-media-shutdown-ucc.

[56] Constitutional Appeal No. 1/1996.

[57] For a more extensive discussion of A2I see J. Oloka-Onyango, "Free At Last? Assessing the Impact of the High Court Decision in the Case of Sulaiman Kakaire & Another v. The Parliamentary Commission," *Makerere Law Journal* (2015): 22-37.

[58] Miscellaneous Case No. 751 of 2009.

[59] The analysis in the following paragraphs is taken from Africa Freedom of Information Centre, *Analysis of the Court Ruling in Charles Mwanguhya Mpagi and Angelo Izama vs. Attorney General (Miscellaneous Cause No. 751 of 2009) against the Framework of the Uganda Access to Information Act, 2005 and International Access to Information Standards*, accessed at: http://www.right2info.org/cases/r2i-charles-mwanguhya-mpagi-and-izama-angelo-v.-attorney-general.

government bodies before he could properly respond. The Solicitor General stepped in to argue that the agreements could not be accessed due to a confidentiality clause prohibiting their disclosure.

Using section 18 of the A2I Act, the petitioners took the PS's non committal response and the SG's opinion as a refusal, and filed a complaint in the Chief Magistrates Court at Nakawa under section 37 of the Act.[60] The court dismissed the government's argument that the information could not be released for fear of breaching a confidentiality clause contained in the agreements because to do so would mean that the State would be able to restrict all information arising out of agreements by simply inserting language which covers this angle.

The court assessed both the public interest and the harm contemplated and it was not satisfied that the public interest in the disclosure was greater than the harm contemplated, and held that the two journalists did not show how they would use the information for the benefit of the public. According to the Court, "Government business is not in its entirety, supposed to be in the public domain." The court determined that demonstrating such a benefit was necessary to prove a public interest in disclosure.[61]

The *Mwanguhya & Izama* case can be critiqued for two main reasons. First of all, it is the public authority to prove that any disclosure of the information in its possession would be more harmful to the public interest than its disclosure. It is not for the persons requesting that information to do so. Secondly, there is no provision in the law which requires that the person requesting the information justifies how they are going to use it.[62]

In *Re: The Access to Information Act 2005, Edward Ronald Sekyewa v. National Forestry Authority*,[63] concerned an attempt to secure documents relating to the management of forests in Uganda. The NFA argued that the reason and purpose for which the information was required should have been disclosed since there was a possibility of jeopardizing public interest in case the information was misused. In response, Chief Magistrate Boniface Wamala stated,

> The above provision is quite clear and unequivocal. The reason for which the information is required and the belief of the officer supposed to provide the information as to purpose for which the information is required are irrelevant considerations. This therefore means that whether the Applicant has given any specific reasons or not, the application has to be considered on its merit. This, in my view, is the reason the "Request Form" under Schedule 2 of the Act does not

[60] *Id.*, at 3.
[61] *Id.*, at 6.
[62] *Id.*, at 6.
[63] Misc. Cause No.73 of 2014.

> require a statement of such reasons. It was clearly the purpose of the legal drafters of the Act that such is not a relevant requirement.[64]

Dismissing the second objection raised by Respondent's counsel, the court ordered that the Applicant be given access "... to any and all records or information that the Applicant requested for in accordance with the Act," and furthermore, that "...the Executive Director of the Respondent be prevented from concealing information pertaining to the subject matter of the Applicant's request."[65] Although the *Sekyewa* case was a much more solid decision than *Mwanguhya & Izama* perhaps the distinction in outcomes lay in the different kinds (and the sensitivity) of information being sought. Indeed, by privileging governmental authority over public interest the reasoning in *Mwanguhya* reflected a clear influence of the PQD.

Finally on the issue of A2I, the case of *Sulaiman Kakaire & David T. Lumu v. Parliamentary Commission & Clerk to Parliament*,[66] primarily dealt with the right to a fair hearing within the context of the powers of Parliament, but more importantly with respect to the right to information insofar as it concerned the access of journalists to a major institution of Government. The case ended up in court because of two stories authored by Kakaire and Lumu, both of whom belonged to the Uganda Parliamentary Press Association (UPPA), an umbrella association for journalists covering parliament and working for the local bi-weekly newspaper *The Observer*.[67]

The stories in question related to the circumstances surrounding the death of Butaleja Woman Member of Parliament Cerinah Nebanda.[68] In the opinion of the reporters, the manner in which the Speaker conducted business in that regard amounted to an attack on the independence of Parliament.[69] In response, the Speaker claimed that the stories were false and damaging to the offices and persons of the Speaker and Deputy Speaker of Parliament.[70] She advised that the journalists retract their stories and make an apology or face suspension from future proceedings of Parliament and a ban from its premises.

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[64] *Id.*, at 4.
[65] *Id.*, at 7.
[66] High Court of Uganda at Kampala, Misc Cause No. 232 of 2013 before Justice Yasin Nyanzi, July 3, 2015.
[67] See, 'How Kadaga, Oulanyah fought over petition,' *The Observer*, January 21, 2103, at: http://www.observer.ug/index.php?option=com_content&view=article&id=23261&catid=78&Itemid=116, and Sulaiman Kakaire, *'House recall petitioners strike deal with Kadaga,' The Observer,* http://www.observer.ug/news/headlines/23307-house-recall-petitioners-strike-deal-with-kadaga, January 23, 2013.
[68] HRNJ Uganda, 'Court nullifies speaker's dismissal of journalists,' July 4, 2015. Available at: https://hrnjuganda.wordpress.com/2015/07/04/hrnj-uganda-alert-court-nullifies-speakers-dismissal-of-journalists-from-parliament/. (Accessed September 21, 2015)
[69] *Id.*
[70] See Article 19, *Freedom of Expression in East Africa: Parliament bans Journalists over stories about the Speaker*, February 13, 2015. Available at: https://www.article19.org/resources.php/resource/3608/en/newsletter:-freedom-of-expression-in-eastern-africa.

Convinced that they had no case to answer the duo refused to retract the stories and/or apologize. Hence, in a letter signed by the Public Relations Officer of Parliament on January 28, 2015, their accreditation was suspended. The two applied for judicial review, challenging the Speaker's decision on the following grounds: (i) they were not heard; (ii) they were charged with a non-existing offence, and (iii) the action was marred by procedural impropriety and irrationality.

The judge found in favour of the journalists, holding that they had been wrongly barred from Parliament, the PRO was not vested with the authority to make the decision to bar them and that the Applicants had not been accorded a fair hearing.[71] According to the judge, "... in order for the right to be heard to be fulfilled as per the provisions of the Constitution, the applicants ought to have been called before an independent body and informed of the allegations against them, [and] given an opportunity to respond to the said allegations and a decision thereof made."[72]

Although warmly welcomed by the Press and clearly marking distance from the PQD, the *Kakaire* case essentially laid down the clear extent of the powers of the Speaker of Parliament vis á vis the position of journalists in the House. In other words, the case was mainly about the Right to a Fair Hearing (Article 28), which could be regarded as a due process right rather than as a substantive one such as the right to free expression. The right to a fair hearing is a constitutional guarantee that is central to the enforcement of individual rights and freedoms. Any action that results in the abuse of the right needs to be challenged in the bid to strengthen the overall protection of democratic freedoms of all categories.

Despite the limitation of the case to the right to a fair hearing, the position of the court nevertheless needs to be applauded because not all judges have adopted such an assertive position when confronted by the excessive use of executive or administrative power. For example, in the case of *Jacqueline Kasha Nabagesera & 3 Ors. v. Attorney General & Anor ('Kasha-2')*,[73] a court found nothing wrong with the high-handed action of the Minister of Ethics and Integrity in arbitrarily closing down a meeting of LGBTI activists. In other words, Justice Nyanzi could have taken the easy way out of the matter by finding that the Speaker or her designated representative had the power to arbitrarily decide who should be allowed to report on parliamentary proceedings and who should be prevented from doing so.

[71] *Id.*, Para 23.
[72] *Id.*, Para 27.
[73] Judgment of Justice Stephen Musota in *Jacqueline Kasha Nabagesera & 3 Ors. v. Attorney General & Anor*, Misc. Cause No. 33 of 2012, [2014] UGHC 49, accessed on September 2, 2014 at: http://www.ulii.org/ug/judgment/high-court/2014/85.

The *Kakaire* decision is important for several other reasons. Although the judge does not mention this, the ruling underscored the point that the Constitution is supreme (Article 2) and binds all authorities and persons throughout Uganda—including State agencies such as Parliament. That emphasis is important and cannot be over-stated. Once the courts become acclimatized to the idea that everybody is bound by the Constitution, it is a major step to addressing the problems of excessive power which the PQD let loose. Secondly, the case also underlined the stipulation in Article 20 of the 1995 Constitution which obliges all organs and agencies of Government to respect the rights enshrined in the Bill of Rights. In other words, not all acts done by officials at whatever level are legitimate especially those that impinge on freedoms and liberties. *Kakaire's* case demonstrates that Government officials endowed with political and other powers cannot simply be allowed to engage in arbitrary acts without due regard to the law and get away with it, which is another challenge to the PQD.

Interestingly, despite its implications for press and media freedoms *Kakaire's* case only obliquely touched on articles 29 (freedom of expression) and 41 (the right of access to information). Indeed, the petitioners and the judge made no reference to Article 41.[74] Nevertheless Article 41 was implicated in the case via the right to access angle. That article is crucial in the struggle for enhanced governmental openness and increased accountability. If a journalist is denied access to the premises of a State agency or organ from which they derive their information, in effect they have been denied the right of access to information. It means the only way they can access such information is through second-hand sources, the reliability of which is often suspect. Furthermore, the lack of accreditation from Parliament may throw suspicion on the veracity of the information which they publish.

The *Kakaire* case raised one final issue, viz., the question of impunity on the part of State officials, including the Speaker and the Clerk to Parliament. The PQD directly encouraged impunity by in effect stipulation that certain actions by the executive and legislative arms of the State are beyond question. Following the *Kakaire* case, Parliament went on to ban an additional 50 journalists; filed a notice of appeal against the decision of the High Court, and still refused to issue the two journalists with a press card. More recently, the 10th Parliament has engaged in a running battle with the Press over coverage variety of issues. While such clashes are not new, the trajectory they have taken is quite disturbing, epitomized by the summons issued by the Committee on Rules and Privileges to Media houses to seek "clarification" on their reportage.[75] Such action harks back to the days when state institutions such as the Executive and the Legislature believed they were beyond reproach. In other words it marks a return to the atmosphere which produced the PQD.[76]

[74] Aside from Article 28, the case also relied on Article 40(2) on the right of every person to practise his or her profession.
[75] Solomon Arinaitwe, 'Parliament, Media Row Deepens,' Daily Monitor, October 6, 2016 at 5.
[76] J. Oloka-Onyango, 'Parliament Reviving Sedition Law,' New Vision, October 4, 2016 at 12.

05

ASSOCIATION, ITS PROTECTION AND VIOLATION

Together with the two previous rights reviewed, the right to freedom of association is guaranteed under Article 29(1)(e) of the 1995 Constitution which provides that: "Every person shall have the right to freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organizations." It is important to note the dual nature of the right to "assembly" and "association" which are normally used interchangeably. When reference is being made to congregations, demonstrations, or gatherings for legal purposes, then "assembly" is the most appropriate feature of the right. Where reference is being made to the act of formation of groups and organizations, "association" is the more relevant component of the right.[77] Freedom of association applies to any group of individuals or legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interest. This right covers civil society organizations as well as trade unions, political parties, foundations, professional associations, religious associations, cooperatives and any other forms of group-not-for-profit activity.[78]

Despite its crucial relevance to the political life of the country, realization of the right of association in Uganda has confronted several obstacles dating back to the colonial era.[79] Indeed, the problematic approach of the colonial regime to the right of association produced a political pluralism on the eve of independence that was unsustainable, leading first of all to the single party state of the 1960s and culminating in military dictatorship in the 1980s. Alongside the attack on political rights, organizations and activities, civic associations were either nationalized (such as the worker's unions) or simply banned, as happened to many of the professional bodies and religious groupings that were regarded as a challenge to the regimes in power.

Against this backdrop, the emergence of the NRA/M appeared to represent a new dawn for associational rights in Uganda. First, through the introduction of resistance councils and committees (RCs), the new regime brought the practice of politics much closer to the people. This "Movement" system of governance—in place from 1986 to 2005—was premised on the argument that political parties were divisive and unsuitable for developing countries like Uganda.[80] However, underpinning this argument was a

[77] Chapter Four, *A Simplified Guide to Freedom of Expression and Assembly in Uganda:What you need to know about your expression and assembly freedoms*, at 12.

[78] African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association and Assembly in Africa: "Freedom of association, as pertaining to civil society, and freedom of Assembly in Africa: A consideration of Selected Cases and Recommendations," (2014) at 23, accessed at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf.

[79] See Mahmood Mamdani, 'Pluralism and the Right of Association,' in Mahmood Mamdani & Joe Oloka-Onyango (eds.), *Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism,* JEP & Centre for Basic Research, Vienna/ Kampala, 1994, at 522-543.

[80] Ben Kiromba Twinomugisha, "The Role of the Judiciary in the Promotion of Democracy in Uganda," African Human Rights Law Journal, Vol.9 No.1 (2009) accessed at: www.ahrlj.up.ac.za/twinomugisha-bk.

much more sinister intent: the ban imposed on the full operation of political parties effectively sought to eliminate the right of political organization, an essential element in the right of association. Since that time, the struggle over associational rights in Uganda has been a struggle over the right to legitimate opposition. That struggle continues upto the present time even with the restoration of a multi-party system of government. In sum, the ghost of *ex parte Matovu* has hovered over the realization of the right to freedom of association, particularly insofar as the courts are concerned.

First attempts to challenge the NRM model of political organization date back to the debate over the draft constitution in 1993. While from 1986 political parties had been prevented from operation without the mechanism of a legal instrument to impose the sanction, as elections for the Constituent Assembly approached, there was a need to translate what had been an informal arrangement into the black-letter of the law.[81] The result was a law which for the first time stipulated that during campaigns for the CA nobody would be allowed to solicit for votes using party slogans, colours or symbols. This led to the case of *Rwanyarare v. AG* which was a constitutional challenge brought by the chairperson of the Uganda Peoples' Congress (UPC) who alleged that the rights of members of his party had been infringed by the proscription in the law. The court responded by arguing that the arrangement for the CA election was temporary and would be fully addressed during the course of debate over the draft constitution.

Several other court cases brought by the UPC and other parties attempted to challenge the movement system of government once enshrined in the 1995 Constitution. *Dr. James Rwanyarare & another v. AG*,[82] attacked the referendum on political systems. *Ssemogerere & Others v. AG*,[83] and *Dr. James Rwanyarare & others v. AG*,[84] challenged the Political Parties and Organizations Act, while the nebulous Movement system of government was scrutinized in the case of *Dr. James Rwanyarare & others v. AG*.[85] There was also an attempt to argue that the Movement system of government violated the freedoms of assembly at the Uganda Human Rights Commission, a petition which was ruled to have been filed in the wrong forum.[86]

[81] See James Katorobo, 'Electoral Choices in the Constituent Assembly Elections of March 1994,' in Holger Bernt Hansen and Michael Twaddle (eds.), *From Chaos to Order: The Politics of Constitution Making in Uganda*, James Currey, London, 1995.
[82] Constitutional Petition No.5 of 1999; [2000] UGCC 2.
[83] Constitutional Appeal No.4 of 2002.
[84] Constitutional Petition No.7 of 2002; [2004] UGCC 5.
[85] Constitutional Petition No. 11 of 1997.
[86] *In the Matter of The Free Movement and the State,* Uganda Human Rights Commission (Legal & Complaints Department) Complaint UHRC No.671/98. Obviously, the PQD extended beyond the courts. According to the Tribunal: "It can be discerned from the foregoing that the Commission as a Tribunal cannot in any way be described as a Court of Judicature. This then means that the Commission cannot refer any matter to the Constitutional Court nor can it exercise any original jurisdiction in interpreting the Constitution. The Commission has powers of a court for purposes of what is contained in Article 53 of the Constitution only." *Id.*, at 8.

Most of the cases were unsuccessful, both because the spirit of the 1995 Constitution opening access to the courts had not been fully internalized by the Judiciary, but also because the courts were clearly operating under the influence of the PQD.[87] Thus, in the case of *Rwanyarare v. Attorney General*,[88] the court refused to allow the petitioner's challenge to the Movement Act ostensibly because he lacked the representative capacity to do so, holding that,

> We cannot accept the argument of Mr. Walubiri that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences. For example, how would the Respondent recover costs from the unknown group called Uganda Peoples' Congress? What if other members of Uganda Peoples' Congress chose to bring a similar petition against the Respondent, would the matter have been foreclosed against them on the grounds of res judicata.

The PQD was in bold display in the case of *Paul K. Ssemwogerere and Zachary Olum v. Attorney General*,[89] in which the petitioners alleged that the Referendum and other Provisions Act of 1999 was not validly passed by Parliament as both the House and the Committee lacked the quorum required by the Constitution. The petitioners sought declarations that the conduct of the Speaker during the process of enacting the said Act contravened Parliament's own Rules of Procedure and resulted in contravention of articles 79, 88 and 89 of the Constitution. It was contended that the Act should be declared void because it was enacted in contravention of Article 271(2) and did not obtain the constitutional majority at the stages of its passing and should be struck down as void for contravening Articles 79, 88 and 89. The Constitutional Court held, inter alia, that the petition was not properly before court since it did not require interpretation as to the meaning of the articles allegedly contravened:

> Therefore, since ground 1(a) does not require this court to determine the meaning of Article 88 of the constitution, the petition is not properly before this court. Again since ground (b) merely seeks to challenge the procedure adopted by the speaker in determining whether there was quorum in the House or not, this court is not the proper forum. The remedy lies with Parliament itself and nowhere else. We do not agree with the submission by Mr. Lule that this court has concurrent jurisdiction with parliament in the matter. With regard to paragraph 1(c), we think that the issue as to whether the Act was passed after the expiry of time stipulated in the constitution for its enactment requires no interpretation of Article 271(2) of the constitution. The issue is one of enforcement of the constitution and not interpretation.

[87] J. Oloka-Onyango, 'New Wine or New Bottles? Movement Politics and One-Partyism in Uganda,' in J. MUGAJU & J. Oloka-Onyango (eds.), NO-PARTY DEMOCRACY IN UGANDA: MYTHS AND REALITIES, 2000, Kampala, Fountain.
[88] Constitutional Petition No. 11 of 1997.
[89] Constitutional Petition No.3 of 1999.

In what amounted to a massive abdication of its constitutional duty, the court concluded that it had no jurisdiction over the matter. Although it did not feature in the judgment, it is quite clear that the majority of members on the Bench were operating under the influence of the PQD. However, the case was appealed to the Supreme Court, the decision reversed and the matter remitted to the Constitutional Court for hearing, the result being that the declarations sought were granted and the Act struck down for being null and void.[90]

The appeal to the Supreme Court was also important because it produced a scathing indictment of the Constitutional Court's failure to live up to the mandate it had been given by the 1995 Constitution. According to Justice Kanyeihamba what the lower court had done amounted to a serious abdication of duty, and "...almost tantamount to taking a maiden voyage into the mystery of interpretation."[91] The judge went on to state,

> In my view, an Act of Parliament which is challenged under Article 137(3) remains uncertain until the appropriate court has pronounced itself upon it. The Constitutional Court is under a duty to make a declaration, one way or the other. In denying that they had jurisdiction to make a declaration on this petition, the learned majority Justices of the Constitutional Court abdicated the function of that court.[92]

Having been chastised by the superior bench, subsequent decisions of the Constitutional Court were much less obvious in terms of evading responsibility, while many of them were quite bold in addressing abuse of power and political excess.[93] Several of the decisions related to freedom of association. Thus, the case of *Paul K. Ssemwogerere and 5 others v. AG*,[94] challenged the constitutionality of sections 18 and 19 of the Political Parties and Organisations Act. The issues were; whether or not sections 18 and 19 imposed unjustifiable restrictions or limitations on the activities of political parties and organizations; whether or not the sections rendered political parties and organizations non-functional and inoperative; whether the sections were inconsistent with Article 75 of the Constitution which prohibits the establishment of a one party state and whether the sections were inconsistent with Articles 2, 20, 29, 43, 71 and 73(2) of the constitution. The court unanimously declared that the sections were unconstitutional and thus null and void as they imposed unjustifiable restrictions on activities of political parties:

[90] See *Paul K. Ssemogerere, Zachary Olum & Juliet Rainer Kafire v. AG,* Constitutional Appeal No.1 of 2002.
[91] *Id.*, judgment of Justice Kanyeihamba at 12.
[92] *Id.*, at 13.
[93] See *Paul K. Ssemogerere, Zachary Olum & Juliet Rainer Kafire v. AG,* Constitutional Appeal No.1 of 2002.
[94] Constitutional Petition No.5 of 2002.

> The freedoms to assemble and associate in as far as this petition is concerned do not only concern the right to form a political party but also guarantee the right of such a party once formed to carry on its political activities freely. Such an association is a highly effective means of communication. It stimulates public discussion and debate of the issues concerning the country, often offering constructive criticism of government programmes and alternative views. The right to freedom of association lies at the very foundation of a democratic society and is one of the basic or core conditions for its progress and development.

The court thus emerged as a feasible arena for the political opposition to challenge unconstitutional measures taken by the ruling regime to restrain their activities in the arena of the rights of free association.[95] In this particular instance, the court correctly demonstrated the inherent power of the judiciary in checking the actions of the Legislature and the Executive.

Before it was repealed, the Anti-Homosexuality Act, 2014 constituted a clear violation of a host of rights, including that to freedom of association, especially by imposing criminal sanctions on persons found to be involved in the "act of homosexuality," those who aided the act as well as those who promoted it. In this respect, the AHA posed a serious risk to non-governmental organisations (NGOs) were involved in fighting for the rights of this minority group.

Challenged in the case of *Prof. J. Oloka-Onyango and 9 others v. AG*,[96] for not being passed in accordance with the law since there was no quorum in Parliament at the time the bill was put to vote, Court held that; the act of the parliament in enacting the Anti Homosexuality Act without quorum was inconsistent with and in contravention of Articles 2(1) and (2) and 88 of the Constitution and Rule 23 of the Parliamentary Rules of Procedure and thus null and void, and; that the act of the speaker of not entertaining the objection that there was no quorum was an illegality which tainted the process and rendered it a nullity. Although decided on what many viewed as technicalities, the case quite clearly marked a very important act on the part of the court in terms of the safeguard of human rights.

The same cannot be said of the case of *Jacqueline Kasha Nabagesera & 3 Ors. v. Attorney General & Anor ('Kasha-2')*,[97] which demonstrated that the PQD can find manifestation even in situations where the facts appear obvious. In *Kasha-2*, Minister of Ethics and

[95] Twinomugisha, *op.cit*

[96] Constitutional Petition No. 8 of 2014.

[97] Judgment of Justice Stephen Musota in *Jacqueline Kasha Nabagesera & 3 Ors. v Attorney General & Anor*, Misc. Cause No. 33 of 2012, [2014] UGHC 49, accessed on September 2, 2014 at: http://www.ulii.org/ug/judgment/high-court/2014/49.

Integrity, the Hon. Simon Lokodo broke up a seminar organized by the group Sexual Minorities—Uganda (SMUG) in Entebbe. The applicants were the organizers of the meeting and sued the Attorney General (in his official capacity) and minister Lokodo in his personal capacity for violations, among others, of the freedoms of assembly and association. In responding to the claim, the judge concluded that the minister was indeed justified in forcibly closing down the workshop. Turning the reading of the notion of 'public interest' on its head, the court stated,

> My reading of the above provisions—i.e. Article 43 of the Constitution defining the term 'public interest'—persuades me that it recognizes that the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable, (and) acceptable in a free democratic society. Whereas the applicants were exercising their rights of expression, assembly, etc., in so doing, they were promoting prohibited acts (homosexuality) which amounted to action prejudicial to public interest. Promotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions.[98]

It is quite clear from the judgment that the court was reading much more into a case that was essentially concerned with freedom of expression and assembly and the arbitrary exercise of state power by an errant government official. Indeed, the judgment in this case was all about homosexuality, moreover approached with a thinly-disguised homophobia, a fact evident from the following passage taken from the judgment:

> In my ruling I have endeavored to come to conclusions that while the applicants enjoyed the rights they cited, they had an obligation to exercise them in accordance *with the law.* I have also concluded that in exercising their rights they participated in promoting homosexual practices *which are offences against morality.* This perpetuation of illegality *was unlawful and prejudicial to public interest. The limitation on the applicants' rights was thus effected in the public interest specifically to protect moral values.* The limitation fitted well within the scope of valid restrictions under Article 43 of the Constitution. Since the applicants did not on a balance of probabilities prove any unlawful infringement of their rights, they are not entitled to any compensation. *They cannot benefit from an illegality.*[99]

In broad terms, the *Kasha-2* case represented a serious setback from the string of cases—such as *Victor Juliet Mukasa and Yvonne Oyo v. Uganda,*[100] and *Kasha Jacqueline, David Kato Kisuule & Onziema Patience v. Rolling Stone Ltd. & Giles Muhame* ('Kasha-1'),[101]

[98] *Id.*
[99] *Id.*
[100] Miscellaneous Cause No. 24/06, High Court of Uganda at Kampala, Civil Division, 22 November 2008; (2008) AHRLR 248.
[101] Miscellaneous Cause No.163 of 2010, unreported, available at: http://iglhrc.org/sites/default/files/2010%20Kasha%20Jacqueline%20v%20Rolling%20Stone.pdf.

—which witnessed consecutive successes for sexual minorities in Uganda in terms of their broad protection under the law. While studiously avoiding making the connection to sexual orientation or questions of identity, the courts in the earlier cases of *Mukasa* and *Kasha-1* were able to protect the rights of LGBTI individuals by simply treating them like other human beings.

But *Kasha-2* had implications beyond the LGBTI community. It was also a negative case with respect to the position of the court on the freedoms of assembly and association. By inordinately conferring excessive powers to a government agent to act in an arbitrary and draconian manner simply on account of the sexual orientation of the individuals involved, the issue extended well beyond the matter of same-sex erotics. In effect, the decision basically gave government officials carte blanche not only to arbitrarily decide that certain action is illegal, but also on the most appropriate action to take in the circumstances. The *Kasha-2* case is especially dangerous because it reversed basic principles of the law such as the burden of proof and the presumption of innocence, underscoring a threat that should alarm and concern even those who are not gay. In other words, the PQD becomes an even more dangerous brew once mixed with prejudice and discrimination.

A number of court decisions regarding the freedom of association particularly of LGBTI groups and individuals are still awaited as at the time of this report. First, the *Kasha-2* case is in the Court of Appeal. Secondly, Sexual Minorities Uganda (SMUG) and two other groups have petitioned the High Court challenging the Uganda Registration Service Bureau (URSB) for denying them registration on the grounds of the name chosen for their organization. It remains to be seen to what extent the PQD will influence the decisions in these matters.

The recently-enacted Non-Government Organisations (NGO) Act of 2016 is a final illustration of the executive and legislature's determination to frustrate enjoyment of fundamental rights and freedoms. Where the fight is lost in court, legislation often becomes the new battle ground. The NGO Act suppresses the freedom of association by subjecting NGOs to harsh, unpleasant and manifestly unfair rules. The Act introduces monitoring committees at both district and sub-county levels to closely supervise the work of NGOs, who are also subjected to numerous procedures involving the securing of permits from the NGO board. To crown it all, Section 44 of the Act bars organizations from doing anything deemed "... prejudicial to the security of Uganda and the interests and dignity of Ugandans." The vagueness of such a provision and others of a similar nature is outstanding, although they reflect the broader problem of checkered progress in this area: one step forward can many times be marked by several steps back. Once again, the matter is in court, but there is no guarantee that the PQD will not raise its ugly head to further stifle the struggle for progressive jurisprudence in this area of human rights.

06

THE QUESTION OF ASSEMBLY

The main intent of the right to freedom of assembly is to protect people who wish to express themselves in public or private places. Essentially, this freedom guarantees the right to protest by holding meetings and demonstrations either individually or in association with other people. It is thus related to the right to freedoms of expression and association and is designed to protect the ability of people to come together and expressed themselves in favour of a common cause or to protest a particular course of action taken by state or private authorities which have violated one's rights. Indeed, the ability of people to come together and demonstrate is core to a free and democratic society, and as such the freedom to assemble entails participating in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose. States not only have the obligation to protect peaceful assemblies but they should also take the necessary measures to facilitate them. Suffice to note, the right is not absolute. It may be subject to certain restrictions, but such measures must be prescribed by law and necessary in a free and democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, the generic test which is applied under the Ugandan Constitution.[102]

The most prominent case on freedom of assembly is *Muwanga Kivumbi v. AG*,[103] which straddled the fence between the rights of expression, association and assembly. Here, the petitioner sought a declaration that Section 32(2) of the Police Act which gave powers to the Inspector General of Police to prohibit the convening of an assembly or procession was unconstitutional and did not confer upon the Police of Uganda the powers to prohibit political activities. The main argument of the petition was that by calling rallies or convening assemblies across the country, people were exercising their fundamental rights of association guaranteed by the Constitution and which were not given to them by the State. The respondent argued that it was within the mandate of the Uganda Police to regulate law and order as provided by Article 211 of the 1995 Constitution.

In an important decision for the right to free assembly in Uganda, the Constitutional Court held that Section 32(2) was unconstitutional. According to the court the powers conferred in Section 32(2) were prohibitive and not regulatory and thus could not be justifiable. A declaration was therefore made to the effect that the section was inconsistent with and contravened articles 20(1) and (2) and 29(1)(d) of the Constitution and hence null and void. Justice Byamugisha observed that the powers given under

[102] Amnesty International, "We Come in and Disperse Them" Violations of the Right to Freedom of Assembly by the Ugandan Police, AFR 59/2983/2015.
[103] Constitutional Petition No.9 of 2005.

Section 32(2) of the Police Act were prohibitive and not regulatory, and thus could not be justified:

> The right to freedom of expression is closely related freedom of religion, belief and opinion, the right to dignity, the right to freedom of association and the right to peaceful assembly. These rights are inherent and not granted by the state. It is the duty of all government agencies who include the police to respect, promote and uphold these rights- these rights and many others taken together protect the right of individuals not only to individually form and express opinions of whatever nature, but to 'establish associations' of groups of likeminded people to foster and disseminate such opinions even when those opinions are controversial.

The judge was unequivocal in expounding upon the rights of the individual in this case, and underlying the obligation of the State and its agencies in this regard.

However, through the Public Order and Management Act (POMA) of 2013, Section 32(2) of the Police Act was in fact resurrected and reinstated into Ugandan law via provisions giving the Inspector General of Police powers to regulate the conduct of public meetings. Furthermore, Section 8 of the POMA gives the IGP or an authorized officer the power to stop or prevent the holding of public meetings. To compound matters, not only was the POMA a re-enactment of legislation that had been overruled by the Court, it also offended the clear provisions of the Constitution, which disallow the enactment of new legislation which has been ruled unconstitutional by a court of law.[104] Several petitions have been lodged challenging the POMA in a bid to ensure that the freedom of assembly is restored to its correct status within Ugandan jurisprudence. It remains to be seen what the courts of law will do to restore the freedom of assembly to its proper status, but also to address the clear expressions of impunity manifested by the enactment of a law which directly challenges the power and constitutional status of the Judiciary.

The question of assembly has proven especially problematic for the LGBTI community. The Anti-Homosexuality Act (AHA) had several clauses which infringed the guaranteed freedom of assembly of not only the LGBTI community, but of the broader populace who might engage with them. In overcoming the looming ghost of the PQD, the Court in the *Oloka-Onyango* case put a stop to the many possibilities of abuse that the AHA could have wreaked on the Ugandan body politick. However, the LGBTI community continues to be affected by numerous infringements to the freedom of assembly. In the first instance, several Pride marches, beauty pageants and similar events have

[104] Article 92 restricts retrospective legislation by prohibiting parliament from passing laws to alter the decision or judgment of any court and yet it is very evident that the POMA was enacted as a way of giving back the IGP powers to restrict political meetings.

been disrupted by the Police and other authorities, the most recent taking place on August 16th this year.[105] The legal basis on which such interference is effected is unclear, with the Police invoking the POMA, while Ethics Minister Simon Lokodo speaks of efforts to thwart the "promotion of homosexuality" for the brutal suppression of what are otherwise peaceful assemblies.[106] In neither instant is the Police or the Minister justified in the actions taken. Discussions are underway to consider whether or not these actions should be challenged in the courts of law and about the most appropriate judicial forum within which to take up the matter. In seeking judicial intervention to deal with the confrontation between State authorities and the LGBTI community, the decision in *Kasha-2* demonstrates that not only is there the looming threat of the PQD, but also the over-arching scourge of homophobia.

[105] See HRAPF, *A Legal Analysis of the Brutal Police Raid of an LGBTI pageant on 4th August 2016 and subsequent actions and statements by the Police and the Minister of Ethics and Integrity,* Kampala, August 16, 2016.
[106] *Id.*, at 7.

07

CONCLUSION

The PQD was dealt a significant blow in the Supreme Court appeal in the *CEHURD & 3 Others v. AG*[107] case. In a wide-ranging decision on the powers of the Constitutional Court *vis-á-vis* Parliament, Justice Esther Kisaakye held that,

> … the political question doctrine has limited application in Uganda's current Constitutional order and only extends to shield both the Executive arm of Government as well as Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution. It goes without saying that even in these circumstances, factual disputes will always come up where a private citizen challenges either the Executive or Parliament action or inaction and the resultant outcome of such actions and inaction in respect to either institution's implementation of its respective constitutional mandate and whether such action or inaction contravenes or is inconsistent with any provision of the Constitution.[108] It is my considered view that it was for this very purpose that the Constitutional Court was established and given powers under Article 137(1) and (3) to consider these allegations and determine them one way or another.

The *CEHURD* appeal judgment is significant because it addresses the more overt dimensions of the PQD, namely the reluctance of courts of law to address matters they deem too "political." However, as was pointed out in the analysis above the PQD has the more subtle dimension which consists of courts of law being unduly submissive to and even fearful of the other arms of the State. As much as the Supreme Court decision is a progressive step, it remains to be seen whether this marks the final end of the application of the doctrine in Ugandan jurisprudence.

[107] Constitutional Appeal No.1 of 2013.
[108] Judgment of Kisaskye, *Id.*, at 25-26.

chapter four

PROTECTING CIVIL LIBERTIES &
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