THE LAW OF PENOLOGY AND CRIMINOLOGY

"I CAN'T BREATHE"

A LEGAL PHILOSOPHICAL APPRAISAL OF THE NEED TO HAMORNIZE THE LAW IN UGANDA

BY ISAAC CHRISTOPHER LUBOGO

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SCHOLARY REMARKS

INJUSTA NON EST LEX

"If a law is unjust, a man is not only right to disobey it, he is obligated to do so as a test of legal validity, any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority

"Woe to those who make unjust laws, to those who issue oppressive decrees, to deprive the poor of their rights and withhold justice from the oppressed of my people, making widows their prey and robbing the fatherless." ~ Isaiah 10:1

Recent developments in the law have occurred against a background of mounting public anxiety about violent street crime. Leading politicians have proclaimed crime a priority rivaling even inflation and defense. As the sense of urgency intensifies, the desperate search for answers quickens. Virtually every day, a politician, editorial writer, or criminal justice professional offers a new prescription for ending crime. I believe the discussion currently raging over justice issues can best be understood by focusing upon a central question: Must we compromise the most basic values of our democratic society in our desperation to fight crime? I have elsewhere considered the implications of this question for issues of criminal responsibility and for policy choices in the administration of justice. In this book, I will examine the ways in which different answers to this fundamental question can affect the development of legal doctrine, particularly with respect to the constitutional rights of those accused of crime.

Proficiency in law involves a number of different skills and competencies. It requires knowledge of the rules wherein the elements of criminal offences are to be found. It requires knowledge of the rules of evidence and procedure. It requires an ability to identify the rule(s) applicable to a fact situation and to apply them logically and coherently. Attaining these latter competencies is necessary to discharge effectively the day-to-day tasks of a criminal lawyer solicitor, advocate or judge. However, true mastery requires something further. It requires also a critical and evaluative attitude. The law in action is not just a matter of doctrine , it has its purpose that is the delivery of justice and criminal justice which are a contingent outcome in which rule, process and context all play their part. It is not simply a logical description of what happens when rule meets (prohibited) event. Understanding the law requires, therefore, an appreciation of the day-to-day workings and constitution of the criminal justice system. Moreover, it requires an understanding of the resources of the criminal law to produce substantive justice. If the mechanical application of a given rule to a fact situation acquits a dangerous or wicked person, or convicts someone neither dangerous nor blameworthy according to ordinary standards, the law may be considered not only 'an ass' but as confounding its own rationale. Understanding this

rationale is also, therefore, a necessary preliminary to understanding the law itself since it will inform a realistic appreciation of what can be argued and what cannot. At its most basic, to know what the law is may require an understanding of how to produce cogent and principled arguments for change. This book seeks to examine the rules of the law in an evaluative context. It concerns itself with what makes a crime, both at a general theoretical level and at the level of individual offences. It addresses what the law is and, from the point of view of the ideas, principles and policies informing it, also what it ought to be. We will explore some general matters which will help to inform such an evaluative attitude, the principles and ideas informing decisions to criminalize will be considered. What is it, say, which renders incitement to racial hatred a criminal offence, incitement to sexual hatred a matter at most of personal morality and sexual and racial discrimination a subject of redress only under the civil law? This book examines punishment and the theories used to justify it. Although this is the subject-matter of its own discrete discipline, namely penology, some understanding is necessary for the student of law. It provides a basis for subjecting the rules of criminal law to effective critical scrutiny. If we have a clear idea of why we punish, we are in a position to determine, for example, what fault elements should separate murder from manslaughter, or indeed whether they should be merged in a single offence. Without such an idea our opinions will, inevitably, issue from our prejudices rather than our understanding. Individual offences themselves are covered and although elements of these offences vary, they have certain things in common. In particular, they require proof of some prescribed deed on the part of the offender unaccompanied by any excusing or justifying condition, together with a designated mental attitude, commonly known as guilty mind. Since this model of liability (conduct–consequence–mental attitude–absence of defense) is fairly constant throughout the criminal law these separate elements and the ideas informing them will be explored in before we meet the offences themselves, so as to avoid unnecessary duplication. Finally, we will examine how criminal liability may be incurred without personally executing a substantive offence, whether by participating in an offence perpetrated by another or by inciting, attempting or conspiring to commit a substantive offence. Before tackling these issues we will, examine some general issues pertinent to understanding the law and its operation, concentrating, in particular, upon the philosophy, workings and constitution of the justice system.

DEDICATION

TO THE AUTHOR AND FINISHER OF MY FAITH: THE LORD GOD MOST HIGH TO YOU OH GOD IS THE GLORY AND HONOR AND MAJESTY, MY ONLY TRUE FRIEND AND COMFORTOR.

CONTENTS

CHAPTER ONE

THE PRINCIPLE OF LEGALITY (NULLUM CRIMEN, NULLA POENA SINE LEGE)

The principle of legality, in criminal law, means that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege). It also embodies, that criminal law must not be extensively interpreted to an accused's detriment, for instance by analogy. According to that principle, an offence must be clearly defined in the law. The concept of law comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability. The requirements are satisfied where the individual can now from the wording of the relevant provision and, if need be, with the assistance of court's interpretation of it, what acts and omissions will make him criminally liable. The principle of legality also includes the rule which prohibits the retrospective application of the criminal law to an accused's disadvantage. That principle is enshrined in the constitutions of many countries as well as in the most important international convention that protects human rights.

There is nothing particularly new about judges construing statutes and deploying their interpretive powers more broadly to protect rights and interests considered fundamental at common law. Indeed, it may even be possible to trace the origins of such an approach back to Lord Mansfield's judgment in Somerset v Stewart ('Somerset's Case'), the famous King's Bench decision of 1772 regarding the law of slavery. In the transcript of his judgment, Lord Mansfield held that English common law did not authorize slavery: The state of slavery is of such a nature, that it is incapable of now being introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its rise from positive law. This conclusion followed Lord Mansfield's revolutionary adoption of the principle that English common law provided certain minimum levels of substantive protection to anyone who came to England'. George Van Cleve considers that [t]his represented the emergence of a new English concept of legal freedom that divorced fundamental legal rights from race, birth, or free/servile status and based them instead on an individual's status as political subject.

In doing so Lord Mansfield, arguably, laid the normative foundations for the common law to protect fundamental rights so far as interpretively possible, subject only to statute law clearly to the contrary. Similarly in Australia, the principle of legality has a significant common law lineage. As early as 1908, the High Court recognized and applied the principle to protect the right of any Australian-born member of the Australian community to re-enter the country after a period of absence. However, for a good part of the 20th century the common law courts only applied the

principle of legality to protect a narrow set of rights. In this regard, Lord Browne-Wilkinson, in a seminal 1992 article, highlighted the traditional rights concerns of the courts before, importantly describing the fundamental societal and legislative changes effected by the emergence of the modern welfare state and the increased regulatory role of government: Until comparatively recently, government was seldom concerned in matters affecting freedom of the individual outside the realms of criminal law, taxation and to a lesser extent, property rights. In those fields where government intervention was common, the courts consistently stood as defenders of the individual against the state. Penal and tax statutes were strictly construed; there was a presumption against a statute interfering with property rights but, the world has changed. The growing complexity of life has necessarily led governments, of all political shades, to intervene in many aspects of our daily lives. Legislation now authorizes direct executive intervention in our education, our food, our transport, our health, our use of our property, what is shown on television or broadcast and a host of other areas. The pressure of parliamentary business means that Parliament has not got time to ensure that invasions of personal freedom are kept to the essential minimum. In contemporary parlance, the common law principle of legality was applied by judges in favour of a narrow vision of classical economic liberalism and against incursions from a modern, collectivist state. As a consequence, the rights considered fundamental and therefore protected by the courts became increasingly at odds with those favored by the political arms of government and the general public who stood to benefit from the socially progressive and economically redistributive legislation. As Lord Browne- Wilkinson observed, "the courts, when construing statutory powers to interfere with personal freedoms, have not invariably applied the same strict criteria applied to penal or taxing statutes." The catalyst for the contemporary renaissance of the principle of legality can be traced to the rise of human rights' in shocked response to the horrors of World War II as a core concern of the international legal order. As a consequence: During the second half of the 20th century, the international human rights movement and its various regional and domestic offshoots have provided common law judges with an updated set of values to protect and with an enhanced constitutional expectation that they will act in a guardianship role with respect to them.

This development provides the context for the judicial reassertion during the 1990s of a common law 'principle of legality' that fundamental rights cannot be overridden by general or ambiguous words. In any event, and some time before the Westminster Parliament incorporated the European Convention on Human Rights ('ECHR') into English domestic law, Lord Browne-Wilkinson argued that courts already had the capacity if not the duty to robustly deploy their interpretive powers to protect fundamental rights: Even though the ECHR forms no part of our law, it contains a statement of fundamental human rights (accepted by this country) much wider than the freedoms of the person and of property which have, of late, become the only rights afforded special treatment by our courts. We must come to treat these wider freedoms on the same basis and afford to freedom of speech, for example, the same importance

as we have afforded to freedom of the person. Interestingly, the judicial reassertion of the principle of legality was already well underway in Australia. It underpinned the 1987 decision of the High Court in Re Bolton; Ex parte Beane('Re Bolton'), where the fundamental right at common law to personal liberty (and the corollary remedy to seek a writ of habeus corpus) was not displaced by a statute that failed to express that intention with unmistakable clarity. Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation. The Court then confirmed the centrality of the principle of legality to the construction of statutes in its important 1990 decision in Bropho v Western Australia, and once again in 1992 in Coco v The Queen where it noted the consistency of its interpretive approach with that advocated by Lord Browne- Wilkinson:

In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required. That approach is consistent with statements of principle made by this Court. In the years to follow, judges throughout the common law world began to routinely apply the principle of legality in cases37 and promoted its constitutional significance in extra-curial papers 38. Its most famous contemporary judicial exposition probably comes from the judgment of Lord Hoffmann in R v Secretary of State for the Home Department; Ex parte Simms. In a passage that has become the quintessential statement of the principle, Lord Hoffmann wrote: Parliamentary sovereignty means that Parliament can, if it chooses to legislate contrary to fundamental principles of human rights. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were in- tended to be subject to the basic rights of the individual. Importantly, in Australia Gleeson CJ also emphasized the constitutional significance of the principle of legality for the maintenance of the rule of law: The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law where these are ringing statements of principle, and their widespread acceptance clearly demonstrates that judges throughout the common law world now recognize their capacity (if not constitutional responsibility) to protect rights whenever interpretively possible. It may, however, be the case that questions as to the content and scope of the principle of legality are no longer so pressing in those jurisdictions where statutory bills of rights now operate and the judicial protection of rights is undertaken primarily by

the application of interpretive provisions which require statutes to be construed conformably with the protected rights. But in New Zealand and the UK at least, one only applies the rights interpretation provision after ordinary that is, common law interpretive principles have been applied. And significantly, at least two members of the New Zealand Supreme Court in R v Hansen considered their bill of rights interpretation provision to embody the common law principle of legality. In a similar vein, Chief Justice French of the High Court of Australia made the following observation in Momcilovic v The Queen: The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application. This suggests that the content and scope of the principle remains a live issue even in those jurisdictions with interpretation provisions in statutory bills of rights.

One of the most important principles of the rule of law, the principle of legality lies at the foundation of any judiciary edifice, without which the existence of the rule of law cannot be conceived. As it is appropriately outlined "the rule of law in its broad sense, understood as a whole set of public authorities no matter of their position, does not deserve the name of rule of law unless it provides by itself an example of abiding legality." Established as a principle of the organization and functioning of the state public authorities at the Revolution of 1789 in France, the acknowledgement of the principle of legality in an act having a constitutional value marked the moment of foundation for the state based on law principles and represented a premise of creating a modern public administration. In the context of a more pronounced intervention of the judicial norm in regulating the details of social life, the principle of legality decisively contributes to maintaining order and balance in the functioning of the social system. Out of the multitude of implications that this principle has in the law as a whole, the most important ones are related to its implementation within public law. The relationship of the principle of legality with other principles of law The principle of legality falls among other constitutional principles which ensure the existence of the rule of law, the principle of the separation of powers in the state, the principle of the protection of the rights and liberties of man, the principle of equality in the rights and obligations of all citizens, the principle of political pluralism, the principle of free access to justice and the principle of the independence of justice. The current relevance of the principle of legality in the Romanian law must be understood according to its significance in the community law, where alongside with other principles it represents an essential component of the European union of law.

At the level of the community law, by promoting the necessity of a rational balance and of a conciliation between the advantages and the disadvantages of state intervention, through a correlation with the principle of proportionality and of subsidiary the principle of legality acquires an increasing recognition in the inner law of European states and decisively contributes to making efficient the decision- making activity of public authorities. Thus,

”the legality of a judicial norm is dependent on the condition that it corresponds, from the point of view of the means it supposes, with the legitimate aim pursued and does not go beyond the strictly necessary measures in achieving it.”

The principle of legality in the constitutional law in order to be applicable to a system of law in its integrality, the principle of legality also needed a corresponding constitutionalization. Contemporary constitutions understood and adequately turned to good account this imperative demand in their texts, through the express provision of this principle. In Romania’s Constitution, the principle of legality is provided by article 1 paragrah 5 and involves the obligativity of complying with the Constitution, with its supremacy and of the laws by all the individual citizens and legal entities, including the state authorities and institutions. The recognition of this principle has the advantage of being an express norm which has certitude in a strict sense and predictibility in an unquestionable way. The principle of legality represents the main means of obtaining and promoting social order and of maintaining relationships among members of the society based on judicial norms. This principle demands that all the subjects of law, individual citizens and legal entities, Romanian and foreign citizens, public authorities and private institutions or organizations should abide by the law and by all the other normative acts based on it, applicable to all the social relationships they participate in under the guarantee of the judicial sanctions that are to be applied in case the judicial norms are not abided by. In order to provide efficiency to this acknowledged principle, Romania’s Constitution stipulates that no one is above the law (article 16 paragraph 2) and that the Parliament is the supreme representative body of the Romanian people and the unique law-making authority of the country (article 61 paragraph 1). As for the decisions of the Government, according to article 108 paragraph 2 of the Constitution, these are issued only for the organization of the fulfillment of the laws and, thus, cannot exceed the requirements of the laws. In order to ensure the supremacy of the Constitution, in Romania the Constitutional Court is organized and functions, its responsibilities being provided both in the Constitution (article 142-147), and in Law no. 47/1992 regarding the organization and functioning of the Constitutional Court.

The principle of legality in administrative law

As a fundamental principle in the organization and functioning of public administration of any rule of law, the principle of legality supposes the necessity of a strict rapport of conformity of the administrative decision, in its judicial form, with the law. Thus, the law becomes ”not only the limit of the executive activity, but also its condition, the administrative bodies being confined only to its execution”. The need for the actions of public administration to be founded on law becomes mandatory, the system of public administration being the expression of law, as well as its instrument. Three essential requirements have been established in order to provide a suitable dimension to this principle:

a) The legality represents the limit of administrative action;

b) The legality is the foundation of administrative action;

c) The legality obliges the public administration to act only for effectively complying with the law.

The capacity of the authorities of local public administration of having initiatives in the fields that are not assigned to other authorities is recognized by law, the assuming of responsibilities and tasks being granted to the authorities that are closest to the citizens and the assigned competences must be thorough and exclusive, so that no central or territorial authority can intervene, expect for the cases provided by law. If the higher judicial force of the acts of public administration is unquestionable in a hierarchical system, in an administrative system in which the relationships are not based on subordination, as in the case of autonomous local public administration, the higher judicial force of several administrative acts requires only the conformity of the acts having a low value, not their annulment, modification or abolition.

The principle of legality also fully shows its effects within the activities that are specific to national defense, which as a public service represents an important supporting point of the role of the contemporary state"the evolution of administrative organization being connected to the evolution of the army; the idea itself of hierarchy derives from the idea of subordination specific to the military phenomenon." As a subsystem of public administration which in peace time carries out the normative acts that are specific to the military field, the military administration ensures the organization, maintenance, completion and conscription of the armed forces, as well as the elaboration of the specific rules for the implementation of the law and of the normative acts in the army. Also by abiding by the principle of legality, in situations of crisis and of warfare, the military administration is the one which ensures the organization and the management of an occupied territory by means of the military authorities or ensures the carrying out of specific tasks in exceptional situations, such as the state of siege or that of warfare. The way in which the measures are applied and the activities specific to national defense are accomplished by the central and local public administration authorities is conditioned by the degree of efficiency in the organization and functioning of public administration, to which the principle of legality brings its contribution too.

As a subsystem of public administration, the military administration must be prepared at all times in peace time and in war to provide the best answer to the internal or external challenges that the Romanian state may be confronted with.

As an exigency of the modern state, the principle of legality has developed along with the current legislative systems as a warranty of their efficiency and has become a sine qua non prerequisite in the elaboration and contemporary law enforcement. The mandatory character of complying with the constitution, its supremacy and the

laws by all the individual citizens and legal entities, including the state authorities and institutions ensures the order and hierarchy of the legislative assembly, as a manifestation of will of the state.

THE MAGNA CARTA AND INALIENABLE RIGHTS

The Magna Carta, or "Great Charter," was arguably the most significant early influence on the extensive historical process that led to the rule of constitutional law today in the English-speaking world.

In 1215, after King John of England violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta, which enumerates what later came to be thought of as human rights. Among them was the right of the church to be free from governmental interference, the rights of all free citizens to own and inherit property and to be protected from excessive taxes. It established the right of widows who owned property to choose not to remarry, and established principles of due process and equality before the law. It also contained provisions forbidding bribery and official misconduct.

Widely viewed as one of the most important legal documents in the development of modern democracy, the Magna Carta was a crucial turning point in the struggle to establish freedom.

Petition Of Right (1628)

In 1628 the English Parliament sent this statement of civil liberties to King Charles I.

The next recorded milestone in the development of human rights was the Petition of Right, produced in 1628 by the English Parliament and sent to CharleGs I as a statement of civil liberties. Refusal by Parliament to finance the king's unpopular foreign policy had caused his government to exact forced loans and to quarter troops in subjects' houses as an economy measure. Arbitrary arrest and imprisonment for opposing these policies had produced in Parliament a violent hostility to Charles and to George Villiers, the Duke of Buckingham. The Petition of Right, initiated by Sir Edward Coke, was based upon earlier statutes and charters and asserted four principles: (1) No taxes may be levied without consent of Parliament, (2) No subject may be imprisoned without cause shown (reaffirmation of the right of habeas corpus), (3) No soldiers may be quartered upon the citizenry, and (4) Martial law may not be used in time of peace.

The Magna Carta finds its roots in early 13th century England under the rule of King John. Traditionally considered to be a ruthless, authoritarian king, John had a myriad of issues facing England when he took the throne and it seems that much

of the resentment towards him is unwarranted. It is worth noting that England was practically bankrupt due to John's brother, King Richard incurring exuberant costs from going on Crusade and later ransom from captivity at the hands of the Holy Roman Empire. After Richards's death due to injuries sustained while fighting in France, King John faced adversity from the French and English nobility who had supported John's nephew the young Arthur of Brittany. When Arthur was killed in an altercation while under the custody of John, many implicated John in the killing. Soon afterward the French attacked and took Normandy from English hands. As a result of this John began to raise taxes to build an army to re-take Normandy. The end result of the war was disastrous, the English army was left in ruin and country had all but run out of money. Upon returning to England King John was faced with rebellion from his barons and found that he had very few allies left. In 1215 these baronial rebels forced King John to sign the Magna Carta, literally meaning the "Great Charter". These 25 barons sought to outline the unwritten customs that had in effect governed the country for centuries and put them into written law that would have to be observed by the king. Now at the time of its inception the charter wasn't meant to be a principle of law that would apply to everyone, it was simply a way that the ruling elite of the time, the barons could put some limits to the king's power. The charter itself was really the product of difficult back and forth negotiations between King John's government and the barons, both really wanting to avoid civil war and trying to find a compromise. The enshrinement into law of feudal custom and the operation of the legal system, one which even the king would have to abide by was the driving force behind most of the clauses. Once brought into law it was made clear that certain aspects were to be made more important and are considered to be the main reason why the barons wanted such legislation in the first place. The biggest issue was the oppressive taxation that King John imposed to fight against the French. Despite making significant advancements in the revenue system within England there had been a general sense of growing discontent with the arbitrary way the royalty imposed heavy taxes. In truth there was little John could do given how the coffers had been drained from his aforementioned brother and from his father, Henry II's forays into France. As such it isn't very surprising that more periods of high taxation was all that was needed to incite the barons to revolt and force John into signing. The charter made it clear that the monarchy would have to follow some set of rules regarding taxation and other customs according to the nobles. These included the protection of the English church, the special significance of London and the rights accompanying its status. Others are concerned with family law, transportation across England and what I see as being the most important the clauses dealing with justice. Again I will refer back to clause 39 which is interpreted today as being concerned with what is known as habeas corpus. The immediate impact of this clause was not felt by a great many people, for at the time it was of course intended for those of high privilege. As such at the time it was more of a settlement between the royal head of state and England's most powerful families. The barons wanted a kind of safeguard against a reckless king having seen far to much of what can happen when one spends with abandon as many kings before John had, while not wanting to go so far as to

replace the king himself. The Magna Carta itself was in a rather precarious situation as only weeks after being signed by King John it was denounced by pope Innocent III as having been forced on the king, and John was happy to agree and renounce it as well. This lead to the barons inviting the French KingPhilip to invade and take the crown. A civil war ensued and the fate of the charter was in question. The rebellion ended with the death of King John in 1216, this left the throne to his son 9 year old Henry III. The nobles agreed that young Henry should be the one to take the throne, as despite being the son of the king whom they had despised, they weren't about to abandon the lines of succession with regard to heredity. The Magna Carta was reaffirmed by Henry with the key focus being on a good reliable government led by the king. Eventually Henry began to deviate from the guidelines the charter had laid out for him and once again the barons went into open rebellion. The rebellion was put down but only on the condition that the king would adhere to the charter once again. This is important as it set a precedent by which other English kings could not simply ignore the Magna Carta and do as they pleased, out of risking open rebellion. The charter comes in prominence again with the reign of Henry III's son, Edward I. Once again frustration mounted over the heavy tax burden the king set upon the country and Edward had to admit that he was in fact bound by the Magna Carta, thus giving concession to the nobles. By this time the charter had become prominent enough that certain clauses pertaining to individual liberty were become common practice. As free men in England could enjoy the rights set forth in the Magna Carta. The structure of the charter is as such that it has an open-ended nature allowing for small tweaks and revisions at times when it is warranted.

Over time we see events of great importance in England with the Magna Carta being the backbone of the movements. This is apparent with attempts to limit the royal powers of kings following Edward I. It isn't until the late 14th century do we see however the charter being used in such an all-encompassing way. Under King Edward III the Magna Carta was proclaimed to be the law of the land and that no other law present or future could challenge it. We also see the first instances of the Magna Carta affecting general law, including the expansion of clause 39 making it in effect the due process that all men would be condition to if subject to the justice system. It is around this time that we see the gradual shift from the charter serving only the purpose of giving power to the nobles against the crown, to a general defense of human liberty in England. This can only be seen as a good thing as until this time the charter by and large only served the privileged few. The common people were subject to mistreatment at the hands of those in power in England for a very long time, the idea that they now have rights was an entirely new concept but one that gradually began to take hold, as the Magna Carta was reinterpreted.

When taking into account the Magna Carta the role the English church played is one of great import. It is explicitly stated in the charter that the church be given full freedom and unimpaired liberty, the fact that this is mentioned long before any mention of liberties for the freemen of England is important to take into account. Of

course it is hard to say that King John considered these clauses a concession, as the church already possessed many liberties given their unique position within England. The church had an expectation that they could practice their spiritual tasks without interference from the king. Society in this period had many dependencies on the church and as such it made sense for the king to observe the freedoms the church enjoyed rather than infringe upon them and threaten the peace that the church held in the kingdom. King John seemed to regard the freedom of the church as something of paramount import in England, even deferring to the pope on several occasions. The evolution of the Magna Carta can also be attributed to the privileged status of the church itself. The type of freedom that those within the church enjoyed was outlined in the charter and a connection was made between this and the clauses dealing with the freemen, or the individual. This is important because without the church there would simply be no precedent for liberty in England.

The Magna Carta then can be seen as a very important step towards liberty, especially considering the time when it was written. Its evolution from a document which was originally intended to force King John to consult the nobility on issues pertaining to taxes and justice in the realm, to the cornerstone of individual liberty is of great importance. The novel view that a king should be respectful of the rights of the nobility and church would be extrapolated into one in which all people regardless of birthright would be protected by law. As such I would say that yes the Magna Carta has indeed served its purpose and then some. Its continuing influence can be seen even today, enshrined in constitutions all over the western world. The gradual shift in England towards individual rights and movement of government towards democracy can be attributed to the Magna Carta. As a result individuals gained more rights including the common people this lead to the rise in the democratic process, including the creation of the English parliament where commoners could participate in government. Looking back however on its inception it is hard to say that the barons really had a specific goal in mind with the Magna Carta's creation. The extent to which King John was an evil, tyrannical king seem to have been blown way out of proportion, given the circumstances I don't see how he could have changed much of what he did during his reign. The idea that the barons were these visionaries thinking well ahead of their time is laughable, and seems more likely that they were simply distrustful of King John's rule and were looking out for their own short-term interests. That is not to say of course that there weren't some good ideas enshrined within the charter as it is apparent that there were, only that the majority of what was actually included seemed to be a result of various motivations on the part of upset barons. One of the most important aspects of the Magna Carta, and its most enduring is the idea of due process. Now granted due process and the subsequent trial by jury were not of any great importance to the barons at the time of the charters writing, although given the framework it is hard not to say that a few of them weren't thinking ahead of what may become of it. This malleable framework provided just what subsequent generations needed to reinterpret certain clauses within the charter and make them take on a more general meaning apply to a much larger spectrum.

The effects of continued reinterpretations have been profound on western society, first in the form of Habeas Corpus which served to strengthen what due process had already given the general populace. The point being that after Magna Carta and all its various iterations people had a series of natural rights and liberty by law, these influences have helped shape constitutions and how countries are governed today.

CONTENTS OF THE MAGNA CARTA

Magna Carta 1215 contained 63 clauses which span a wide array of topics from free navigation on English rivers to the standardization of weights and measures. There were some blemishes in its human rights provisions, for example clause 54 prohibits any woman from accusing a man of murder or manslaughter, save in accusations that involved her husband.

Today it is celebrated mainly because of two of its clauses:

Clauses 39 and 40 read as follows:

"39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. 40. To no one will we sell, to no one will we refuse or delay, right or justice."

And I emphazise the fundamental concept "except by the lawful judgment of his peers".

IMPACT OF THE MAGNA CARTA

Today one would say that the Magna Carta promoted judicial integrity and impartiality, forbade the denial of justice and its delay to all citizens and lay the foundation for the protection of the right to life, the right to personal liberty, the right to the protection of property and the right not to be arrested, imprisoned, outlawed, destroyed or put upon in any way except by the lawful judgment of one's peers or the law of the land. It stands for what has become one of the most fundamental and immutable tennets of law namely that no one is above the law.

The Magna Carta is part of the history of the struggle between power and freedom. In England, we could note that under the influence of the great jurist Sir Edward Coke, Magna Carta became a key element in the fight by Parliamentarians to develop parliamentary democracy in the seventeenth century. The traditions have remained as underlying foundation pillars on the constitutional evolution in Britain.

Magna Carta then travelled to the New World in the hearts and minds of the first British settlers and became a rallying cry for the American colonists in their fight

for independence from the British crown. It was later woven into the American Constitution and the Bill of Rights.

In the Caribbean, as indeed throughout the British Commonwealth it is attributed as being one of the most significant land marks on the road to the establishment of the rule of constitutional law.

There can be no doubt that it influenced the development of Caribbean jurisprudence and in particular Caribbean constitutions. I reintroduce the idea of symbolism because it is significant that it found expression in Caribbean constitutions even though there was no constitution in England. Of course there are many commentators that would equate the Magna Carta with a constitution.

In general Caribbean constitutions constrain the actions of the organs of the State, whether Executive, Legislative or judicial, and ensure that no one is above the law. They balance the enjoyment of individual rights with the public interest and determine the mechanisms through which sovereignty is exercised. The Constitutions articulate core values such as a commitment to parliamentary democracy, constitutional supremacy, the separation of powers, judicial independence and the rule of law.

They protect fundamental rights, such as freedom of association, equality before the law, the right to personal liberty, the right to life, protection from deprivation of property, protection from inhumane and degrading punishment, the right to free movement and the right to freedom of expression, and they also express the lofty aspirations of the people.

But one cannot forget the colonial roots. In Caribbean constitutions there was and still is that restrictive clause known as the transitional provision which prohibited Caribbean courts from applying constitutional principles to laws that might infringe the fundamental freedoms and lofty aspirations of the people, once they were passed during the colonial period and were still in force at the time of adoption of the constitution. I would doubt that transitional provisions could or should be regarded as having permanent or indefinite application. Caribbean courts must be committed to adopt a generous approach to the interpretation of constitutions that gives the citizen the full breadth of the stated rights free from any restriction.

I must at this juncture introduce the sobering thought that the issue of criminal justice reform must be high on our regional agendas owing in part to the undeniable fact that we are witnessing rising crime rates across the board. There must be holistic change among all the major players: the police, the prosecution, the judiciary and the prison system. In relation to the police, the level of crime detection must be addressed as the low regional rate particularly in small societies such as ours is a cause for concern. This is aggravated by the extraordinary length of pre-trial detention which

must be regarded as a human rights issue and should be targeted for elimination as a pressing priority. In this context I could add that it is an affront to the concepts underpinning Magna Carta.

In order to address this and related problems the Caribbean Court of Justice as the implementing agent of the Conference of Heads of Judiciary in the region has embarked on a judicial reform and institutional strengthening project with donor funds that have been solicited. The JURIST project is aimed improving the justice system by enhancing the technological capabilities of courts in the region, re-engineering court processes in order to expedite case flow, expand the range of ADR mechanisms offered to court users and address gender imbalances in the administration of justice.

Of course, one of the challenges here is that reform, especially criminal justice reform requires a holistic approach that integrates the coordinated efforts of all the key stakeholders. Since low crime rates and respect for the rule of law will naturally attract investments and lead to increased economic prosperity. The gains to be realized from addressing these problems extend to economic development and social stability and so the major stakeholders also have a vital interest in partnering with the CCJ in this endeavour.

The establishment of the Caribbean Court of Justice (CCJ) has been an important milestone in the completion of the circle of independence for Caribbean states. The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence. As a court of final appeal the CCJ is best equipped to carry forward the goals and aspirations of the Caribbean people, to protect democracy in the region and to advance the noble principles upon which Magna Carta is premised. The orderly delinking from all vestiges of imperial and colonial rule is a natural process that is consistent with Magna Carta and the Caribbean Court of Justice has been fulfilling its mandate over the last ten years, confronting the challenges which face the rule of law and democracy in those Caribbean countries which have acceded to its final appellate jurisdiction.

This is important because the Magna Carta was a symbol that had far greater impact than its actual wording and its real historical context. The freedoms which today we say apply to everyone, were at the time of the Magna Carta, only applicable to the class of barons who themselves had no concept of the universality of the rights that they demanded. Yet today the Magna Carta is celebrated as being consistent with the applicability of those rights to everyone.

This is particularly significant because the Magna Carta was being used by parliamentarians to support their fight for parliamentary democracy in England, it was engaging in imperial rule over the colonies. Today there is no doubt that colonialism was a denial of the concept of the universal equality of mankind and the

fundamental freedoms attributed to the Magna Carta. Even more stunning is during its use for these and other laudable developments in the independence movements in France and the USA the odious trade in the trafficking of enslaved human cargo was being practiced. The Magna Carta survived that shameful period. Today the Magna Carta would be used to condemn such practices.

During the Second World War and in that era, the Caribbean human being, not free, still a colonized person fought together with the British colonial power against Nazism which had threatened the freedom of Britain in the name of ethnic superiority, thereby helping to explode the myths of ethnic superiority. Immediately after that war, at the United Nations, the nations of the world joined together and proclaimed the Universal Declaration of Human Rights and the ideas that this released has changed the world. They caused the end of colonialism and developed the concept of human equality and dignity in profound ways. Today my tiny nation state of St. Kitts-Nevis can sit in the General Assembly of the United Nations and contribute to making decisions that influence world affairs with the same voting power as the biggest nations in the world.

I would like to quote a few excerpts from the Preamble:

"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"

The Universal Declaration of Human Rights (UDHR), is a foundational document of international human rights law. It has been referred to as humanity's Magna Carta by Eleanor Roosevelt, who chaired the United Nations (UN) Commission on Human Rights that was responsible for the drafting of the document.

I doubt that there could be any opposition to the statement that the declaration had a profound impact on world history. It was during the same year of the declaration in 1948, that the great nation of India won its independence.

In 1960 the UN again pronounced on human equality and dignity in its Declaration on the Granting of Independence to Colonial Countries and Peoples. This convention has been described as the Magna Carta of colonial states.

I think it is worth reminding ourselves of some excerpts of the preamble and the resolution:

"Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom, Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United

Nations ideal of universal peace, Solemnly proclaims the necessity of bringing to speedy and unconditional end colonialism in all its forms and manifestations;

And to this end declares that:

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

It was just two years afterwards, and fifty years ago in 1962 that Jamaica and Trinidad became independent nations. These two leading Caribbean countries were among the leaders of a large group of British Colonies in Africa and the rest of the Caribbean to become independent.

However, the independent status reflected itself in an independent executive and an independent legislature. It was only in a few cases in the Caribbean that independence included the establishment of a national as the head of state. In almost every other former colony in other parts of the world, a national is the head of state. In the commonwealth Caribbean it is only Guyana, Trinidad and Tobago and Dominica that has taken this important step to completing the circle of independence. The same reluctance to take the final step to independence is also seen with regard to the judicial arm, setting the Caribbean region way behind former colonies from every other part of the world. Only for Caribbean commonwealth Caribbean countries have taken the necessary step to judicial independence, Guyana, Barbados, Belize and most recently Dominica. The time has come for all commonwealth Caribbean countries to remove the vestige of colonialism represented by the Privy Council.

In 2001, the Heads of Government of the Caribbean Community, signed the Revised Treaty of Chaguaramas. An important feature was to create the CARICOM Single Market and Economy (CSME) and eventually The Caribbean Court of Justice (CCJ). The CCJ was inaugurated on 16 April 2005 in Port of Spain, Trinidad & Tobago, the Seat of the Court and this year celebrates its 10th anniversary.

The independence of the CCJ and its fitness to replace the Privy Council should not be a matter in which there is any doubt. In assessing the independence of a court one looks at the quality and the character of the judges of the court, the institutional arrangements for the selection of judges, focusing particularly on the absence of political involvement, as well as the independence and sustainability of the financial arrangements for the operation of the court. The CCJ meets these standards. In a book by renowned law professors examining how judges are chosen for international courts Professor Kate Mallenson held up the Caribbean Court of Justice as a model of how to choose judges for international courts and for identifying independent and high-quality candidates. It is true that these developments in international law provided rights and opportunities to the countries that were colonial. But today as

we celebrate the 800th anniversary of the Magna Carta, I propose that they also create obligations on the colonial powers to put an end to even the last vestiges of colonialism. England, in particular, as the parent of the Magna Carta and one of the champions of the international conventions on human rights and colonialism should be considered as having an obligation to remove the last vestige of colonialism represented, in this case, by the Privy Council. It should be proactive in promoting the international regime to that it helped to develop. What a tremendous legacy to the Magna Carta that would be !!

THE LEGACY OF MAGNA CARTA

A Joint Commitment to the Rule of Law for near on eight hundred years, lawyers and parliamentarians have kept the spirit of Magna Carta alive. For their pains they have been accused of representing an essentially feudal Charter that was motivated by self-interest and the demands of political expediency, as a constitutional document of enduring significance. On this view, it is the glint of the sword, not the spirit of liberty, which best characterises Magna Carta. The principal offender is said to be Sir Edward Coke, himself both Judge and Parliamentarian. In his Second Institutes, he wrote that the Charter derived its name from its 'great importance, and the weightiness of the matter'. He was wrong in this. It was so named to distinguish it from the separate and shorter Charter of the Forest. Coke also considered that the terms of Magna Carta were for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law .

Coke certainly went too far although it can be said that Magna Carta has had effect both as a statute and through the common law. The real issue, however, is whether Coke was closer than his critics to an enduring truth.

Magna Carta was re-issued four times, with various amendments, and is now thought to have been confirmed by Parliament on almost fifty further occasions. The authoritative text, four chapters of which remain on the statute book in England, is Edward I's inspeximus of 1297. A copy of this version, the only one outside the United Kingdom, is displayed in Australia's new Parliament House. By accompanying words of confirmation also still on the statute book, it is said that the Charter of Liberties made by common assent of all the realm shall be kept in every point without breach and that the Charter shall be taken to be the common law. In many respects Magna Carta has transcended the distinction between law and politics and its legacy represents a joint commitment by Monarchs, Parliamentarians and the Courts, to the rule of law. This legacy forms a central part of the shared constitutional heritage of Britain and Australia. It is in recognition of this that the monument to Magna Carta, which I visited earlier today, has been established in the Parliamentary Zone of Australia's national capital, incorporating the British Government's contribution

towards the celebrations of the Centenary of Australia's Federation last year.

For some, Magna Carta today represents no more than a distant constitutional echo. My proposition to the contrary is that the spirit of Magna Carta continues to resonate in modern law. However, let me first reaffirm Magna Carta's constitutional significance and refute suggestions that it was no more than a narrow baronial pact.

Magna Carta and the Conception of Modern Human Rights Documents If we shift our gaze from the thirteenth century to modern law, we find the modern- day equivalents of Magna Carta in agreements to respect human rights. Unlike Magna Carta, the abuses which inspired these documents became the concern of the whole world and they were conceived on the international plane. After the Second World War, the international community resolved to spell out in writing the inalienable rights of individuals to ensure the future protection of, as the Preamble to the Universal Declaration of Human Rights puts it, "freedom, justice and peace in the world."These principles increasingly flesh out the rule of law in modern democracies. However, the ancestral connection between Magna Carta and the modern human rights era, whilst there, must not be over-stated. Magna Carta was framed in a time when tests of legal right might still be by battle or ordeal and even the most beneficent of childhood folk heroes, Robin Hood, was said to have paraded the mutilated head of Guy of Gisborne on the end of his bow. This is a far cry from the respect for human dignity and the fundamental worth of human life which underpins modern human rights documents. Also, despite its universality, Magna Carta still rested upon a system of inequality and feudal hierarchy.

However, to reject Magna Carta's relevance and contribution to the modern human rights era would be to adopt a far too simplistic analysis. We should recall that the United States Constitution was held for many years to licence racial segregation; that, like Magna Carta, the American Declaration of Independence of 1776 consisted largely of a list of alleged wrongs committed by the Crown, and that it was proclaimed against a background of legalised slavery. The primary importance of Magna Carta is that it is a beacon of the rule of law. It proclaimed the fundamental nature of individual liberties, notwithstanding that many of the liberties it protected would not find direct counterparts in modern democratic states. That said, I shall discuss later its provisions protecting access to justice and illustrate their continued vitality in modern law.

Magna Carta influenced human rights documents in several, connected, ways. The first was through its role in the development of theories of natural rights. Second, these documents owe a large debt to the various constitutions of the American States and the United States Constitution itself. In their turn these owe much to the legacy of Magna Carta, and in particular the writings of Blackstone and Coke. American constitutional documents effectively married this constitutional inheritance with the

ideology of natural and inalienable rights, best represented by the writings of John Locke and Tom Paine. I do not intend to pursue these avenues; but I will nevertheless show that the spirit of Magna Carta played an important role in the conception of modern human rights documents and continues to resonate through them.

On January 1st, 1942, the Allied powers included in their War aims the preservation of human rights and justice, in their own lands as well as in those lands in which human rights had been denied. From this point the Second World War can be seen as, in part, a crusade for what Winston Churchill termed, in an address to the World Jewish Congress that year, 'the enthronement of human rights. The United Nations Charter, signed after the conclusion of the War, included central commitments to human rights. In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights.

Surprisingly perhaps, the most prominent voice demanding that the War be fought for human rights was that of the author, H.G. Wells, who had visited Canberra in the 1930s. Wells sparked public debate in two letters to The Times in 1939. In the second he included a 'trial statement of the Rights of Man brought up to date'. He introduced his declaration with the proposition that at various moments of crisis in history, beginning with Magna Carta and going through various bills of rights, it has been our custom to produce a specific declaration of the broad principles on which our public and social life is based (perhaps better, on which our public and social life should be based). The debate was conducted in the pages of the Daily Herald, and a drafting committee was established to refine the proposed declaration. It was nominally under the chairmanship of the former Lord Chancellor, Lord Sankey, whose name the declaration eventually bore. Wells produced a mass of material in this cause, and much was translated and published across the world. Some was even dropped by aircraft over the European Continent. His book, The Rights of Man Or What are We Fighting For? is steeped in references to Magna Carta. He admits to having deliberately woven its terms into the provisions of the declaration itself, so that, he wrote, 'not only the spirit but some of the very words of that precursor live in this, its latest offspring'.

The extent to which the enterprise of Wells and his colleagues influenced Anglo-American policy, or the framers of the United Nations Charter and the Universal Declaration of Human Rights, has not been conclusively established. President F.D. Roosevelt, who was on good terms with Wells, commented upon his draft declaration in 1939. In 1940 Wells conducted a lecture tour in the United States. Introducing the Universal Declaration to the General Assembly, the Lebanese delegate mentioned the contribution of six individuals. H.G. Wells was one, a second was Professor Hersch Lauterpacht, to whom we will return, and a third was President Roosevelt. It is rightly considered to be Roosevelt's famous 'Four Freedoms' address on the State of Union delivered in January 1941 that is the most direct ancestor of the United Nations Charter and the Universal Declaration of Human Rights, as well as

the International Covenants that followed. But if the spirit of Magna Carta was alive in the popular imagination in this period, so it was in political rhetoric. President Roosevelt himself appealed to Magna Carta and the heritage of freedom in his addresses to the American nation. Similarly, in a broadcast to the United States after the conclusion of the war, Winston Churchill spoke of the 'great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence'.

Popular oratory of this sort would, of course, have had no direct effect on the jurisprudential developments of the time. Nonetheless, the spirit of Magna Carta was alive and well. It was in the minds of those who made the great political moves of the time and in the ears of those who had to put those moves into practice. After the Lincoln Cathedral copy of Magna Carta was transported to the United States Library of Congress for safekeeping in 1939, an astonishing fourteen million people queued to see it for themselves. At a ceremony returning the Charter in 1946 the Minister representing the United Kingdom traced a lineage that he said was 'without equal in human history' and considered that the preamble to the United Nations Charter was the most recent of Magna Carta's 'authentic offspring'.

In academic, but not physical, terms a far more weighty contribution than that of H.G. Wells to the development of modern human rights was Professor Lauterpacht's work, An International Bill of the Rights of Man, published in 1945. Like Wells, Lauterpacht sought to emphasise the continuum between Magna Carta and his own enterprise, and to affirm its continued relevance to the modern world. He extolled the significance of the Charter in initiating the English constitutional practice of safeguarding the rights of subjects by way of general statutory enactment, and even went as far as to declare that, 'in the history of fundamental rights no event ranks higher than that charter of the concessions which the nobles wrested from King John.'

The United Nations itself has suggested that the roots of the human rights movement can be traced to John's Charter of 1215. And Eleanor Roosevelt, who chaired the Human Rights Commission responsible for drawing up the Universal Declaration, proclaimed that it was a declaration of the basic principles to serve as a common standard for all nations and thus it 'might well become a Magna Carta of all mankind'. If there was much in Stubbs' comment that Magna Carta was the first great act of a united nation, then there is also much to be said for the Universal Declaration of Human Rights as the first great act of a united world. Dr H.V. Evatt, the Australian President of the General Assembly, saw the Declaration as 'a step forward in a great evolutionary process … the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms.'

The Universal Declaration, whilst not as 'universal' as we might today wish, triumphed in uniting the common values and traditions of many seemingly disparate nations. The Commission contained representatives from eighteen nations and republics. The Anglo-American legal tradition was a major element in its conception, although the Chinese, French, Lebanese and Soviet Union representatives exerted influence. Nonetheless, although the precise terms of Magna Carta found no place in the final document, we can see in the guarantee that 'no one shall be subjected to arbitrary arrest, detention or exile' clear similarities with Chapter 29 of Magna Carta.

The fact that the spirit of Magna Carta continues to resonate through modern human rights documents is reason enough for sparing it from that dusty cupboard of constitutional relics that have outlived their significance. There is, however, a further dimension to the relationship between Magna Carta and modern protections of human rights. This relates to the translation of international human rights guarantees into domestic law.

THE CONTINUING RELEVANCE OF MAGNA CARTA

In Modern Law Let me sum up this discussion briefly. The constitutions of the UK and Australia are distinct, but they share the same roots and Magna Carta and its legacy represent the sturdiest and the oldest. The fact that the provisions of Magna Carta rarely break the surface or provide explicit contributions to the outcome of modern cases should not obscure its contemporary importance. I hope I have shown that in celebrating the legacy of Magna Carta in the UK and Australia we are not clinging to a constitutional relic, vastly overestimated by generations and without modern significance. The opposite is in fact true. Magna Carta can be truly appreciated as the foundation stone of the rule of law. Its terms continue to underpin key constitutional doctrines; its flame continues to burn in the torches of modern human rights instruments; and its spirit continues to resonate throughout the law.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF CRIMINOLOGY

Criminology started in Europe between 1700 and the early 1800. Classical school of criminology founders such as Cesare Beccaria and Jeremy Bentham were theorists on crime and punishment development. The classical school of thought propounded that crimes were committed through free will. That is; people know what they are doing and should be punished harshly to deter people from the crime. They further urged that criminal justice system should be modernized and improved unlike those days when criminal justice system included painful torture such as stretching, stubbing of accused persons.

The Neo classical school of thought followed the classic school and was developed by criminologists such as Raymond Saleilles and Teacher Gabriel Tarde. and brought with it few revisions. They suggested that the world is imperfect and so mistakes are inevitable. The concept of self-defense was developed.

In 1920, Robert E. Park and Burgess presented their Chicago school of thought .They related criminology to sociology and provided research on concentric zones or zones in transmission. They also asserted that crimes tend to be taught by the older criminals whom people may be associated with either personally or professionally.

Contemporary criminology includes a similar hedonistic theory that people can deter emotions and actions according to incentive manipulation.

Introduction to Criminology

Criminology is the study of crime, attempts to control it and attitude to it.1 Crime is interpreted in its widest sense so as to include minor as well as major law breaking and also conducted which but for special status or the role of those involved would be regarded as law breaking. A crime is an act or omission prohibited by the law2. Crimes are those acts or omissions which are specifically prescribed by the law. Their proscription, however always involves sanctions or punishments and it is this connection between crime and its punishment that has remained the key element in the concept of crime.3Crime is defined as an act or omission in respect of which legal punishment may be inflicted. To this effect, crime is any human conduct that

[1] *Sir James Stephen 1829-1894, History of criminal law.*

[2] *The Penal Code Act Cap 120.*

[3]

violates the criminal law and is subject to punishment.

Crime is a status conferred on and ascribed to certain non-approved acts legislated against and through the duo process. There are certain acts and behavior which have received disapproval and condemnation transcending time, place, and culture but are not crime. No matter how outrageous something is, a person cannot be criminally liable unless such an act is prohibited by the penal laws of a given state. In other words, not all harmful acts are defined as crime and not all crimes are necessary harmful.

Criminalization represents the technical process through which acts are identified as crimes, legislated against and regulated through the law enforcement and via the courts are punished. Criminalization specifically targets those whose behavior, personal qualities or position threaten the social relations of production.

Criminal Justice System is the process through which the state responds to behavior that is deemed unacceptable. It is derived through a series of stages , charges, prosecution, trial, sentence, appeal and punishment. These processes are collectively referred to as the Criminal justice system. The word justice in this context refers to the provision actually made for trial and treatment of offenders

The frame work of the criminal justice system is laid down by legislation specifying the penalties available in consequence of various crimes, the powers, rules and procedure for each process and agency. Discretion has however been used in some instances.

According to Edwin H. Sutherland, criminology is the body of knowledge regarding crime as a special phenomenon . It includes within it its scope, the process of making laws, breaking of laws and transformation of crimes. The objective of criminology is the development of a body of a general and verified principles and of other types of knowledge regarding this process of law, crime, treatment and prevention.

Criminologists study crime from a broad scientific perspective in an effort to understand its causes and ultimately its prevention. They are equally interested in deviance and punishments imposed on criminals and to whether sanctions have expected effect. They are also interested in knowing whether the punishment imposed on those criminals has an impact on the family members. (reaction of family members). Criminologists are always engaged in research questions about the causes, consquences and evolvement of crimes. In Uganda and Africa as a whole, it is important to note that slavery has been transformed into Human trafficking. Millions of people are transported to Arabic countries but they are treated in cruel, undegrading treatment amounting to slavery.

Criminologists are experts at studying the criminal exploitation of human desires and ambitions , the organizational structure of the large and persasive syndicates that resort to many kinds of crime in order to enrich themselves at the expense of individual victims and public at large.

ORIGIN THEORIES OF CRIMINOLOGY

1. The consensus

2. Conflict views of law and crime

Consensus model

Informal methods of fighting crime such as religion, family and kinship have lost significance in controlling crime due to poor examples of religious leaders, family wrangles, the nature of work today. As long as society loses control over its members, then criminality becomes inevitable. Subsequently, formal ways of controlling crimes must been adopted in the criminal justice system to curb crime and this is through penal laws, courts and police.

In the traditional interpretation of historical development of legal systems and of criminal justice, law making is an accommodation of interests in society so as to produce a system of law and enforcement to which every body basically subscribes. Law comes from an agreement among members of a society as to what constitutes wrong doing and crimes are behaviors believed to be repugnant to all elements of society and criminal law is a mechanism of social control. Law reflects the values, beliefs and opinions of society's mainstream. This is known as the consensus model.

The consensus model presumes that certain acts are deemed so threatening to the country's survival that they are designated crimes if the vast majority of people in society view it as crime, then it becomes criminal by consensus.

The consensus model assumes that members of a society by large agree on what is right and wrong and that codification of social values becomes law with a mechanism of control which settles disputes that arise when some individuals stray too far from what is considered acceptable behaviour. That is; we can say that an act is criminal when it offends strong and defined states of the collective conscious . Consensus theory views society as a stable entity in which laws are created for the general good , that the function of the law is to reconcile and harmonize most of the interests that most of us accept with the least amount of sacrifice.

According to the consensus theorists, if the law does not gain support of the people , it loses its efficacy. For example, the Prohibition of Female Genital Mutilation Act 2010 which prohibits female genital mutilation. Albeit that the Sabiny are still practicing Female Genital mutilation.

Conflict theorists

Some criminologists view the making of laws in society in a different theoretical perspective, in their interpretation criminal law expresses the values of the ruling class in society and the criminal justice system is a means of controlling the classes that have no power. That criminal law originates in the conflict of interests of different groups. The definition of crime is assumed to reflect the wishes of the most powerful interest groups who gain assistance of the state. Crimes of the rich (the wealthy) are usually not covered because the law is a means of preserving the status quo on behalf of the powerful. The poor are imprisoned for minor violations and yet the wealthy are given lenient sentences for even the most serious breaches of law since crime is a political concept designed to protect power and maintain position of the upper class at the expense of the poor.

Conflict theorists claim that a struggle for power is a far more basic feature of human existence than conscious. It is through power struggles that various interest groups manage to control law making and law enforcement. The conflict theorists claim that dominant group has ended conflicts by imposing its will.

Characteristics of Criminal law

Criminal law is assumed by the political authority, That is, the state assumes the role of the plaintiff and so brings charges. The police is at the entrance, to arrest and investigate, thereafter the Director of Public Prosecutions institutes the case. The plaintiff is the state and the defendant is the accused in the format of Uganda v XX.

Criminal law is specific. It must be specific in defining both the offence, its elements and punishments. The Penal Code Act clearly defines the offence, its ingredients and the penalty. For example, Murder is defined under section 88 of the Penal Code Act[4] . According to section 88 of the Penal Code Act, any person who of malice aforethought causes the death of another person by unlawful act or omission commits murder and shall if convicted be sentenced to death. This means, that murder is intentional taking away some one's life. In criminal law, the ingredients of the offence must be present that is the actus reus and mens rea. The actus reus is the act or omission. The mens rea is the mind. Therefore in murder, the actus reus is the act of killing and the mens rea is the malice afore thought.

It is uniformly applied that is equal punishment for the same crime irrespective of social status. The 1995 constitution [5]provides for equality and equal protection of the law. The penal code creates no exemptions in defining crimes. It uses guiding words couched in mandatory terms like 'any person who….'a person shall be guilty of… if he does.."

[4] *Penal Code Act Cap 120*

[5] *Article 21 of the 1995 constitution*

Causes of crime

The guiding question is what motivates people to do crimes.?

There is no universally acceptable answer to this but researchers have approached the question from different perspectives. Contemporary criminologists look to factors such as economic and social conditions which can produce strain among social groups role of the media, influence of western culture and from a biological perspective and influence of Western culture.

Economic and Social factors

Economic factors include unemployment poverty, urbanization, high cost of living and greed for money among others. People undergoing such conditions are forced to engage in crimes such as bulgarly, robbery, theft in order to find ways of survival.

Decline in religion

This is also a social factor that is responsible for the criminality. Most people have ignored religion. They live ungodly lifestyles and this has influenced them to engage in crime.

Social factors include peer pressure

Some people engage in criminality in by associating with the criminals. They learn the tactics, means of defence and motivation from their friends that engage in the same.

Biological perspective

These include Poor examples from parents, somebody structures and lack of self control. Some people engage in crimes because of the Poor examples from their parents. Their parents are criminals and so they engage in criminality because it looks normal to them. A boy that will find his father a thief is likely pick an example from his father and so is a girl child who finds her mother as a prostitute because they have seen their parents survive and providing needs for them using such illegitimate means. No wonder literature says that prostitutes are born but not made.

Lack of self control

Some people engage in criminality because of lack of self control. Whenever they feel they want something or wish to something, they cannot have control over their bodies. They end up engaging in crimes such as rape, because they conscience cannot force them to restrain from certain things.

Body structure

Some people's body structures qualifies them to be criminals. According to Cesare Lombrose , (the so called father of criminology,) states that people with long jaws high cheek bones are potential criminals [6]

The role played by media, moral development and personality

The media has been key in influencing people's decisions about live. Through media people watch pornography and so end up engaging in unnecessary sexual intercourse.

Exposure is another factor for example through media people have learnt criminal tactics that help them engage in crime, others have learnt criminal tactics on how to survive from being caught in a criminal act through the media and on how to defend themselves.

Personality is an important element, that can make someone engage in crime or not. Personality includes influence of alcohol and drugs and idleness. The influence of drugs and alcohol impairs people's mind from rightful thinking hence making them engage in crimes without exercising their conscious. They engage in crimes such as theft, rape, and defilement and assault because of alcohol.

Idleness also is a personality trait that can motivate people into engaging in crimes. An idle man is the devil's work shop. When people are idle, they move aimlessly with no sense of direction this tempts them to engage in criminal acts such as assault, theft which they ought not to have committed if they were busy. Others because of being idle engage in peer groups where they copy criminal tactics from their peers. Idleness also motivates people into use of drugs and alcoholism which pave way for commission of other crimes.

Influence of western cultures is another factor People want to adopt the western way of living in the disguise of modernity. They end up copying all their acts however criminal they might be. Consequently people have engaged in beastility, homosexuality and yet all these started from the western world.

Furthermore, the western world has led to technological improvements which have increased crime. The contraceptives have been used by many people to engage in sexual offences, the development of telephones and computers have led to hacking of people's accounts and banks.

Crime and Deviance

Deviance is a fact or state of diverging from the usual or accepted standards of a community. It is a rule breaking behavior of some kind which fails to conform to

[6] *Cesare Lombrose, Criminal man1876,*

the norms and expectations of a particular society or social group. In other words, deviance means violation from the social norms. As long as there is no socialization, deviance must occur. The customary ways of doing every day things are governed by norms other than laws, criminologists are interested in all social norms and how society reacts to success or failure of compliance. They are interested in what society does when customary ways of doing things no longer proves effective in controlling conduct perceived as undesirable. Deviance is a must in every society because there is no society of saints. Deviance varies from place, time, contest, historical and the social group. For example among the Baganda of central Uganda, a muganda girl who fails to kneel while greeting elders is seen as deviant. Deviance basically depends on the society and the culture or group in which they belong and not to the act that they perform. Therefore it is relative and not person or individual specific.

Types of deviance

Societal deviance

This refers to forms of deviance that most members of a society regard as deviant because they share similar ideas about approved and unapproved behavior. Acts such as murder, rape, child abuse, fall in this category.

Situational deviance

Situational deviance refers to the way in which an act being seen as deviant or not depends on the context or location in which it takes place . These two conceptions of deviance suggest that there may be some acts that many people agree are deviant in one society.

Deviance deals with two important aspects that is Universality and Relativism. Universality deals with acts that are condemned worldwide. Relativism deals with acts condemned in a particular society. Criminal behavior is usually deviant but not all deviant behavior is criminal.

The difference between crime and other forms of deviance is subject to constant change and may vary from one state or country to another and from one time to another. Making something that is distasteful into a crime may be counterproductive and detrimental to the social organization. If everything deviant (inconsistent with the majority norms) were to be made criminal, society would become very rigid. The more rigid behavior a society, the more behavior defined as violating social norms prohibited by law.

A criminologist would find challenges in answering questions like, how comes some behavior is deviant and another behavior deemed criminal. How comes that some

conduct is deemed both deviant and illegal? Who in a society decides and when under what circumstances are acts that some acts or omissions considered deviant in that society?

Factors considered in determining whether an act is deviant

Historical period

Definition of deviance changes over time in the same society as standards of normal behavior change. For example, cigarette smoking used to be very popular but it is now illegal to smoke in restaurant or buses.

The place or context

This is also an important factor, Certain acts are deviant in certain places and yet the same acts are not deviant in other locations. Nudity is deviant in public places and rarely in private places. Playing loud music is deviant on public transport but not at a music festival.

The social group

What may be regarded as unacceptable at a societal level may be regarded as acceptable in small groups or even whole age cohorts.

Deviance is both functional (advantageous) and dysfunctional. (disadvantageous).

Importance of deviance

Deviance helps to clarify rights and wrongs for example Deviance is observed through setting up the norms of the society. Therefore deviance helps in affirmation of cultural values and norms especially when we see people being punished.

Deviance promotes unification of others in society for example according to criminologist Emile Durkheim, deviance brings in social order and unity. It helps to decide and clear boundaries of a society and norms as to how people think and act. Deviance increases unification and joins people together in case of a crime.

Deviance makes conformity more desirable. When some one is punished for being deviant, the rest also pick a lesson and are likely to conform.

Deviance provides the key to understanding the disruption and recalibration of society that occurs over time. If a student is found cheating in class and is penalized,

it becomes a lesson to the rest of the people not to do the same.

Disadvantages of deviance (Dysfunctional)

Deviance can make life very unpredictable and harmful. If people do not live up to the expected norms and rules then life can be endangered. For example in a political demonstration, if someone is carrying out his business, then he can easily be attacked and killed.

Deviance shows the level of social disorganization in society. Most deviant acts are crimes so this brings a lot of chaos, disruption of business and injuries.

Deviance leads to loss of lives and increases a lot of victims. Many people lose their lives in the name of doing deviant acts such as smoking, strikes and mob justice and the impact and trauma also extends to their family members.

Controlling deviance

Deviance can be controlled through socialization in school, family, education religion .The values obtained from those institutions help to model people through their teaching.

Also through imprisonment, the arrest and imprisonment of deviant people helps to bring stability. Furthermore, most people would refrain from committing crimes because of fearing hard life in prisons.

Relationship between Crime and age

Criminality is high in the youth because the youth are young, energetic, idle .They know how they can escape being caught, new criminal tactics. Usually the elderly do not engage in criminality because they do not have energy and fear for their reputation.**Crime and social class**

The rich are engaged in white color crimes. Criminality usually targets the unmarried or the widows because these people cannot fully defend themselves.

INTRODUCTION TO PENOLOGY

Penology comes from a latin word, 'Poena' which means punishment and a greek suffix 'Logia' which means 'study of'[7]. The Oxford English Dictionary[8] defines Penology as the study of the punishment of crime and prison management.

[7] *Rajendra Kumar Sharma , Criminology and Penology , 1998, Atlantic Publishers page 2.*

[8] *Oxford English Dictionary.*

Penology is a sub component of criminology that deals with the philosophy and practice of various societies in their attempts to repress criminal activities and satisfy public opinion via appropriate treatment regime for persons convicted of criminal offences.[9]

Penology is concerned with the effectiveness of those social processes devised and adopted for the; prevention of crime, via the repression or inhibition of criminal intent via punishment.

The study of penology is concerned with the effectiveness of those social processes devised and adopted for the prevention of crime via the fear of punishment. It also covers the treatment of prisoners, and subsequent rehabilitation of convicted criminals, probation (rehabilitation of offenders)as well as penitentiary science relating to secure rehabilitation of convicted criminals.

Historical Back ground of Penology

Historical theories were based on the notion that fearful consequences would discourage potential offenders. An example of this principle can be found in the Draconian law of Ancient Greece and Bloody code which persisted in Renaissance England when capital punishment was prescribed for over 200 offences.

Modern theories of the punishment and rehabilitation of offenders are broadly based on the principles articulated in the seminal pamphlet 'On crimes and Punishments' published by Cesarew, Marquis of Beccaria in 1764. They centre the concept of proportionality and differ from previous systems of punishment.

[9] *Shlomo Giora Shoham, International Handbook of Penology and Criminology, CRC Press, 2013.*

CHAPTER THREE
TYPES OF CRIMES

Economic crimes

It is difficult to have one legal definition of concept of economic and financial crimes because of economic and financial crimes all over the world because the criminal policy especially in the economic area varies greatly from one country to another, their growing perception evolves , many cases are not reported, investigation to discover these crimes requires a lot of technology, and emergency of new forms of economic and financial crisis.

However, Dr. Abboud Al Saria defines economic crimes as any act or omission that runs counter to the public economic policy. Economic crimes are actions conducive to inflicting damage on public funds, production activities, distribution, circulation and consumption of commodities and services as well as relations related to insurance, trade, companies, taxes and protection of minerals. Economic crimes are generated from hidden power that defines the relationship between economics and politics[10]. It is one of the important hurts that threaten economic security of countries. The Economic crimes cover a wide range of offenses from financial crimes committed by banks, tax evasion, crimes committed by the public officials such as bribery, embezzlement among others.

Corruption and economic crimes are different, Corruption is one of the more complex and comprehensive criminal phenomenon which is an economic crime. Causes of economic crimes include financial windfalls, disturbing economic balance, capital loss, disturbing authorities.

Victim and Victimless

Victim crime also known as real crime is an act or omission prohibited by laws that has an identifiable victim and the activity is performed by one or more people that causes harm , injury or violation to someone not voluntarily participating in the activity.

Victim is a person affected by the crime. These people may be direct or indirect victims. The guiding principle or universal rule to use when distinguishing between victimless and real crimes is whether the act was completed voluntarily.

Victimless crime is generally an illegal criminal act that does not have an identifiable victim. Victimless crimes are crimes known as crimes against the state that do not harm the society. Many activities that were not once considered crimes are now crimes at least in part because of their status as victimless crimes.

[10] *Yousefi Maraghen Mahdi , Journal of Social order, Reasons for committing economic crimes and the solutions. Volume 5 page 3.*

Victimless crimes are the harm principle of John Staurt Mill, victimless from a position that considers the individual as the sole sovereign to the exclusion of more abstract bodies such as community or a state against which criminal offenses may be directed. John Stuart emphasizes that this is personal conduct which is amenable to society. The criminal only concerns himself, his independence, his absolute right over his own body and mind making the individual sovereign.[11] This may include suicide prostitution and drug possession drugs.

The criminal justice system is meant to punish or restrict unwanted behavior and actions. Many of these criminal laws are meant to protect others. However, the criminal Justice system also has a number of laws that criminalize consensual behavior or actions where there are no victims. The courts and judges do not always take into account whether the crime is a victimless crime when enforcing laws.

The major aim of legalizing victimless crimes is punishing the criminals for degradation of societal moral standards and also punishing citizens for their choice to engage in victimless acts declared by the law to be immoral.

The controversies surrounding victim crimes stems right from the definition itself. The definition emphasizes that these are crimes without victims. The reality is that all crimes have victims. These victims are either direct or indirect. Direct victims are those directly affected by the offence. This is the victim perpetrator himself. Indirect victims are the secondary victims who are affected as a result of the harm suffered by the direct (primary) victim such as family and friends.

Victimless crimes also restrain freedom (personal choices) that may or may not be perceived as morally wrong.

Blue collar and white collar crimes

White collar crimes consist of a range of criminal actions committed by government and professionals. They do not rely on violence or weapons. Instead they commit crimes using internet, browsers, bookkeeping soft ware, or even those that affect their reputations.

White collar crimes are unique bin their ability to victimize many people at once and cause significant monetary damage to both individuals, and organizations. Examples of white collar crimes include, corporate fraud, money laundering.

Blue collar crimes refer to a violent acts such as murder, sexual assault and armed robbery. It also includes non violent crimes such as prostitution and illegal gambling. Blue collar crimes are often easier to detect, have a clear victim and are without doubt illegal to those observing the action.

[11] *John Stuart, On liberty, 1859, Oxford University Press,*

It is quite interesting to note that during investigation and prosecution, white collar crimes which are committed by powerful people are investigated and prosecuted differently from blue collar crimes which are often associated with lower economic and social class.

Often blue collar crimes unlike white collar crimes are first covered in media and the news and these results into a dramatic response from the public. Because of this the public may have a disproportional view of how prevalent blue collar crime is or perceive white collar crime as rare.

Violent crimes

Violent crimes is a crime of violent nature in which an offender or perpetrator uses or threatens to use harmful force upon a victim. This entails both crimes in which the violent act is the objective such as murder, assault, rape as well as crimes in which violence is used as a method of coercion or show of force, such as robbery, terrorism, sexual assault, rape, robbery, kidnapping among others.

Violent crimes may or may not be committed with weapons. Depending on the jurisdiction, violent crimes may be regarded with varying severities from homicide to harassment.

Violent criminals who use hostile acts towards others include criminals, rapists, burglars , rapist.

CHAPTER FOUR

MEASUREMENT OF CRIME

Measurement of crime is the process by which law enforcement, researchers, and other interested parties attempt to record or study the type and amount of crime that has occurred in a specific place or country.

There are three major reasons for measuring characteristics of crimes, criminals and crimes a for researchers to collect and analyze information in order to test the theories about why people commit crimes. Some criminologists might record different kinds of offences committed by people of different ages the number of crimes committed at different times of the year and relate or support the theories of crime causation. The strain theory for example suggests that crime results from wide disparity between people's goals and the means available to reaching this goal. Those who lack legitimate opportunities to achieve this try to reach them through criminal means.

To test this theory, researchers might begin with a hypothesis such as the following:

A. Testable preposition that describes how two or more factors are related that the lower class individuals engage in more serious crimes frequently than middle class. Therefore a finding that lower class persons commit crimes would support the theory that people commit crimes because they do not have legitimate means to reach their goals.

B. To enhance our knowledge of the characteristics of various types of offenses. It helps to answer some questions such as reasons why some crimes more often committed than others, in which place, area and time do certain crimes occur. Expert criminologists have urged that this information is needed if we are to prevent crime and develop strategies.

C. Criminal justice agencies depend on certain kinds of information to facilitate daily operations and anticipate future needs and how to anticipate future needs such as knowing how many persons have been jailed, how many have been released on bail , and how many were acquitted or remanded at the end of the trial.

This information also helps in the day to day functioning of the system such as the number of beds, distribution and hiring of personnel, making legislative and policy decisions such as answering the question if there will be an increase in the crime rate incase more police is deployed in the area or neighborhood.

Methods of collecting data

It is important to collect data in the criminal justice system as mentioned above. This can be through survey research, experiments, observation, case studies, and conducting victim surveys.

Survey

A survey is a cost effective method of measuring characteristics of groups. Surveys are conduct to obtain quantitative data. A survey is a systematic collection of respondent's answers to questions asked in the questionnaire or interviews.

Obtaining information by a survey can be through a face to face interview or by phones. Surveys help to gather information about attitudes, characteristics or behavior of a large group of people. Surveys also help to measure the amount of crime, attitudes towards police and judiciary, determine the fear of crime, carry out an assessment of drug abuses, and sentencing dangerous offenders.

The number of people who respond to questions in the survey are called the population of the survey. Instead of interrogating the total population under study, most researchers interview a representative subset of the population – called a sample.

Experiments

The experiment is a technique used in the physical and biological sciences and in social sciences as well. An investigator introduces a change into a process and makes measurements or observations in order to evaluate the effects of the change.

Victimization surveys

It is a measure of the extent of crime by interviewing individuals about their experiences as victims. The survey covers characteristics of crime such as time, place of occurance, number of offenders, use of weapons, economic loss , characteristics of victims such as race, sex, age, ethnicity , marital status and households.

Reasons for conducting a victimization Survey

To measure Unreported and unrecorded crimes

Victimization surveys help criminologists to get information from the victims. The interaction or interview can help the reporter can know why people committed certain crimes and what happened after being reported, they also get to know why people did not report certain crimes. This helps in making policies or changes in the police. From the surveys, criminologists have learned that a considerable amount of

crime actually occurs but is not reported to the police and cannot be included in the crime rate calculations. Clearly, victimization surveys are an important adjunct to police statistics.

To measure psychological harm or tortured people.

Through victimization surveys, the interviewer can know who was harmed physically or psychologically, as a result of the crime or unfair treatment in the criminal justice system.

To measure the dissatisfaction of police

Through surveys, people express their opinions about the police, the reasons as to why they do not trust the police and the miscarriages of justice committed by the police.

Limitations of victimisation surveys

The sample it is difficult to get a truly representative sample, and victimisation surveys suffer from the overrepresentation of certain groups and underrepresentation of others.

The attrition in the sample even when a good, representative sample is constructed, it is practically impossible to reach and to interview all members of the sample.

The costs of victimisation surveys, especially national ones, can be prohibitive. It is costly to carry out a survey because it requires money, trained personnel, computers which might not be readily available.

Self-reported studies

The self-report study is an attempt to discover what kinds of people commit offences in this case, a sample or a sub-sample more often of the population is asked to report any crimes or any anti-social behaviour that they may have committed themselves in the course of a given period. Victimization surveys are used to illicit data on the hidden dimension of crime; the crimes which people commit for which there may not have been a report or there was no arrest.

Strengths of self-reported studies

They reveal that criminal acts are spread throughout the population and that the official difference, male and female or working-class and middle-class rates of criminality are far smaller than the official statistics would suggest.

They identify more offenders than official crime statistics and different types of offender. Brought into question many of the conventional explanations of crime which have been based on official police records, they provide much-needed evidence of the extensiveness of hidden criminality and law violation.

Limitations of self-reported studies

With sensitive matters of crime, there are doubts as to whether subjects will tell the truth. Most criminals will prefer to keep quite in order to avoid criminal sanctions. The victims too are likely to conceal some information for fear of stigmatization.

It is extremely likely that admissions to certain crimes are overrepresented and that admissions to other crimes are underrepresented. Most times violent crimes will not be reported because of their heavy penalty or fear of stigmatization associated with being identified as one.

Concerns about the truthfulness and accuracy of the information can be stronger in self-report studies because the respondents are usually asked to report their illegal behaviour. Others may feel tempted to exaggerate the frequency and/or seriousness of delinquent acts they have committed. Girls may feel more shame and boys are more inclined to boast about past delinquencies.

Sources of crime data

Police records

The recorded crime statistics do not include crimes that have not been reported to the police or that the police decide not to record.

Court records

The large number of statistics always talked about is from the courts of Judicature. As long as a case is instituted, then it is recorded in the courts of law.

Penal institutions records

Prisons have the best reliable data but rarely does it capture rates of recidivism since a new number is always given to an admitted inmate.

Reports from other government institutions such as the Uganda Bureau of Statistics, and Immigration also show the crime rate.

Victimisation surveys or Self-reported

Studies in which respondents are asked which of a list of offences they have committed.

Why crimes are not reported to police

Some matters can be settled more easily outside the formal system

Sometimes people feel they can handle matters independently and efficiently without following the normal court process. This can be through counselling, reconciliation, reasonable chastisement and use of mob justice. Reconciliation and Counselling amicably restores the relationship between the offender and the victim.

Reasonable chastisement (corporal punishment) is also acknowledged as a way of settling disputes. Here the offender is punished through stalks of a cain. This provides retribution satisfaction to the victim.

Mob justice is also done by most people who do not want to report to court. Mob justice means that people use the law in their own hands by punishing the offender. They can do this by beating the offender for the harm he has caused or pouring acid in the offender's ears to kill them instead of using the formal system.

Lack of trust and confidence (Scepticism about the ability of the police to arrest the culprit or to recover the stolen goods)

The high levels of corruption in the police system have led people to lose trust in the police system. The police is seen as a corrupt institution. The police men engage in bribery and corruption .They are efficiently able to help the rich that can bribe them. When a rich person commits a crime and is reported they call that person immediately telling them to escape. When a matter is reported to police, they intentionally hide the file or inform the victim that they are still investigating, this makes people distasteful of the police and so adopt other means to deal with crime instead of using the police.

Some offences are known only to the offender and are not likely to be reported

In instances where the offences such as unsafe abortions are best known by the offender himself, he might not take the initiative to report to police.

Lack of knowledge of the law, processes and systems by the victims

Most Ugandans are illiterate and do not know the law and the processes involved. Similarly even the literate Ugandans also do not the law. This means that their rights can be violated and then they fail to report the matter to court simply because of their ignorance of the law and yet equity aids the vigilant.

Witnesses of the offence may not want to report the offence to avoid inconveniences

Fear and embarrassment and get entangled in time-consuming procedures. Other witnesses may fear reprisal if the offence is committed. A witness of a criminal offence such as murder, arson may not wish to go to police because of the unnecessary police interrogations. The police can ask hard questions that might even implicate the witness as the accused in the matter. Questions like where did the fire come for how long did the fire last in arson cases can be annoying and implicate the witness. In murder cases questions like where were you coming from, why didn't you report immediately, how do u know that the accused is the real offender can be inconveniencing. So in order to avoid such inconveniences, witnesses choose not to report to police.

The victim may be unable to report the offence more especially for weak victims who feel threatened and not reporting remains as the best option to avoid revelation e.g., illegal immigrants.

Lack of trust in the system- lack of confidence, corruption, in appropriate circumstances, nothing to gain by reporting etc

Wives often refrain from reporting physical violence on the part of their husbands, because they wish to remain married to them, and still have positive feelings despite the physical abuse.

Witnesses may also decide that they can themselves deal with the offence more satisfyingly than the police could; the brother or father of a raped girl may decide that he should avenge her himself, rather than subject her to the indignities of a court appearance.

Limitations of official crime statistics

Crime statistics are limited to offences detected, reported and recorded, crime statistics are dependent heavily on the efficiency of the organs of the criminal justice system.

Crime statistics are subject to artificial fluctuations without actual changes in crime, due to variations in police operations in collection and compilation of data, and also the differences in definitions and legal interpretations, these statistics may not be accurate for national comparisons.

These statistics may not take into account the relationship between crimes and offenders. One offender can commit several crimes and this would create a distorted picture of the crime problem.

Importance of conducting victimisation surveys

To learn about unrecorded crime

To measure psychological harm and other consequences, and material damage and other costs caused by victimisation.

To measure repeat, serial, and multiple victimisations, victim careers, accumulation of victimisation risks, vulnerable population groups.

To compare survey findings with police data.

To measure satisfaction with police performance both generally and in each concrete case

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Concerns about the truthfulness and accuracy of the information can be stronger in self-report studies because the respondents are usually asked to report their illegal behaviour.

Others may feel tempted to exaggerate the frequency and/or seriousness of delinquent acts they have committed. Girls may feel more shame and boys are more inclined to boast about past delinquencies.

They are only limited to those crimes that are reported and recorded, statistics are never accurate, statistics focus on how many crimes committed rather than those committed, there are issues of memory gaps.

CHAPTER FIVE

THEORIES OF CRIME CAUSATION INTRODUCTION

Crime is an act or omission prohibited by law .Criminologists have come up with theories to explain why crimes are committed and using the same theories to prevent the crimes.

A theory can be defined as an abstract statement that explains why certain phenomena or things do or do not happen. Criminologists have sought to collect vital facts about crime and interpret them in a scientifically meaningful fashion.

By developing empirically verifiable statements, or hypotheses, and organizing them into theories of crime causation, the criminologists hope to identify the causes of crime. The theories have been classified into three major categories,that is the social cultural determinism, multi factor theories and social structural theories. However the challenge with all these theories is that they were developed so many years ago and so most of them are no longer applicable.

a) Social-cultural determinism

This sub-school of thought assumes that crime is not produced by a flawed person but rather a flawed society. For this reason, humans are seen as primarily influenced by social or cultural factors, which are again largely outside their control. According to this group of theories, it is not so much the social structures which determine the criminal conduct in society but rather the processes within these structures. For example, these theories observe that despite ethnic and other barriers, criminal skills are transmitted from one delinquent child to another. The three key theories under this sub-school include:Theory of Differential Association and Differential Social Disorganisation; Crime Control Theory and Symbolic Interactionism and the Labelling Theory.

b ,The Multi-Factor Theories

These theories assert that crime can only be understood by studying whole persons in their social contexts. They believe that numerous factors in the social context of persons are responsible for criminal acts and nothing, in particular, can be singled out as the cause of these acts. The weakness of these theories is that they assume that there is no single factor in the social setting that causes crime and do not identify these factors. They have been accused of having a limited explanatory value because to them everything causes crime and nothing does not cause crime

c. The Socio-Structural Theories

These are some of the American Sociological theories of crime that have lent a lot to social policy and practice.

According to these theories, there are aspects of the social structure itself that cause people to engage in crime. Key among these theories are the Strain Theory The Opportunity Theory The Sub Culture Theory. To control crime, these theories suggest that the solution lies in dismantling such criminogenic social structures and opening up opportunities for the disenfranchised.

The Strain Theory or Anomie theory

The most famous of these social structural explanations of criminal behaviour is offered by the Strain theory of Robert Merton. Merton borrowed the term "anomie" from Durkheim to describe causation in this theory. According to Merton, crime is caused by social structure that holds the same goals to all its members without giving them the equal means to achieve it. That in every society, there is a universal goal of everyone wanting to gain economic success and there is also only one legitimate means to attain this goal formal education and hard work. This lack of integration between what culture calls for and what structure permits, the former encouraging success and the latter preventing it can cause norms to break because they are no longer effective guides to behavior; that is the disparity between goals and means to achieve the goal causes pressure (strain) that influence people to commit crime.This makes the poor people never to be satisfied with the much they have and crave for the goal.

Strain theories develop the positivist sociological tradition to propose that most members of society share a common value system that teaches us both the things we should strive for in life and the approved way in which we can achieve them. However, without reasonable access to the socially approved means, people will attempt to find some alternative way – including criminal behaviour – to resolve the pressure to achieve.

Merton argued that in a class oriented society, opportunities to get to the top are not equally distributed. Very few members of the lower class ever get there. The strain theory emphasizes the importance of two elements in any society. That is the cultural aspirations or goals that people believe are worth striving for and secondly the institutionalized means or accepted ways to attain the desired goals. If society is to be stable, these two elements must be reasonably integrated. There must be means for individuals to reach goals that are important to them since disparity between goals and their achievements fosters frustration which leads to a strain.

In society there is an overemphasis on the achievement of goals such as monetary success and material goods, without sufficient attention paid to the institutional means of achievement and it is this cultural imbalance that leads to people being prepared to use any means, regardless of their legality, to achieve that goal .

The ideal situation would be where there is a balance between goals and means and in such circumstances; individuals who conform will feel that they are justly rewarded.

Under the Strain theory because the members of the lower class are extremely disadvantaged in the race to reach the goal using only the legitimate means given that they hardly access education, have no jobs and family networks, they become overburdened except for only the lucky few or only those who are extremely talented. The gap between the popular universal goal and the structure makes it universally possible to achieve legitimately then creates a segment in the population strained by the desire to achieve the goals they cannot achieve legitimately.

What influences the effect of strain on delinquency?

Stressful events and conditions make people feel bad.

These bad feelings, in turn, create pressure for corrective action. This is especially true of anger and frustration, which energize the individual for action, create a desire for revenge, and lower inhibitions. There are several possible ways to cope with the strain. Involving negative emotions, some of these ways are delinquent. Strain theorists attempt to describe those factors that influence the likelihood of a criminal response.

Coping skills:

Among other things, the strain is more likely to lead to crime among individuals with poor coping skills and resources.Some individuals are better able to cope with strain legally than others. For example, they have the verbal skills to negotiate with others or the financial resources to hire a lawyers

Conventional Social Supports:

The strain is more likely to lead to delinquency among individuals with few conventional social supports e.g Family, friends, and others often help individuals cope with their problems, providing advice, direct assistance, and emotional support. In doing so, they reduce the likelihood of a criminal response.

The Cost Benefit Analysis of delinquency:

Strain is more likely to lead to delinquency when the costs of delinquency are low and the benefits are high; that is, the probability of being caught and punished is low and the rewards of delinquency are high.

Personality traits:

Besides, a strain is more likely to lead to delinquency among individuals who are predisposed or prone to delinquency. The individual's disposition to engage in delinquency is influenced by several factors. Certain individual traits like irritability and impulsivity increase the disposition for delinquency. Another key factor is whether individuals blame their strain on the deliberate behaviour of someone else.

-Finally, individuals are more disposed to delinquency if they hold beliefs that justify delinquency if they have been exposed to delinquent models, and if they have been reinforced for delinquency in the past.

Adaptation techniques

It is important to note that not every one who is denied access to a society's goals becomes deviant. Merton pointed out 5 ways in which people adopt to society's goals and means that people adopt whenthat can occur when people are not in a position to legitimately attain internalised social goals. Individual responses depend on their attitudes towards cultural goals and institutional means of attaining those goals. The Options (adaptations) are conformity, innovation, ritualism, retreatism and rebellion.

Conformity:

Conformity is the most common mode of adjustment . Individuals accept both the culturally defined goals and prescribed means for achieving those goals. They work, save, go to school and follow legitimate paths.Merton found that for some people; even if they fail to ascent to the goal do not deviate but stick to the universal goal and the legitimate means to ascend to this popular goal.

Innovation:

On the other hand, when some people feel the disjunction between the popular universal goal and the legitimate means of reaching it, they stick to the universal goal but adopt non-conventional means of reaching this goal. He called this form of adaptation innovation which is a form of deviance from the norms and values revered in the society. They design their own means of getting ahead . These means include burglary and embezzlement. The students without parental attention, no encouragement in life and without connections to help them in acquiring top jobs may scrawl their signatures on the subway cars and buildings and park benches in order to

gain recognition of the kind. Such illegitimate forms of innovation are certainly not restricted to the lower class as evidenced by such crimes as stock manipulation , sale of defective products and income invasion.

Ritualism:

People who adopt by ritualism abandon the goals they once admired to live and resign to live their present lifestyle. They play by the rules, hold middle jobs or follow some other safe routine. Ritualists outwardly remain conformant to the institutionalised means of reaching the universal goal, however, realistically, they deal with the strain of failing to reach the goal by scaling down their aspirations to a point (below that universally set by the society) attainable comfortably and are satisfied with that. Therefore, despite the cultural mandate to pursue the goal of success, they are careful not to take risks and live within the contexts of their daily routines.

Retreatism

Retreatism is the adaptation of people who give up both the goals and the means. These people feel confident that they cannot make it and see no use in trying or making additional efforts. Overwhelmed by the universal goal of success and the blockades in the legitimate means of achieving the goal, retreats resign fatalistically both the goal and the legitimate means of ascending to it. These are the people who are in society but not of it, and they retreat into the world of drug addiction, alcoholism, vagrancy, drug abuse and psychosis and most ultimately, suicide. They have internalized the value system and therefore are not under pressure to innovate. The retreats mode allows for an escape into non productive, non striving lifestyle.

Rebellion occurs when both the cultural goals and the legitimate means are rejected. Many individuals substitute their own goals (get rid of the establishment) and their own protests.

According to Merton, a rebel not only rejects the goal for success and the legitimate means but also seeks to substitute or change both the goal for success as well as the legitimate means of achieving it. They get an alternative For example, a socialist in a capitalist society or a guerrilla warlord in a democracy.

Criticisms of Anomie or Strain Theory

Several scholars have questioned some of the assumptions and views raised by the anomie theory (the Strain and opportunity theories). Among the critical observations are:

Assumption of universality:

The theory has been accused of wrongfully assuming the universality of what constitutes illegitimate and legitimate. According to these critiques, what is illegitimate varies by space and time and deviance is a relative concept by group and context. The theory would mean that criminality is by majority of the people in lower class. This is not true because all people are potential criminals.

The theory would also mean that women would be more criminals because they do not have conventional means to succeed.

The trouble with Retreatism:

The explanations offered by the theory on retreatism as an adaptation to strain has been criticised for lacking precision and oversimplifyingwhat is a more complex process in the development of deviance (alcoholism, drug abuse, mental disorder and suicide). This is because the process by which the person becomes mentally ill or commits suicide is much more complex than retreatism from success goals just. It involves normativism and role-playing. Drug addicts are not retreats in any conventional sense of that term but active participants in their social worlds.

The other criticism under retreatism is that the theory fails to distinguish between the origins and the actual effects produced by deviance.

Long periods of drug abuse may impair a person's social relations and the ability to achieve certain goals in society. In this case, anomie may confuse what is a cause and what is an effect.

Alternative perspectives: Because of the broad social-structural approach, acts of deviance are presented as having only one social meaning. Thus while drug abuse is alleged to represent an escape from economic failure in anomie theory, it may serve different purposes. Drug use may be a form of innovative behaviour such as risk-taking.

Class Bias: The theory rests more on the assumption that deviant behaviour is unproportionally too high in the lower class.This assumption is made because it is in the lower class where the pressure to succeed and the reality of low achievement is greatest. For this reason, considerable deviance can be cited since lower-class persons and members of minority groups are more likely to be detected and labelled deviants, delinquents, drug addicts etc compared to persons of the middle and upper classes even if they share in the same behaviour.

Research on occupational, white-collar, and a corporate crime however has shown

that even if pressure for success is not too much in these middle and upper classes, crime also occurs in them. Even conventional offenders are not exclusively found in the lower classes.

The simplicity of explanation: According to this argument, while it is possible for an individual in some cases to experience something close to the strain of anomie, many other factors influence deviance. And two, although deviant deviants undoubtedly experience frustration because of failure to meet the goal legitimately, most deviant acts arise in the process of socialisation and role-taking rather than a disjuncture between the goals and means.What is critical is that anomie does not agree with the explanations of subcultures, deviant groups, the role of characteristics of urban life and the processes of interpersonal influence and control.

What influences the effect of strain on delinquency?

Stressful events and conditions make people feel bad. These bad feelings, in turn, create pressure for corrective action. This is especially true of anger and frustration, which energize the individual for action, create a desire for revenge, and lower inhibitions. There are several possible ways to cope with the strain. Involving negative emotions, some of these ways are delinquent. Strain theorists attempt to describe those factors that influence the likelihood of a criminal response.

Coping skills: Among other things, the strain is more likely to lead to crime among individuals with poor coping skills and resources. Some individuals are better able to cope with strain legally than others. For example, they have the verbal skills to negotiate with others or the financial resources to hire a lawyers

Conventional Social Supports: The strain is more likely to lead to delinquency among individuals with few conventional social supports e.g Family, friends, and others often help individuals cope with their problems, providing advice, direct assistance, and emotional support. In doing so, they reduce the likelihood of a criminal response.

The Cost Benefit Analysis of delinquency: Strain is more likely to lead to delinquency when the costs of delinquency are low and the benefits are high; that is, the probability of being caught and punished is low and the rewards of delinquency are high.

Personality traits: Besides, a strain is more likely to lead to delinquency among individuals who are predisposed or prone to delinquency. The individual's disposition to engage in delinquency is influenced by several factors. Certain individual traits—like irritability and impulsivity increase the disposition for delinquency.

Finally, individuals are more disposed to delinquency if they hold beliefs that justify delinquency if they have been exposed to delinquent models, and if they have been reinforced for delinquency in the past.

Opportunity Challenge Theory

This theory is a brainchild of Cloward and Ohlin (1960). It argues that some people become criminals because they are blocked out of the legitimate opportunity structure and therefore resort to alternatives such as crime.

According to them, although society has a universal goal for economic success, persons have differential access to both the legitimate and illegitimate means of reaching these goals.

Specifically, while the top-class members have an opportunity to reach these goals using the legitimate means, the lower class only has an opportunity to reach this goal illegitimately. In their analysis, this is what then accounts for the taking of criminal roles by the lower class members as delinquents and criminals. This is because unable to realistically adjust their goals to attainable levels, frustrations then make them commit crimes if the norms and opportunities are not accessible to them.

Agnew (1985) has also similarly argued that delinquency may be caused by the inability to avoid painfully negative situations in life and that the lack of opportunity, in this case, may make the adolescents feel they are trapped with few prospects for the future.

To control crime, this theory stands the solution in opening up opportunities for the disenfranchised. This theory served as the explicit policy basis of the 1960's "war on poverty".

The socio-cultural determinism and crime control

The philosophy of individual determinism finally diminished in the 19th century with the emergence of new optimistic theories in psychology and sociology that saw the possibility of rectifying criminal situations through counselling and fixing the social environments the criminals live in.

These new arguments then also had an impact on policy and renovated the criminal justice system. These reformers also called progressives argued that the system should be arranged not to punish offenders but rather rehabilitate. Consequently, in the first two decades of the reforms brought about by the theory in the 19th century, state after state initiated the juvenile courts to save children from the lives of crime.

Efforts were made to release back into the community convicts from prison depending on the extent to which the person had been rehabilitated not on the nature of the crime.

Accordingly laws were passed that made sentencing more indeterminate with

offenders being given sentences of 1-5 years, Parole boards were made to determine which inmates were cured and should be returned to the community, probation practices by which offenders were to be both supervised and helped by officers of the court was also widely adopted.

Lastly, criminal justice officials of the courts were given great discretion to effect the individualised treatment of the offenders (Rothman, 1980).

However, the controversy which still exists on whether the policies instituted in the name of rehabilitation made the criminal justice systems more humane or more repressive. Some of the key questions of the debate are: Does giving criminal justice officials of the courts great discretion to effect the individualised treatment of the offenders expose suspects and criminals more abuse/injustice or humanism/justice? Have these reforms created renewed interests in the previous explanations that the origins of crime lie in unchangeable characteristics of individuals?

The social process theories

According to this group of theories, it is not so much the social structures which determine the criminal conduct in society but rather the processes within these structures. For example, these theories observe that despite ethnic and other barriers, criminal skills are transmitted from one delinquent child to another. The three key theories under this sub-school include:Theory of Differential Association and Differential Social Disorganisation; Crime Control Theory and Symbolic Interactionism and the Labelling Theory.

Theory of Differential Association

The key proponent of the Differential Association theory is Edwin Sutherlands in his book called "The principle of Crimnology" and his theory dominated criminological thinking in the mid 20th century.

According to this theory, crime is learned in interaction with other people who are more oriented to crime than conventional behaviour and is then transmitted from generation to generation.

To describe this learning process, Sutherland coined the term, differential association. He argued that any society has what he called differential organisation. By differential social organisation, he meant that there are differential social organisations, with social groups that are arranged differently, some organised in support of the criminal activity and some against it. Forexample rape looks normal and is not contested among the Karimajong .

Sutherland relied heavily on Shaw and MC Kays findings that deliquent values are

transmitted within a community or group from one generation to another.

Sutherland in his book propounded nine prepositions that explain how crime is learned and committed as follows.

According to him, crime is learned in interaction with other persons in a process of verbal and non verbal communication with criminals. That the learning of criminal behavior occurs within intimate groups such as close friends and families than mass media.

Learning criminal behavior includes learning the simple and complicated techniques of committing crime, understanding the specific direction of motives , drives, rationalizations and attitudes. This means criminals learn skills and gain experience for example young deliquents learn how to defend their action.The specific direction of motives and drives is learned from definitions in the Penal Code or any other legal regime which are favourable or may be unfavourable. In some societies, an individual is surrounded by persons who invariably define the legal rules to be strictly adhered to. In some instances , a person may be surrounded by a person who does not care whether laws are respected or not.

That a person becomes a criminal because of the excess of definitions in the Penal Code or any other law favourable to definitions favourable to violation of law. This is through associating with bad company and so learning criminal behaviour depends on how many defintions we learn that are favourable to law violation as opposed to those that are unfavourable to law violation. While criminal behaviour is an expression of general needs and values. It is not explained by those general needs and values, since non criminal behaviour is an expression of the same needs and values. For example, Shop lifters steal to get what they want. Others work hard to get money to buy what they want. Therefore, the motives, frustration, desire to accumulate goods or social status , low self concept cannot be logically the same because they explain both lawful and criminal behaviour.

The process of learning criminal behaviour by association with criminal and anti criminal patterns involves all the mechanisms that are involved in any other learning. Learning criminal behaviour is like learning conventional patterns and not a matter of observation and imitation.

Therefore, in his theory of differential association, he argued that any person could come into contact with definitions favourable (unconventional views) or unfavourable (conventional views) for violation of the law.

The balance between these influential views in a person's life then is what determines whether he becomes a criminal or not.He then concluded that the

concepts of differential social organisation (equivalence of Shaw and McKay's social disorganisation concepts) and differential association are compatible and permit for a complex explanation.

As a social-Psychological theory, the theory of differential association explains why any individual is drawn into crime. And as a structural theory, the differential social organisation explains why crimes are higher in certain sectors or areas of society and low in others (socially organised/conventional vs non socially organised/ unconventional).

In the final form in the evolution of this theory, Sutherland in 1947 articulated a set of 9 propositions, which compose one of the most influential statements in the criminological history of the cause of rime:

Learning the Criminal behaviour.

Criminal behaviour is learned in interaction with other persons in a process of communication.The principal part in the learning of criminal behaviour occurs within intimate personal groups. When criminal behaviour is learned, the learning includes: (a) the techniques of committing the crime and (b) the specific direction of motives, drives, rationalisation and attitudes.The process of learning criminal behaviour by association with criminal and anticriminal patterns involves all the mechanisms that are involved in any other learning

Criminal learning is an expression of general needs and values, it is not explained by those general needs and values since non-criminal behaviour is an expression of the same needs and values (Sutherland and Cressey, 1970.Therefore according to Sutherland, preventing crime meant interfering with this learning process since the propensity of an individual to act conventionally or non conventionally lies in the content of what is learnt.

More companion ideas have been developed in this theory by other scholars.

For example, there have been new arguments in this theory that in the process of interaction, the law-abiding values of some individuals may be nullified by the neutralisation techniques of deviants and criminals that can exempt them from following the popular rules and values of the community.

On the other hand, deviants and criminals can also be contained from engaging in crime by both the inner constraints (self-concept) and outer constraints (external control systems). In other words, the best way to control process-induced crime is by promoting as well as process-based control measures of crime containment, namely, the inner and outer constraining measures of crime control.

Criticisms of the theory

The theory is subject to Criticism based on errors from interpretation of the theory itself. For example, not every one in contact with criminals becomes a criminal. The prison wardens and policemen are always in daily contact with prisoners but are not criminals.

The theory attempts to define some types of crimes but not all the types. It can explain crimes like theft because thieves can learn stealing from each other but however it does not explain murder that was caused by jealousy. (Malice aforethought).

The theory simply explains the transmission of criminal behaviour but does not explain the origin of the crime, criminal techniques and definitions. In other words, it does not explain how the first person became a criminal.

Control theory

The key proponents of this theory include Travis Hirschi who as the think tank of this theory has dominated literature, Gerald Patterson and associates, Michael Gottfredson and Travis Hirschi, and Robert Sampson and John Laub all of whom have extended Hirschi's theory in important ways.

The Control theory begins with a question, why do people conform? Unlike strain and social learning theorists, control theorists take crime for granted.

They argue that all people have needs and desires that are more easily satisfied through crime than through legal channels. For example, it is much easier to steal money than to work for it. So in the eyes of control theorists, a crime requires no special explanation: it is often the most expedient way to get what one wants.

Rather than explaining why people engage in crime, we need to explain why they do not.

According to control theorists, people do not engage in crime because of the controls or restraints placed on them. These controls may be viewed as barriers to crime. So while strain and social learning theory focus on those factors that push or lead the individual into crime, control theory focuses on the factors that restrain the individual from engaging in crime.

Control theory goes on to argue that people differ in their level of control or in the restraints they face to crime. These differences explain differences in crime: some people are freer to engage in crime than others.

According to the key proponents of the control theory, (Travis Hirschi whose ideas

have dominated the literature, Gerald Patterson and associates, Michael Gottfredson and Travis Hirschi, and Robert Sampson and John Laub), there are three major types of crime control.

These are Direct control, Stake in conformity, and Internal control, each type having two or more other components.

Direct control:

This control involves someone watching over people and sanctioning them for crime and may be exercised by family members, school officials, coworkers, neighbourhood residents, police, and others. This form of control has three components: setting rules, monitoring behaviour, and sanctioning crime.Direct control is enhanced to the extent that family members and others provide the person with clearly defined rules that prohibit criminal behaviour and that limit the opportunities and temptations for the crime. These rules may specify such things as whom the person may associate with and the activities in which they can and cannot engage.

Direct control also involves monitoring the person's behaviour to ensure that they comply with these rules and do not engage in crime. Monitoring may be direct or indirect. In direct monitoring, the person is under the direct surveillance of a parent or other conventional "authority figure."

In indirect monitoring, the parent or authority figure does not directly observe the person but makes an effort to keep tabs on what they are doing. The parent, for example, may ask the juvenile where he or she is going, may periodically call the juvenile, and may ask others about the juvenile's behaviour. People differ in the extent to which their behaviour is monitored.

Initially, direct control involves effectively sanctioning crime when it occurs. Effective sanctions are consistent, fair, and not overly harsh. Level of direct control usually emerges as an important cause of crime in most studies.

Stake in conformity.

The efforts to directly control behaviour are a major restraint to crime. These efforts, however, are more effective with some people than with others. For example, all juveniles are subject to more or less the same direct controls at school: the same rules, the same monitoring, and the same sanctions if they deviate. Yet some juveniles are very responsive to these controls while others commit deviant acts regularly. One reason for this is that some juveniles have more to lose by engaging in deviance. These juveniles have what has been called a high "stake in conformity," and they do not want to jeopardize that stake by engaging in deviance.

So one's stake in conformity that which one has to lose by engaging in crime functions as another major restraint to crime. Those with a lot to lose will be more fearful of being caught and sanctioned and so will be less likely to engage in crime. People's stake in conformity has two components: their emotional attachment to conventional others and their actual or anticipated investment in conventional society.

Still under the control theory; If people have a strong emotional attachment to conventional others, like family members and teachers, they have more to lose by engaging in crime. Their crime may upset people they care about, cause them to think badly of them, and possibly disrupt their relationship with them. Studies generally confirm the importance of this bond. Individuals who report that they love and respect their parents and other conventional figures usually commit fewer crimes. Individuals who do not care about their parents or others, however, have less to lose by engaging in crime.

A second major component of people's stake in conformity is their investment in conventional society. Most people have put a lot of time and energy into conventional activities, like "getting an education, building up a business, [and] acquiring a reputation for virtue" (Hirschi, p. 20). And they have been rewarded for their efforts, in the form of such things as good grades, material possessions, and a good reputation.

Individuals may also expect their efforts to reap certain rewards in the future; for example, one might anticipate getting into college or professional school, obtaining a good job, and living in a nice house. In short, people have a large investment—both actual and anticipated in conventional society. People do not want to jeopardize that investment by engaging in delinquency.

Internal control:

People sometimes find themselves in situations where they are tempted to engage in crime and the probability of external sanction (and the loss of those things they value) is low. Yet many people still refrain from crime. The reason is that they are high in internal control. They can restrain themselves from engaging in crime. Internal control is a function of their beliefs regarding crime and their level of self-control.

Under the control thoery;

Most people believe that crime is wrong and this belief acts as a major restraint to crime. The extent to which people believe that crime is wrong is at least partly a function of their level of direct control and their stake in conformity: were they closely attached to their parents and did their parents attempt to teach them that crime is wrong? If not, such individuals may form an amoral orientation to crime: they believe that crime is neither good nor bad.As a consequence, their beliefs do not

restrain them from engaging in crime. Their beliefs do not propel or push them into crime; they do not believe that crime is good.

Their amoral beliefs simply free them to pursue their needs and desires most expediently. Rather than being taught that crime is good, control theorists argue that some people are simply not taught that crime is bad.

Finally, some people have personality traits that make them less responsive to the above controls and less able to restrain themselves from acting on their immediate desires. For example, if someone provokes them, they are more likely to get into a fight. Or if someone offers them drugs at a party, they are more likely to accept. They do not stop to consider the long-term consequences of their behaviour. Rather, they simply focus on the immediate, short-term benefits or pleasures of criminal acts. Such individuals are said to be low in "self-control."

Self-control is indexed by several personality traits. According to Gottfredson and Hirschi (1969), "people who lack self-control will tend to be impulsive, insensitive, physical (as opposed to mental), risk-taking, short-sighted, and nonverbal" (p. 90). It is claimed that the major cause of low self-control is "ineffective child-rearing." In particular, low self-control is more likely to result when parents do not establish a strong emotional bond with their children and do not properly monitor and sanction their children for delinquency. Certain theorists also claim that some of the traits characterizing low self-control have biological as well as social causes.

More so Gottfredson and Hirschi claim that one's level of self-control is determined early in life and is then quite resistant to change. Further, they claim that low self-control is the central cause of crime; other types of control and other causes of crime are said to be unimportant once the level of self-control is established. Data do indicate that low self-control is an important cause of crime.

Data, however, suggest that the self-control does vary over the life course and that other causes of crime are also important. For example, Sampson and Laub demonstrate that delinquent adolescents who enter satisfying marriages and obtain stable jobs (i.e., develop a strong stake in conformity) are less likely to engage in crime as adults.

Therefore, in sum, crime is less likely when others try to directly control the person's behaviour, when the person has a lot to lose by engaging in crime, and when the person tries to control his or her behaviour.

In recent years criminologists have begun to emphasize the importance of society's reaction to crime, as an important ingredient in the perpetuation and intensification of criminal and delinquent careers.

Basically, this perspective has provided a theoretical model by which criminologists could reassert their interest in the study of the criminal justice system, after decades of focusing on the characteristics of the offender.

Labelling theory

The founding fathers of this theory are George Herbert Mead and Blumer .The core argument of this theory is that people relate to each other through symbols and that the meanings attached to these symbols have great importance including the fact that sometimes the labels we put on other people have unintended consequences, including, driving them further into the arms of criminality.

Edwin Lemert (1967), eventually argued that secondary deviance and criminality can also be adopted by non-deviants by accepting the labels applied to them. For example, a child who has been labelled dense can proceed to fail at school.

This notion ultimately led to the development of the labelling theory (Becker, 1963) which asserted that the critical variable in understanding crime is understanding the social audience which evaluates some behaviour as being criminal.

Following consideration of the works of Tannen- Baum (1938), Lemert (1951), Becker (1963), Turk (1969), and Quinney (1970), Schrage identifies what he considers the basic assumptions that distinguish labelling theory from other theoretical, perspectives.

The assumptions identified are:

1) No act is intrinsically criminal;

2) Criminal definitions are enforced in the interest of the powerful;

3) A person does not become a criminal by a violation of the law but only by the designation of criminality by authorities;

4) Since everyone conforms and deviates, people should not be dichotomized into criminal and non-criminal categories;

5) The act of "getting caught" begins the labelling process;

6) "getting caught" and the decision-making in the criminal justice system is a function of the offender as opposed to offence characteristics;

Age, socioeconomic class, and race are the major offender characteristics that establish pit- terns of differential criminal justice decision-making;

8) The criminal justice system is established on a freewill perspective that allows for the condemnation and rejection of the identified offender; and,

9) Labelling is a process that produces, eventually, identification with a deviant image and subculture, and a resulting "rejection of the rejectors" (Schrage 1971: 89-91).

Some people are differently seen as criminals but whether their actual behaviour warrants that labelling is suspect according to this line of thought.

The social policy implications of this approach, coming out in the 1960s as it did are clear: stop labelling people as bad and they will stop acting criminally. Or, assess our criminal justice system agencies and see whether they are applying criminal labels to everyone equally. Perhaps some people are behaving the way they do because we expect them to do so.

According to the critical theorists, whereas the labelling theorists like Tannenbaum and Lemert correctly see crime as socially constructed in community reactions to behaviour which are consequential and labels as selectively applied

However, the criticism is that they labelling theorists do not go in-depth in their analysis of the origins of these labels and their application which according to these theorists fundamentally are rooted in the inequities in the structure of capitalism.

They also argue that power differences are what make the behaviours of the poor but not that of the rich defined criminal.

And that since the class structure influences the superstructure, the creation and enforcement of the criminal justice system also explains selective labelling and criminalisation in society.

According to empirically oriented criminologists or positivists, when subjected to empirical tests, the key tenet of the labelling theorists wilts. According to them, whereas the perspective became popular, its popularity has nothing to do with its adequacy and empiricism but rather it's the provocative message is carried.

For this reason, they argue that its arguments are not backed by hard data. For example, their arguments that state intervention deepened criminality, has been pinned down by these critics on these grounds.

Their arguments that the extra-legal factors such as class, gender, economic status other than the legal factors such as the seriousness of the act are more important in regulating criminal justice labelling has also been nullified by study after study that have found otherwise.

For this reason, they argue that, whereas this may make sense, the influence of extra-legal factors is only but weak. The other assumption of the labelling theory is state intervention through the justice system is the cause of career criminality.

However, the criticism again is that many criminals get involved in crime even before coming to the attention of the criminal justice system. For example, chronic delinquency has had blighted areas being blamed than being arrested and prosecuted or criminally sanctioned.

However, in defence of the theorists, Robert Sampson has argued that reactions to behaviour are influenced by a plethora of contingencies. One of the contingencies he raised is the ecological bias in police control of delinquency.

In his study, even when he considered the seriousness of the legal factors, he found that the police were likely to make arrests in slums of poor neighbourhoods than in affluent neighbourhoods. The conclusion is that policing activities are normally concentrated in slums where every one residing is assumed to be a criminal. This, therefore, justified the argument of extralegal influence in the criminal justice system.

Policy Implications of labelling theory

According to Empey (1982), the labelling theory had a profound impact on social policy. This impact was based on the warning/assumption that pulling offenders to the criminal justice system increased criminality. The implication, therefore, is that if state intervention causes crime, then steps should be taken to limit it (Schur, 1973).

To effect this, the labelling theorists embraced four policies that promised to reduce the intrusion of the state in the offenders lives: Decriminalisation, diversion, due process and de-institutionalisation. These policies have been implemented at varying degrees and have had an uneven impact.

Policy implications

Decriminalisation: According to the labelling theorists, the criminal justice system or criminal law has time and again been used to target not only crimes that threaten life and property but also unjustifiably "victimless crimes" (drunkenness, gambling, pornography and drug abuse) and juvenile status offences (like promiscuity and truancy).

To them whereas the morality of these "victimless crimes" may be debatable, using criminal law as a means of control is unwarranted, expensive, ineffective and criminogenic (Morris and Hawkins, 1970).For instance, Edwin Schur (1973) argued that the use of criminal law to control these victimless crimes/deviance creates more deviance, in various ways.

The presence of the laws alone turns those participating in the behaviour into candidates for arrest and criminal justice processing. It compels them to commit related offences, for instance, drug addicts can steal to support their activities

By prohibiting legal means of acquiring services and goods, it fuels illegal ones or exchanges

Lastly, the existence of the illegal means perpetuates corruption through bribery of the justice system officials.

On these grounds, the labelling theorists have advocated for the removal of many conducts from the scope of criminal law to reduce the extent to which people are labelled and treated as criminals or limiting them to minor fines. Because of these arguments, several countries made some changes.

Abortion was legalised in the US, the criminal status of pornography was left to communities to decide, some forms of gambling were legalised. However, the call to legalise all forms of drug abuse was not honoured.

Diversion: In this policy, the labelling theorists called for the adoption of programmes where deviants, delinquents and juveniles are diverted from prisons and juvenile courts to youth service bureaus, welfare agencies, special schools, the community under intensive community probation supervision or home incarceration.

This proposal however only benefited by being taken as an add-on to the existing system. This means that the people under the current arrangement benefiting from this proposal are those who would have had under the old system suspended sentences, who would have been signed or released.

Due Process: This proposal was based on the reforms under the progressive era that provided the justice system officials with excessive discretion to effect the individualised treatment of offenders.

Whereas this power had been entrusted to the state to serve as a kind parent for juveniles, labelling theorists accused state officials of abusing this power by discriminating the powerless from lower classes, especially those who resisted coercive correction by rehabilitation officials

For this reason, they advocated for a return to the rule of law where abuses would be curbed by constitutional protection.

They also embraced the arguments of the classical school to have punishments prescribed by law and sentences being determinate according to written codes. In a way, this proposal also has shaped policy and has helped protect the rights of inmates and offenders from state abuse.

Policy implications

De-institutionalisation: Having noted the criminogenic effects of incarceration, the labelling theorists called for depopulation of prisons by de-institutionalisation. Using this argument, thy advocated for a change from the institutional approach to rehabilitation to the community-based approach. They believed this would reduce the rate of recidivism. Research later proved dramatically their conviction that actually, the rates of recidivism reduce with a systematically adopted community-based approach to juvenile rehabilitation.

The Conflict theory

The conflict theory is a sub-school of thinking first suggested by the think tank Sellin (1938) in the early 19th century.

This theory sees crime as essentially a product of whoever wins the struggle to control the labelling apparatus.

For this reason, when a particular group conquers the other and imposes its laws over that society, behaviours which have been previous acceptable might become criminal and vice versa. Look at the closure of the Guantanamo Bay by Obama which was formerly operational under Bush.

Therefore, the protagonists of this theory argue that crime, it's important to understand the actions of norm creators, norm interpreters and norm enforcers than it is to understand the norm breakers (Turk, 1969).

Laws are made by the state, which represents the interests of the ruling class. This line of argument forms the basis of a theory of widespread crime and selective law enforcement; crime occurs right the way through society, but poor criminals receive harsher treatment than rich criminals. Conflict theorists tend to emphasise 'white-collar, corporate crime' and pay less attention to 'blue-collar' variants.

They note that the crimes of the upper class exert a greater economic toll on society than the crimes of the 'ordinary people'. They also have many related strong beliefs

on the idea that the poor are driven to commit the crime by the ruling class.

First, to them, deviance is partly the product of unequal power relations and inequality in general. They see it as an understandable response to the situation of poverty.

Two, they see power as largely being held by those who own the factors of production and crime is often, therefore, a result of offering society-demeaning work with little sense of creativity. The Marxist concept of alienation can be applied here.

They also see the superstructure as serving the ruling classes because to them most of the laws passed by the state support ruling class interests. They also see the purpose of these laws as maintaining the power of the ruling class, to coerce, and control the proletariat.

Ideally, also, these theorists see the laws passed by the state reflecting the wishes and ideologies of the ruling classes with different people in different classes having unequal access to the law. For example, having money to hire a good lawyer can determine the possibility of being found not guilty or guilty and therefore justice or injustice.

It is against these grounds that these theorists deduce that punishment for a crime may depend and vary according to the social class of the perpetrator. Given these, the main issues raised by these theorists rotate around:

The manipulation of basic values and morality of society

The process of law creation.

The enforcement of law

individual motivation to deviate or commit the crime.

The social implication of this theory is quite a fatalistic one i.e we shall always have crime since someone will always be a loser in the power struggles in society. For this reason, the only real question is how to minimise it.

Weaknesses of Structural Theories

Like other theories, the structural theories have not escaped criticism from the subsequent theorists. Among these criticisms are:

They emphasize the causal importance of the transmission of criminal cul-

ture but offer much less detail on the precise origins of this culture
They emphatically deplore the consequences of urban sprawl such as crime and delinquency and in their differential social organisation and differential social association, they see the spatial distribution of groups in cities as a natural social process. This perverts their lenses of looking at the reality as influenced by inequality rather than the product of power and class.

Weakness of structural theories

The theories have also been accused by other scholars of lacking adequacy and universal applicability. This is because they can not account for all forms of crimes. For example, while they at best account for stable criminal roles and group delinquency, they are less persuasive in explaining crimes of passion (crimes committed by persons with perennial or prolonged mental problems or an emotional state of the mind) or other impulsive offences committed by people who have had little contact with deviant value.

Differential association theory has also received special criticism. Many subsequent scholars see it plausible and perhaps correct but the problem they associate with it is that it can not be tested scientifically.

For example, the question which has been raised time and again is whether it is possible to accurately measure whether in the course of one's life a person's association with criminal definitions outweighed his association with conventional definitions (Vold and Bernard, 1986)

These theories have been roundly criticised for focussing attention on the lower classes.

Lastly, the solutions they suggest for crime control are admittedly difficult prescriptions to follow.

Strengths of structural theories

Several scholars have failed to dispute the influence the structural theories have had on criminology. They adequately explained how crime is evidence of individual pathology. This is to say that when looking for origins of crime, it's important to consider areas people grow up from and those they associate with.
Two, they laid a foundation for the development of two perspectives that remain vital to this modern day.Lastly, their argument that society gets the crime it structures itself for has been supported by many scholars and evidence across the world.

Sample questions

With very practical examples, discuss the validity of the Sutherlands propositions in his differential Social organisation and Association theories.

2. Pick any one of these propositions and with relevant examples discuss its validity. Suggest measures to deal with the criminal issues you raise in your discussion.

3. According to Sutherland, the theory of differential association provides general explanations to very divergent types of illegal activity (Lilly, Cullen and Ball, 2002:40). Do you agree?

SPIRITISTIC THEORIES

According to Vold Spiritistic explanations are those which rest on the belief that Supernatural forces, such as gods, demons and cosmic forces interact in the world and earthly phenomena or events are affected or caused by such supernatural interference.

Thus the explanations for some criminal acts like homicide have included the ancient belief in the "evil eye" which in the various cultures meant that a human being had been infected by Supernatural forces with the capacity to cast evil upon the world by looking at it.

To prevent and control crimes caused by such forces, such a person had to be blinded or ritually (sacredly) cleansed (to appease the supernatural powers) at least or killed at worst. This is because killing the person was expected to prevent such contamination from spreading.

Against this background, the participants in this culture wouldn't treat this as a murder and as such many such murders that have occurred across the world have been justified by this Spiritistic explanation.

In the 1970s also, a group of Quakers in Philadelphia conceived of the idea of isolating criminals in cells and giving them only bibles to read and some manual labour to perform. The Quakers believed that the criminals would then reflect on their past wrongdoings and repent. They used the term Penitentiary (a place for penitents who were sorry for their sins) to describe their invention.

Today, some religious individuals also attribute crime to influence of the devil and sinful nature of man. They therefore also argue that the only solution to this is religious conversion.

The validity of these theories cannot be scientifically proven because, by definition,

these theories defy scientific scrutiny. Even if the followers of these explanations are less dominant today, it is important to note that these Spiritistic explanations of crime are still alive in the world and have many believers in even modern cultures.

NATURALISTIC THEORIES

Naturalistic explanations assume that things happen in the world because of the interaction and interrelationships between natural objects, events and ideas. These theories assume that things happen only because of natural phenomena not because of Supernatural phenomena.

Accordingly, even if some of the natural causes of behaviour can not be determined now, improvements in technology will make it possible in the future.

For this reason, a criminal claiming to be acting under the supernatural influence would be interpreted as possibly mentally impaired or deliberately fabricating falsehood, a condition which can be empirically tested.

Even if traditional Spiritistic explanations still have some believers in, virtually, all modern criminological theories are naturalistic. Vold (1958) suggested the multitude of crime explanations within the realm of naturalism could be divided into at least three big categories, which he referred to as the schools of thought, meaning ways of thinking.

These schools of thought he classified include The Classical, The Positivist and The Critical explanations of crime.

Classical explanations of crime control

Being an interdisciplinary field, a wide range of professionals, including sociologists, philosophers, medics, legal practitioners and scholars, in general, have been trying to explain crime since the 18th century.Among the leading classical scholars in this process of seeking explanations of crime are philosophers like Rousseau in France, Kant in Germany, Beccaria (an Italian Jurist) and Lombrosso (an Italian physician).

However, CesareBeccaria (1738-1794) and Bentham (1748-1832) are considered the founding fathers of classical criminology.

According to Beccaria, a classical in this school of thought, people are by nature inherently rational (capable of logic), hedonistic (motivated by gain/pain) and self-determining. Under this circumstance, all behaviour is freely and rationally chosen basing on the assessments of pain/pleasure or cost/benefit of the actions.

In his argument, therefore, he saw criminal behaviour as a product of deliberate

choice/free will (rational choice explanation/criminological economics).Bentham argues that, because crime is a rational choice act, based on the evaluation of the gains and pains, to deter, prevent and restrain individuals from committing it, society needs only to increase the pain of action to the point where it overwhelms its possible pleasures/benefits (deterrence theory). However, we must not merely increase the pains and costs across the board or punish all crimes to the extremes.

The punishment must fit the crime, not the criminal. This is because as rational beings, excessive punishments for lesser offences merely increase the likelihood that people will creatively engage in greater crimes since no harsher punishment will befall them for the greater offence than is the case if caught in lesser offences. For this reason, the deterrence theorists (like Bentham) argue that a careful calculus intended to make the crime fit the punishment will deter a person from committing a lesser offence to avoid the pains/costs that will follow. Also, to be effective, this punishment does not only have to fit the crime (proportionate to the crime), it must take place publicly, it must take place as soon as possible after the crime.

Social policy implication

That humans can be persuaded to change their behaviour either by changing the consequences of that behaviour or changing the decision-making process by which humans evaluate the consequences of their actions. That criminal acts are the responsibility of the individual committing it or the society that sets forth the consequences of individual actions. Humans act out of the free will (hedonism) rationally. It calls for criminal laws to be impartial, fair for all citizens and specific for crimes.It urges punishments to target crimes rather than criminals. All these ideas have become increasingly acceptable .

And lastly, every good legislation system aims to prevent crime rather than punish.

This school of thought influenced revolutions across the world, right from the French revolution of 1789 and its famous code of 1791, USA's independence in 1776 and the constitution. It also influenced constitutionalism in Italy, UK (e.g. the Penitentiary act of 1779).

Weaknesses of the classical school

Whereas the theory argues that bad laws make bad people (Rothman, 1971) evidence of reducing trends in criminal behaviour does not exist even in countries which made legislative forms following the issues it raised in the middle of the 18th century when it was published. For example, in modern democracies today, with better legislation, why is crime increasing and why are even worse crime emerging i.e. .terrorism?

Similarly, its argument that all criminal behaviour could be explained by hedonism

or pleasure seeking is weakening. There is evidence that aggravating and mitigating circumstances have a role to play in criminal behaviour i.e. several intervening variables interfere with the free wills of individuals e.g. pathology (study of disease). For this reason, not all criminal behaviour can be explained by free will.

The neoclassical school of thought itself has admitted a weakness associated with its argument that by assuming that all persons are equal before the law and crime is determined by free will, the theory is unrealistic in unequal societies e.g. the children of the rich rarely pickpocket vis-à-vis those of the poor.

The theories also concentrate on crime and the criminal at the expense of the victim.

On a positive note, however, the theories have influenced the criminal justice systems worldwide. Particularly, they have injected a view that legal sanctions and punishment are an effective way of preventing crime. The rational choice theory is built on these classical arguments.

Failure of the classical explanations of the rational man to answer the questions of why crime remained a troubling question resulted in the emphasis being given to action being determined by factors outside the control of an individual rather than being a result of the free will of an individual. The advocates of this alter view then came to be known as the Positivists.

The criminal as determined

With a common assumption shared by all positivistic explanations that human behaviour is influenced at least in part by factors largely outside the control of any specific individual and loss of favour of the classical theories in the 19th century, the positivistic explanations of crime started flourishing.

However, despite having a common assumption, this school of thought has three different sub-schools of thought reflecting different ideas about the locus of the factors influencing human behaviour.

These sub-schools of thought include the Individual Determinism, the Socio-Cultural Determinism and the Social Process Theories.

Individual determinism

The philosophy of this sub-school of thought is that the factors which influence human behaviour are largely located inside an individual, either in her physical/ biological nature or in his mental/psychological processes.

For example, Lombroso Cesera, the founding father of this school of thought while

serving as an army physician in several military posts in Italy between 1959-1963 developed the idea that diseases, especially, cretinism and pellagra contributed to a mental and physical deficiency which may result in violence and homicide (Wolfgang, 1973).

In other words, this school of thought agrees that it is something about someone himself that causes him to behave criminally.

Policy implication

Even if these theories differ on the source of criminal conduct, with some pinpointing the body and others the physical-biological makeup, they all agree that little insight on crime can be found in the social environment or context outside the individual.

Policies and measures to prevent and control crime should therefore also target the individual's mind or biological set up.

The Physical Type Theories

This reflects the early works of Cesare Lombroso who is credited with pioneering the biological explanations of criminal behaviour. Being a Darwinist, Lombroso's major tenet is that criminals are less evolved than other people and for this reason; criminals are physically different from non-criminals.

For example, in his book, Criminal man, he described criminals as atavistic (born criminals), a throwback of an earlier form of evolutionary life.

He pointed out ears of unusual size, sloping foreheads, excessively long arms, receding chins and twisted noses as the physical characteristics distinguishing criminals.

According to Hooton (1993), the policy ramification of this explanation for crime control is that since evolution status can not presumably be altered, little can be done to such creatures except confining them or eliminating them.

Hereditary and Defectiveness Theory

This sub-school assumes that criminality is either inherited genetically or produced by physical/biological defects. Though some of these early theories have been debunked, such as the notion of degenerative families, some modern versions of these theories are scientifically credible and therefore highly provocative.

For example, the notion that aggression may result from some form of head trauma or that psychopathy may result from defects in the autonomic nervous response system.

One implication of these theories is that a person may be condemned based on the biological factors over which they have no control contrary to the principles of democratic freedoms. This has made the reception of these theories in a democratic world difficult (Marsh and Katz, 1985).

Mental Deficiency Theories

Mental Deficiency Theories assert essentially that criminality is a product of low intelligence. This theory enjoyed popularity at the beginning of the 20th century as well as periodic rises. This idea asserted by this theory received support from the earlier IQ tests until later when it was determined that the scale was erroneously applied. Once this was corrected, IQ tests did not reveal much difference between criminals and non-criminals, an outcome which has been regularly observed (Tulchin, 1972).

One disadvantage with these theories is that they hold out the prospect that mental deficiency is a fatalistic situation which cannot be cured.
The pioneer of this sub-school of thought is Sigmund Freud with his Psychoanalytic theory and other behaviourists with their behavioural theories. Though these theories differ on their assumptions about the working of the human mind, they all attempt to explain human behaviour in terms of mental functioning or malfunctioning.

Rational choice theory

Rational choice theory is rooted in the classical criminology of 18th-century social philosophers CesareBeccaria and Jeremy Bentham and at the same time most closely associated with the work of criminologists such as Clarke, Cornish, and Cook (Siegel, 1998; 1989).Generally, the prevalent conditions in society have a substantial effect on the themes and contents of theories, as is the case with rational choice.

Like classical theorists, rational choice theorists view offenders as reasoning decision-makers Offenders, in this case, are assumed to be in a position to think about their actions before getting involved in crime. The effect of such an assumption is that offenders can, therefore, be held responsible for their actions and be legitimately punished .

Rational choice is a theory about criminal events (Cornish and Clarke, 1986). This suggests that emphasis is put on crimes and not criminality. How potential offenders weigh the costs and benefits in particular situations is the concern for rational choice theory.

Vold, Bernard, and Snipes (2002) demonstrate that if the conditions under which offenders consider before deciding to commit crimes can be known and altered, potential offenders would desist from committing crimes.For example, offenders

always try to maximise their risks of crime by considering the time, place and other situational factors .

In general terms, rational choice theory's premises suggest that actors are free riders, calculating the cost and benefits of their criminal behaviour and always maximising their personal choices. Ultimately, all these have implications for the development of policies and strategies aimed at crime prevention.

Assumptions of rational choice theory

The theory assumes that law violating behaviour occurs after offenders weigh information on their personal needs, the situational factors involved and the difficulty and risk of committing a crime (Siegel, 2007).

The need for cash by many unemployed people is more likely to drive them into committing a crime to satisfy their needs through acts such as robbery, burglary, and theft from vehicles, among others.

Motivated offenders consider the ease of access to the target, the likelihood of being observed and caught, and the expected reward before committing a crime (Bernard, Snipes, Gerould, 2010). If the business's premises, for instance, are not guarded, it is assumed the offenders and vice versa would most likely target them.

Assumptions of rational choice

The rational choice theory assumes that offenders seek to benefit themselves by their criminal behaviour. This involves making decisions and choices; however, rudimentary on occasion, these processes might be. The processes which the offenders go through to reach decisions about whether or not to commit a crime exhibit a measure of rationality the rational choice theory proposes that pure or partial rationality operates in crime.

Offenders are intelligent beings who make decisions about crime, no matter how limited their mental ability, information, or time. In some situations, offenders may not necessarily have all the information or fail to analyse the information available to them appropriately. Accordingly, Siegel (1998) argues that the decision to forego crime may be based on the criminals' perception that the economic benefits of crime are no longer there.

The rational choice theory assumes that crime is purposive behaviour designed to meet the offender's commonplace needs and meeting these needs involves the making of sometimes quite rudimentary decisions and choices. For example, there are instances where drug abusers get involved in criminal activities to get cash to

sustain their drug-taking habits.

The rational choice theory assumes that offenders weigh the costs and benefits of particular courses of action and choose those most likely to result in the highest return on investment be it in terms of time and effort. For instance, the decision of the corporate employee to commit a crime is influenced by the perceived costs and benefits of the offence.

When the benefits of committing a crime are high compared to the costs, then the offender will go ahead and commit the crime. Criminality, as argued by Clarke and Felson (1993), is more likely to be selected when legal options are less rewarding for the individual, or when criminals are punished less.

Limitations of rational choice theory

The rational choice theory of crime has faced numerous criticisms from various scholars in the field of criminology who are not satisfied with the validity of the assumptions on which the theory is built. Cornish and Clarke (1986) firmly maintain that theories are primarily of heuristic rather than intrinsic value and that the standard by which the rational choice approach should be judged is the degree to which it enhances thinking about crime control policies. Caution is therefore made not to dispel the explanatory power of this theory.

Similarly, (Burke 2009) asserts that more often that murder, particularly in a domestic context, is a crime where the offender is highly unlikely to make a rational choice before committing the act. The implication as Burke (2009) suggests, is that it would be hard to explain the actions of those individuals who have little control over their impulses or who break the law unwittingly if the assumption of rationality of the offender is accepted without questioning.

Nagin (2007) emphasises the need to understand the interaction between cognition and emotion to understanding crime and how to prevent it. Such efforts it assumed would help in preventing crime.

Critics fault the rational choice theorists on the idea that offenders are rational when committing a crime. Lilly et al. Ball (2011) insist that offenders are not entirely reasonable, but instead their rationality is bounded. What is rationality? How do you determine rationality? Is rationality always the same?

It is strongly argued by Akers and Sellers (2009) that even offenders who pursue crime on a regular business like basis typically do not operate through a wholly rational decision –making process.

Burke (2009) is quick to suggest that if the prescriptions of the rational choice actor model are in any way accurate, then the prisons should be full of people who have made rationally calculating decisions to commit criminal offences.

Sampson and Wikstrom (2006), however, maintain that most often people act impulsively, emotionally, or merely by force of habit. There is a lack of realism in the above assumption, and it should, therefore, be treated with caution.

Rational choice theory is criticised because the rewards of crime are treated mainly in material terms while mostly ignoring those rewards that cannot be easily be translated into cash equivalents (Clarke and Felson, 1993). For example, one wonders how the rational choice theory would explain the criminal act of rape or hooliganism.

It is appropriate to suggest, therefore, that the rational choice's explanatory focus on such crimes is limited and not convincing enough.

Another critique is on the assumption that actors are free riders, yet under specific structures, systems constrain and influence people's behaviour. How can you explain the rationality of crime during a riot, war, mass violence among others where some people may turn criminal without exercising their personal choice, but somewhat being constrained by the environment to behave in that way?

The rational choice explanation for this situation is, therefore, inadequate.

Evidence suggests that many petty criminals (Burke, 2009) are incapable of accurately balancing the costs and benefits before committing an offence, for example, in the street fights. This makes the assumption of the theory questionable.

It would not be perfectly reasonable to suggest that the criticisms directed towards the rational choice theory of crime reduce its relevance and its explanatory potential for crime.

Akers and Sellers (2009) strongly advance that the value of any criminological theory is always its usefulness in providing guidelines for effective social and criminal justice policy and practice. The fact remains that the rational choice theory has far-reaching implications for crime prevention such as situational crime prevention and deterrence (Cornish and Clarke, 1986), among others.

Concerning Policy implications

The rational choice theory has a far-reaching impact on crime prevention, both in theory and practice.

Bouhana and Wikstrom (2010) assert that theories themselves do not provide direct solutions to applied problems but are necessary to devise solutions.

It is from the assumptions of any given theory that the actors involved in crime prevention can draw some lessons that will inform the strategies developed to prevent crime in the society.

It is believed that influencing the decision making of the would-be-offenders so as not to choose to commit a crime would in one way or another help in crime prevention (Wikstrom and Sampson, 2006).For instance, people who would be involved in burglary and robbery due to economic difficulties can be given jobs to help them earn a living. This is not to suggest that the problem will disappear entirely, but at least the chances of viewing crime as an option are reduced.

Cornish and Clarke (1986) strongly assert that the rational choice model provides an excellent framework for analysing and understanding the decision-making process used by offenders.

Lilly et al. (2011) argue for the need to study offenders, not as empty vessels propelled to commit crimes by background factors but rather as conscious decision-makers who weigh options and act with purpose. The needs and motivations of the offenders should, therefore, inform the crime prevention policies.

Rational choice theory suggests that crime prevention should be achieved through policies that convince potential criminals to desist from criminal activities (Siegel, 1998). It is assumed that if potential targets are carefully guarded (Siegel, 1998) and the means to commit crime are controlled, and potential offenders are closely monitored, crime can, therefore, be prevented.

Only the genuinely irrational will attack a well-defended target Siegel (1998). By protecting the targets, for example, the airports against terrorists, the supermarkets against shoplifters using Closed Circuit Television Cameras, the chances are that most people would be deterred from getting involved in crime. However, there is evidence to suggest that suicide bombers always attack even highly guarded targets.

There is evidence to suggest that increasing chances of apprehension reduces the chances of people getting involved in crime. This can be achieved through a situational crime prevention strategy that is aimed at convincing would-be criminals to avoid specific targets.

The philosophy behind situational crime prevention is that crime can be prevented if motivated offenders are denied access to suitable targets (Siegel, 2007). People who have higher estimates of risk are less likely to commit a crime (Horney and Marshal

(1992; Wright et al. 204).

Burke (2009) asserts that the probability of apprehension is more effective in deterring crime than the severity of the punishment. Keith (2007) makes a strong case for the use and installation of Closed Circuit Television (CCTV) cameras in the fight against crime. These deter potential offenders from committing crimes, although some go-ahead to commit crimes even when they are aware that they are closely monitored.

Siegel (1989) suggests that easily recognisable uniforms and patrol cars serve as constant reminders that criminal violations can result in apprehension and severe punishments.

Given this underlying assumption, the implication would be that increased police presence around the hotspots and in public reduces the crimes.

Cornish and Clarke (1986) make a strong case for eliminating the opportunities to commit a crime. By tinkering with the environment, it is assumed that the choice of crime is discouraged (Lilly et al., 2011). Similarly, Clarke (1997) posits that opportunity plays a large part in motivating criminal acts such as homicide.

It is proposed that the capabilities and intentions of offenders should be altered. To reduce the risk of being victimised by crime, Dekeseredy and Schwartz (1996) suggest that steps should be taken to lower vulnerability to criminal activities such as burglary, shoplifting, and vandalism, among others.

Burke (2009) argues for the introduction of measures aimed at reducing the opportunity to offend, for example, target-hardening and controlling access to certain facilities targeted by offenders.

Lilly et al. (2011) assert that crime is prevented not by changing offenders but rather by changing aspects of the situations in which offences typically occur. This argument seems to be credible after evaluating the role played by situational crime prevention measures such as target hardening and access control in preventing crime.Denying the offender benefits, according to Dershowitz (2002), ensures that the potential criminal understands that he has far more to lose than to gain from committing a crime.

Dershowitz further proposes punitive damage remedy which disgorges all gains from the person who secured them improperly and imposes a punitive fine. It could be argued and has been submitted that denying criminals the benefits of crime is so critical in crime prevention. For instance, if the people involved in white-collar and corporate crimes were given severe sentences and at the same time are made to pay back the money which they mismanaged, it would make many people think that

such criminal acts were less attractive since the punishments deny them the benefits of crime.

Since offenders are assumed to weigh the benefits of crime against the costs of being caught, it is believed that making punishments more severe and certain will deter would-be offenders from committing a crime.

However, Cornish and Clarke (1986) strongly believe that stiff penalties are unlikely to stop those who do not think they will be caught.

All hope is not lost; if the offenders are punished severely after apprehension, this will deter some, although not all.

Criticism of the theory

It must be noted that there is always a gap between theory and practice and therefore situational crime prevention control as suggested by the rational choice theory has to be accepted with caution for it has been faulted on several grounds.

Siegel (1998) asserts that preventing crime from occurring in one locale does little to deter criminal motivation and therefore supposes that people who desire the benefits of crime may choose alternative targets.

Empirical evidence from Lampe's study on 'the application of the framework of Situational Crime prevention to 'organised crime', shows the ineffectiveness of situational crime prevention approach to crime and even questions its applicability (Lampe, 2011).

Similarly, results from a study by Waples, Gill, and Fisher titled 'Does CCTV displace crime?' concluded that situational crime prevention measures have a significant effect on the displacement of crime,

All this evidence implies that the offenders would not attack highly guarded targets but shift their efforts and attention to less guarded or unguarded targets.

It should also be observed that the police cannot be everywhere at once (Munchie et al., 1996), as suggested by the situational crime prevention approach to crime. For instance, it's difficult, if not impossible, to prevent crimes that take place in the private sphere, such as domestic violence.

Criticism of the rational Choice theory

Whether or not one finds it persuasive, there is a need for an action theory (Burke, 2009) that must recognise the significant number of motivational states, both rational

and irrational, that can result in the commission of a crime.

Akers and Sellers (2009) point out that political and economic factors that come into play to enhance or retard the effectiveness of crime prevention policies and programs have nothing to do with the validity of the theory. Therefore the success or failure of policies and programs cannot be used by themselves to test the theory.

The problem with the rational choice theory is that offenders are treated as though they were only decision-makers which impact the prescription of criminal justice policies by ignoring the social context and focus on making crime a costly decision. Siegel (1998) posits that the rational choice theory has influenced in shaping public policy. Most if not all, criminal laws are always designed to deter potential offenders by punishing those involved in illegal acts.

Conclusion

In conclusion, therefore, it remains a clear fact that the rational choice theory provides an insight in understanding crime despite the criticisms levelled against the approach. The search for a theory that can explain all crimes fully has not yet yielded any success. Rational choice theory best explains best some of the crimes like juvenile delinquency, shoplifting, white-collar crime, robbery, burglaries, terrorism among others but fails on some behaviours that can only be explained well by psycho-biological theories. In reality, no theory can explain everything about a complex concept like crime, but instead, they must attempt to do so approximately; this is also true of rational choice. Rational choice theory gives insight into how criminals behave, and why and how we can best prevent crime, and this has implications for crime prevention.

Strengths of structural theories

Several scholars have failed to dispute the influence the structural theories have had on criminology. They adequately explained how crime is evidence of individual pathology. This is to say that when looking for origins of crime, it's important to consider areas people grow up from and those they associate with.

Two, they laid a foundation for the development of two perspectives that remain vital to this modern day. Lastly, their argument that society gets the crime it structures itself for has been supported by many scholars and evidence across the world.

Sample questions

1.With very practical examples, discuss the validity of the Sutherlands propositions

in his differential Social organisation and Association theories.

2. Pick any one of these propositions and with relevant examples discuss its validity. Suggest measures to deal with the criminal issues you raise in your discussion.

3. According to Sutherland, the theory of differential association provides general explanations to very divergent types of illegal activity (Lilly, Cullen and Ball, 2002:40). Do you agree?

In conclusion, there is no single theory that can explain crime causation in its entire totality. All these theories complement each other. They are subject to criticism for failure to bring out certain ideas very well.

CHAPTER SIX

CRIME VICTIMS

A generation ago it would have been difficult to have found any criminological agency (official, professional, voluntary or other) or research group working in the field of victims of crime, or which considered crime victims as having any central relevance to the subject apart from being a sad product of the activity under study criminality. To officials the victim was merely a witness in the court case, to researchers either the victim was totally ignored or was used as a source of information about crime and criminals. Until very recently there was a striking lack of information about victims, and even now the knowledge is sketchy, limited to certain crimes and often to certain types of victim. This ignorance was astonishing when one considers that the criminal justice system would collapse if victims were to refuse to cooperate. Some victims have found and still find that their treatment by the officials in the criminal justice system the police, lawyers, court officials, judges and compensation boards to be too stressful, demeaning, unfair, disregarding of their feelings, rights, needs and interests.[12]

In my percipience, there could be no better definition of a victim than what is encompassed in The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power as this provides a broad definition thereof.

Accordingly; 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power . . . A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.1

I associate more with this definition because it encompasses anyone who is victimized as a result of a violation of the criminal law, and captures a range of abuses relating to criminal abuse of power. This therefore implies that the direct victims of crime such as those who were physically present at the crime scene, the indirect victims who are closely associated with the victim, as well as the secondary victims are

12 *Katherine S. Williams _ Textbook on Criminology. 7th Ed. page 105*

all embraced in the umbrella of the declaration. In this regard, the Declaration surpasses the criminal law in many countries, particularly in its identification of 'abuse of power' as victimization. Indeed there is no generally accepted definition of who or what the term "crime victim" encompasses. A person can be classified as a crime victim regardless of whether a perpetrator has been identified, arrested, charged or convicted and regardless of any kinship relation between the victim and the perpetrator. To put it simple, a victim can be defined as one who suffers physical injury or loss of or damage to property as a result of another's criminal actions .A natural person who suffers physical or psychological injury or material loss by reason of criminal offence committed whether or not the perpetrator is identified, apprehended, prosecuted or convicted. Victims are usually natural persons therefore the incorporation of unnatural persons like companies is grossly uncertain.

The study of victims is referred to as victimology. This is defined by World Society of Victimology (WSV), the academic study of victimology can be defined as:

The scientific study of the extent, nature and causes of criminal victimization, its consequences for the persons involved and the reactions thereto by society, in particular the police and the criminal justice system as well as voluntary workers and professional helpers.2

(Karmen, 1990), attempts to give a narrow definition of victims and victimology but the UN and the WSV's definitions, emanating as they do from international arenas, provide the weight of shared consensus. In contrast to these 'neat' definitions, Rock, a British academic, supplies an in-depth critique of what is meant by and what it means to become a 'victim' (2002: 14):

'Victim', in other words, is an identity, a social artefact dependent, at the outset, on an alleged transgression and transgressor and then, directly or indirectly, on an array of witnesses, police, prosecutors, defense counsel, jurors, the mass media and others who may not always deal with the individual case but who will nevertheless shape the larger interpretive environment in which it is lodged.

Rock calls for a dynamic understanding of the 'victim' identity that looks to the experience and construction of 'victim' by different actors in different contexts. Rock's interpretation of 'victim' focuses more on victimhood but this may not be helpful to students of criminal law though he offers readings of 'victimhood' that allow us to understand and critically navigate how and why it is that 'victims', and the subject of victimology, were neglected before coming to prominence in recent years.

The need to define victimology and a focused look on victims came especially after the world wars owing to the prevalence of many dead bodies along streets and not

these alone but the multitude of tears shed by their loved one's the relatives, friends, employers and employees, house helpers and all dependents on these victims not forgetting the on lookers both at the scene of war and after the scene. This wide range of collection of victimized characters created an urgency of victims' rights definition under jurisprudence.

Thus in the years following the Second World War, a handful of scholars approached the subject of victims: von Hentig (1948), Mendelsohn (1956), Wolfgang (1957, 1959), and Nagel (1963). Von Hentig's text, The Criminal and His Victim, was reflected in Schafer's book two decades later, The Victim and His Criminal (Schafer, 1968). What these various authors have in common is their exploration of the part played by victims in precipitating crimes of violence – what came to be known as 'victim precipitation', or, latterly, 'victim blaming 'which saw the rise of theories of crime such as the victim precipitation theory. It is trite that in blame casting, a victim too can carry blame for their personal harm, selfishly induced.

Von Hentig identified different victim 'types', one of which was the 'tormentor', who, as the victim of attack from 'his' target of abuse, provoked 'his' own victimization – typically, the 'nagging' wife who is beaten by her husband. This early work on victims variously talked about victims' conscious and unconscious role in their own victimization, and focused on victims' responsibility in the escalation and manifestation of a situation into a criminal incident.

However the early definitions of crime and the study thereof have been criticized for unfairly placing the victim in a disfavored, biased position and that such definition would not stand the test of a changing society as well as the particular crime environment. For example, this is the case for Amir's controversial publication on rape (1971). Feminist criminologists, from the 1970s on, were quick to condemn ideas that blamed victims for their own victimization, particularly in the case of physical and sexual violence against women (Edwards, 1981; Griffin, 1971). And clinicians, later with feminist criminologists, also alerted the public and practitioners to the extent and nature of child abuse that could not readily be explained away by 'victim precipitation' (Griffiths and Moynihan, 1963).Some of the early scholarly definitions of victims have been characterized with sexist segregation and gender undermining and in the event of feminist opinions regarding the same, the early theories have been partly discredited.

The early constructions of crime victims have seen victims in some instances victimized in the precipitation of their plight therefore. Regardless, the underlying rationale, the gist of their theories and insinuations cannot be disregarded as truly they apply to this present age victimhood.

Victim Vs Survivor

The term victim is complex and contested (Walklate, 2017). Because Crime affects a broad audience, it is impossible to determine the extent of how a man's action will travel in as far as affecting the livelihood, peace, future of others, and even influencing the political space of a whole nation. I imagine if as according to one ancient book, one man's action alone can cost the holiness or disgrace of others, so does the evil done by one person affect the quality of life of others. (Hebrews. 5. 9), the inequities of a single man's actions would affect the wide un-contemplatable scope of victims to the third and forth generations, (Deut. 5.9) so could the range of victims of a crime be grossly unascertained distance and time and a result, the liability of a perpetrator to a victim is so much immeasurably unascertained.

The Distinction between a survivor and a victim is also blurred and faintly distinguished by the effect of harm caused. Although the two concepts are used often interchangeably (Tapley, 2016), survivors and victims differ fundamentally. Survivor and victim are distinct concepts having recourse to different people.

Crime victim

The category "crime victim" is quite heterogeneous even if the public debate, however, often sees victims as a homogenous group, characterised by similar reactions even though, it is inevitable that such reactions will differ slightly take for instance Crime may entail no emotional reactions for some persons, while others experience it as an extremely traumatic event involving strong cognitive and emotional stress.nTruly, one's reaction to a given trauma cannot be fully ascertained and the same applies to how long various victims take to heal. These all call for an individual assessment of crime impact, causation and reaction by players in the criminal investigation field and the courts. Because of this, several factors that do generally affect the extent of the reaction. In addition to recovery time, variations in the extent of the reaction are influenced by the type of event, the victim's personal characteristics and situation, the victim's social network and the consequences of the crime.

A great irony is paused when the psychological reactions are often the most common consequence of crime and yet these are the least visible and most difficult to understand in all circumstances. Take for instance in Alcock v. Chief Constable of South Yorkshire Police (1992) 1 A.C. 310, Lord Hoffman, stated that "the law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals." This was said to discredit the claim of psychiatric harm experienced by individuals, rescuers and bystanders at the incident of an accident. However, the occurrence of psychiatric injury is appreciated by law and this fits more easily with page v. smith (1996) A.C 155.

In Page v. Smith, the plaintiff was driving hiscar at 30 miles a hours when the

defendant turned right immediately into his Path. The consequence as an accident in which both cars suffered considerable damage but the occupants all escaped physical injury. The plaintiff, however had suffered for 20 years from a condition known as chronic fatigue syndrome which manifested itself from time to time. The judge held that the shock of the accident reactivated this condition which was now in all probability permanent and that it is it was unlikely that the plaintiff would be able to return to fulltime employment, and he was awarded damages. The court of appeal allowed the defendants appeal on ground that psychiatric injury was not foreseeable consequence of the accident. The House of Lords (H.O.L) by majority held that in in circumstances such as road accident in which a defendant owes a duty of care into to cause physical injury, it mattered not whether the injury suffered as a result of the defendants negligence was physical injury or psychiatric injury and liability would be established without the necessity to prove as an independent part of the cause of action that psychiatric injury in the absence of physical injury was foreseeable.

In my percipience, I regard this as a sensible development of the law … if some very minor physical injury is suffered and this triggers a far more serious psychiatric disorder no one questions that damages are recoverable for the psychiatric disorder. It the victim of the negligence escapes minor physical injury but the shock or fear of the peril in which he is placed by the defendants negligent conduct causes psychiatric injury I can see no sensible reason why he should not recover for that psychiatric damage._ Lord Brown Wilkinson

This ruling shows judicial activism for the rights of a victim of psychiatric injury on a background that such emotional and psychological harm is difficult to fully imagine.It is therefore important that people who encounter victims have knowledge and understanding of victims' reactions. This guides people such as those within the investigation field to consider what questions they can or ought not to ask from a victim as some of it could be embarassing and further worsening of the victim's situation. Take for instance, a victim of rape who is being interviewed in the immediate aftermath might not feel free in explaining how she felt during the rape.

Unlike in the past times, 'Victims', as a generic group, are now both 'newsworthy' and deserving of public and criminal justice support. But while victims are increasingly important to law and criminal justice reform in uganda, their new-found status is relatively recent and not well defined in the country's legal history. It is absurd that victims were simply viewed as potential witnesses for the prosecution, and their experiences of victimization were responded to primarily as harms against the State but the question is whether now their needs, and to some extent their rights, are recognized and acted upon. Whether we can talk of the victim's central role in criminal justice is, however, dependent on the standpoint of those interpreting the victim's place at the beginning of the twentyfirst century. Prosecutors and probation officers might consider victims as having considerable new 'rights' with the potential to undermine defendants' rights. Individual victims, depending on their particular

experience or experiences of victimization, can feel at times either satisfied or acutely dissatisfied with 'the system' as they have encountered it[13]. The system will keep referring to the accused's right to bail and their fair hearing but not minding upon the issue of the victim's state. The victim's role and in fact "feigned benefit" from the Ugandan criminal justice system is in practice seen to end at the point of reporting their plight and ceases thereafter.

The rationale for recognizing victims' rights

Briefly, it is important to ponder upon the possible reasons why victimology and the rights of a victim are forming a substantial argument in the present age and not ever before. This we can attain by looking into the developments over time in society, politics and moral adaptations that form a basis for reforms and social activism. Some of the reasons for studying about and recognizing victim's rights are;

- an increase in official crime rates;
- revelation of extensive hidden crime by crime surveys;
- heightened fear of crime among the public;
- public intolerance towards increasing crime and social disorder;
- failure of the offender treatment model, and its replacement with retributive justice linked to victims;
- media reports of crime against vulnerable victims and victims' maltreatment by the criminal justice system;
- recognition, and politicisation by feminists, of the problem of violence against women/child abuse;
- recognition, and politicisation by civil action groups, of the problem of racist violence.
- politicisation of rising crime rates by politicians focusing variously on

'law and order', 'crime reduction', and victims as 'vote winners';

- A movement towards citizens' charters/patients' rights that also encompasses victims.

Victims of crime

In line with criminal law, the definition of a "victim of crime" can be found outrageously defined by many though all leading to the same thing. Some of these definitions are given thus;

Notwithstanding the definition of a victim under the UDHR which encompasses

[13] *Jo Goody _ Victims and victimology; research, policy and practice_ Longman Criminology Series pg. 13*

various legal environments such as tort among others, a "victim of crime" per se can be defined narrowly and variously thus;

_A natural person who has suffered injury as a direct result of criminal offense whether or not the injury was reasonably foreseeable by the offender.

_A citizen, a legal person or an organisation that has directly suffered harm as a result of a criminal act.

_A natural person who has suffered harm including physical or mental injury, emotional suffering or economic loss directly caused by a criminal offence

_Physical persons who have suffered from crime either directly or indirectly.

_A victim is someone who has suffered a misfortune through no fault of his or her own.

Primary victimisation

This refers to a direct impact that crime has on a victim. Primary victimisation is the process that helps in distinguishing between the effects and consequences of the results of the crime and their impact of the results of the crime and their impact on the victim. Such impact on the victim can be in form of:

The financial loss associated with goods stolen

Time taken off work to sort out the aftermath of a burglary

Physical injury as a result of an assault

The post-traumatic stress syndrome reported by some victims of rape

Shock, and loss of trust or faith in the society

Guilt often associated with feelings of anger and or fear

Changes in lifestyle

A primary victim on the other hand is a person who is injured or dies as a result of; a violent crime committed against him or her; trying to arrest someone he/she believes, on reasonable grounds, has committed a violent crime; trying to aid or rescue someone he/she believes is the victim of a violent crime. I'd one saves somebody or something from dangerous or harmful situation, there is an explicit risk that they will be exposed to danger.

Secondary Victimisation

A secondary victim is one who suffers psychiatric injury not by being directly involved in the incident but by witnessing it. Take for instance, seeing injury being sustained by a primary victim or the fearing of such injury to a victim. If for example a friend of yours was assaulted or abused or was a victim of any crime, you're a

secondary victim. Secondary victims often feel anger, guilt and hopelessness but feel that since they were not the primary victim, they should just get over it.

Research has indicated that individuals who are involved in the criminal justice process as either victims or witnesses frequently feel let down by that process. This arises from;

Not being kept informed of what was happening in their case

Being treated unsympathetically by the professionals working in the criminal justice process Not being believed when they are giving evidence.

Indirect victimisation

As already noted, the impact of crime can be broadly encompassing. Indirect victimisation –draws attention to experiences such as those involved in murder, in which families of both the murderer and the murder victim can feel victimised by their experiences of the criminal justice process. These more indirect experiences can manifest themselves in relation to;

Feelings of bereavement. The family of the deceased has an obvious emotional attachment to the latter and would obviously suffer the wrath of their beloved one's demise.

Being under suspicion themselves for what has happened. This is a natural situation affecting most especially those people who were known to be obviously attached to the victim. Take for instance, the murder of wife to someone could bring some family members known to be natural notorious, to be under suspicion for having masterminded the killing and this could affect the prudence in their relation with others.

The negative impression made of the relatives of a victim could have them uncomfortable. If for instance, my girlfriend is raped, it would be hard for both her and I to keep the formerly positive reputation we owned prior.

Not being able to make sense of what has happened. This could leave someone oblivious and to the extremes, it would lead to psychological torture.

A glance at the victims' rights

The provision of rights to victims of crime is controversial. As already noted, it appears to me that the criminal justice system in Uganda largely focuses on proving the accused wrong than remedying the plight of the victim. Much of the modern victim policy agenda in most jurisdictions traces its roots back to the 1985 UN

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration speaks of victims being afforded:

Access to justice

Fair treatment and compassion

Respect for their dignity

Information about their role and the scope , timing and progress of proceedings as well as disposal of their case

Assistance from the criminal justice system

Protection from unnecessary delay or inconvenience

Rights afforded to victims; a brief comparative study with other jurisdictions

In Scotland, victims are entitled to understand the information being presented to them by the criminal justice actors. In practice, this provision is equally respected in Uganda. In England and wales, prosecutors must meet with victims personally, prior to court proceedings to offer explanations and answer questions. In South Africa, victims have a right to receive information including information concerning victims' rights as victims.

In European Union, member states must ensure that measures are available to protect victims and their family members from secondary and repeat victimisation; intimidation and retaliation; against risk of emotional or psychological harm; protect the dignity of victims during questioning. In the USA, the victims have a right to be reasonably protected from the accused. More to this, the Miranda Principle operates to protect those being questioned against self-incrimination as a result of their own statements that could probably be used against them. This reminds a victim of their right under the 5th and six amendment. In New Zealand, judicial officers may withhold part of the statement from offenders to protect victim's physical safety or security.

Analysis of victim's rights in Ugandan criminal justice system

An important question to ponder about is a critical analysis of a victim's rights in the criminal justice system; have they any rights or they simply have obligations.

QN. The regulation of the concept of the victim under the Uganda criminal justice system remains ineffectual inadequate and leaves a lot to be desired. With specific reference to the criminal procedure laws and regulations, critically analyze the above statement with specific emphasis to the efficacy of the current legal regime relating to the laws played by rights and protection of the victim in the criminal justice system.

Background. About 60 years ago, Uganda experienced a fundamental change in her

jurisprudence owing to her submission to British colonial rule. For so long a time, most African centralized societies had constituted their own style of criminal and civil adjudication spearheaded by local chiefs and at the advice of their council of elders. These gave binding judgements in all matters civil and criminal in nature and the remedies they gave ranged from compensation to punishment such as banishment, execution, fines and corporal punishments among others. With the inception of colonial rule, the colonial protagonists introduced the 1902 and 1920 orders in council, the latter containing a "reception clause" which introduced the application of English laws in the Ugandan system with an effect that all the laws applied in England would be applicable to Uganda. The coming into force of the Judicature Act cap 13 established the present day hierarchy of courts and in its section 14, provided the applicable law in these courts, established both procedural and substantive laws in force up to date.

The landmark to our present day judicial system was sealed in January 1950 when the Criminal Procedure Code Act was promulgated. Its significance to the subject matter at hand is that it outlawed the ancient African criminal procedural adjudication and established the current criminal procedure in which all forms of punishments were stipulated for in the statutes.

Introduction. It is stated that whereas the African criminal adjudication was aimed at vindication of the victim, the effect sought under the statutes would be to obtain justice for the victim and protect the public at large against wrong doings.[14]

Victims are defined as Persons who individually or collectively have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment rights through acts or omissions that are in violation of criminal laws operative within member states including those laws protecting criminal abuse of power.[15] The scope of a victim varies according to the jurisdiction in question wherein some define it to include family members of the witness and anyone they're financially responsible for but in the Ugandan context subject to the Evidence Act cap 6, victims are only restricted to those in judicial proceedings. Court in Prosecutor v. Thomas Lubanga Dyilo D.R.C. 19th March 2010 court ruled against the disclosure of intermediaries who are not victims or witnesses and went further to appreciate the contribution of these intermediaries towards attainment of justice and acknowledged the need for protection thereof.

The present day legal regulation of the concept of the victim under Uganda's justice system has despite the initial motive, (to protect the public) remained somewhat ineffectual, inadequate thereby leaving a lot to be desired. Thus in my submission hereunder, I will discuss the instances of the legal framework's attempt to protect a victim in various laws as well as where it has fallen short in achieving justice for a

[14] *Odoki, Benjamin Justice: A Guide to Criminal Procedure in Uganda, 1990*

[15] *United Nations Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power*

victim. I thus submit;

Victim's right to file a complaint. Article 50[16] provides a victim with a right to lodge a complaint in its phrasing that "Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation." The right to a remedy is a secondary right, deriving from a primary substantive right that that has been breached. So if there is no primary right, there can be no secondary right. A victim's right to file a complaint is furthermore enhanced under criminal law by the absence of statutory limitation of litigation in criminal matters. This carries the effect that a victim of crime has an 'eternal right' to file their complaint for legal redress which is grossly a protection to them.

Victim's right of appeal. Every victim's right to attain justice is furthermore enhanced by the legal facility of one appealing to a higher court where they feel dissatisfied with the previous ruling or have gathered adequate evidence to the facts in issue. Section 132[17] allows the DPP to appeal on a matter of law, fact or mixed law and fact. This in essence aids to see to it that justice must not only be done but be seen as done.

Victim's right to compensation. article 126 (c)[18] and section 120(6) of the Trial on Indictments Act provides that "if the victim has suffered material loss or personal injury in consequences of the offence committed, the court may upon its discretion and in addition to any other person grant such compensation as the courts deems fair and reasonable." This was so granted in Muwanga Angelo & Anor v. Uganda criminal Appeal no. 12 of 2010 where in the trial court, the victims of malicious damage to property were granted 5milion shillings compensation. It follows that a victim can obtain compensation for any damage to property, economic loss and personal injury among others.

Collective responsibility for a victim's rights. The same article mentioned above in its clause two allows organizations and other groups of people other than the victim to bring action on behalf of the latter for the enforcement of their rights. This is the doctrine of public interest litigation and it serves for the good of those victims whose ability to take action is handicapped by their physical, psychological, social and financial status. A landmark case on public interest litigation though in civil matters, is that of CEHURD v. A.G & Anor[19]. Therefore the law is highly cognizant of a victim's rights that it ensures advocacy at whatever cost.

It is a victim's right for police to ensure that intensive investigations into the victim's case are carried out. Negligence or reluctance by police to carry out proper

[16] *1995 Constitution of the republic of Uganda*

[17] *Trial on Indictments Act*

[18] *1995 Constitution of the republic of Uganda*

[19] *CEHURD & Ors v. The Executive Director Mulago Referral Hospital, A.G(HCCS No. 212 /2013)*

investigation accrues a cause of action. Take for instance in the British case of Commissioner of Police of the Metropolis v. DSD & Anor (2018) UKSC under which the supreme court awarded damages to victims who initiated proceedings against police for failure to carry out substantial investigation into a number of sexual assaults.

Updating a victim on the progress of a case. All important information concerning a victim should be held by authorities for purposes of keeping the former updated about the date, time and place of hearing. This goes hand in hand with the right to access information in possession of the state as under article 41[20] which allows anyone to access information in the hands of the state except where it is prejudicial to public security. This right therefore protects a victim in the sense that they are capable of following their matter to see to it that justice is attained owing to the fact that equity serves the vigilant not the indolent.

Victim's participation in court proceedings. It is imperative to have a victim included in the entire judicial process than only requiring them to make a statement. By practice, a witness is usually denied presence in court until when they are called upon to testify. This as seen in Anywar & anor v. Uganda (1936-51) 6 ULR 264 is done for purposes of keeping the witness' evidence uninfluenced by the events in court. However apart from practice, there was no rule of law or procedure or evidence that requires potential witnesses for other side not to sit in court and listen to evidence of other witnesses prior to giving their own. In my view, it is imperative to have a witness who doubles as a victim sit in the court room and follow all proceedings relating to their case. Court has held in Uganda V Ochola[21] that the correct way of writing a judgement is by considering the evidence from both sides and make findings on it.

Article 27[22] provides the right to privacy of persons which without discrimination, extends to victims amidst criminal proceedings. Principle 6(d)[23] requires measures to be taken to ensure the privacy and safety of victims and protect their families against intimidation and retaliation. Uganda is signatory to international conventions and various treaties which makes these binding upon it. In practice, courts have adopted a system where some critical cases are handled in camera which is a good practice essential to the privacy of a victim amid certain proceedings.

Victim' right to arrest without a warrant. Sec. 23 of the Police Act[24] allows a private citizen who has reasonable belief that someone has committed crime, to arrest them and take them to police. In this manner, a victim of an offence such as robbery is

[20] *1995 Constitution of the Republic of Uganda.*

[21] *(1981) HCB 8*

[22] *1995 Constitution of the Republic of Uganda (as variously amended)*

[23] *United Nations Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power*

[24] *Police Act cap 303*

legally protected when they arrest their offenders and follow the legal prompts. This arrest by a victim without a warrant is very crucial to the cause of attaining justice speedily and to oppose this would bring expenses by police in chasing the offender and to delay justice which when delayed, could be denied.

A victim's benefit from plea bargains. In practice still, courts have adopted a system of allowing the accused who had initially pleaded not guilty, to change their plea to 'guilty' at any time before the final judgement.[25] This upon being analyzed, carries an effect beneficial to the victim and prosecution before especially where it would have been so much difficult to acquire certain evidence convicting the accused. This in essence saves the time and cost incurred in procuring evidence and therefore sees to it that justice is met sooner. This brings a conclusion that a victims rights are thereby enhanced.

Victim's right to confer with prosecutor in plea bargains. Some states provide the victim with some level of prosecutorial consultation about a negotiated plea bargain. However the level of participation varies from state to state. In Uganda, a victim's participation in the plea bargain agreement is grossly minimal and the transaction is largely seen to pertain basically the prosecutor, the defense counsel and the judge, as in Inensko Adams v. Uganda[26]. In those states, the law requires prosecutors to consult a victim on the plea bargain agreement. However still, the victim's opinion is not binding on the district attorney as the words confer or consult do not mean a victim can direct the prosecutor on what to do.

Victim's protection under bail procedure. Subject to article 23[27], court considers certain things before granting bail to anyone and among these, the judge or anyone in authority must be satisfied that the accused shall not tamper with the witnesses or victim. This is self-evident of the legal endeavor to have a victim protected. However, victims should also be given an effective say in the bail granting process instead of following the principle bail conditions which in tandem, dispose all discretion to the judge. In practice, we have seen and heard of police bond" (carries a similar effect like bail) where it is granted to even potentially hostile suspects who could antagonize the victim's procurement of evidence.

On the other side, the role played by Victims remains shallow in court take for instance, a victim has no right to bring evidence in court unless they're allowed a "private prosecutor" facility. Furthermore, the law is inefficient in regards the mode of adducing evidence especially in cases of sexual assault. This is owing to the fact that at times it appears humiliating for a victim to narrate before a crowd, the circumstances surrounding for instance their rape as this could involve emotional breakdown and embarrassment. A video facility is thus highly important to enable a

[25] *See Rule 5 of the Judicature (plea bargain) Rules 2016 established under the judicature Act Sec. 41 (1)& 2 (e)*

[26] *(criminal Appeal no. 004 of 2017 [2018] UGHCRD 101*

[27] *1995 Constitution of the Republic of Uganda.*

victim narrate their oral evidence in a conducive private environment.

Provision of medical and psychological assistance to victims. The Ugandan Criminal Procedure Code Act are a bit silent on the provision of medical services to victims of crime especially those who may suffer injury arising from sexual assault. It is important to provide medical checkup to victims of crimes relating to assault and other related offences to a person for purposes of enabling them to follow properly the court proceedings. Article 14[28] provides that victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

The standard of evidence required is beyond reasonable doubt. This may at times pose a great difficulty for prosecution to prove before court as well as the victim to maintain certain allegations such as rape which tend to happen in the wee hours of the night without adequate assembly of witnesses. In Uganda v. Ngaswireki Paul & anor (criminal Appeal no.3 of 2017/2018 the trial magistrate ruled that the victim's evidence was not corroborated and hence wrongly acquitted the accused. Yet even the burden of proving the case against reasonable doubt does not shift to the accused and the accused person is only convicted on the strength of the prosecution and not because of weakness in his defense[29]. Thus in my well-considered opinion, it appears that the legal protection regarding a victim is much more pronounced in the laws than that afforded to a victim with recourse given to the previous statement. Therefore, maintaining this standard of proof across most criminal charges would render the victim inadequately protected. Good enough, courts have built a culture of examining all circumstances to realize that which creates an inference that the accused was rightly identified by the victim as was in Uganda v. Nakoupuet (criminal case no.109 of 2016) [2019]

Furthermore, it is a bit inaccurate to state that all victims are fully protected in all instances yet the law recognizes a hostile witness. This can be seen in Okwanga Anthony v. Uganda[30]where the judge upheld the declaration by the trial judge that PW1 was a hostile witness. This in essence means that a victim who is a witness and contradicts their statements despite bearing truth in the later evidence for any genuine cause of mistake, may have their evidence disregarded and justice dispensed with.

In a nutshell, it's important to appreciate all the legal and institutional provisions for the security of victims. The concept of protection of a victim is not a thing of yesterday but has been earlier on contemplated by various law makers as evidenced in today's legal framework. However, its enhancement and implementation remains handicapped by a number of factors. These among others, I have labored to explain

[28] *UN Declaration on the Basic Principles of Justice for Victims of crime and Abuse of Power*

[29] *Uganda v. Barugo (criminal sessions case no. 1020 of 2017) [2018] UGHCCRD 73*

[30] *Cr. Appeal No. 45 of 1999) [2000]*

and how I wish that much more is done to emphasize a victim's rights. Just as we see those rights of an accused being clearly pronounced under article 28[31], so should those of a victim be.

Victim participation in criminal justice

First of all, victim's participation in criminal justice is different from victim's rights in criminal justice. Under international law, the system for victims' participation in the Court's proceedings has been described as one of the major innovations and achievements of the Statute. The role of victims under the Statute is not confined to that of witnesses. Victims, for the first time, have the opportunity to tell their stories before an international criminal court and to obtain, where appropriate, some form of reparation for their suffering.

The purpose of victim participation is to give victims a voice, and thereby contribute to the truth finding process. The most direct, and arguably most meaningful, form of participation is the victims' giving testimony as witnesses. This has been the commonest and most obvious in practice. One of the arguments in favour of victims' participation at trial is that since victims lived through the relevant events, their experience and knowledge provide the Judges with important information on the facts relevant to the case.

Victims can provide Judges with knowledge that only those who experienced the events possess and 'their attendance in person at the trial may help in establishing the truth. Victims can make meaningful contributions to the Chamber's 'determination of the truth' .However, sometimes witness evidence has been found not reliable. According to the Uganda Evidence Act, victims as witnesses are guided by rules of admissions such as oral admissions in section 92 of the Evidence Act..

The common law rule required that a witness be competent. The trial judge had to determine the competency of any witness, and there were many grounds for incompetency, including tender (young) age, old age, infirmity of mind, lack of religious belief, having been convicted of a crime, or having an interest in the outcome of the case.

These historical standards no longer hold true. Rather, the only requirements for a victim to be able to testify are that the individual:[32]

[31] *1995 Constitution of the Republic of Uganda (as variously amended)*

[32] *See Evidence Act cap 6. Sec. 117*

has personal knowledge of facts pertinent to the case;
has the ability to understand the obligation to tell the truth; and
be willing to take an oath (or affirm) that he or she will tell the truth.
Ability to perceive: (5 senses) "Personal Knowledge"
Ability to Recall
Ability to Communicate
Understand to tell the truth
Take an Oath or Affirmation (Perjury)

Nevertheless, the system has gaps that require filling using both the legal and institutional handle. There is a need to allocate more resources than at present on participation of victims. I submit that the part of witnessing suffers a problem where for instance the presence of a witness may be instrumental to the case and so their absence becomes fatal to the same and yet resources may not permit the witness who is upcountry to appear before court. To avoid the inconvenience and cost of transporting witnesses/ victims, the prosecution may proceed in a trial against the accused without sufficient evidence and this is harmful to the victims rights.

Victim participation in criminal justice

There is need to provide 'physical, psychological rehabilitation and/or material support to those who have suffered 'physical, psychological and/or material harm as a result of crimes. It must be remembered that the biggest remedy of a victim to crime is seeing the perpetrator apprehended and whereby sometimes this arrest does not directly benefit the victim since the harm caused may remain irreversible.

The Rome Statute gives victims the right to participate in proceedings, the right to request reparation and the right to legal representation.

The ICC is the first court of its kind to explicitly include reparation for victims and the practice is spreading.

Reparation should aim to heal and allow victims to cope with the past as well as the future since what has been done is already done thus, reparation, is not about going back to the way things were before: victims are generally unable to return to their original condition and are often changed by their experience.

As a defence lawyer, Mendelsohn was keen to develop a scale of victim proneness that could point to mitigating factors in support of the defendant. His work, like other early victimological attempts to explain victimisation, reflected established wisdom about the nature of the ideal and innocent victim: the very young, the very old, the sexually vulnerable, and the socially respectable could be considered as 'innocent' parties in their own victimisation. In comparison, those who were regarded by the establishment as living or acting outside the parameters of acceptable social behaviour, such as the unemployed and the homeless, were to be regarded with

suspicion when assessing their degree of culpability in their own victimisation. These stereotypes tended to work on the basis of dichotomies that served to distinguish the victim (us) from the offender (them). From this tradition, ideas about the part played by victims in their own victimisation have come to be associated, most damagingly, with 'victim blaming'.

Impact of crime

Anyone can become the victim of crime at any time, in any place. The Individual's response to experience of crime can be hugely variable owing to the natural differences we possess; our history and social setting. Nearly all crimes result in victims, regardless of whether the crime is reported to the authorities and a suspect is apprehended or other action is taken by the justice system. Nevertheless, I take cognizance of the "victimless crimes"
Crime leads to extensive and long-lasting consequences. These crimes do not only affect the victims, their families and friends. Take for instance a child would in future live as an orphan owing to the killing of its parents while at infancy. Because of this, the same child could never proceed with studies due to lack of tuition. This could make a child to live a poor state and adopt harmful addictions such as drug abuse.

Being the target or victim of a rape, robbery, or assault is a terrible burden that can have considerable long-term consequences. It is not certain whether victims of rape are more susceptible to getting married and living happily in marriage. Neither can we ascertain whether their ability to trust is not fettered.

Crime affects the entire society through the feelings of fear and insecurity that they spread. Take for instance, the recent bombings in Komabongo, at Digida Pork joint on 23rd October 2021 which caused fear among natives ion Gayaza Road. The fear and insecurity may result into condemnation and abhorrence towards the ruling government.

I therefore recommend that all crime victims should be treated with the same respect and empathy while ignoring the unfavourable societal stereotype. This should run straight away from the start of the criminal justice process including this in charge of search, arrest and investigation. A police officer investigating a woman, victim of rape should not blame it on her for being poorly dressed.

Governmental authorities and non-governmental organisations (NGOs) should offer the same standard of service regardless of the victim's sex, race, age, handicap, sexual orientation, social status, lifestyle, etc.

There is a tendency to see certain groups as more worthy of protection than others which is absurd. The rich class will most probably attain the public sympathy as

compared to the poor who are judged with bias. However, it can never be acceptable to provide varying standards of treatment to victims. It is possible that certain groups of victims may be in need of special efforts at various times and a question is whether they actually obtain it. Whether he customer service of police institutions is encouraging and entering for a come again.

Crime may lead to a number of negative effects economic damages, physical damages, and psychological reactions, social consequences and practical problems which can be of a temporary or more lasting nature.

The costs of victimization can include such things as damaged property, pain and suffering to victims, and the involvement of the police and other agencies of the justice system.

In the economic sense, Crime often results in various forms of indirect and direct economic damages for the victim. There may be direct cash or property losses associated with the crime, costs related to property damages, medical fees or loss of income due to injury.

The direct economic damages are naturally quite varied some crimes may result in large direct economic damages, while others are associated with quite low nominal damages.

The indirect economic damages may, in many cases, be quite large. They may involve costs for an abused woman to change her locks and telephone number or even to relocate to a new town to escape an abusive ex-husband or partner.

They may encompass therapy costs for the psychological damage of rape or robbery, loss of future income for an assault victim etc. some of the psychological harm caused may be completely incurable whereas the accused may serve a sentence and be set free later.

One common cost is associated with victims attempting to protect themselves from future crimes through the installation of alarm systems, security doors. These are obviously expensive to purchase and install.

Economic costs

Many crimes affect persons who are already in a precarious economic position. This can be imported partly to the fact that the poor are less protected and cannot easily protect themselves owing for instance to the lack of resources to afford well sheltered houses, security guards and CCTV cameras. For these individuals, the costs associated with replacing stolen goods or repairing damaged property can often have serious consequences.

When the costs of goods taken during property crimes is added to productivity losses caused by injury, pain, and emotional trauma, the cost of victimization is estimated to be in the hundreds of billions of dollars. This implies that the cost of curing the impact of crime will in all circumstances double that of preventing.

The taxpayer is burdened with the costs of crime and justice. These include assisting the victims and medical treatment for the injuries and services to the victims. Take for instance, the impact of the rampart boda boda killings which devoured AIGP. Felix Kaweesi, Kiggundu, and the recent attempted assassination of Gen. Katumba Wamala in 2021 led government into placing cameras on roads and in some vehicles (as they so intend) but these would have to increase the national budget which cost is incurred by a tax payer.

The losses suffered by victims, such as lost wages, pain, suffering, and reduced quality of life. Some people are permanently unable to resume work. This causes a heavy dependence burden upon the existing people at work but most especially family members.

Crime produces social costs that must be paid by non-victims as well. These include primarily treatment for HIV/AIDS and psychiatric care, as well as paying for the cost of incarceration, policing, legal adjudication, and the cost to crime victims for heroin abuse.

There is also the cost of lost productivity—heroin addicts are less than half as likely to have a full-time job as compared with the national average—and the treatment of heroin addiction in clinics and hospitals is also not an easy and low-cost process.

In addition to these societal costs, victims may suffer long-term losses in earnings and occupational attainment. The collapse of business is much likely to happen to such individuals. This may lead to insolvency proceedings and eventual loss of income.

The court process itself may be time and money consuming but also disappointing to a victim's family. Some takes take so long in court and some court orders too have an effect of surpassing and halting work and other important activities. If victims have no insurance, the long-term effects of the crime may have devastating financial as well as emotional and physical consequences.

Possibilities for Economic Compensation

Whereas some countries have developed a system of compensating victims of crime, most African countries are reluctant to do the same. As jurisprudence grows over time to encompass more rights to parties of crime i.e. the victim and accused, others like Uganda is contemplating the removal of bail for murder suspects. That aside,

a state like Texas in particular has a Crime Victims Compensation Program_ CVC (1979) created by the Legislature and managed by the office of the attorney general which offers help to crime victims and their families in to acquire information, resources or financial assistance. It covers crime related costs such as counselling, medical treatment, funerals, and loss of income not paid by other sources. The najor goals of this is to;

Encourage greater victim participation in the apprehension and prosecution of criminals and;Reimburse innocent victims for certain costs related to the crime.

The opportunities for compensation have varied over time. From early times when compensation was paid directly to the victim, the process evolved into the use of fines as payment for crimes committed.

Insurance Companies – Insurance Claims- Many crimes are never solved, and thus the perpetrator is unknown. In some cases where the perpetrator is known, he/she may lack the financial ability to pay compensation. This leaves the victim helpless and having to suffer all cost implications forever while the perpetrator is bailed from cells. Worse more, we have already noted that most perpetrators of crime are usually the poor and youths who lack resources to earn a proper living and yet through crime, can cause damages worse billions.

In cases where the perpetrator is unknown or the enforcement service comes to the conclusion that the perpetrator is unable to pay there is often an insurance policy, either public or private, which can compensate the damages but as already noted, insurance is less used to Ugandans.This is because in many developing countries, not so many people actually can use it since insurance is not still widespread among population enough.

Psychological Reactions

Although crime often leads to considerable economic and physical damages for the victim, the psychological experience is often the most critical and difficult to treat and yet the most difficult to prove too and comprehend therefore. An arm in a sling or a bandage around the head is an outward and visible sign that a person is not totally well. Such signs are not visible with Psychological pain which could prejudice the acceptability of a claim by the plaintiff.

The type and strength of the reactions are highly individual, however. As already noted, Crime may entail no emotional reactions for some persons, while others experience it as an extremely traumatic event involving strong cognitive and emotional stress.Even small, apparently negligible crimes may involve considerable stress for the victim. This variation in reaction partly relies on the character and past

experiences of the victim and these may cause them to Demand more attention in a given situation and yet for another it would seem so much negligible. Many also have feelings of fear and helplessness and experience physical reactions such as difficulty breathing or chest pressure.

It is not uncommon for the victim to experience feelings of rage towards the perpetrator. This rage may even be focussed on other individuals, such as the police of an employer. This feature may cause a victim to act with transferred malice towards others which also criminal.

Certain types of crimes, such as sexual assault or home burglary, also tend to leave the victim feeling dirty or violated. Much of the victim's energy immediately following the crime is expended on finding an explanation to why he/she was chosen. Victims may suffer stress and anxiety long after the incident is over and the justice process has been completed.

Posttraumatic stress disorder (PTSD) a condition whose symptoms include depression, anxiety, and self-destructive behaviour is a common problem especially when the victim does not receive adequate support from family and friends.

To shield themselves, some victims deny the attack occurred or question whether they were "really raped." But denial only goes so far and does not shield victims from the long-term effects of sexual assault.

Many people fear crime, especially the elderly, the poor, and minority group members. Their fear is escalated by shocking news accounts of crime and violence. Though death awaits every man, The longer you live, the more you are prone to death and scared thereof. The shocking news could even escalate the death of an elderly person.While hearing about crime causes fear, those who experience it are even more likely to be fearful and change their behaviours.

Victims of violent crime are the most deeply affected, fearing a repeat of their attack. A victim of rape will most likely hate and fear moving at night and living alone in the room. Thus may cause lack of self confidence and esteem.

Many go through a fundamental life change, viewing the world more suspiciously and as a less safe, controllable, and meaningful place. They decide to live life carelessly, a thing which is detrimental to them. Some develop a generalized fear of crime and worry about being re-victimized. Crime can have devastating effects on its victims, who may take years to recover from the incident.

Relationship Stress

This arises as an obvious consequence of difficulty, misunderstandings and domestic violence even if solved, could leave stress and mistrust among parties. Spousal abuse takes a particularly heavy toll on victims. Numerous research efforts show that victims of spousal abuse suffer an extremely high prevalence of psychological problems such as depression and substance abuse disorders. Psychological abuse can lead to depression and other long-term disabilities.

Vicarious Fear

Even if people are not personally victimized those who observe or are exposed to violence on a routine basis become fearful. A burglary attack on a neighbour could affect the decisions and mentality of the whole community through fear of the same happening to them too. Hearing about another's victimization may make people timid and cautious. If they don't fear for themselves, they become concerned for others— their wives or husbands, children, elderly parents, and siblings. Not only are people likely to move out of their neighbourhood if they become crime victims, but they are also likely to relocate if they hear that a friend or neighbour has suffered a break-in or burglary. Vicarious fear is escalated by shocking news accounts of crime and violence.

Antisocial Behavior

Research shows that both boys and girls are more likely to engage in violent behaviour if they were the targets of physical abuse and were exposed to violent behaviour among adults they know or live with or were exposed to weapons. People who were physically or sexually abused, especially young males, are much more likely to smoke, drink, and take drugs than are non-abused youth. As adults, victims are more likely to commit crimes themselves.

Physical damages

Physical injury may occur in a wide variety of crimes. The risk of suffering physical injury varies according to the type of crime. In cases of violence without weapons – primarily punching or kicking – we can say that the injuries are largely cuts, bruises, swelling of the face or head and facial fractures. Similar injuries may occur on the arms, legs and chest. Life-threatening injuries can arise through strangulation or severe head injuries. Victims of sexual crimes such as rape often lack visible physical indications of the crime.

Factors that affect the extent of the reaction to a traumatic event

The type of event-Psychological studies show that crimes involving violence or the threat of violence lead to a worse psychological state for the victim than non-violent crimes.

Another factor that can exacerbate the event is the existence of an individual who did not intervene to stop the crime despite the opportunity to do so.

The victim's personal characteristics and situation-Studies show that apparently trivial crimes can also lead to serious reactions.

This is due to the fact that the ability to handle traumatic situations is affected by the victim's personal characteristics.

A number of reports have found that young victims are generally less affected by emotions associated with crime than the elderly.

This does not hold true for children, however. The sex of the victim is also an important factor in determining the extent of the reaction.

Studies show that women tend to be more affected than men.

The victim's social network and the consequences of the crime; The ability to successfully deal with a traumatic event is thus largely dependent on the type of crime and the personal resources that an individual has at his/her disposal. In most cases traumatic situations can be handled through discussions with other individuals as well. It is extremely important for an individual to have someone to talk to following a crisis.

Social network

Research indicates that social support following a crime is positively correlated with physical and psychological health. Crime victims who receive support from people in their surroundings following the event have a greater probability of recovering from the trauma than those without support. Friends, colleagues and especially family are important social resources in times of crisis. They can also assist in the practical matters associated with the crime.

The relationship between the victim and the perpetrator

A crime committed by someone known to (and possibly trusted by) the victim leads to more complicated and serious psychological problems than an attack by a stranger. Take for instance a situation where a girl is raped by her brother. This could cause a bigger psychological battle than by a stranger which is more obvious. The victim raped by a brother would face a lot of stigma and die silently given that saying this out would cause shock in the family and community at large. Such people need the best of friends to help. One group especially affected by this is women who are battered by a known assailant.

Another vulnerable group is children who are abused by someone in whom they have sought love and care. This is really traumatising to contain and help is not easily found since the one that should offer assistance is the perpetrator.

Another factor affecting the extent of reaction to crime is previous experience with crime and other traumatic events. Persons with previous experience of crime and trauma can meet the new experience with increased vigour .People who had previously been exposed to crime react more strongly than those who had never been victims.

The extent of the reaction is also influenced by the personal situation of the victim. Studies show that crime is experienced as more difficult by those who already have a difficult personal life, such as family troubles, unemployment and/or health problems. There are also indications that an individual with poor self-esteem will have more difficulty recovering from a traumatic event.

The After-Effect of Crime

Another factor that affects the consequences a crime has on the individual is the after-effects of the crime. The actual event itself may not be the largest threat to an individual's mental health. Of equal importance is the treatment (or lack of treatment) that the individual receives following the crime. Individuals in a period of crisis must be treated in a manner that reduces the risk of "secondary victimisation.

Social Consequences

All three results of crime – economic loss, physical injury and psychological reactions – may involve negative social consequences for the victim. Some individuals find that the crime completely alters their lives.

They may be forced to completely change their situation, such as changing occupations because of a fear of working at night or changing residences due to a feeling of insecurity. The changing of occupations too comes with different financial repercussions too. The latter example is especially relevant for the thousands of women and children who live with the threat of violence every day. In these cases it is almost always the battered woman who has to move to escape the violent man, a move that involves large social, practical and economic problems.

Another social consequence, which may arise as a result of crime, is that the victim often pulls away from contact with other individuals. This could be because the victim does not wish to discuss the event because of feelings of shame or painful memories or because the victim no longer trusts others.

Some people face the segregation at their new places of work when their story is later on told. This could affect their way of working, character and attitude towards one's job and the bosses.

In some situations the case is reverse – other people feel such a strong uneasiness that

they withdraw when the victim desires to discuss the feelings and emotions associated with the crime, because the thought reminds them of their own vulnerability.Rather than discuss their grief and pain, victims may then internalise their problems.

Persons in the victim's immediate surroundings may also have difficulty understanding how to react to the victim. This, added to the other pressures, may reinforce the victim's feeling that no one understands his/her situation, which may in turn lead to social isolation.

Exposure to crime can damage an individual's fundamental sense of security. Studies of crime victims' thoughts and feelings about the future have found that many have serious worries about becoming victims again.

Social consequences; this feeling of insecurity does not affect only those who were personally victims of crime, however. Local studies of security and victim surveys show that many people worry about being victimised by crime, and feel unsafe strolling about their own neighbourhoods after dark.

Even though the number of people worried about crime far exceeds the number actually victimised, this worry can often have a larger impact on a person's life than the actual crime. Information regarding the actual extent of crime in combination with relevant crime prevention information is something that can reduce a victim's anxiety and fear of being victimised yet again.

Another social consequence of crime is the stigmatisation, which may accompany the event. The victim's social fate is almost predetermined from the instant the crime occurs. Of primary importance is peace and quiet to recuperate, with a patient person to listen and take care of the practical measures necessary while the victim rides out the storm.

Instead, attention is focussed on the victim, his/her rights may be violated, and he/she may be looked down upon or overprotected. The families of crime victims often exhibit psychological symptoms similar to those of the victim – they report feelings of worry and anxiety, feel depressed and have reduced self-confidence. Providing these individuals with information concerning the "normal" recovery process and an understanding of what is going on within the victim could both aid them through reducing their own anxiety and also help the victim through their increased insight into his/her situation.

Practical Problems

Crime almost always leads to practical problems for the victim. Examples of these problems could be the need to come into contact with the authorities, which may

itself involve the need for childcare and transportation to the police station etc. The victim may have to contact his/her insurance company to file a claim, or arrange for a glazier or carpenter to come and repair a broken window or damaged door.

In some cases the crime involves physical injury, which requires medical attention. This also threatens the finances of the victim and their family where money saved for education and household purposes is shifted to saving life which is more urgent. This can lead to financial breakdown and stagnantation.

The crime may result in costs, which necessitate financial assistance. Practical problems may also arise through the time-consuming process of recovering or replacing stolen objects. International studies have found that crime victims often require assistance with practical matters such as contacting the authorities, calling a locksmith, arranging temporary lodgings or financial assistance.

Link between victimisation and crime

Victimization causes social problems.

People who are crime victims experience long-term negative consequences, including problems with unemployment and developing personal relationships, factors related to criminality. Some young victims may run away from home, taking to the streets and increasing their risk of becoming a crime victim.

Victimization causes stress and anger.

Victimization may produce anger, stress, and strain. Known offenders report significant amounts of posttraumatic stress disorder as a result of prior victimization, which may in part explain their violent and criminal behaviour.

Victimization prompts revenge

Victims may seek revenge against the people who harmed them or whom they believe are at fault for their problems. In some cultures, retaliation is an expected and accepted response to victimization.

The nature of victimisation

Question; How many crime victims are there in Uganda, and what are the trends and patterns in victimization? Victimization is not random but is a function of personal and ecological factors.The stability of these patterns allows us to make judgments about the nature of victimization; policies can then be created in an effort to reduce the victimization rate.

Important Questions Who are victims? Where does victimization take place? What is the relationship between victims and criminals?

Victim characteristics

Gender affects victimization risk.
Except for the crimes of rape and sexual assault, males are more likely than females to be the victims of violent crime.

Men are almost twice as likely as women to experience robbery. Women, however, are six times more likely than men to be victims of rape, domestic violence, and sexual assault.Although males are more likely to be victimized than females, the gender differences in the victimization rate have narrowed significantly over time. One significant gender difference is that women are much more likely to be victimized by someone they know or with whom they live.

Age

Victim data reveal that young people face a much greater victimization risk than do older persons. Even the youngest kids are not immune.

Elderly Victims

Although the elderly are less likely to become crime victims than the young, they are most often the victims of a narrow band of criminal activities from which the young are more immune. Frauds and scams, purse snatching, pocket picking, stealing checks from the mail, and committing crimes in long-term care settings claim older than younger victims.

Because the elderly are especially susceptible to fraud schemes because they have insurance, pension plans, proceeds from the sale of homes, and money from Social Security and savings that make them attractive financial targets.

Because many elderly live by themselves and are lonely, they remain more susceptible to telephone and mail fraud. Unfortunately, once victimized, the elderly have more limited opportunities either to recover their lost money or to earn enough to replace what they have lost.

The association between age and victimization is undoubtedly tied to lifestyle: adolescents often stay out late at night, go to public places, and hang out with other kids who have a high risk of criminal involvement. This has been encountered by the teens also face a high victimization risk because they spend a great deal of time in the most dangerous building in the community the local school.

Social Status

The poorest are also the most likely victims of violent and property crime.Although the poor are more likely to suffer violent crimes, the wealthy are more likely targets of personal theft crimes such as pocket picking and purse snatching.Perhaps the affluent—wearing more expensive attire and driving better cars—attract the attention of thieves.

Marital Status

Marital status also influences victimization risk. Never-married males and females are victimized more often than married people. Widows and widowers have the lowest victimization risk. This association between marital status and victimization is probably influenced by age, gender, and lifestyle for example adolescents and teens, which have the highest victimization risk, are too young to have been married. Young single people go out in public more often and sometimes interact with high-risk peers, increasing their exposure to victimization. Widows and widowers suffer much lower victimization rates because they are older, interact with older people, and are more likely to stay home at night and to avoid public places.

Question; Does prior victimization enhance or reduce the chances of future victimization?

Individuals who have been crime victims have a significantly higher chance of future victimization than people who have not been victims. Households that have experienced victimization in the past are the ones most likely to experience it again in the future.

Characteristics that increase potential for victimisation

Target vulnerability

The victims' physical weakness or psychological distress renders them incapable of resisting or deterring crime and makes them easy targets.

Target gratifiability

Some victims have some quality, possession, skill, or attribute that an offender wants to obtain, use, have access to, or manipulate. Having attractive possessions such as a leather coat may make one vulnerable to predatory crime.

Target antagonism

Some characteristics increase risk because they arouse anger, jealousy, or destructive impulses in potential offenders. Being gay for example, may bring on undeserved

attacks in the street; being argumentative and alcoholic may provoke barroom assaults.

Repeat victimization may occur when the victim does not take defensive action. For example, if an abusive husband finds out that his battered wife will not call the police, he repeatedly victimizes her; or if a hate crime is committed and the police do not respond to reported offenses, the perpetrators learn they have little to fear from the law.

Women who fight back and/or use self-protective action during the first incident of sexual battering reduce their likelihood of being a recurrent victim.

Of course, not all victims are repeaters. Some take defensive measures to lessen their chance of future victimizations. Some may change their lifestyle, take fewer risks, and cut back on associating with dangerous people; once burnt, twice shy.

Victims and Their criminals- Males are more likely to be violently victimized by a stranger, and females are more likely to be victimized by a friend, an acquaintance, or an intimate.

THEORIES OF VICTIMISATION OR CRIME SUSCEPTIBILITY

For many years, criminological theory focused on the actions of the criminal offender; the role of the victim was virtually ignored. A number of theories concerning crime and criminality have been proposed through the years. Today a number of different theories attempt to explain the causes of victimization. Some of these theories have focussed on victim behaviour, while others have been based on the individual characteristics and background of the perpetrators. The typology of victim proneness was established by Mendleson, from the 'completely innocent' victim through to the 'most guilty' victim, which attributed degrees of 'blame' for victimisation with the victim. Just as criminological research looks to degrees of culpability when assessing offending behaviour, so early victimological theory concentrated on victim culpability in the enactment of a crime and its associated victimisation.

VICTIM PRECIPITATION THEORY

Early theories attempted to find causes of victimisation in personal characteristics of the victim or in the interaction between the victim and the perpetrator. That many violent crimes were the result of a superficial or deep interaction between the victim and the perpetrator. The victim is not always a passive object. The victim's behaviour in interaction with the perpetrator can be contributory to the criminal act itself.

While theories of crime causation frequently focus on the offender, some consider the role of the victim in setting the stage leading up to the criminal event .Criminal

victimization is a complex process involving many parties such as the criminal, the victim, the justice system, members of society among others.

Victimologists recognize three ways in which victims contribute to their own victimization. The first is victim facilitation, which can occur when potential victims fail to take simple precautions against being victimized.

Facilitation of victimization may happen when home-owners leave their doors unlocked, when drivers leave keys in their cars, or when purses are left unattended in a restaurant or public place.

Victim facilitation can be distinguished from victim provocation, in which the victim may be the initial aggressor who has the tables turned on him or her and ends up being injured or killed. Finally, victim initiation happens when the victim attracts the offender's attention through certain activities (i.e., hiking alone on an isolated mountain trail) or by visible displays of wealth or other things of interest.

Victim precipitation

Refers to crimes and situations where the victim, through their behaviour, can be seen as the cause. The study of events leading up to a crime is crucial to any understanding of victimisation.

According to victim precipitation theory, some people may actually initiate the confrontation that eventually leads to their injury or death. Victim precipitation can be either active or passive. Active precipitation occurs when victims act provocatively, use threats or fighting words, or even attack first. According to Victim Precipitation theory, female rape victims often contribute to their attacks by dressing provocatively or pursuing a relationship with the rapist.

Courts have continued to return not-guilty verdicts in rape cases if a victim's actions can in any way be construed as consenting to sexual intimacy.

Passive precipitation

occurs when the victim exhibits some personal characteristic that unknowingly either threatens or encourages the attacker.

Although the victim may never have met the attacker or even know of his or her existence, the attacker feels endangered and acts accordingly.

In some instances, the crime can occur because of personal conflict—for example, when two people compete over a job, promotion, love interest, or some other scarce

and coveted commodity.

A woman may become the target of domestic violence when she increases her job status and her success results in a backlash from a jealous spouse or partner.

Passive precipitation

May also occur when the victim belongs to a group whose mere presence threatens the attacker's reputation, status, or economic well-being, For example, hate-crime violence may be precipitated by immigrant group members arriving in the community to compete for jobs and housing.

Under Victim Precipitation theory Research indicates that passive precipitation is related to power: if the target group can establish themselves economically or gain political power in the community, their vulnerability will diminish.

They are still a potential threat, but they become too formidable a target to attack; they are no longer passive precipitators. By implication, economic power reduces victimization risk.

Victim Impulsivity

Perhaps there is something about victims' personality traits that incite attacks. A number of research efforts have found that both male and female victims have an impulsive personality that might render them rude and intolerable, characteristics that might incite victimization.

Under this theory; People who are impulsive and lack self-control are less likely to have a high tolerance for frustration and a physical rather than mental orientation; they are less likely to practice risk avoidance.

It is possible that impulsive people are not only antagonistic and therefore more likely to become targets, but they also are risk takers who get involved in dangerous situations and fail to take precautions.

Victim Precipitation Theory

These are theories of victimology, which developed in the late 1970s, moved the focus away from the role of victim characteristics as a central cause of victimization and examined the choices that people make that increase their availability to offenders and make them easier targets for crime.

This theory attempts to explain variations in the risk of becoming a victim of crimes where there is direct contact between the victim and the perpetrator.

The underlying assumption is that certain lifestyles increase the likelihood of being in situations where the risk of crime is high.

Von Hentig (1948) and Mendelsohn (1956) were pioneering proponents of theories which set out to document victims' personal characteristics and actions that might explain degrees of individual victimisation proneness. They attempted to relate the crime affecting a victim to the character of the victim. These ideas were incorporated in Wolfang's (1957, 1958) research on 'victim precipitation'. Wolfgang made a conclusion that 26 per cent were precipitated by the victim; that is, the victim had a direct role to play in the instigation of violence which led to their homicide.

Lifestyle theory

Lifestyle' or 'routine activities' theory (Cohen and Felson, 1979; Hindelang et al., 1978),is yet another theory which surpasses the narrower applications of victim precipitation. While victim precipitation dwells on the act of victimisation when explaining victim proneness, other theories look towards aspects of the individual's lifestyle with respect to the likelihood of victimisation. Here, the individual's daily adaptation to the worlds of work and leisure, and their social structural constraints, as mediated by demographic variables such as gender and age, is directly linked to risk of victimization. In other words, where you go, what you do and who you are, as determined by the limited choices in your routine daily activities, determines your victimization proneness. Therefore, some groups are more prone to certain types of victimization than others. "Lifestyle" refers to a style of life, or the way a person lives

Lifestyles are composed of repetitive, patterned, regular, and recurrent events that people engage in on an everyday basis. Because lifestyles are associated with exposure to people, places, and times with varying risk of victimization, they determine a person's vulnerability to criminal victimization. Simply put, certain lifestyles favor victimization because they offer more opportunities for it.

Another assumption is that lifestyle is influenced by an individual's demographic and social characteristics. The risk of being subjected to crime is thus a function of characteristics such as sex, age, civil status, occupation, ethnicity and social group – characteristics, which influence an individual's choice of activities both at work and during free time.

Some criminologists believe people may become crime victims because their lifestyle increases their exposure to criminal offenders.

Victimization risk is increased by such behaviours as associating with young men, going out in public places late at night, and living in an urban area. Conversely, one's

chances of victimization can be reduced by staying home at night, moving to a rural area, staying out of public places, earning more money, and getting married.

The basis of lifestyle theory is that crime is not a random occurrence but rather a function of the victim's lifestyle. For example, due to their lifestyle and demographic makeup, college campuses contain large concentrations of young women who may be at greater risk for rape and other forms of sexual assault than women in the general population. Single women who drink frequently and have a prior history of being sexually assaulted are most likely to be assaulted on campus.

Lifestyle theory proposes that demographic variables, including things such as age, gender, race/ethnicity, and influence lifestyles and hence determine victimization risk through their effect on lifestyle. Someone working a late-night shift in a crime-prone area, for example, is likely at higher risk of victimization than someone who is asleep at home.

Hence, young males are at greater risk of assault, in public places at night, than the elderly or women. In turn, women are at great risk of becoming victims of violent crime in private space from known offenders. Having said this, early lifestyle theory disregarded the degree to which particular groups, such as women and children, are exposed to potentially victimizing situations in private places as a reflection of their social-structural 'place' in society. Hence, lifestyle theories of victimization proneness need to be re-interpreted to incorporate the private sphere and the role of gendered power relations which sustain violence, predominantly by men, against women and other vulnerable groups in society. We can only begin to appreciate the impact of gender, age, class, ethnicity and sexuality on the individual's victimization proneness if due recognition is given to the differential impact of power on social-structural relationships and settings.

Taking a look at these theories, one may think that the early framers of such were casting blame on mostly the victim for the harm caused on them. However, this may not be the fact, rather the focus lies on intersection of a series of circumstances, in time and place, which may manifest in a likely offender and a likely victim.

But beyond stating the obvious, these theories help us to understand the relative likelihood of certain groups becoming victimized. Unlike victim precipitation, which focuses on the circumstances of an individual event, lifestyle-based theories engage with victimization as part of people's lived realities.

People who belong to groups that have extremely risky life homeless, runaways, drug users are at high risk for victimization; the more time they are exposed to street life, the greater their risk of becoming crime victims.

Similarly, a person who routinely withdraws large sums of cash from the same ATM machine on a regular basis is more likely to be victimized than one who conducts transactions at a teller's window in a bank, or who varies their routine— especially if they frequently visit ATMs in poorly lit areas late at night.

Some authors use date rape as another example of crime associated with lifestyles, especially when young women engage in high-frequency dating with a relatively large number of men.

A married lifestyle, they point out, is relatively safer, even though domestic abuse and family violence are not uncommon.

Some groups of people including the homeless, runaways, sex tourists, and heavy drinkers or alcoholics who visit public bars and nightclubs participate in very risky lifestyles. Likewise, unemployed youth who drop out of school are more likely to associate with others who get them into "trouble," and may find themselves faced with victimization.

Deviant Place Theory

According to deviant place theory, the greater their exposure to dangerous places, the more likely people will become victims of crime and violence. Victims do not encourage crime, but are victim prone because they reside in socially disorganized high-crime areas where they have the greatest risk of coming into contact with criminal offenders, irrespective of their own behaviour or lifestyle. The more often victims visit dangerous places, the more likely they will be exposed to crime and violence.

Under Deviant place theory neighbourhood crime levels, then, may be more important for determining the chances of victimization than individual characteristics. Consequently, there may be little reason for residents in lower-class areas to alter their lifestyle or take safety precautions because personal behaviour choices do not influence the likelihood of victimization.

Deviant places are poor, densely populated, highly transient neighbourhood in which commercial and residential property exist side by side. The commercial property provides criminals with easy targets for theft crimes, such as shoplifting and larceny.

Successful people stay out of these stigmatized areas; they are homes for "demoralized kinds of people" who are easy targets for crime: the homeless, the addicted, the retarded, and the elderly poor.

People who live in more affluent areas and take safety precautions significantly

lower their chances of becoming crime victims and the effect of safety precautions is less pronounced in poor areas. Residents of poor areas have a much greater risk of becoming victims because they live near many motivated offenders. To protect themselves, they have to try harder to be safe than the more affluent. Deviant places theory is spatially oriented. It suggests that victimization occurs most frequently in socially disorganized areas and that people become victims as a result of their exposure to such areas by living there, transiting through them, or by visiting them.

The theory focuses primarily on the geographically determined risk of coming into contact with an offender, irrespective of lifestyle, behaviour, or personal characteristics.

The routine activity theory was formulated at about the same time as the lifestyle theory (Cohen & Felson, 1979).

Routine activities theory was first articulated in a series of papers by Lawrence Cohen and Marcus Felson. They concluded that the volume and distribution of predatory crime (violent crimes against a person and crimes in which an offender attempts to steal an object directly) are closely related to the interaction of three variables that reflect the routine activities of the typical American lifestyle.

According to this theory, three factors must interact for a crime to take place;Cohen and Felon feel that the likelihood that a crime is committed is a function of these three factors converging at a given time and place. Some individuals routinely find themselves in situations where all three factors are present, while others have daily routines which rarely place them in these situations.

a) The availability of suitable targets, such as homes containing easily saleable goods

b) The absence of capable guardians, such as police, home owners, neighbours, friends, and relatives

c) The presence of motivated offenders, such as a large number of unemployed teenagers

Routine activities theory under the presence of these components increases the likelihood that a predatory crime will take place.

Targets are more likely to be victimized if they are poorly guarded and exposed to a large group of motivated offenders, such as teenage boys. Thus as targets increase in value and availability, so too should crime rates.

Conversely, as the resale value of formerly pricey goods such as iPods and cell

phones declines, so too should burglary rates.

Increasing the number of motivated offenders and placing them in close proximity to valuable goods will increase victimization levels for example young women who drink to excess in bars and flat houses may elevate their risk of date rape because (a) they are perceived as easy targets, and (b) their attackers can rationalize the attack because they view intoxication as a sign of immorality ("She's loose, so I didn't think she'd care").

Conversely, people can reduce their chances of victimization if they adopt a lifestyle that limits their exposure to danger: by getting married, having children, and moving to a small town.

Guardianship- Even the most motivated offenders may ignore valuable targets if they are well guarded.

Despite containing valuable commodities, private homes and/or public businesses may be considered off-limits by seasoned criminals if they are well protected by capable guardians and efficient security systems.

Under Routine activities theory criminals are also aware of police guardianship. In order to convince them that crime does not pay, more cops can be put on the street.

Proactive, aggressive law enforcement officers who quickly get to the scene of the crime help deter criminal activities.

Hot Spots Motivated people—such as teenage males, drug users, and unemployed adults—are the ones most likely to commit crime. If they congregate in a particular neighbourhood, it becomes a "hot spot" for crime and violence. People who live in these hot spots elevate their chances of victimization.

It is not surprising that people who (a) live in high-crime areas and (b) go out late at night (c) carrying valuables such as an expensive watch and (d) engage in risky behaviour such as drinking alcohol, (e) without friends or family to watch or help them, have a significant chance of becoming crime victims.

Cohen and Felson assume that there will always be a substantial number of motivated offenders, but those suitable targets (either vulnerable people or unattended valuables) and capable guardians (watchful friends and neighbours, the police, and security personnel) vary with the place and over time.

Social activities engaged in by potential victims who are suitable targets for robbery contribute substantially to criminal opportunities when they are undertaken in the

absence of a capable guardian as when someone wearing valuable jewellery fails to consider the potential threat of being out in public unaccompanied by others.

Caring for the victim

Helping these victims adjust and improve their coping techniques can be essential to their recovery.

Law enforcement agencies, courts, and correctional and human service systems have come to realize that due process and human rights exist for both the defendant and the victim of criminal behaviour.

Recommendations include providing witnesses and victims with protection from intimidation, requiring restitution in criminal cases, developing guidelines for fair treatment of crime victims and witnesses, and expanding programs of victim compensation.

Victim Compensation One of the primary goals of victim advocates has been to lobby for legislation creating crime victim compensation programs. As a result of such legislation, the victim ordinarily receives compensation from the state to pay for damages associated with the crime.

Compensation may be made for medical bills, loss of wages, loss of future earnings, and counselling. In the case of death, the victim's survivors can receive burial expenses and aid for loss of support.

Victim Advocates;

Ensuring victims' rights can involve an eclectic group of advocacy groups, some independent, others government sponsored, and some self-help. Advocates can be especially helpful when victims need to interact with the agencies of justice.

They can help victims make statements during sentencing hearings as well as probation and parole revocation procedures. Victim advocates can also interact with news media, making sure that reporting is accurate and that victim privacy is not violated.

Court advocates; can prepare victims and witnesses by explaining court procedures: how to be a witness, how bail works, and what to do if the defendant makes a threat. Lack of such knowledge can cause confusion and fear, making some victims reluctant to testify in court procedures.

Many victim programs also provide transportation to and from court, and advocates may remain in the courtroom during hearings to explain procedures and provide support.

Caring for the victim

Court escorts are particularly important for elderly and disabled victims, victims of child abuse and assault, and victims who have been intimidated by friends or relatives of the defendant.

These types of services may be having a positive effect since recent research shows that victims may now be less traumatized by a court hearing than previously believed.

Victim Counselling

Numerous programs provide counselling and psychological support to help victims recover from the long-term trauma associated with a violent victimization.

Clients are commonly referred to the local network of public and private social service agencies that can provide emergency and long-term assistance with transportation, medical care, shelter, food, and clothing.

In addition, more than half of victim programs provide crisis intervention to victims, many of whom feel isolated, vulnerable, and in need of immediate services. Some programs counsel at their offices, and others visit victims' homes, the crime scene, or a hospital.

Helping victims adjust is often a difficult process, and recent research has found little evidence that counselling efforts are as successful as previously hoped. Crisis Intervention- Most victim programs refer victims to specific services to help them recover from their ordeal.

Clients are commonly referred to the local network of public and private social service agencies that provide emergency and long-term assistance with transportation, medical care, shelter, food, and clothing.

In addition, more than half of all victim programs provide crisis intervention for victims who feel isolated, vulnerable, and in need of immediate services. Some programs counsel at their offices; others visit victims in their homes, at the crime scene, or in the hospital.

Victim Offender Reconciliation Programs

Victim offender reconciliation programs (VORPs) use mediators to facilitate face-to-face encounters between victims and their attackers. The aim is to engage in direct negotiations that lead to restitution agreements and, possibly, reconciliation between the two parties involved.

Reconciliation programs are based on the concept of restorative justice, which rejects punitive correctional measures in favour of viewing crimes of violence and theft as interpersonal conflicts that need to be settled in the community through non-coercive means.

CHAPTER SEVEN

GENDERED JUSTICE

By virtue of nature, women are perceived as mothers, the modest and meek in all their transactions and therefore less susceptible to committing crime. This causes no surprise finding that most statistics reflect men as being mostly found in prison cells than females. However, developments have come about to bring rise to many new crimes which may be committed with ease and by anyone at any time, in any country and affecting someone elsewhere. This has added onto the rate of women offenders and female population in cells. Despite this, some communities like China still find this issue of female offenders myriad and uncouth and so have a negative attitude towards female offenders.

As regards women and crime, 'there is clear refusal to engage with the reality of female offending in a reasonably objective manner' (Shen &Winlow, 2013: 2). The writing of one author (Yang, 2012: 55) provides a good example for this claim:

"The (offending) women are incredibly benighted, shameless, and embraced with unlimited greed, who stretch out their black claws, open their mouths with sharp teeth, suck our society's blood, create one after another sin and crime, damage their own families and cause disasters to the society ... For them, beautiful appearance is drowned in sin and crime, and beauty has turned to ugliness."

Historically, the differential treatment of men and women and later of boys and girls has reflected gendered notions of public and private space. The expression or legacy of a gendered double standard dates back to the chauvinistic sexual customs and conceptions of private property first articulated in ancient Greek and Roman laws (Posner 1992). Until recently these customs explicitly prevailed in U.S. law[33]. Women were considered chattel or possessions of their fathers and husbands, forbidden from holding property in their own names or from entering into business deals or contracts. Women were treated as different or as "second-class" citizens, and they were subject to the patriarchal rules of family, usually under the guise of protecting them and controlling them "for their own good." Whether in the public or private sphere, gendered justice denied women equal protection under the law. In fact, it was not until the 1980s that husbands could be charged with the crime of raping their wives. Moreover, the burdens of legal proof involved in extramarital rape cases before then were always hard to meet, making rape the single most difficult crime to successfully prosecute on behalf of women victims seeking justice from the criminal law.

Early European feminists worked to raise awareness of women's oppression, a tradition

[33] *Anqi Shen_ Offending Women in Contemporary China; Gender and pathways into Crime (An introduction)- pg. 3*

that continued in spite of social revolutions in Europe and passionate discourses about equality and brotherhood. Indeed, in the late 1700s, Mary Wollstonecraft, in the name of "sisterhood," observed "the inconsistency of radical males who fought for the freedom of individuals to determine their own happiness and yet continued to subjugate women, leaving them to 'procreate and rot'" (Kandal 1988, 12).

In the United States, few advocates of abolishing slavery saw any connection with women's suffrage. For example, the Grimké sisters used their status as part of a prominent southern family to argue that female slaves "are our sisters" and have a "right to look for sympathy with their sorrows and effort and prayer for their rescue." But the New England abolition society chastised them for forgetting "the great and dreadful wrongs of the slave in a selfish crusade against some paltry grievance . . . some trifling oppression" of their own (Kandal 1988, 214).

With the arrival of the Progressive Era, social reformers sought to address the widespread prostitution and venereal diseases that resulted from the temporary shortage of women that accompanied the great waves of immigration in the late nineteenth and early twentieth centuries. Laws were passed that tried to suppress abortion, pornography, contraception, and prostitution. Federal laws such as the Mann Act of 1910 outlawed the importation of contraceptives, the mailing of obscene books and other materials, and the interstate traffic in prostitutes. The selective enforcement of those laws against the female sellers and the male purchasers of sex remains to this day a de facto component of the social relations of gendered justice and social control.

To be sure, persons handled formally by the criminal justice system and who ended up in prisons through the nineteenth and twentieth centuries were 95 percent male and 5 percent female (Rafter 1990). However, at least since the nineteenth century, the social control of girls and women has also included the patriarchal institutions of marriage and family, the associated treatment of females for their recalcitrance and waywardness, and the medicalization and the hospitalization of their problems (Foucault 1980; Platt 1969).

Women also experienced gendered justice in other ways besides the chivalry that has been shown primarily to white women but denied to other women. For instance, when the first wave of organized imprisonment of women occurred between 1870 and 1900, many reformatories were opened as alternatives for white women. These women were regarded as in need of moral reform and protection. Women's case files in the American West in the late 1880s "rarely expressed an official opinion that an incarcerated female offender represented a threat to society. Instead, parole boards denied a woman freedom because she 'had not been sufficiently punished,' or she 'traveled with bad companions in the past,' or she 'broke the hearts of her respected parents'" (Butler 1997, 226).

While the reformatory movement "resulted in the incarceration of large numbers of white working-class girls and women for largely noncriminal or deportment offenses," such offenses did not extend to women of color (Chesney-Lind 1996, 132). Rather, African American women, for example, continued to be warehoused in prisons where they were treated much like male inmates (Butler 1997). In the South, black women often ended up on chain gangs and were expected to keep up with the men in order to avoid beatings (Rafter 1990).

Gendered justice has also socially constructed the "normal" criminal as male and the "abnormal" criminal as female. In other words, men were seen as rational creatures of culture and women as governed by their nature. Thus, criminology constructed crimes by men as being bad choices that reflected a normal weighing of gain and loss, but crimes by women were seen as "unnatural" because they went against the allegedly docile and submissive "nature" of women (Hart 1994; Rafter 1990). Links have also been made between the "unnaturalness" of female criminality and lesbianism (Faith 1993; Hart 1994).

Basing on the gender issues allotted to women, in this patriarchy, together with their role and natural responsibility, a very pertinent issue to tackle is whether women should be treated differently in the criminal justice system.

A one writer, Wootton (1959: 32) made the observation that, 'Yet, if men behaved like women, the courts would be idle and the prisons empty'.[34] According to a global research by the female gender is on record to be least involved in crime[35] and yet more quickly reformative compared to men. The criminal justice system is defined according to the Black's Law Dictionary[36] as the collective institutions through which an accused passes until the accusations have been disposed of or the assessed punishment concluded.

First and foremost, the pre-existing laws have conferred and thereon envisaged a distinct treatment for women as evidential within existing laws which include the notion of affirmative action that seeks to move equity towards the female gender in various aspects of life including but not limited to; education, health, employment. For purposes of this submission, the criminal justice stands out as yet another department wherein the same notion ought to be envisaged and the practice analyzed with emphasis given to how this positive discrimination is effected in the same. To so discuss would be to explore under the notion called Gendered justice. Gender justice is defined as the systematic redistribution of power, opportunities, and access for people of all genders through the dismantling of harmful structures including patriarchy, homophobia and transphobia[37]. According to Oxfam International, it is

[34] *John Muncie & David Wilson - Student Handbook on Criminal Justice and Criminology pg. 96*

[35] *For instance in Europe, only 4.5% of the prison population was female, a thing which shows least female participation in crime.*

[36] *Bryan A Garner – Black's Law Dictionary- 9th Ed. Page 431*

[37] *https://www.globalfundforwomen.org/gender-justice*

the full equality and equity between women and men in all spheres of life, resulting in women jointly and on an equal basis with men, defining and shaping the policies, structures and decisions that affect their lives and society as a whole[38].

Status Quo. Currently in the prison's department, a female prisoner, pregnant prisoner or nursing mother may be provided special facilities needed for their conditions[39]. This is in recognition of their inherent responsibility to mother, nurse and nurture. Section 59 is about the manner in which female prisoners should be admitted into custody. It requires that Female prisoners shall be admitted and confined in separate prisons, or part of the prison set for female prisoners. This is in respect of their natural difference from men that somehow leaves them vulnerable to harsh conditions. Even with the existing laws, minimal effort has been placed in ensuring different treatment of women in the justice system. Take for instance section 60 of the Prisons Act 2006 emphasizes the need for female prisoners to at all times during detention or imprisonment be under the care, custody and supervision of a female prison officer, a thing which is not the case with men. Two years ago, the prison population including pre-trial detainees and remand prisoners stood at approximately 55,229; being contained within 254 prisons. In my opinion, the criminal justice system starts from the point of arrest to the point of sentencing and it is within such parameters that issues affecting women need to be unmasked.

However, I submit that the protection so granted to women in the criminal justice system is still not enough! These and other issues have to be addressed so as not to prejudice the female gender in the criminal justice system;

The separation from children

According to section 59 of the Prison's Act, a female prisoner may be admitted into prison custody with her infant and the child ought to be supplied with clothing and other necessities of life by the State until the infant attains the age of 18 months in which case the officer in charge shall, on being satisfied that there is a relative or friend of the infant able and willing to support it, cause the infant to be handed over to the relative or friend. This is in consonant with S. v. M[40] where court ruled that "the best interests of the child are paramount in all matters concerning the child on sentencing of primary caregivers of young children."In the absence of such relative or friend, the Commissioner General may entrust the care of the infant to the welfare or probation authority[41]. However, the operation of this law remains into question especially where children have to be discharged from prison at 18 months with immediate effect.

[38] *https://www.oxfam.org/en/what-we-do/issues/gender-justuce-and-women-rights*

[39] *Section 59 – Prison's Act 2006*

[40] *Constitutional Court of South Africa, 26 September 2007, Ref. no. [2008] (3) SA 232 (CC) 261)7*

[41] *Section 59(2) & (4)*

It's not uncommon that for innocent children to over stay in prison over a long period of time is like a punishment to them. In my opinion, a mother is the principle guardian and caretaker of an infant who is least able to know and defend its rights. This means that an infant's right is a mother's right and such denial thereof is an infringement of the mother's right as well. In essence, such overstay of a child in prison requires gendered based justice and redress. In my opinion, breast feeding mothers should be afforded special health facilities within prison supported with a special diet until when the children can stand on their own. Similarly, mothers of vulnerable children should not be kept separate from their children as this I attribute to be a denial of a right to life, suffered by the child.

In 2011, the CEDAW Committee stated that failure of detention facilities to adopt a gender-sensitive approach to the specific needs of women prisoners constitutes discrimination, within the meaning of article 1 of CEDAW. It thus recognizes the fact that most detention facilities are male based and so cannot facilitate fully, the female gender. It is important to note that surely long ago, the criminal field was dominated by men as prisoners but as years moved on and society evolved with technology, the circle of crimes continued to expand and as well[42], potential criminals multiplied to include ladies and children. No wander, with the advance of the digital world, anyone can commit a crime anywhere at any time without exerting force or intention.

Sexual assault & rape in prisons

In a research carried out across the whole world, it was found that female prisons are commonplace for rape and sexual assault for a long period of time in most continents; that females are being coerced into sex with staff members in return for various favors such as alcohol and cigarettes.[43] In Uganda as well, the same story stands; a thing which warrants that legal and institutional address be included within criminal justice institution to safeguard women against violations of their rights.

Reformative and deterrent-ability

The rationale behind the criminal justice system takes the form of four theories i.e. the retributive, reformative, punitive and deterrent theories. These are the reasons why we need the criminal justice process to for instance, reform criminals. Women are more easily susceptible to being reformed than men, upon facing criminal sanctions. Similarly under the deterrent theory, the female propensity to crime can easily be restricted and curtailed both within cells and after cells which suffices according to me, a requirement that women deserve the special care and treatment in the system and a human hand should be applied to them during the criminal and penal process.

[42] *This is evident with the statistics showing a steady increase in the prison population rate from the year 2000 to 2019. Accessed at https://www.prisonstudies.org/country/Uganda*

[43] *See - UNODC Handbook on Prisoners with Special Needs, chapter on "lesbian, gay, bisexual and transgender (LGBT) prisoners*

Arrest and search model

It is on record that out of a total of 41,760 police officers in Uganda, only 7,777 are females which represents 18,3% of the total. This disparity in numbers obviously leaves a gap wanting in the system of arrest and search with regard taken that female offenders should be arrested by female officers and the search therefore. In practice, even the few female police officials are congested in towns leaving villages with few or nothing. To be honest for sure, it was until my adult age that I came to learn of women too being "policemen," that thereon I started to refer to them as "police-women". The problem with this comes when in female prisons too, there just a few female officers. We need more female officers in the criminal justice system so as to bridge the gap. A research made with a sample of 7,200 observations about policing behavior shows that female officers are less corrupt, Gendered justice is necessary to bridge this gap.

The reproductive factor

Every one above 18 years has a right to found a family pursuant to article 31(1). With respect to nature, a woman who attains certain age slightly before 50 i.e. menopause cannot give birth nor found a family. I submit that women's rights and vulnerability deserve special recognition before the law and in criminal justice institutions. In Norway and Sweden, male inmates are allowed visits from their loved ones so as to enjoy their conjugal right. However, by public opinion, a female inmate or anyone who was once an inmate is judged with bias and rarely are men interested in extending a relationship with them. To this effect, I concur that women deserve special consideration in regards enabling them realize their rights to a family.

Gender roles in a family

Women are the life of the family which is the smallest unit of any given community/ nation. As fathers build a home, mothers raise a family and so the absence of a mother relates so much to the breakdown of various families. It also affects the psychology of children and generally can cause family breakdown[44] thence breakdown of the nation. The duties a woman plays in a family are indispensable with thence requiring such recognition at all stages of the criminal justice system. In small crimes, the sanctity of marriage and the family needs to be taken consideration of in as much as to save family life[45].

Conclusion. It is grossly absurd that overall, cases are judged independently of the gender of the victim/perpetrator and the gender of the police agents depicted in the case. This carries an effect of neglecting some sort of gender bias in the perception

[44] *Submission by Friends World Committee for Consultation (Quakers) to the Committee on the Rights of the Child- Children Deprived of Parental Care, Quaker United Nations Office, 2005, p. 2*

[45] *The Psychology of Sentencing: Approaches to Consistency and Disparity*

of female police officers and female victims[46]. We do not know how many cases are left unsolved or how many are mishandled, frustrated at police or denied justice in the hands of poor investigation or interrogation misplaced along gender lines. I submit that the quality of information necessary before court to convict, depends on the quality of the police in doing its roles at all stages of the criminal process. Let us therefore improve and foster gender justice so as to remedy the above inequities.

THE BAIL QUESTION

Definition of bail traditionally

Originally bail meant security given to court by another person that the accused will attend his trial on the day appointed. But these days, it includes a recognizance entered into by the accused himself conditioning him to appear and failure of which may result of the forfeiture of the recognizance.

PLAUSIBLE SUGGESTIONS OF BAIL AMMENDMENTS FOR UGANDA S JURISPRUDENCE; FOOD FOR THOUGHT

In simple words, bail is a release of a person from the custody of police and delivery into the hands of sureties who undertake to produce him before the court whenever required to do so.

Basic Principle Underlying Release on Bail:

Case study, United States of America

The principle underlying release on bail is that an accused person is presumed in law to be innocent his guilt is proved and a presumably an innocent person, he is entitled to freedom and every opportunity to look at his case, provided his attendance is secured by proper security. It is also an accused's rights that he may liberal the eye of law defends the allegations leveled against him and pursues his case as well. The American jurisprudence provides different kinds of bail that are available to an accused or prisoner.

KINDS OF BAIL

Bail is of the following three kinds:

1. Pre-Arrest Bail
2. Bail after Arrest / Post Arrest Bail
3. Bail after Conviction

[46] *Natascha Wagner, Mathias Rieger & Ors - Gender and Policing Norms: Evidence from Framing Experiments among Police Officers in Uganda – study by Erasmus University Rotterdam. Page. 4*

1. Bail before Arrest / Pre-Arrest bail

Pre-arrest bail is very rare and limited and it can be extended in very strong and exceptional circumstances either based on mala fide intention or enmity. Pre arrest bail can be awarded in instances where the arrest is for ulterior moves,

Pre-arrest bail is of two types:

i) Protective bail

Protective bail was granted to the accused specific date for moving pre-arrest bail application before trial court. It enables the accused to approach the concerned court of other provinces for the purpose of obtaining pre-arrest bail without touching its merits. In the case of Qadir Bux alia Karo V State 2008, the High Court granted protective bail to the accused without looking at the merits or demerits of the case.

ii) Direct approach to High court

The exercise of this power of grant of bail before arrest is an extraordinary relief to be granted only in extraordinary situations to protect innocent persons against victimization through amusement of law for ulterior moves.

In Rana Muhammad Arshad versus Muhammad Rafique and Another , the Supreme Court of Pakistan held that while seeking bail directly from higher court, the accussed need to show that his arrest was being sought for ulterior moves, parcularly on the part of the police; to cause irreparable humiliation to him and to disgrace and dishonour him.

2. Bail after Arrest / Post Arrest Bail

A post arrest bail can be granted to a person who has already been arrested and kept in police custody. When the accused has been arrested by the law enforcing agency, bail may be generated to him.

For confirmation of post-arrest (after arrest) bail, following are essential condions to fulfil:

● Prohibitory Clause which is to the effect that post-arrest bail cannot be granted when there exist reasonable grounds for believing that the prisoner has been guilty of that offence, which is punishable with death or imprisonment for life or imprisonment for ten years.

It reveals that the pre-condion or essenal ingredient for confirmaon of post-arrest bail is that the alleged offence should not fall within the prohibive clause.

● No Reasonable Ground for commission of Non-bailable offence

Another pre-condion for confirmation of post-arrest bail is that there should be no reasonable grounds for believing that the accused has committed a non-bailable offence.

● Sufficient grounds for further Inquiry

For confirmation of post-arrest bail, there should also be sufficient grounds for further inquiry into guilt of the accused.

● Bail Bond

Post-arrest bail can be confirmed when the accused is ready to submit bail bond in prescribed manner under Criminal Procedure Code

3. Bail after Conviction

It is granted at conviction of accused, the appeal has been accepted for hearing and the court observes that there are grounds for the release of the accused, therefore, it accepts the bail peon and allows bail.

Who May Be Released On Bail After Conviction?

The Appellate court shall release a convicted person who has been sentenced:

i. to imprisonment for a period not exceeding three years and his appeal has not been decided within period of six months beyond his conviction.

ii. to imprisonment for a period exceeding three years but not exceeding seven years and his appeal has not been decided within a period of one year from the date of his conviction to imprisonment for life or for a period exceeding seven years and his appeal has not been decided within a period of two year from the date of conviction.

The High Court is also authorised to exercise aforesaid powers in the case of any appeal filled by a convicted person to a court subordinate to it

GRANT OF BAIL

The principles in granting bail to persons accused of offences are quite well settled. In connection with non-bailable offences (not punishable with death or imprisonment for life) one of the considerations is the danger of the accused absconding. In considering this danger, the court has to consider the weight of the evidence against the accused, the nature and gravity of the charge and severity of the degree of punishment that might follow. Another consideration is the danger of witnesses being tampered with or of evidence being suborned. In considering these matters, the character, means and standing of accused persons have to be taken into consideration. At the same time, the Court has to see that there is no punitive detention and that opportunity is given as far as possible to the accused persons to prepare their defence.

REFUSAL OF BAIL

When a court has reason to believe that an accused person is likely to commit similar or any other offence if he is enlarged on bail, it would refuse bail whatever other considerations there may be in favour of the accused. According to the case of Lawrence Luzinda V Uganda [1986] HCB 33, the definition of bail was given by justice Okello and he stated that bail is an agreement between the court, the accused and sureties on the other hand that the accused will attend his trial when summoned to do so. An amount of money or property must be deposited by an accused person with the court in order to be released from custody. This in law is called a recognizance.

According to the late Ayume in his book, criminal procedure in Uganda at pg 54, he said that there are two basic principles underlying bail. The first principle is that the accused is innocent until proved guilty or until he pleads guilty and therefore it would be unfair in certain circumstances to keep him in prison without trial. This is also enshrined in our constitution of 1995 article 28(3) (a).

The second principle underlying bail is that the only person capable of building up his defence at the trial may be the accused himself. If he is released on bail, it must be on the understanding that he will turn up for his trial. There fore there are good reasons why the accused would want to be released on bail. If employed he would likely loose his job or have his business damaged while in prison.

Even section 17(1) of the CPC states that except in cases of a serious nature, like treason, rape and murder, aggravated robbery, etc. The officer in charge of a police station has powers to release a person who has been arrested without a warrant on bond if that person cannot be produced before a magistratewithin twenty four hours. The officer releases the arrested person against that person executing a bond, with or without sureties for a reasonable sum determined, requiring him to appear before a magistrate's court at a time and place named therein.

POWERS OF MAGISTRATE'S COURTS TO GRANT BAIL

The Magistrates Courts Act Cap 16, Section 75 (1) states that a Magistrate Court before which a person appears or is brought charged with any offence other than the offences specified in ss. (2) may, at any stage in the proceedings, release the person on bail, on taking from him or her a recognisance consisting of a bond with or without sureties, for such an amount is as reasonable in the circumstances of the case to appear before the Court, on such a date and at such time as is named in the bond.

Section 75(2) of the MCA provides that the offences excluded from the grant of bail under subsection (1) are as follows;

an offence triable only by the High Court

an offence under the penal code relating to acts of terrorism

an offence under the penal code relating to acts of cattle rustling

an offence under the firearms act punishable by a sentence of imprisonment of not less than 10 years;

abuse of office c/s 87 of the Penal code

rape c/s 123 of the Penal code and defilement c/s 129 & 130 of the penal code act;

embezzlement;

causing financial loss

corruption

bribery of a member of a public body Any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

A chief magistrate has powers under Section 75(3) to direct that any person to whom bail has been refused by the lower court within the area of his or her jurisdiction, be released on bail but the offence for which the accused faces must not be one that falls under subsection 2.

POWERS OF THE HIGH COURT TO GRANT BAIL

The Trial on Indictment Act Cap 23 section 14 provides that the High Court may at any stage of the proceedings release an accused person on bail, that is to say, on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond. Bail is a kind of insurance to guarantee that the accused will appear in Court for his or her trial. Where the accused fails to appear before the Court when ordered to do so, his or her bail money is forfeited.

The High court has powers after releasing an accused person on bail to increase the amount of the bail. This the court will do by issuing a warrant of arrest against the person released on bail directing that he be brought before the court to execute a new bond for an increased amount; and the High court will have powers to commit the person to prison if he or she fails to execute the new bond for an increased amount. (Section 14 (2) of the TIA

Bail money may be paid up by the accused or someone on his or her behalf. A person released on bail may or may not be asked to put up people as his or her sureties to stand up for him or her before the Court.

A surety gives security to the Court that the accused will attend his trial on the hearing date fixed by the court.

Recognisance is a security entered into before a Court with a condition to perform some act required by Law; on failure to perform that act, the sum is forfeited.

Bail allows an accused person to be temporarily released from custody (usually on condition that the recognizance usually in the form of a sum of money guarantees their attendance at the trial).

Bail money should not be excessively high so that the accused is unable to pay it. In Charles Onyango Obbo & Andrew Mwenda v Uganda (1997)5 KALR 25 the High Court was empowered to interfere with the discretion of the lower court while granting bail under Section 75 (4)(a) MCA where it is shown that the discretion was not exercised judiciously. The imposition of a condition that each accused should pay 2,000,000/-, was a failure by the lower court to judiciously exercise its discretion according to Bossa J. While court should take into account the accused's ability to pay, while exercising its discretion to grant bail on certain conditions, the court should not impose such tough conditions that bail looks like a punishment to the accused.

Constitutional provisions on bail:

The Constitution of the Republic of Uganda, 1995 contains provisions on the protection and promotion of fundamental human rights and freedoms. Article 20 (1) provides that fundamental rights and freedoms are inherent and not granted by the state. Article20 (2) provides that all those rights and freedoms must be respected, upheld and promoted by all organs and agencies of Government and by all persons. Article 28 (3) thereof provides that every person who is charged with a criminal offence shall be presumed to be innocent until proven guilty or until that person has pleaded guilty is the basis on which the accused person enters into an agreement with the court on his recognisance that he appear and attend his trial whenever summoned to do so. Bail gives the accused person adequate time to prepare his or her defence. (Article 28 (3) (c))

Hence Article 23 (6) provides that where a person is arrested in respect of a criminal offence the person is entitled to apply to the court to be released on bail, and the Court may grant that person bail on such conditions as the Court considers reasonable.

Applying the interpretation of article 23(6)(a) as amended by the judges in the case of Uganda V/s Col (Rtd) Dr. Kiiza Besigye, Constitutional Reference No.20 of 2005

Under article 23 (6)(a) of the constitution, where the accused person has been in

custody for 60 days before trial for a non capital offence here, the court has no discretion in the matter. It has to grant bail upon such terms as the court deems reasonable.

Article 23(6)(c) of the constitution where the accused person is indicted with capital offences triable by the High Court only. In this case once the accused person has spent 180 days on remand, then the court has to release him/her on automatic bail upon reasonable conditions.

According to Justice Akiiki Kiiza in Florence Byabazaire's application for bail, it appears the accused can only benefit from this article, if he is not yet committed to the High Court for trial.

Their Lordships had the following to say in Kiiza Besigye's reference "as regards article 23(6)(c), where the accused has been in custody for 180 days on an offence triable by the High Court only and has not been committed to the High Court for trial, that person shall be released on bail on reasonable conditions'.

In the situation where the accused is charged with an offence only triable by the High Court, but has not spent the statutory period of 180 days in custody before committal, in this case, the court may refuse to grant bail where the accused fails to show to the satisfaction of the court exceptional circumstances under section 15(3) of the Trial on Indictments (Amendment) Act 9/98 (cap 23). These circumstances are regulatory.

The Lordships went on to state as follows; "it is noteworthy that this is a 1998 Act, which came into force well after the constitution of 1995. Its sole purpose was to operationalise Article 23 (6) (c) for the accused desirous for applying for release on bail before the expiry of the constitutional time limit of 180 days.

Justice Akiki Kiiza said in Byabazaire's application that before the High Court can release an accused on bail, one of the conditions or exceptional circumstances outlined in Section 15(3) of Trial Indictment Act must be satisfied and dismissed the applicant's application on the ground that none of the exceptional circumstances had been satisfied.

Considerations for Bail in the Magistrate's Court

Conditions for the grant of bail: In as much as the accused person has a constitutional right to apply for bail as enshrined in article 23(6)(a) of the 1995 constitution, the grant of bail is subject to some conditions being fulfilled by the person seeking bail. As per Justice Akiiki Kiiza in the application for bail by Florence Byabazaire Vs Uganda 284 of 2006, Bail is not an automatic right. Article 23(6)(a) confers discretion upon the court whether to grant bail or not.

The conditions / considerations for granting bail are set out in both the Trial on Indictments Act Cap 23 for bail applications made in the High Court and the Magistrate Courts Act Cap 16 for applications made to the Magistrate's court.

Considerations in the Magistrate's court;s. 77 MCA sets down some considerations that the Magistrate Court must have regard for in deciding whether bail should be granted or refused-

The nature of the accusation; see Uganda Vs Mugerwa & Anor [1975] HCB 218.

The gravity of the offence charged and the severity of the punishment which conviction might entail; (it is more likely that bail will be refused where the offence is so grave as to warrant a severe penalty).

The antecedents of the applicant so far as they are known(it would be a mockery of the judicial process and a miscarriage of justice if bail were to be granted to a person who has a staggering record of previous convictions to his name, which is an indication of his likelihood of committing further crimes if released on bail).

Whether the applicant has a fixed abode within the area of the court's jurisdiction; (Sudhir Ruparelia Vs. Uganda [1992-1993] HCB 52, (the fact that the accused has a kibanja, and that he has sixteen wives and or twenty four children, may be an indication that he is unlikely to abscond. But this by itself cannot be a ground for releasing a person on bail- Livingstone Mukasa & 5 others vs Uganda [1976] HCB 117.

Whether the applicant is likely to interfere with any of the witnesses for the prosecution or any of the evidence to be tendered in support of the charge. (In the case of Uganda Vs Wilberforce Nadiope and 5 others, bail was refused on the ground that because of the accused person's prominence and apparent influence in life, there was every likelihood of his using his influence to interfere with witnesses.

Considerations for Bail in the High Court

Section 15 (1) TIA provides that Court may refuse to grant bail where a person accused of an offence specified in ss (2) if he or she does not prove to the satisfaction of the Court –

That exceptional circumstances exist justifying his or her release on bail; and
That he or she will not abscond when released on bail.

In S. 15 (3) exceptional circumstances mean

(a) grave illness certified by a medical officer of the prison or other institution

or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody. (Capt. Wilberforce Serunkuma Vs Uganda [1995] I KALR 32 The applicant was charged with aggravated robbery and had been on remand for eight months. He brought an application for bail basing on his exceptional circumstances of grave illness. In his affidavit supporting the application the applicant deponed that he was an AIDS Victim and needed constant care which he could not get while in prision. He brought documents to prove that he had been attending AIDS clinics like TASO. It was held that where satisfactory evidence of AIDS is adduced, a court may consider the circumstances of the case and in the absence of a certificate from the medical board hold that AIDS is grave illness, and to justify grant of bail, the applicant has to prove to the satisfaction of the court that he was incapable of getting adequate treatment whilst in custody. In this case, all the applicant had were documents from TASO indicating that he was an AIDS victim and no report was made by any doctor who treated him at Luzira or Mbuya military hospital to show that he could get adequate treatment whilst in custody.

A certificate of no objection signed by the Director of Public Prosecutions, or

The infancy or advanced age of the accused. (Mutyaba Semu V Uganda the accused was a 60 year old and suffered from diabetes and he brought an application for bail on the ground that he was of advanced age. It was held that 60 years per se was not advanced age but this coupled with the fact that the accused suffered from diabetes, a disease that required a good diet which could not be provided by prison authorities he would be granted bail.

Section 15 (4) provides that in considering whether or not the accused is likely to abscond, the court may take into account the following factors-

a. Whether the accused has a fixed place of abode within the jurisdiction of the Court or is ordinarily resident outside Uganda. (Christopher John Boehlke v Uganda Misc. Application 332 of 2006)- no fixed place of abode and a non resident. Look at the conditions considered in this case.

Dennis Obua Otima v Uganda H C Crim. App. No 18 of 2005.

The applicant was charged with embezzlement and causing financial loss applied for bail on the assertion that he was of advanced age and that he is such a person entitled to be released on bail. Justice Remmy Kasule looked at the considerations in light of the other factors which court uses to deny bail. Firstly is whether the accused is likely to interfere with the prosecution evidence. Where it is found to be the case, the court would exercise its discretion by refusing bail. Secondly is to prevent a perception of the justice system as being a mockery of justice. This discretion to refuse bail is vested by the constitution. Article 23 (6) (a).

Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail,

Whether the accused has on previous occasion when released on bail failed to comply with the conditions of his or her bail; and

Whether there are other charges pending against the accused.

Is Bail a constitutional right and therefore automatic?

Generally the grant of bail is discretionary and court must always exercise its discretion judiciously and always give the accused the benefit of doubt. Magistrates and Judges have interpreted the provisions regarding the conditions and considerations in different ways with some stating that they must be fulfilled before a person can be granted bail, while others holding that it is a constitutional right.

The right to bail is a constitutional protection of the right to personal liberty clearly based on the presumption of innocence which must thus not be denied lightly. An accused person charged with a criminal offence must be informed of his right to bail. It is not a constitutional right to automatic bail but a right to apply for bail.

The later view is the one that has been propagated by judges in most of the recent judgments as seen hereunder;

To conclude, the object of bail is to save innocent persons from being unnecessarily harassed. In every bailable offence, bail is granted as a matter of right and not as a matter of favor. The grant in non-bailable offences depends upon the discreon of the Court and such concession cannot be claimed as of right.

CHAPTER EIGHT:

THE REFORM ON RAPE (POWER DIFFERENTIAL EQUALS COERCION)

The topic of contemporary rape-law reform holds a natural point of interest for this book of Law & Inequality: A Journal of Theory and Practice, In this chapter, I undertake two distinct tasks. First, I want to discuss what the laws against sexual assault ideally should look like. But second, I also want to discuss rape law from the perspective of someone who has spent the past four years in the messy and frustrating work of legislative compromise, trying to design a law reform that can be both progressive and enactable however there is an obvious contradiction in that regard. The goal is to pass reforms that move society and our criminal justice system in a progressive direction, to the place where society ought to be. But that means, by definition, getting broad agreement on principles about which people do not agree—at least not yet. Before I turn to that second part of the story, this Article addresses three points. First, it sketches the traditional twentieth century law of rape (still in force in some jurisdictions!) and outlines the reforms that were emphasized in the 1960s and 1970s, before Professor MacKinnon's (a senior philosopher of rape laws) impact was felt. Second, it describes the distinct perspective that Professor MacKinnon brought to these debates and how it helped shaped the reforms that followed. Third, this chapter offers an outline of where we are now, the progress we've made, and some of the problems that still need to be addressed. This chapter then turns to the second large part of the rape reform story and discusses the work of getting progressive reform enacted in the face of strong and determined resistance. Part of that resistance is outright misogyny—unconscious or overt disrespect for women. Although it is important to acknowledgethe that fact, this article will focus instead on resistance that is not attributable to misogyny. It can be hard to see that resistance sometimes reflects legitimate concerns which those of us committed to reform must understand and address.

TRADITIONAL RAPE LAW AND THE FIRST WAVE OF REFORM (1960–1980)

In the eighteenth century, Blackstone defined rape as "[carnal knowledge of a woman forcibly and against her will." Courts were obsessed with the idea that a woman might fabricate a rape accusation so there were unique obstacles to conviction. Requirements of prompt complaint and corroboration, including corroboration of unwillingness by proof that the victim had resisted to the utmost. Those requirements are now largely absolute, but Blackstone's core concepts—force and non-consent—are now the focus of intense debate and disagreement. In the 1960s, the reformers who wrote the Model Penal Code (MPC) expanded Blackstone's narrow concept

of force, so that it could include nonviolent duress, like a threat to fire someone from a job or to take away custody of their children, in cases where such a threat could prevent resistance by "[a] woman of ordinary resolution." States that generally followed the MPC in other respects, however, were not ready to accept its cautious extension of the law of sexual assault; they continued to define rape as a crime of physical violence. In the 1970s, there was another wave of reform. Strong feminist organizations and rape-survivor advocacy groups joined with the general tough-on-crime movement that became powerful in the 1970s. Politically, the reformers were almost unstoppable. Yet what stands out, in light of Professor MacKinnon's subsequent work, is how modest the 1970s reforms were. The top priority was to eliminate procedural obstacles and protect victims from abusive cross-examination in the courtroom, and those goals were almost entirely successful, at least in the laws on the books. A 1975 Michigan statute was probably the most ambitious reform of its time. It enacted almost the entire victim-advocate's wish list. For example, the statute repealed the resistance requirement and eliminated all reference to consent, because a non-consent requirement seemed to put the victim on trial and divert attention from the defendant's misconduct. But from today's perspective, what is striking is that the Michigan statute still required proof of physical force or threats of physical violence however flagrant coercion still fell outside the reach of criminal law. In a 1983 case, an Illinois man accosted a woman on an isolated bike path. He was almost twice her size, and after they talked for a few minutes, he picked her up, carried her into the woods, and performed several sex acts. She was terrified, but because she never cried out or protested, the court reversed the rape conviction. In a 1985 case, a foster parent threatened to send the fourteen-year-old girl who was in his care back to a detention facility if she did not submit to sex. The court upheld a conviction for corrupting the morals of a minor but reversed the rape conviction because the foster parent had not threatened the girl with physical force. In a 1990 case, a Montana high school principal threatened to prevent a student from graduating unless she had sex with him. The court held that the principal could not be guilty of rape for the same reason he had not threatened her with physical force. That is where things stood when Professor MacKinnon addressed rape in a powerful 1983 article and, of course, in her 1989 book Toward a Feminist Theory of the State. By then a few courts were willing to say that coercive circumstances could sometimes be sufficient. But these were halting steps. Even the most progressive courts were requiring some implicit danger of physical harm, for example, when an armed police officer implicitly threatens the victim with arrest. Nearly all courts were still asking whether the defendant's conduct was essentially equivalent to physical violence.

PROFESSOR MACKINNON'S CONTRIBUTION

What Professor MacKinnon's work showed was that "force" has many faces, that the absence of physical force does not necessarily enable women to control, as she vividly put it, "what is done to them." Rape law could not justifiably assume that ability to control because, under conditions of gender inequality, social constraints

and pervasive disparities of power can be decisive. MacKinnon's work laid bare the ways that women sometimes have no alternative except to acquiesce. As she wrote in "Toward a Feminist Theory" of the State: [Acceptable sex, in the legal perspective, can entail a lot of force. The adjudicated line [distinguishing rape from sex in specific cases] . . . commonly centers on some assessment of the woman's will . . . [but] the deeper problems are that women . . . may have or perceive no alternative . . . [except to] submit to survive. Absence of [physical] force does not ensure the presence of that control [over what is done to them]. In other words, force runs on a continuum the knife at your throat, the threat to throw you in jail, the threat to take away your job or your children, the need to placate a thesis supervisor all these things can lead a person to tolerate and submit to unwanted sexual advances. In the 1980s, a few courts finally started to understand this. For example, a Pennsylvania judge defined force as "[c]compulsion by physical, moral, or intellectual means or by the exigencies of the circumstances." Another court recognized that force "includes 'not only physical force or violence, but also moral, psychological or intellectual force [when] used to compel a person to' [submit]. "A 1995 Pennsylvania statute defined forcible compulsion to include "[e]motional or psychological force, either express or implied." Progress was also made from a different direction: instead of expanding "force" to include all forms of coercion, some reforms achieved a similar result by requiring consent, and then requiring that the necessary consent be "freely given" under all the circumstances. In 1988, the Supreme Court of the United States reflected the older view when it held that the statute used to prosecute sex trafficking—the law against holding any person in "involuntary servitude" applied only to traffickers who use physical or legal compulsion. Congress overruled that decision and specified that coercion "includ[es] psychological, financial, or reputational harm . . . sufficiently serious to compel a reasonable person [to submit] . . . ." We cannot necessarily draw a straight line from all these reforms back to Toward a Feminist Theory of the State, but nothing else was as important as Professor MacKinnon's work in severing the link between our understanding of rape and the expectation that the crime inherently involves aberrant physical brutality. Her writing shattered the myth that force must mean physical violence. Nothing else was as important in opening society's eyes to the fact that many faces of force can compel submission just as effectively as threats of violence. So far, I have left out two important parts of this story. One is pushback based on the argument that that women supposedly should not be pampered or "infantilized" that nothing stops a woman from resisting a nonviolent sexual advance if she really wants to resist. I will say more about that below. But first, there was reform that came from the other side of the fence: the feminists and victim advocates who did not really get the full MacKinnon message I am especially pointing to the slogan, "no- means-no." I found myself under fire from some reform advocates in the 1990s when I criticized the no-means-no movement. Obviously "no" must mean no. But pitching the argument that way does not go very far and its emphasis is badly misplaced. One thing Professor MacKinnon's work makes clear is that the no-means-no idea puts the entire burden on the woman to speak up, to resist, even when speaking up and resisting is exactly what social constraints and disparate

power make it difficult or impossible for her to do. Of course, some who supported the no-means-no slogan understood that; they just wanted to make sure that at a minimum a verbal protest would always be sufficient. Unfortunately, however, the no-means-no mantra distracted attention from the main point, and reinforced the expectation that an unwilling person would protest. Its subtext was and still is that sexual aggressors are entitled to take for granted a woman's availability unless and until she clearly and explicitly objects. In addition, some reform advocates even made that assumption explicit. In arguing for no-means-no, one feminist reformer wrote that "the jury has to believe that she did say 'no' ….Women should not be overprotected." My own work argues otherwise. For practical and theoretical reasons, willingness should never be assumed. Arriving at the same conclusion from a somewhat different starting point, Professor MacKinnon writes in Toward a Feminist Theory of the State that "[t]he deeper problem is that women are socialized to passive receptivity; [they] may have . . . no alternative to [passive] acquiescence." Therefore, silent submission and actual willingness are not the same thing; one should never be equated with the other. That brings me to the current battle cry: "yes-means-yes." Here, the problem is similar to the one we encountered with respect to no-means-no: a well-intentioned, ostensibly progressive rallying cry misleads and fosters assumptions that ultimately are antithetical to effective reform. The yes-means-yes slogan impedes genuine clarity in society's understanding of the stakes. What the slogan is supposed to mean is that silence does not mean yes. People have to give permission; that's the essential minimum. But again, the mantra, in this case "yes means yes," is drastically incomplete. It distracts attention from the main point because it reinforces the expectation that "yes" does mean yes and that a person who says "yes" is willing. We must be clear about this: for all the reasons that Professor MacKinnon shows, "yes" does not always mean yes. In situations dominated by disparities of power, merely saying yes is not saying that I have freely made a sexual choice.

LESSONS FOR UGANDA

We therefore remain a long way from a proper social understanding of the issues and the law's role in addressing them. But first the good news, two key points are mostly accepted. They are, first, that "no" is always sufficient to establish non- consent, and second, that force does not always have to be physical force other coercive circumstances suffice. To be clear, even these basic points still are not universally accepted in United States law. We are still fighting these two elementary battles. But for the most part, these battles have been won. Now the status report moves into more disappointing territory. It should be an equally basic point that non-consent for example, a clear "no" is sufficient by itself to make penetration a crime, even when there is no additional force of any kind: physical, psychological, situational, or otherwise. This simple proposition should not be the least bit controversial. Unlike the first two points, however, this proposition is not close to being fully accepted in United States law. In almost half the states, sexual penetration is not a crime unless

there is both non-consent and some sort of force. Penetration without consent is not, in itself, a crime. This last point is emphasized for a reason; it is not a misprint. All people (or almost all people) know, as a matter of common decency, that no one is supposed to ignore a clear expression of non-consent. Today many students learn in high school, and nearly all college students learn in freshman orientation, that it is unacceptable to ignore a clear expression of non-consent. But that is not a criminal law requirement in almost half the states. In all these jurisdictions, some sort of force is required, in addition to non-consent, to make out a crime. I will come back to this legal approach in a moment, but I do not want to dwell on it, because it has finally become the minority view. In a majority of states, it is finally true that non-consent alone suffices, and this is the recommendation currently before the American Law Institute in its revision of the sexual offense provisions of the Model Penal Code. This battle is not over, but the trend is clear. The opposition is becoming weaker by the minute. That leaves two important issues where the trend is not clear and where reform still faces formidable opposition. First, what counts as consent? What is the minimum requirement? And second, when that minimum requirement is met for example, when you have explicit permission—what circumstances nullify that apparent consent? When does yes not mean yes? These are the places where the key battles for reform are now being fought.

WHAT COUNTS AS CONSENT?

Even among states that treat absence of consent as sufficient (together with sexual penetration) to establish the offense, there is wide and consequential disagreement about what "consent" means. There are three options in play. The first option says that to prove unwillingness, there must be some verbal protest. The second option says we should assume non-consent unless there is clear affirmative permission. In the first option, silence and passivity always imply consent; in the second option, silence and passivity always mean no consent. In the third option, silence and passivity can imply either consent or non-consent, depending on all the circumstances. In media accounts, the requirement of affirmative permission is often portrayed as a nightmare of fascist intervention in private life, as if all sex would be illegal in the absence of a written agreement signed, sealed, and notarized. You would never know from the alarmist media hype that realistic standards of affirmative consent, signaled by words or conduct, are already the law in many states, including Minnesota and Wisconsin, where these standards seem to work perfectly well. Equally important, it is crucial to explain why this is the right standard. This standard simply says that people do not want to be sexually penetrated unless and until they indicate (by words or actual conduct) that they do. Without that requirement, the law would, in effect, be assuming that people are always receptive to sexual intercourse (at any time, with any person) until they do something to revoke that permission. That is hardly an accurate description of ordinary life. Moreover, when we consider the specific contexts in which sexual abuse typically occurs, the point is even clearer. Sexual interaction too often occurs when someone's ability to express unwillingness

is impaired, whether by fright, intimidation, alcohol, or drugs. A standard that treats silence or passivity as equivalent to consent a standard that requires people to communicate their unwillingness—presents enormous dangers of sexual abuse.

WHAT CIRCUMSTANCES CAN NULLIFY APPARENT CONSENT?

The second arena where the major battles over reform are now playing out is on the difficult question: when does yes not mean yes? Obviously, "yes" is not authentic consent when it is given at the barrel of a gun. The issue we are fighting over today is the same one that has been unresolved since the 1960s: what things other than physical violence make consent inauthentic? Broadly speaking, the major disagreement on this issue is between those who want the list to be very short—limited to things that are almost as coercive as physical violence—and on the other side, those who want that list to include many or all the other circumstances that limit a completely free choice. Before discussing the choice between grudging reform and very ambitious reform, it is worth mentioning a more abstract but nonetheless crucial issue of strategy. This is an issue that divides those of us in that second group, those of us who agree about the need to protect against a broad range of coercive pressures. The issue here is the choice, familiar to law students and legal academics, between clear rules and flexible standards: should reform aim for statutes that specify which pressures are unacceptably coercive? Or, should reform statutes prohibit coercive pressure in broad, general terms, leaving it for the jury to decide whether circumstances were too coercive in the context of each particular case? When you get into the details of legislative reform, this becomes a decisive issue, and committed reformers have different views, not only about which framework meets fairness requirements but also which approach is ultimately better for victims. Professor MacKinnon and I have had a friendly disagreement on this issue. She proposes that the legal formula for identifying criminal conduct should be whether the sexual intrusion involved either "[the] threat or use of force, fraud, coercion, [or] abduction," or also "the abuse of power, trust, or a position of dependency or vulnerability." The Model Penal Code provision I have been drafting and working to get passed aims to identify in detail which circumstances involve prohibited kinds of force, fraud, coercion, exploitation, and vulnerability. This means, of course, that the proposed MPC provision also identifies, by implication, the kinds of force, fraud, coercion, exploitation, and vulnerability pervasive in any modern society that do not suffice to establish criminal liability. The advantage of the proposed MPC approach is that it sets boundaries for the criminal law that are as clear and specific as possible. On the downside, it is infinitely less concise than Professor MacKinnon's conceptually phrased alternative. Also, arguably on the downside for the MPC proposal (or an advantage, depending on your perspective), it would not reach various kinds of coercion and exploitation that could sometimes be prosecuted under Professor MacKinnon's approach. Examples of coercion that the MPC proposal would not prohibit, absent aggravating circumstances, would include the implicit pressure that can arise, even without direct or indirect threats, in interaction

between a supervisor and a subordinate at work, between a public defender and the accused, between a wealthy older man and an economically vulnerable young mother, or between a popular athlete and an insecure student on campus. Indeed, Professor MacKinnon argues that the MPC proposal's elaborate structure of rules and exceptions is "fundamentally beside the point." Referring specifically to the MPC revision effort I lead, Professor MacKinnon acerbically writes: Scholars debate granular details of the traditional elements of consent and force in sexual interactions in complex and esoteric ways, fracturing consent into a dozen forms with as many modifiers and force into multiple guises and levels, seldom assessing these elements themselves in sex equality terms . . . . If rape is less a question of unwanted sex than of unequal sex, if equality not autonomy is its primary issue, if internal psychology is less determinative of these criminal acts than leveraged external conditions and gendered social behaviors, the existing conceptual framework, together with its lexicon of examples, has been fundamentally beside the point all along. A far better approach, she argues, is to prohibit: [A]ll the forms of force that someone, usually a man, deploys to coerce sex on someone with less power than he has. This is not only far more realistic in lived experience. It is also more sensible, more humane, and more workable in legal practice. Coercion, including circumstances of social coercion, tend (with social hierarchies) to build upon and leave forensic tracks in the real world that are subject to investigation, observation, and evidence. There are uniforms, positions of authority, traditions and triggers of dominance, well-worn consequences that flow from refusal of the desires of the dominant. Even the psychological dynamics of coercion are far more externally observable in their referents than are those of consent. The choice between these two approaches is very important and by no means easy. As is often the case when it comes to translating reform aspirations into concrete legal form, the devil is in the details. The differences among reformers on this issue, however, are much less important than the disagreement between all of us on the reform side and the large group of people who want to make sure that prohibited forms of coercion regardless of whether defined by clear rules or by flexible standards are kept within narrow bounds. Instead of going more deeply into the weeds on those issues here, I want to turn now to broader and more fundamental problems that we reformers face in trying to achieve progress. The most intractable problems we face involve trying to convince the large body of citizens who resist efforts to move forward, citizens who do not want criminal sanctions in this area to reach even one millimeter further than they already do.

RESISTANCE TO REFORM

I will use three greatly oversimplified categories to describe groups that resist almost any reform of a relatively ambitious nature. I will call them the misogynists, the low-information opponents, and the well-informed, very thoughtful opponents. Those that I call misogynists are those who do not make it a priority to assure the dignity and equal worth of people who happen to be women. They may not even consider the condition of women in our society as a particularly pressing problem.

They simply do not see that women are disadvantaged, or they take male privilege for granted. I am not going to say anything further here about this group. Unlike some reformers whom I respect, I do not see people in this group as hopelessly beyond persuasion. We can and must think about ways to communicate with this group and enlighten them. But this is not the place to pursue that issue. I want to focus here on the two groups of well-intentioned opponents: those whose views are shaped by low-information and those whose opposition springs from sophisticated concerns. These last two groups pose a larger challenge because they hold the balance of power in settings where reform efforts play out. These are the groups that we must understand and connect with if we want to make progress. The low-information group includes people who have decent values but a distorted picture of what rape cases really involve. They think they understand the problems, because they have seen TV shows about sexual assault on campus; they have heard TV pundits debating both sides of the issues in those cases; they may even have read newspaper op-eds discussing the pros and cons on the subject. I wish someone would study the amount of time and space that TV and the newspapers devote to campus sexual assault, especially cases involving upper middle-class, mostly White defendants, and then compare it to the time and space devoted to all other situations involving sexual abuse. I do not know what the numbers would show, but I do know that when my work on legislative reform runs into resistance, it comes far too often from people in policy-making authority who want to know how my proposals would apply to their own son or daughter who just started college. That is a perfectly reasonable question for any parent to ask. But lawyers, judges, legislators and others weighing the merits of public policy surely can be expected to consider the problem through a wider lens. Yet ninety percent of the time, resistance to reform seems to come from decision-making elites who picture the typical rape scenario as a case involving two college classmates at a party, flirting, drinking too much, experimenting sexually, and not communicating with each other very well. Of course, rape-victim advocates vigorously challenge this picture of campus life by stressing how much deliberately predatory behavior occurs between classmates in college settings.

Unfortunately, that kind of challenge inadvertently perpetuates the idea that the central problem our society faces today in connection with sexual abuse is the problem of too much drinking, too little communication, and too much boorish behavior on college campuses. This pervasive assumption is dangerously misleading; it can almost be described as a myth. My claim in this regard may seem counter-intuitive, and it is important not to misunderstand it. Sexual assault on campus is a very serious problem. Reform efforts must give it a great deal of attention and it is a big part of my own work. But focusing on these campus scenarios gives people both those committed to reform and those who oppose it a distorted picture of sexual abuse in the United States today. The situations in which the serious inadequacies in current rape law become most salient and consequential include domestic violence, physically and mentally disabled victims, and gross discrepancies in age, power, or authority. The salient abuses also include intoxication, of course, but not only

intoxication involving middle- class college students. Equally important are cases of intoxication in settings framed by poverty, domestic violence, and social deprivation of all kinds. So, building a consensus for reform requires changing the narrative. We must work to shake people free of the media's obsession with young, inexperienced, middle-class peers in college settings. We have thousands, probably millions of well- intentioned citizens, people of good will and good values, who are stuck in the media narratives about naïve, inexperienced kids behaving badly. These low-information people have to be reminded of the wide range of very different contexts in which current rape law fails. They must be made aware of what the rape reform effort is really about. The third group, the last source of resistance I want to discuss, is the hardest. These are well informed, highly sophisticated people with decent values. They are intensely concerned about the injustice to defendants that pervades our entire criminal justice system: abuses of prosecutorial discretion; shocking racial disparities; intense leverage deployed to coerce guilty pleas, especially when the evidence is the weakest; overly punitive sentencing; mass incarceration; and by no means least, our overly rigid, vastly over-inclusive system of sex-offender registration. This system often includes absurd, life-long restrictions on the offender's residency, education, and employment, applied to offenders whose crimes, though serious to be sure, do not mark them with the potential for life-long violent recidivism. One answer to all these concerns is that there are vast numbers of conscientious, dedicated police, prosecutors, and judges who work hard every day to make responsible judgments and pursue justice fairly and even-handedly, without overreacting to less egregious behavior. Another answer is that in rape cases the failures of our criminal justice system usually lean in the opposite direction: police and prosecutors who will not pursue meritorious cases, juries that will not return justified convictions, and outrageously lenient sentencing, especially in cases involving middle-class, White defendants. For many of the victim advocates I work with, those answers are more than sufficient. Many of them cannot imagine that it is in any way plausible to think of rape law as an area where our criminal justice system is too harsh or too discriminatory. I wish I could fully agree with the victim advocates who hold that view, because it would make my job and my own commitments to reform much easier and much less conflicted. I can certainly match every claim about unfairness to defendants with a dozen stories that demonstrate the opposite. When I'm being honest with myself, however, and when I am trying to reach people of good will who do worry about racial discrimination, people who do worry about sex- offender registration and harsh, inflexible punishments, I must acknowledge that there is no simple answer to their concerns. Both pictures have a lot of disturbing truth. There is pervasive under-reporting and under-enforcement, pervasive unwillingness to credit well-founded victim complaints, and pervasive inadequacy of punishment in prosecutions that lead to conviction. All that is true. Those problems exist to an alarming degree. But victim advocates must be equally willing to acknowledge the opposing dynamic that exists side-by-side with that neglect: pervasive race bias and class bias in enforcement; pervasive abuse of charging power and plea bargaining; pervasive rigidity and disproportionality in punishment; pervasive over

breadth, overreaction, and inflexibility in the deployment of collateral consequences such as registration, community notification, and restrictions on public benefits, employment, and residency. The vexing problem we reformers face in trying to craft a more protective law of sexual assault is resistance from decent people who are well aware of un-redressed victimization but at the same time are acutely aware of extreme racial disparities and the wildly inconsistent responses our media and our society have to sexual abuse: extreme skepticism toward victim allegations on the one hand and on the other, almost simultaneously, indiscriminate, extremely harsh condemnation and punishment when someone is alleged to be or found to be an offender. The challenge for successful reform is to find ways we can maintain and strengthen our commitment to fair and proportionate punishment while also giving victims the much more effective protection they need from male aggression and all the other forms of exploitation and sexual overreaching that are still so pervasive in Uganda today.

CHAPTER NINE:
A NEED FOR REFORMS ON MARITAL RAPE

Marital rape (including other forms of sexual violence in intimate relationships) is a prevalent problem throughout the world. Some studies suggest that as many as one in three women has experienced sexual and/or physical violence perpetrated by a husband or other male intimate. Yet many of the world's countries still fail to criminalise sexual assault in marital relationships (also described as intimate partner sexual violence, IPSV) or fail to criminalise it adequately. The marital rape exemption has a long and varied social and legal history. Its entrenchment is inextricably linked to women's subordinate status in societies at large, and to women's subordination in marriage specifically. As entrenched as impunity for IPSV has been in so many jurisdictions, the marital rape exemption has not remained uncontested. On the contrary, it has been vigorously condemned by women's rights movements around the world. This condemnation has also been central to the repudiation of associated legal constructs of gender inequality, such as the doctrine of coverture, which obliterates married women's independent and autonomous separate legal existence, and constructs them as their husband's property. Yet so powerful and embedded are the taboos and privacy surrounding sexuality and marriage that even in some countries where extensive legal reforms have been made to end domestic and other forms of violence against women, the idea (and reality) persists that sexual assaults perpetrated by spouses should remain beyond the reach of the criminal law. Human rights and women's groups in countries where marital rape retains its criminal immunity have been relying on international human rights law, inter alia, to demand its criminalisation in order to fulfil their state's obligations under international law. The demand for an end to the marital rape exemption in criminal law is more than a demand for a penal remedy. It is fundamentally a demand for women's legal equality and autonomy, rights that centrally define international human rights law. The existence of a criminal remedy for sexual assault in marriage is a crucial form of state condemnation of and protection from gendered violence. But too many states still fail to provide it, either by retaining spousal immunity for sexual assault or by treating it as a less serious legal wrong. Criminalising sexual assault in marriage and providing legal remedies for this form of gendered violence is fundamental to achieving women's equality and other human rights. While this has been recognised by many of the world's states, too many others remain resistant and lag behind, insulating sexual violence against women by their spouses from legal sanction. In this chapter we provide a big-picture perspective on the long and bumpy road taken by many of the world's countries in moving towards legal recognition that sexual assault can occur in a marital relationship and in the provision of a criminal law remedy for this form of gendered violence. We begin the chapter by articulating our arguments about why engaging the power of criminal remedies is necessary to the struggle to end sexual violence against women in marriage, particularly with reference to criminal law's importance in expressing fundamental social norms.

Section II moves to a critical review of the historical origins and ideological justification underpinning the marital rape exemption in diverse societies. We show how similar themes occur across very different social regimes. A great deal of the advocacy undertaken by those seeking to end violence against women has focused on engaging state power to criminalise acts of physical and sexual abuse of women that had previously been seen to be 'normal' or legitimate. The appeal to criminal law represents a utilization of both its expressive and remedial functions to put a stop to this kind of discrimination and inequality in women's lives, particularly in women's intimate lives. Criminalizing behavior that has previously been condoned or considered acceptable in oppressing members of subordinated groups has long been a part of the struggle to achieve equality. As Cass Sunstein has pointed out, 'a large point of law may be to shift social norms and social meaning'. This applies to law's changing grasp of various forms of what is now recognized as discrimination and harassment. For example, Sunstein notes that: 'Anti discrimination law is often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behaviour seems to deny.' Criminal law has an especially important role to play in shifting social norms towards equality and in condemning behaviors and actions, such as sexual assaults, which undermine equality, bodily integrity and dignity. As Sunstein elaborates: 'There are many areas in which law is used in an expressive way, largely in order to manage social norms. The criminal law is a prime arena for the expressive function of law.' Criminalizing domestic violence, for example, has been a crucial dimension of the work to end this form of violence against women in intimate relationships. Criminalizing the use of physical violence against wives provides, in theory at least, a way for individual women to seek state protection against this harm. It also simultaneously represents a rejection of traditional patriarchal ideas, which had previously legitimated men's use of force against their wives as a form of discipline and domination. Similarly, ending the marital immunity for sexual assault in criminal law is crucial both at the micro level, to give individual women the option of criminal remedies for their experiences of this form of violence, and at the macro level, to shift norms towards recognizing women's full equality and autonomy rights in private relationships. Criminalization is, and should be, only one aspect of the multiple kinds of state and social responses to gendered violence which feminist human rights scholars and activists pursue. Calls for criminalization are necessarily situated within a broader agenda for structural change and for an improvement in the social, economic and political conditions which allow for gendered violence in the first place. Julie Goldscheid has pointed to the range of responses which should be under- taken in order to require that states address gendered violence. As she explains:

International human rights laws due diligence framework requires a range of responses that include the obligation to prevent, protect, and provide redress, along with the obligation to prosecute and punish. Explicitly framing states' obligations in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction.

Drawing on international human rights law as a source of authority for challenging the marital rape exception in criminal law allows feminist and other social justice organizations, working within their specific national and local contexts, to seek greater state action and accountability in ending this form of violence against women and violation of women's human rights. The very fact that so much IPSV remains unreported and unremedied, and its victims unassisted, makes the law even more essential. Likewise, it further creates the need to intensify efforts to make the law more responsive, effective and just. Due diligence to criminalise marital rape does not stop at the level of statutory reform. It also requires proper and fair enforcement of the law. For example, there are multiple evidentiary difficulties in proving lack of consent in criminal proceedings and these are compounded in cases of spousal sexual assault. Struggles for women's human rights that engage criminal law as part of the strategy to eradicate gendered violence have been of central importance to the women's movement and to the move towards gender equality. This is not the same as suggesting criminal law is the only important strategy for challenging violence against women. Nor is it an un ambivalent embrace of criminal law or the criminal justice system. Instead, it is recognition that a state's criminal law power is an essentially important resource to be drawn upon, both conceptually and concretely, to shift social norms and practices such that sexual violence in intimate relationships is no longer seen to be acceptable. Engaging criminal law to end IPSV is especially critical at the normative level given the long- entrenched ideological and historical origins and justifications of it, a subject we address next.

HISTORICAL ORIGINS AND IDEOLOGICAL UNDERPINNINGS OF THE MARITAL RAPE EXEMPTION

Historically, in many societies, women have had no remedy against sexual coercion by their husbands. Women's vulnerability to sexual violence in intimate relationships, and the lack of a legal remedy for it, has been inextricably connected to the social, economic and political subordination of women historically, and in most societies. There have been exceptions. For example, there were (and there still are) matrilineal and polyandrous societies across the globe in which women had a much higher social status than they have had in patriarchal social formations, and in which violence against women was not condoned. Women who were wealthy and privileged generally enjoyed some legal emancipation in certain periods and in certain societies and could take legal action against their husbands with adequate support. This was the case, for example, in ancient Rome, medieval Europe and the Ottoman period. Another notable example is found in the Brehon law in Ireland, based on ancient Celtic law, which offered more protection to women from spousal violence than the English common law or Christian ecclesiastical law. Additionally, the property, contractual and other rights that women possessed also played an important role in determining remedies for women facing domes- tic violence and marital rape. For example, Irish women under Brehon law and women in several Arab societies had inheritance rights and could independently hold property. They could also lawfully divorce or separate

from their husbands on the basis of ill-treatment. Similarly, in many pre-colonial Namibian communities, women contributed to the bulk of subsistence agriculture and had access to property and the economy. Divorce was easily obtained, men had lesser control over their wives, and women played important roles as healers, leaders and rulers. Violence against women within the household was much more circumscribed by the laws in these places. Religious legal systems have also always had several interpretive lineages. For example, some Koranic and Talmudic interpretations have emphasized the legal equality of men and women in marriage, interpretations which have been used by courts and governments to provide legitimacy to gender justice claims. Nevertheless, and despite these exceptions, it is safe to say that for the most part sexual assault in marital relationships has been condoned throughout history and husbands have had enforceable 'rights' to sexual intercourse with their wives. While some customary legal systems insist that wives have a symmetrical expectation of sexual intercourse, this apparent equality has often only been used as a ground for divorce or compensation. Furthermore, norms like these that suggest a formal mutuality between men and women in marriage must be read through the lens of the immense power that men carried as heads of household and as primary actors in the economic and political arenas. In patriarchal systems around the world and throughout history, the husband has been seen as the head of the household and to wield authority over it. Christian norms, for example, explicitly make men the authority in the family, and have ratified patriarchal practices across the globe lasting for millennia. The sections which follow articulate the thematic justifications which have been deployed in and through the various legal legitimating of men's rights to sexual access to their wives, consensual or forced. Throughout history, the marital rape exemption has persisted through various legal doctrines that sought to uphold particular ideological constructs of women and marriage. While much has changed in the legal characterizations of women, their bodies and their degrees of autonomy across the world, it is important to understand the contingent and ideological nature of traditional patriarchal historical constructs and how these have ensured that vestiges from the past persist and maintain dominance structures that continue to inhibit women's rights today. Some of these fundamentally masculine-dominant ideas are outlined in the following sections.

WOMEN AS PRIVATE PROPERTY OF MEN…..food for thought

In general, rape laws were originally designed to protect male property interests in women and to protect the 'honour' of the family or social group from defilement by other men. In this way, women were constructed as the private property of their husbands and fathers. In Europe, for example, the father's interest in ensuring a virginal daughter for marriage, as opposed to justice for women victims, was the motivation for laws penalizing rape. After marriage, the woman became the property of the husband in accordance with common law doctrines such as coverture and the idea that women were chattels. This socially construed legal framework made prosecuting a man for marital rape impossible as he had full legal rights over his own

property, which included the body of his wife. Countries where marriage involves financial or commodity trans- actions such as bride-price or dowry continue to perpetrate the characterization of women as chattels or property, ideas that continue to be upheld in criminal and family law in these countries.

COVERTURES AND THE ERASURE OF A WOMAN'S LEGAL PERSONHOOD

In various legal doctrines such as covertures, or femme couverte in English common law and ' marital power ' in Roman-Dutch law, a woman had no legal identity outside of her husband ' s and was treated in law as a perpetual minor. This is a derivative of the Judaeo-Christian doctrine of the husband and wife constituting 'one flesh '. William Blackstone justified this notion in his influential legal treatise, in which he stated: 'By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into her husband's legal existence. On this view, once unified by marriage, the wife cannot enter into any independent legal transaction and her husband could not possibly be charged with rape of his wife as she and her husband were one; he could not rape himself. Blackstone also used the coverture doctrine to legitimate a husband's 'chastisement' and physical violence towards his wife, as well as the perpetual 'minor' legal status of women. In his words: '[A man could] give his wife moderate correction, for, as he is to answer for her misbehavior, the law thought it reasonable to intrust [sic] him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children. ' Black- stone's views remained influential through the eighteenth, nineteenth and even the twentieth century. Reforms in both the United States and England in the 1800s led to the passage of several Married Woman's Property Acts that legally separated the identities of the spouses and abolished many of the common law restrictions on married women ' s rights. Husbands and wives could even sue one another over civil claims such as negligence, or petition the criminal law of assault. Marital rape was nevertheless deemed an exemption, as is elaborated in the next section. Similarly, under the French dotal system, wives had no legal capacity and were considered to be under 'perpetualtutorship'. They could not even appear in any legal proceedings without permission from their husbands. It was only in 1938 that the incapacity of married women was revoked in France, but property law changes took several more decades of reform. In Spain, women had no legal capacity until reforms slowly began in 1958. England, France and Spain, as well as the Netherlands, were all colonising nations which imposed their laws through their colonial empires. In many postcolonial countries, these colonial-era laws and doctrines continue to exist without much progressive change and they continue to pose significant barriers for reforming sexual assault and other laws entrenching gender inequality.

PRIVACY RIGHTS OVER THE HOUSEHOLD

By the early nineteenth century, especially during the American Revolution, a nascent right to privacy within the family institution emerged in America. This right asserted an insulated private sphere which a government could not penetrate with its policies. As Ruth Bloch explains, the household shrouded in a mantle of privacy rights worked to reinforce the unequal relationships between masters and slaves, parents and children, husbands and wives. Before the Revolution, although 'reasonable chastisement' by husbands was legally allowed, women could get some protection against this violence by using criminal law to make a 'b reach of peace' claim. Breach of peace was understood as an action against the sovereign as opposed to assault, which was a lesser, civil claim between individuals and which afforded women no reprieve. After the American Revolution, assault was reclassified as a crime, which could be used by wives as well. Several laws were passed to recognize divorce, thus desanctifying marriage. Nevertheless, despite the increase in available remedies for women, Bloch argues that the Revolution also brought about notions of privacy of the household, a concept ideologically favored by judges and legislatures. As a result, marital violence, including marital rape, was delegated as a private act beyond the reach of the law. Protection of Men's Honour and the Attribution of Women's Shame.

Male-dominant and misogynist concepts of 'honor' have often been used and continue to be used to justify acts of violence against women. Indeed, this has been captured by the term ' honour-based violence ' . Notions of honour in some patriarchal societies, as in some religious interpretations, are tied to the strict and oppressive regulation of women ' s lives, bodies and sexuality. Historically and in some countries still today, if an unmarried woman is raped, marriage to her rapist is mandated to rescue her ' honor ' and absolve her family of the loss of a virginal daughter. One rationale is that the raped woman has been ' spoiled' for use by her future husband who is supposed to be entitled to exclusive sexual access to a woman. I n more than a dozen countries, including those in the Middle East– North Africa (eg Jordan and Tunisia) and in Africa (Angola, Cameroon, Equatorial Guinea and Eritrea), a rapist can still escape punishment if he marries his victim. In the European Community, until September 2015, Bulgaria' s penal code allowed a rapist to escape punishment, even when it was statutory rape , if it was followed by marriage. Despite the changes made in 2015 to the law, spousal rape remains rarely prosecuted in Bulgaria, indicating the continued influence of the patriarchal values behind the repealed law. In many countries, such provisions were repealed only in the last two decades. In Argentina, this legal doctrine, also Latin American countries, such as Guatemala (2006), Costa Rica (2007) and Brazil (2005), repealed their provisions only in the late 2000s.

EXTENSION OF IMMUNITY FOR SEXUAL ASSAULT TO ANY MALE INTIMATE

Although many of the justifications for the marital rape exemption come from the patriarchal social construction of marriage, the exemption is often extended to all socially sanctioned relationships between men and women. For example, those US states that still maintain some form of marital rape exemption also extend it to other intimate partner relationships. Intimate relationships for the purposes of the exemption are limited to cohabitants in some states, while others also include 'Voluntary social companions '. Delaware's code from 1986 to 1988 exempted from first-degree rape all perpetrators who were' voluntary social companions ' or who had sexual intercourse with the victim in the previous 12 months. Rape shield laws and evidentiary requirements continue to codify implied consent in intimate relationships, even in countries which have long removed the marital rape exemption. In countries where extramarital relationships are not socially accepted, justifications to provide immunity to the perpetrators differ substantively from arguments in favour of the marital rape exemption, but are rooted in similar patriarchal constructions of a woman's lack of autonomy. In countries where only marital relationships are exempted from rape laws, one would logically expect extramarital relationships to be included within the definition of rape. Yet, women victims in such cases are constructed as promiscuous and without 'honour ' , and usually have even less access to justice than raped women who are spouses; the latter can at least rely on divorce and domestic violence civil protections, if not the criminal law.

Such social norms also seep into the decisions by the police and judiciary, making it almost impossible to pursue criminal action.

INSTRUMENTALIST AND PROCEDURAL JUSTIFICATIONS FOR THE MARITAL RAPE EXCEPTION

One line of argument for maintaining the marital rape exemption in criminal law is based on the claim that criminal laws are themselves not the right forum for addressing marital rape. On this view, criminal law hinders possible reconciliation and needlessly permits state intervention into the privacy and sanctity of family life. The claim is further made that women sexually assaulted in marriage can use alternative remedies that are available in law such as assault and battery, or can pursue civil claims under domestic violence regulations. Along similar lines, arguments in favour of keeping a marital rape exemption are also based on the idea that it is necessary to protect men from malicious accusations or threats of criminal complaints by their wives and that protecting men from criminal liability for marital rape maintains peace and harmony in the household. This viewpoint prioritizes men's immunity over women's sexual safety in marital relationships and further entrenches the rape myth that women are likely to fabricate claims of sexual assault.

MARRIAGE AS A CONTRACTUAL 'SACRAMENT'

The view of marriage as a contractual sacrament in which wives were, as part of the contract, to service husbands sexually, made marital rape impossible in some nations. Under Imperial Chinese law, for example, the fathers of the bride and groom were contracting parties to a marriage and marriage symbolized 'submission of maturing children to family roles and filial duty'. The wife's consent played no role and no Chinese jurist even thought it necessary to ponder the concept of absence of consent and marital rape at any point. In Western legal systems, consent of the wife may be required for a marriage to be legitimate, but once a marriage is legitimated, the husband and wife were bound together in a sacrament 'before God ' , owing to each other a ' marital debt ' of sexual service marked by ' continuous ' consent. These are paradigmatic examples of an underlying notion that marriage is a social institution where sexual intercourse is to be freely expected and available to husbands on demand, and one in which wives must have a lowered expectation of sexual autonomy. This viewpoint is often evident in the statements of media, legislators and the judiciary who oppose lifting the marital rape exemption. For example, when challenged by her government's reluctance to criminalise marital rape, the Indian Women and Child Development Minister recently opined that:

The concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including levels of education, illiteracy, poverty, myriad social customs and values, religious beliefs, [and] the mindset of the society to treat the marriage as sacrament [emphasis added].

In another example, a decade after South Africa criminalised marital rape, in an infamous case of marital rape which came before the High Court, the judge decided that the victim 'must have come knowing that this [sexual intercourse] was either likely to happen or was going to happen given the nature of their relationship'. The judge further stated that 'this rape should therefore be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable'. The recurring rationales legitimating men's rights to sexual access to their wives thematically relate to various expressions of gender inequality. As will be seen from the analysis below, the marital rape exemption has existed in law (and has also been contested) over many historical epochs, and in most of the world's nations.

COMPARATIVE ANALYSIS OF THE MARITAL RAPE EXEMPTION AROUND THE WORLD

Recent and increasing attention to the problem of gendered violence in general, and marital rape in particular, has led to attempts to document what countries around the world are doing, and still need to do, to remedy it. There is no accurate international database on marital rape legislation, although the UN and the World Bank have each constructed helpful global databases on marital rape legislation. These two

databases provide essential information giving an international snap- shot of law reform on gendered violence, but they are constructed around some methodological and definition differences. Both the databases also have some limitations. The definition of what constitutes criminalisation also appears to differ between reports and databases, leading to inconsistent statistics. For example, according to the UN Gender Statistics database, only 52 countries have laws on marital rape, which excludes several countries that are known to have criminalised marital rape such as the United Kingdom, Israel, Spain and the Netherlands. The reason for this discrepancy is that the database only includes'instances where the law explicitly criminalises marital rape, without qualifications', since explicit criminalisation is considered to be the 'bestpractice'. Explicit criminalisation means that a country has legislated to state expressly that rape or sexual assault in a marriage is subject to criminal penalty; though not having this kind of 'explicit ' criminalisation does not, in theory, preclude the prosecution of a husband for raping a spouse under the country's general rape laws. Explicit criminalisation includes countries such as Canada where the criminalisation of marital rape is stated in the amending legislative act or bill, if not in the penal code. Even while using the definition of explicit criminalisation, there are still many discrepancies between various reports on which countries prohibit marital rape. The UN Gender Statistics surprisingly includes Malaysia and the United States (where only some states explicitly criminalise marital rape), which are excluded in the explicit criminalisation category in the World Bank database. According to the World Bank database, there are 77 countries in which legislation has 'explicitly criminalised marital rape '. This includes several countries, such as Bolivia, Indonesia, Italy, Uzbekistan and Taiwan, which are not included in the UN Gender Statistics database. Also, the UN Secretary General ' s Violence against Women study declared in 2006 that marital rape was prosecutable in at least 104 states, evidently not limiting its analysis to just the 32 states where marital rape was explicitly deemed a ' specific criminal offence ' at that time. Only 39 countries, according to the World Bank database, do not criminal- ise marital rape in any form. These countries, according to the methodology of the World Bank, do not have 'explicit' legislation criminalising spousal rape, nor do they allow women to fi le complaints against their spouses for rape, or they have explicit exemption for husbands from facing criminal penalties, or laws that exempt perpetrators from criminal penalties if they marry the victim. Most of these countries have an explicit marital rape exemption. There are 11 countries in this category from Sub-Saharan Africa, including Kenya and Malawi. However, Ghana is considered to have criminalised marital rape, albeit not explicitly.

LIMITATIONS OF THE DATA AND SOME NOTES ON METHOD

As useful as the World Bank data is, there are several concerns with the data (as well as with the data in the UN reports), which we outline below. First, as noted above, there are errors in the 'explicit criminalisation ' classifications. Additionally, the methodology claims that under 'explicit' criminalisation, the database only includes

countries that (a) explicitly provide for penal puishment and (b) do not exclude spousal prosecution under any circumstances, even where there is no evidence of divorce or separation. Yet, there is no informa- tion on whether marital rape is criminalised as part of the penal code provision on rape or whether it is part of separate domestic violence legislation, with lesser penalties or civil remedies for sexual assault in a marital relationship. One glaring example is that of Nigeria. The World Bank database states that marital rape is explicitly criminalised in Nigeria, pointing to a 2007 Domestic Violence regulation. But the regulation did not change the criminal law definition of rape. Marital rape continued to be exempted by the penal codes in the northern and southern regions as well as in the sharia criminal law-administered region. It was only in 2015 that Nigeria passed the Violence Against Persons (Prohibition) Act 2015, which significantly broadened the definition of rape. However, there still remain some doubts about whether marital rape is criminal, since the legislation did not explicitly remove the marital rape exemption. In any case, the World Bank does not rely on the new legislation to classify Nigeria. Indonesia is also included among the explicit criminalisation countries in the World Bank database. However, the marital rape exemption continues to exist in its penal code, although the Domestic Violence Eradication Act of 2004 made marital rape an offence punishable with imprisonment for 4 – 12 years or a fi ne not exceeding 36 million rupiahs. The World Bank database does not account for this inconsistency. Bhutan is included in both the UN and World Bank data- bases as having explicitly criminalised marital rape, which it did in its 2004 penal code, but it is classified as only a ' petty misdemeanour ' . The code thus still distinguishes rape based on one's marital status. I n other examples, neither database includes Israel or the United Kingdom, even though the judiciary explicitly ruled against and overturned the marital rape exemptions in these countries. Judicial decisions thus appear as less significant compared to legislation, an approach that belies a contextual understanding of various legal systems. Latin America (including Mexico) and the Caribbean (LAC) form the largest bloc with explicit criminalisation (around 62.5 per cent). Only about half of the Organisation for Economic Co-operation and Development (OECD) countries have explicitly criminalised marital rape (17 out of 32 countries). No Muslim or Arab country in the Middle East– N orth Africa has explicitly criminalised marital rape, although eight countries in this region allow for criminal rape complaints to be fi led by wives, according to the World Bank. 71 Only 14 out of 47 countries in Sub-Saharan Africa have explicit criminalisation, while 36 countries allow criminal complaints to be fi led. Secondly, using data on whether a woman can otherwise file a criminal complaint against her husband as a proxy for non-explicit criminal prosecution can also lead to discrepancies. For example, the database claims marital rape is criminalised in China, albeit not explicitly, since China allegedly allows wives to fi le a complaint. However, other reports and news articles assert that marital rape is not illegal in China even though the penal code does not have an explicit exemption. In fact, even China's most recent domestic violence bill does not include any mention of marital rape. Third, the World Bank database is unable to reconcile the multiple criminal law regimes that can exist in federal states such as the United States. The United

States is rightly excluded from the countries that have explicitly declared marital rape to be a crime in their legislation because the treatment of marital rape differs significantly from state to state. In some states, marital rape is given a lesser penalty and has higher evidentiary requirements of proof. However, this analysis is absent in the database and the report relies on the laws in New York State, which has one of the most equitable treatments of marital rape, thereby obscuring the inconsistencies throughout other jurisdictions in the country. Lastly, in general, the World Bank's methodology (and that of the UN) appears limited to a plain reading of statutes and legislation. We are therefore left with no information as to how consent is actually interpreted, for example, or if or how the judiciary has actually ever applied the law.

CLASSIFYING LEGAL SYSTEMS

In our comparative analysis of the status of the marital rape exemption in the world's countries, we have grouped countries based in part on the structure of their legal systems (whether rooted in common law or civil law legal structures), and in part on their status as ' originating ' common/civil law nations or as nations who have received these legal systems and traditions through colonial imposition. The classification of legal systems created by the University of Ottawa ' s JuriGlobe project identifies countries and areas of the world as follows: civil law systems and mixed systems with civil law; common law systems and mixed systems with common law; customary law systems and mixed systems with customary law; Muslim law systems and mixed systems with Muslim law; and mixed systems. This classification shows that, except for five countries which have customary or Islamic law mono-systems, the rest of the world is governed by civil and/or common law systems or systems mixed with civil and/or common law .The civil/common law distinction is important in classifying the trajectories towards criminalisation of marital rape and it can address the deficiencies in the databases that incorporate only a superficial understanding of marital rape laws. However, a classification that differentiates only on the basis of civil or common law will also be deficient, as colonisation and regional contexts play an important role in how gender equality reforms are instituted. Overseas colonies of European countries were given their civil or common law system exogenously' during the colonial period. 78 of these countries have mixed legal systems where their colonial occupier's legal system was mixed with local religious or customary legal systems; nevertheless, the meta-structure provided by the common law or civil law (as the case may be) plays a significant role in determining the conditions and development of legal reforms. To understand the development of marital rape and other laws, therefore, not only is the legal system relevant but so too is a country's colonial history. Other recent studies have also incorporated colonial history to further classify legal systems. Postcolonial countries are therefore classified as countries which 'received' a European civil or common law system. There are a few countries, such as Nepal, Thailand, Turkey and Japan, where the local ruling regime independently adopted foreign common law or civil legal systems; these countries are also included in the ' received ' category

Countries such as England, France, Germany and the Netherlands are classified as ‘ origin ’ countries, where the legal system arose endogenously. Settler countries such as the United States, Canada, Australia and New Zealand are also included in this ‘ origin ’ legal system category, as the national legal system was developed and continues to be developed by settler colonial governments who were never replaced by Indigenous governments. Recognising the limitations of the databases, in this chapter we organise our analysis around classifications of types of legal systems, and whether or not these legal systems have been borrowed or imposed through colonial histories. Within this classification we select a few representative countries to demonstrate how language in the penal code, structural aspects of the legal system, and colonial contexts matter to whether or not and how marital rape is criminalised, which allows for a more contextualised and in-depth analysis.

THE MARITAL RAPE EXEMPTION IN THE COMMON LAW

(i) Common Law ‘Originating’ Countries

Lord Matthew Hale published a famous dictum in 1736 on marital rape that still manifests itself in several common law jurisdictions to this day. Without citing any authority, Hale proclaimed that: ‘ The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract. ’ Although marital rape was largely condoned at that time, scholars have pointed out that Hale, even for his time, was a particularly misogynistic man whose decisions on the whole were ‘ strikingly antagonistic to the interests of women’ . Hale’ s dicta on the marital rape exemption, and his assertion that women give continuous consent to their husbands upon marriage, became further solidified in the late nineteenth century. Interestingly, in the first few cases when marital rape was raised as an issue in the courts, judges in both the United States and the United Kingdom expressed ambivalence about the persuasiveness of Hale ’ s dicta. For example, the 1888 case of Regina v Clarence , the first case in the UK where marital rape was properly addressed, involved the accused not revealing his venereal disease to his wife during sexual intercourse. Two judges criticised the lack of authority for the marital rape exemption and for Hale’ s dicta. Judge Wills argued that there was no ‘ sufficient authority ’ and he was not ‘ prepared to assent ’ to the proposition that ‘ between married persons rape is impossible’ . He further stated: ‘ I cannot understand why, as a general rule, if intercourse be an assault, it should not be rape. This time period presented a critical moment where the law could have avoided institutionalising impunity for marital rape. By the nineteenth century, wife-battering was already criminalised in several jurisdictions and respected thinkers such as John Stuart Mill were condemning marital rape in strong words. Mill famously described a wife as someone who was forever ‘ chained ’ to her husband even if he was a brutal tyrant whom she loathed, and the husband as someone who ‘ can claim from her and enforce the lowest degradation of a human being, that of being made the instrument

of an animal function contrary to her inclination ' . Even as early as the nineteenth century, then, there were strong disagreements in legal and political forums in the Anglo-American common law jurisdictions about the marital rape exemption. By this time, women were no longer legally characterised as property or chattels and as having no legal existence outside of their husbands. In other non-criminal areas of law, such as family, property and matrimonial law, there was no presumption of implied consent between spouses. There was no legal necessity, therefore, for a spousal exemption for rape in the criminal law; indeed, in some ways it was an anomaly at this time. But by the late nineteenth century, courts and legislatures had nevertheless uncritically and wholeheartedly accepted Hales dicta that codified implied consent in criminal law. In 1976, South Australia claimed to be the first jurisdiction in the common law world to remove the marital rape exemption when it amended the presumption of consent in a marital relationship in its Criminal Code. However, responding to objections in Parliament, the amendment also included a provision in section 73(5) that limited charges for rape and indecent assault in spousal relationships unless there was accompanying bodily injury, gross indecency, serious and substantial humiliation or threats of the same.

[M]arriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale ' s proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable. In the United States, statutory codification of Hale's dicta began in the early nine- teenth century. American courts were much less critical of using Hale's formulation of the marital rape exemption than were British courts. Legislative reform and judicial revocation of the marital rape exemption only began slowly in the 1970s. Many of the early law reforms in the United States merely removed the marital rape exemption for separated or divorced couples. However, some court decisions from various states in the 1980s were quick to abandon the marital rape exemption, which was deemed to have its source ' in a bare, extra-judicial declaration made some 300 years ago ' . The pivotal 1984 New York Court of Appeals decision in People v Liberta found the marital rape exemption to be unconstitutional and in violation of the Equal Protection Amendment; on this basis the court rejected the assumption that continuous consent existed in a marital relationship. Notwithstanding these cases, at least 26 US states still retain spousal immunity for sexual assault in one form or another. In some states, marital immunity even exists for having sex with a wife who is incapacitated or unconscious. Astonishingly, this has been found to pertain even when it is the husband who has rendered his wife incapacitated without her consent and has then sexually used her body. In other US jurisdictions, there are separate regulations for marital rape with a lower sentence. In other states still, marriage provides cause for exemption from being charged with sexual offences of a higher degree. In several states, including Oklahoma, Arizona and Connecticut, for a sexual assault in marriage to be defined

as such, it has to be accompanied by actual or threatened physical force or violence. In some states, there has to be proof of estrangement or separation, and in several states, there are higher evidentiary and reporting requirements. In each of these countries, Hale ' s pronouncement became accepted in the late eighteenth century as legal gospel. Despite some strong disagreements in legal and political fora, the spousal exemption persisted through most of the nineteenth century, demonstrating the strength of the marital rape exemption' s anchor within a broader and deeply entrenched patriarchal ideology. Fidelity to precedent and other rule of law concepts were illusory in this regard, as illustrated by the reasoning of the Australian High Court in PGA v The Queen, which refused to accept Hale' s dicta as reifying irrevocability of consent in common law, except perhaps during Hale ' s time. The spousal rape exemption nevertheless continues to persist in some jurisdictions on the basis of a legal fiction that expresses misogynistic socio cultural norms obliterating women' s right to say no to unwanted sex within marriage. Hale's pronouncement formed the basis and provided the language for the statutory law of rape throughout the British Commonwealth and protectorates from North America to Israel to Cyprus to countries across Asia, Africa and the Caribbean.

(ii) Received Common Law Countries

The colonial British government introduced codified criminal law across its colonies from the late eighteenth century onwards and included the Hale marital rape exemption in various ways. Even after independence, the colonial definitions of rape persisted in the postcolonial context without any change, as justifications began to intermingle with local patriarchal values around women' s bodies and role of women in the family. Marital rape exemptions in common law countries generally fall into two categories, dealt with in the following sections: first, where marital rape is explicitly exempted from the rape laws; and second, where rape is defined as ' unlawful ' sexual intercourse and the interpretation of the term ' unlawful' renders marital rape exempted or included in the criminal offence. Both kinds of codifcations were initiated during the colonial period and the strategies for reforming the penal code have generally followed distinct paths.

(a) Wives not included as Women Legally Protected from Rape

I n many received common law countries, the codification of marital rape immunity took the form of an explicit exception, stating that only perpetrators other than husbands could be charged criminally. India ' s Penal Code, which was drafted by Lord Macaulay in 1860, has an exception to the definition of rape in section 135, stating: ' Sexual intercourse or sexual acts by a man with his own wife, the wife not being under ten years of age, is not rape. ' The Indian Penal Code was the model for the law in several countries in the British Empire, including Singapore, Sri Lanka, Malaysia, Kenya and Ghana. The ten-year age limit was later increased to fifteen years, but the explicit exemption remains to this day in India, Singapore

and Sri Lanka, even when the age of consent to marriage has increased. Singapore removed the explicit blanket spousal immunity in 2007 to add exceptions to the immunity, limited to when the husband was living apart from his wife and either formal separation proceedings had been initiated or there was a protection order against him. Sri Lanka ' s law, which had Macaulay ' s explicit exemption until amendments in 1995, is currently similar to the Singapore law where marital rape immunity is removed for judicially separated spouses. Except for a few countries, such as Trinidad and Tobago and Guyana, which have removed the marital rape exemption from their laws, 120 most countries in the Caribbean have similar explicit marital rape exemptions permitting prosecution only under conditions of separation or if the husband has a sexually transmitted disease (as is the case in Jamaica). 121 The existing Caribbean Committee (CARI- COM) model legislation for sexual offences continues to demand criminalisation of marital rape only under specific conditions of divorce, separation or direct order, indicating a clear commitment to retaining criminal immunity for men who sexually assault women to whom they are still married and cohabiting. These jurisdictions are also similar to civil law jurisdictions which retain explicit marital rape exemptions in their penal codes. As will be discussed in the section on civil law and mixed countries, in such cases, the exemptions tend to have been judicially overruled on the basis of state obligations to fulfill constitutional and international human rights protections to women raped in marriages.

(b) 'Unlawful' Sexual Intercourse and Silent Exemptions

In many received common law countries, the penal code has been more ambiguous on the question of marital rape, resembling the UK Sexual Offences (Amendment) Act of 1976, which defined rape as ' unlawful' sexual intercourse without consent, where ' unlawful ' was interpreted to exclude sexual intercourse between a husband and wife. In Malawi, for example, the penal code on rape makes no reference to marital status. Section 132 defines rape as non-consensual ' unlawful carnal knowledge ' . It is, however, uniformly accepted as a matter of common legal knowledge that marital rape is not criminalised under common law or customary rules. I n Kenya, rape is defined in section 3 of the Sexual Offences Act as an intentional act committed ' unlawfully ' and which involves penetration without consent. Section 3 has no explicit exemption; section provides the meaning for 'intentional and unlawful ' and contains an explicit exception clause, which states that ' the section shall not apply in respect of persons who are lawfully married to each other ' . Kenya falls somewhere in between the two categories with an explicit exemption only in the interpretation clause for unlawful', which is not as unambiguous as the Macaulay codes. How has the term ' unlawful' been interpreted in other received common law jurisdictions ? Since the marital rape exemption arose out of an exercise of judicial interpretation, it arguably leaves room for a different legal interpretation of what is ' unlawful' , as is evidenced by the House of Lords decision in R v R . This potential may be especially enhanced in countries with mixed legal systems, where

the most progressive interpretation among the various systems can be selected as the interpretive source. The Israeli legal system is based on a mixed common law, civil law and Jewish law system. The penal code on rape in 1977 was governed by the English common law definition where marital rape was deemed lawful sexual intercourse under all circumstances. The Israeli courts removed the marital exemption as early as 1979/1980. In order to get around the English common law impunity for marital rape, the Supreme Court interpreted the word ' unlawful' in ' unlawful sexual intercourse' on the basis of Jewish religious law and principles, to argue that unlawful sexual intercourse includes marital rape. While South African law is mainly derived from Roman-Dutch civil law, it also contains influences of English common law. By 1992, in R v R , the marital rape exemption had been rejected in English common law, but the exemption persisted in Roman-Dutch law. When a marital rape case came before a South African court that same year, the lower court convicted the husband, using the same argument as in R v R , that the marital rape impunity was obsolete and that the exemption had never been properly assimilated into African or Ciskei (part of South Africa) law.

THE MARITAL RAPE EXEMPTION IN 'ORIGINATING' EUROPEAN CIVIL LAW COUNTRIES

(i) Originating Civil Law Countries

The European civil law countries have had similar laws to those of common law countries providing impunity for marital rape, which is not surprising given the common religious and social lineage of gender practices across Europe. The penal code in some civil law countries was explicit about the exclusion. For example, the German code of 1871 was explicit in mandating extramarital sexual intercourse as one of the necessary elements of rape. The exemption was only removed in 1997 during an overhaul of Germany's sexual violence laws. Even after the changes in the late 1990s, German laws on sexual assault were considered inadequate to provide sufficient protection, especially because of a requirement that the victims should have defended themselves. The German parliament recently passed legislation to modify at least some of the problematic provisions in the sexual assault laws. In cases where the penal code was silent, the judiciary read impunity into the existing law if and when a marital rape case came before the courts. Since the 1970s, however, European courts have usually ruled in favour of criminalisation of sexual assault in marriage, as the following examples show. In France, Italy and Spain, the definition of rape did not explicitly exclude marital rape. The French Cour de cassation in the early 1900s interpreted the definition of rape (viol) in the 1808 French penal code to explicitly exclude ' acts of violence ' by a husband against his wife from constituting the crime of rape. It was only in 1990 that the Cour de cassation removed the criminal exemption for husbands. The Italian Corte di cassazione decided earlier, in 1976, to interpret rape in the penal code as applying to marital relationships. In 1992, the Spanish Tribunal Supremo ruled that there was no impunity for marital

rape under the constitutional principle of freedom to make one's own decisions in sexual activities. The USSR was perhaps the first European country to remove the marital rape exemption. The tsarist criminal code in Russia had an explicit marital rape exemption, but the first criminal code of Soviet Russia in 1926 removed it. At that time sexual freedom was considered to be an essential aspect of self-determination and socialism. Marriage was seen as a bourgeois institution, which should not impinge on the self-determination rights of women. Other countries in the communist bloc which had no marital rape exemption included Czechoslovakia (1950) and Poland (1932). Poland had removed its marital rape exemption even before it became a communist country. The Scandinavian countries are considered to be pioneers in criminalising marital rape because their penal codes have not had an explicit marital rape exemption since the 1960s. The 1962 Swedish penal code removed all references to relationship-based exemptions in its definition of rape. It did, however, until amendments in 1984, permit for lighter sentencing if the 'woman's relationship to the man' or any other circumstances implied a 'less grave' crime. Norway's laws also had no explicit marital rape exemption and the first conviction for marital rape occurred in 1974, which was upheld by the Supreme Court. Denmark's penal code is also considered as lacking an explicit marital rape exemption. Denmark preceded Sweden by a few years in drafting a definition of rape without reference to marital status. However, until 2013, the Danish Penal Code included several marital exemptions, applying many of its sexual assault provisions only to extra-marital sexual intercourse and reducing or remitting punishment if the parties had had sexual relations before or were in a marital relationship. 156 These provisions reflected the stereotypes that have prevailed since the first Danish Penal Code in 1866, where rape was mainly punishable only when committed against married women by strangers. Rape was seen a violation of women's honour because they had been forced into extramarital intercourse. In 2013, the Danish Penal Code was amended to remove all mentions of the marital status of the vic- tim and offender from the provisions.

(ii) Received Civil Law Countries

Just like the spread of British common law, civil law systems promulgated throughout the world as colonising countries introduced civil codes to their colonial subjects. Codification of criminal law usually resulted in explicit marital rape exemptions in the penal codes of colonised countries. When faced with such an explicitly codified exemption for marital rape, legal reform has required sustained, long-drawn legislative campaigns, sometimes over decades. The judiciary in civil law postcolonial countries with explicit marital rape exemptions has not always been the forum where marital rape has been successfully challenged. The courts have been reluctant unilaterally to overturn the marital rape exemption without the legislatures having taken the first step, as the following examples demonstrate. South Africa was one of the first countries in Africa to criminalise rape in a spousal relationship, but through legislative reform. As discussed above, the South African appellate court had held

that although English law had rejected the mar- ital rape exemption, although the marital rape exemption in common law was based on a fiction created by Hale, and although it was possibly anachronistic and inconsistent with current standards, the exemption was nevertheless part of Roman-Dutch law, and therefore a part of South African law. The decision led the South African legislature to enact the Prevention of Family Violence Act in 1993, even before the South African Constitution came into force. The Act removed the provision that exempted husbands from rape charges 'by reason of [a woman's] consent in marriage'. It also incorporated an explicit marital rape criminalisation clause, which stated that 'a husband may be convicted of the rape of his wife'. Another example of successful legislative action from Africa is provided by Namibia, which like South Africa is also a mixed civil/common law jurisdiction. The Combating of Rape Act came into force in Namibia in June 2000 and was considered to be'one of the most progressive laws on rape in the world'. The Act overturned many of the colonial-era patriarchal laws around rape that had been present in the common and civil law, including the marital rape exemption. Marital rape was explicitly criminalised in section 2(3) by stipulating that 'no marriage or other relationship will be a defence to a charge of rape'. The Act was tabled in 1999 and the inclusion of a marital rape clause was not without controversy as male parliamentarians used familiar arguments to oppose it, including that it would lead to the break up of marriages and vexatious, spurious claims by wives. Lobbying by very active women s groups, NGOs, high-ranking female politicians, civil servants and other supporters of the bill ensured that the clause remained. Once legislatures amended their countries' penal codes to include marital rape, the higher courts in at least a few countries helped in creating more progressive formulations of the code. The 1990s was a period of increased international activism among feminist groups in Latin America, where all countries have civil law systems. Women's rights groups used a two-pronged approach combining intense participation in intergovernmental organisations and international policy arenas with grassroots mobilisation. Thus, the legislatures of several Latin American countries began to criminalise marital rape. But the judiciary played an important role in a few countries in articulating that the new marital rape criminalisation laws were essential for protecting human rights and in creating more progressive interpretation of the law. For example, in 1996, marital rape was criminalised in Colombia. When this law was originally enacted, it provided for a lesser punishment for rape within the context of marriage than for rape generally. However, the Constitutional Court of Colombia declared this difference in punishment unconstitutional. The new Penal Code not only affirmed that sexual assault could take place in intimate relationships, but, as happened in Canada, it also made rape in spousal or intimate relationships an aggravating factor to rape , warranting a stricter punishment. In 1994, Mexico's Supreme Court of Justice ruled that forced sex within marriage is not rape but rather 'an undue exercise of conjugal rights'. It also said that because the purpose of marriage is procreation, a man can force his wife to have sex if the sex is for that purpose. The case spurred Mexican women s rights groups to campaign for a legislative change removing the marital rape exemption and the Mexican government passed a new law criminalising

marital rape in 1997. In November 2005, when the next marital rape case came before the Mexican Supreme Court, it explicitly overturned the 1994 decision, asserted that forced sex within marriage is rape punishable by law, and affirmed the necessity of the legislation for protecting constitutional rights. The Supreme Court of Mexico relied on several constitutional rights in its judgment, including the right to sexual and reproductive freedom. Nepal stands as a notable exception where the judiciary unilaterally overturned a marital exception in its penal code that was more than a century old. Nepal was not a British colony and remained at least semi-autonomous through the colonial era. In the late nineteenth century, the ruling monarchy embraced the codification programme that was taking place throughout Europe and its colonies. Nepal ' s legal code, Muluki Ain, was inspired by the Napoleonic code and is an amalgam of European civil codes, common law doctrines, and Hindu tenets and scriptures. When rape was codified, it was defined as sexual intercourse below the age of con- sent (sixteen years) or where there was threat, pressure, coercion or undue influence. It was, however, defined only in the specifi c contexts of a (unmarried) girl, widow or another person' s wife, excluding spousal rape from the definition. The marital rape exemption was continued in the 1963 code, when the country went through a period of legal reform. In 2006, the provision was declared constitution- ally invalid by Nepal s Supreme Court. In a powerful judgment, the Court asserted that legal impunity for marital rape is a'discriminatory practice … against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and [the letter] and spirit of Articles 11(1), (2) and (3) of the Constitution of the Kingdom of Nepal ' . The Court emphasised that women, like all human beings, have the right to equal protection of the law without discrimination, the right to live with self-respect (dignity), and rights of self-determination and independent existence, all of which were infringed by the marital rape exemption. In the same way that the Philippines Supreme Court used foreign case law such as People v Liberta in its decision, the Supreme Court of Nepal also referred to R v R and People v Liberta when it declared the marital rape exemption invalid. The recent higher court decisions in Nepal, Mexico and the Philippines show how international human rights norms and domestic constitutional rights pro- vide the most formidable basis to challenge the marital rape immunity. The Nepal Supreme Court was forthright about how laws must be changed to conform to conceptions of ' universal values and traditions ' , where national level laws have to reconcile with ' globalisation ' of values and ' reciprocal international relations ' determined by treaties and conventions.

HUMAN RIGHTS LAW REQUIRING CRIMINALISATION OF MARITAL RAPE

More and more countries have criminalised marital rape over the last two decades, putting those countries that have failed to do so in the minority. Until 1997, only 17 states had criminalised marital rape. By 2006, more than 50 states had followed suit and now fewer than 50 states still entirely protect marital rape from penal prosecution.

This trajectory has been lock-step with changes in the international human rights forums where womens rights, especially within the household, have slowly gained acceptance. Moreover, the public/private distinction that plagued international human rights law by focusing only on violations by state actors and privileging privacy in the family over gender justice has been slowly dismantled. As People v Liberta was being litigated in the United States and the marital rape amendment was being debated in Canada, the first international multilateral instrument against marital rape was adopted in the European Parliament. The 1986 Resolution of Violence against Women called for the legal recognition of marital rape. 183 In the international human rights forum, a 1982 ECOSOC resolution labelled domestic violence and rape as offences against the dignity of the person, but it did not specifically address marital rape. he turning point came with the biggest milestone in international women's rights law, achieved by the passage of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).This was followed by two signinificant human rights instrument that directly addressed violence against women: General Recommendation by the CEDAW Committee and the Vienna Declaration on the Elimination of Violence against Women (DEVAW). Using these instruments as sources, regional and international human rights bodies, spurred on by the involvement of very active women ' s rights groups from across the globe, firmly institutionalised a due-diligence obligation on states to adequately prevent, combat and remedy marital rape, domestic violence and other acts of gender violence. This was accomplished through a plethora of international and regional women ' s rights conferences specifically focusing on violence against women, the appointment of special committees, investigators and rapporteurs and the passage of multiple declarations. The due-diligence obligation was also influenced by cases brought before international and regional human rights adjudication bodies, the publication of reports, participation of NGOs in committee work, and affirmation of state and international responsibility to combat gender-based violence in all spheres by high-profile actors such as the UN Secretary General, combined with intense local activism by domestic women's rights groups. The CEDAW Committee, UN Special Rapporteurs on violence against women, and several UN bodies have all recognised that criminalising sexual and physical violence against women in all its forms is essential for combating gender discrimination and for providing women with equal protection against violence under the law. At this point, the duty of states to criminalise marital rape can no longer be thought of as only an emergent norm. Instead, it is an established human rights obligation. For these reasons, a state that fails to criminalise marital rape is also failing to live up to internationally recognised human rights obligations towards its citizens. The next sections will elaborate on the key international and regional instruments relevant to the criminalisation of marital rape. Sources of International Human Rights Law Requiring an End to the Marital Rape Exemption.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women

CEDAW was adopted in 1979 by the UN General Assembly and came into force in 1981. Consisting of a preamble and 30 articles, the Convention is the primary international human rights instrument defining what constitutes discrimination against women and setting up an agenda for national action to end such discrimination. Marital status is specifically listed as a prohibited ground of 'distinction, exclusion or restriction. ' However, this Convention contains a glaring omission: violence against women unlike other issues such as the right to vote was not explicitly addressed. CEDAW mentions ' discrimination ' 22 times, ' equal ' or ' equality ' 34 times and ' human rights ' five times, yet makes no mention of violence, rape, sexual assault, domestic violence and abuse, or battery. The drafting of CEDAW took place in the 1970s, when the movement on violence against women in the family and society was still nascent and confined within states. It had yet to become an international movement. Within a few years, however, it became an issue for debate in international forums with increased reports on the widespread prevalence of violence against women and an emerging recognition of its human and economic impacts. Since it was not politi- cally possible to create an entirely new convention addressing violence against women at that point, a ' two-pronged approach ' was initiated by women ' s rights advocates. 190 First, the UN Commission on the Status of Women began draft- ing a non-binding declaration on violence against women, and second, the CEDAW Committee simultaneously began to draft General Recommendation 19, which would provide a binding obligation on state signatories to combat gender violence.

CEDAW's General Recommendation 19 (1992)

T he CEDAW Committee attempted to fill the gap created by the lack of reference to violence against women in CEDAW by using an arguably retroactive 'creative interpretation in drafting General Recommendation 19 (GR 19) in 1992. GR 19 explicitly extended the definition of discrimination in Article 1 of CEDAW to include gender-based violence, which 'is violence that is directed against a woman because she is a woman or violence that disproportionately affects women'. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. I n a strongly worded section, GR 19 declares that domestic or family violence, including rape within the family, breaches Articles 16 and 5 of CEDAW:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional

attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women' s health at risk and impair their ability to participate in family life and public life on a basis of equality.

G R 19 further recognised violence against women as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men', thus setting the stage to claim that the right to be free from gender violence is at least a derivative right based on fundamental and widely accepted rights, even though not explicitly stated in CEDAW. Other regional and international treaty bodies also firmly support this formulation, and following GR 19, they have demanded that their Member States fulfill their obligations to protect these fundamental rights by instituting measures and legislating laws specifically to combat violence against women. These general rights and freedoms include, inter alia, the right to equality in the family, the right to liberty and security of person, the right to equal protection under the law, the right to the highest standard attainable of physical and mental health, and the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment. Other rights violated by states failure to address marital rape include the rights to life, sexual self-determination, human dignity, humane treatment, individual privacy, effective judicial recourse, safety, physical and mental integrity, integrity of the person, and sexual and reproductive choice. G R 19 imposes a list of obligations that states must fulfil in order to protect women, which include penal sanctions along with preventative and protective measures. Specific to family violence, these measures should include criminal penalties where necessary and civil remedies in cases of domestic violence, legislation to remove any defence of ' honour' , and the provision of services to ensure the safety and security of victims of family violence. GR 19 also places an obligation on states to report on the measures they have taken to combat each kind of violence and the impact of the measures. Despite a number of reservations, CEDAW is the second most widely accepted international human rights treaty after the Convention on the Rights of the Child (CRC). There are currently 189 state parties to the Convention. The CEDAW Committee also has the largest membership of all the UN human rights treaty bodies with 23 members, making it the most representative of all the committees. By ratifying CEDAW, states also accept the jurisdiction of the treaty body to monitor state compliance and to provide the substantive con- tent for the rights and the nature of obligations through general comments and recommendations. These factors militate against the claim that the CEDAW Committee invented a non-existing obligation, which was not assumed by states when they signed the Convention. Also, Member States have dutifully accepted the obligations imposed by CEDAW (even if they are imperfectly fulfilled), as evidenced in their periodic reports, not only to the CEDAW Committee but also to the UN Human Rights Committee. In these reports, states are required to present evidence on how they have addressed violence against women, including marital rape. G R 19, along with DEVAW, discussed next, seems to have been especially successful in diffusing a normative standard of due-diligence obligations

of states to combat gender violence. A recent study on the impact of GR 19 finds that state parties to CEDAW were more likely to have anti-gender violence and domestic violence laws enacted since 1996 than non-state parties. The number of pieces of legislation enacted and institutions built to combat domestic violence and violence against women increased drastically beginning in the late 1990s, and ' states rapidly conformed to General Recommendations 12 and 19, despite their rather loose basis in the treaty itself ' .

The 1993 UN Vienna Declaration on the Elimination of Violence against Women (DEVAW)

GR 19 must be read along with the 1993 DEVAW, which is an exceptional instrument that unambiguously spotlights gendered violence as an international human rights issue. Although it is non-binding, DEVAW clearly shows international consensus and political commitment to combat violence against women in all its forms. DEVAW defines violence against women as:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life . 209

Article 2 further elucidates the definition of violence against women, and specifically mentions marital rape and violence within the family:

2. Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including bat- tering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs . 210

By prohibiting both state violence against women and private violence, DEVAW recognises the need to rethink boundaries between public and private life. The only aspect differentiating violence by private actors and violence perpetrated by the state is the location of the criminal act. Physical, sexual and psychological violence within the home is as condemnable in international law as is state- perpetrated violence.

Gendered violence within private relationships was thereby proclaimed to be a matter of international concern in DEVAW. Like GR 19, DEVAW affirms that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms'. A state's obligations to punish acts of gender violence thus also derive from the state's obligation to prevent violations of fundamental freedoms recognised in international law. DEVAW also has a programmatic component articulating a due-diligence obligation for states to protect women from violence. All UN Member States, not just signatories to CEDAW, have a duty to pursue by all appropriate means and without delay a policy of eliminating violence against women. This duty includes due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the state or by private persons'.

Other Major International Legal Initiatives to End Gendered Violence

The Fourth World Conference on Women in Beijing in 1995 and the resulting Beijing Declaration and Platform for Action reiterated that violence against women is recognised under international law as including ' physical, sexual and psychological violence occurring in the family , including battering , marital rape and violence related to exploitation as well as gender violence condoned by the state. The due-diligence standard was reiterated in the Beijing Declaration and Platform for Action which was adopted by 189 UN Member States. 215. The Beijing Declaration further recognised that violence against women, including marital rape is a manifestation of the historically unequal power relations between men and women and demanded that states enact or reinforce sanctions that punish perpetrators and provide women with access to justice. Numerous women's rights advocates from across the globe participated in the Beijing Conference and other UN summits. The participation of these women' s rights groups played a critical role in bringing equality based and feminist legal conceptions of gender violence into international, regional and domestic legal institutions. This role of women' s rights groups at the grassroots and transnational levels must be given particular emphasis, as without their involvement, the norms in GR 19 and DEVAW would not have the binding import and international consensus they have now. In 1994 the UN Economic and Social Council adopted Resolution 1994/45 of the UN Commission on Human Rights, and established the mandate of the Special Rapporteur on Violence against Women to recommend measures to eliminate violence against women and its causes and to remedy its consequences. The Resolution emphasised that it is the duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation , to punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State or by private persons, and to provide access to just and effective remedies and specialised assistance to victims.

The current UN Special Rapporteur on Violence against Women, Rashida Manjoo, notes the discriminatory treatment of spousal violence in many member states. Even in countries where spousal violence is a criminal offence, it is often minimized by being categorized as a minor offence, prosecuted as only a misdemeanor, with reports of spousal violence not being taken seriously by the police. The due-diligence standard, however, requires that states impose 'severe' and effective sanctions against spousal violence to prevent future conduct 'because of the on-going nature of the relationship between victim and perpetrator'. The previous Special Rapporteur confirmed that the criminalisation of domestic and intimate partner violence is a specific requirement under the Beijing Platform and was a minimumstandard'. In 2006, the United Nations established the Task Force on Violence against Women, and the UN Secretary-General released an in-depth study on all forms of violence against women'. The study points out that ' [t]he most common form of violence experienced by women globally is intimate partner violence ' , which includes ' a range of sexually , psychologically and physically coercive acts ' . It reiterates the Beijing Platform's exhortationto treat all forms of violence against women and girls as "criminal offences" explaining why criminalisation is an important and essential response:

State inaction with regard to the proper functioning of the criminal justice system has particularly corrosive effects as impunity for acts of violence against women encourages further violence and reinforces women's subordination. Such inaction by the State to address the causes of violence against women constitutes lack of compliance with human rights obligations.

Regional Instruments and the Criminalization of Marital Rape

Regional human rights systems also make spousal rape a high priority for legislative action. The Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (the Convention of Bel é m do Par à), which has been ratified by 32 states, 228 recognises all gender-based violence as an abuse of human rights and fundamental freedoms. 229 This Convention's definition of violence against women includes' physical, sexual and psychological violence ' that occurs ' within the family or domestic unit or within any other interpersonal relationship ' , covering IPSV. The Inter-American Commission on Human Rights (IACHR) has consistently demanded that states adopt 'criminal, civil and administrative laws to prevent, punish and eradicate violence against women' and demands that states make no distinctions based on the marital status of victim or perpetrator. A recent IACHR report also points out that while ' honour' and other patriarchal cultural values used to be the core interests at stake in sexual violence crimes, it is no longer condoned in many states. The report also asserts that under all circumstances rape is a crime against society and has to be prosecuted by the state as a crime even when the victim 'forgives' the perpetrator.

The Council of Europe and the European Union has consistently reiterated that violence against women, including intimate partner sexual assault, is a form of discrimination that requires adequate criminal remedies. The European Union has expressly called for the criminalisation of marital rape for several decades, beginning with the European Parliament's Resolution on Violence against Women of 1986. The 2009 European Parliament's Resolution on the Elimination of Violence against Women states that:

[M]en ' s violence against women represents a violation of human rights, and in particular: the right to life, the right to safety, the right to dignity, the right to physical and mental integrity, and the right to sexual and reproductive choice and health.

The Resolution further notes that gendered violence 'is an obstacle to the participation of women in social activities, in political and public life and in the labour market, and can lead to marginalisation and poverty for women'. Member States must recognise sexual violence and rape against women, including within marriage and intimate informal relationships and/or where committed by male relatives, as a crime, and must ensure that such offences result in automatic prosecution. The Resolution repeats the language of the 1986 European Parliament's resolution on violence against women and also urges states to reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women. Resolutions by the European Parliament are not legally binding, but the European Parliament's call for the criminalisation of sexual violence in the domestic sphere in several resolutions illustrates the importance given to the need to criminalise sexual violence in intimate relationships. Furthermore, a 2012 EU directive establishing mandatory minimum standards and safeguards to protect victims of crime assumes that IPSV is criminalised in the Member States. Unlike resolutions of the European Parliament, directives are legal acts of the EU imposing obligations on Member States to achieve a specific result through the implementation of domestic legislative procedures. The 2012 EU directive called for effective imposition of criminal sanctions in cases of IPSV, inter alia, that must be implemented by Member States within two years of its enactment, and required that within three years Member States must show the Commission data on how victims have accessed the rights in the directive. The directive furthermore explicitly recognises the particular dynamics of violence in intimate relationships and the need for states to adopt special protection measures:

Where violence is committed in a close relationship, it is committed by a person who is a cur- rent or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological, or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem, which could cause systematic psychological and physical trauma with severe consequences because the

offender is a person whom the victim should be able to trust. Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right to residence.

One of the most comprehensive instruments against gender violence, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), which came into effect in August 2014, explicitly obliges its parties to criminalise sexual violence when committed against former or current spouses or partners (whether or not they were living in the same residence). The Council of Europe currently includes 47 countries extending all the way to the Russian Federation. The fact that the Istanbul Convention, a binding instrument, was accepted by such a wide swath of countries provides further evidence of the existence of an international consensus that marital rape must be criminalised. In 2003, the African Union adopted the Protocol on the Rights of Women in Africa, which defines violence against women as including ' a ll acts perpetrated against women which cause or could cause them physical, sexual , psychological, and economic harm, including the threat to take such acts in private or public life ' .Sub-regional instruments such as the Southern African Development Community (SADC) ' s Declaration on Gender and Development on Prevention and Eradication of Violence against Women and Children specifically mentions marital rape as an expression of violence against women and a ' serious violation of fundamental human rights ' The multilateral Arab Charter on Human Rights explicitly prohibits all forms of violence or abuse against women. However, marital rape is not explicitly mentioned and none of the 14 ratifying Arab states has criminalised marital rape. Asia lacks an effective regional human rights system. However, at least 11 Asian countries, including Nepal, Thailand and Indonesia, explicitly criminalise marital rape.

Summary of Human Rights Law Requiring the Criminalization of Marital Rape

As this overview of international human rights law has shown, marital rape exceptions to the criminalisation of sexual assault impinge on international human rights instruments and binding principles, as courts and states across the world have affirmed. Many state constitutions now include similar rights protections that add another layer of obligation on states to ensure women's equality and protect them from violence in all its forms. The due-diligence obligation further expresses the legal requirement that states take action to prevent and remedy sexual violence, including sexual violence in intimate relationships. Criminalising sexual violence against women in intimate relationships is clearly necessary for the protection of women's full and equal human rights. Most of the world ' s countries now criminalise sexual assault by spouses, even if imperfectly in terms of implementation, and those

countries that do not are outliers. However, only a minority of countries explicitly state in their penal code or statutes that marital rape is not to be distinguished from other forms of rape. The risks of implicit criminalisation are evident in the experiences of the Scandinavian countries and the erstwhile communist bloc. For example, the legislation in all the Scandinavian countries did not explicitly immunise marital rape from prosecution, but until recently, their ambiguous provisions allowed for differences in charges and sentencing, as described in the preceding section on the laws in Denmark and Sweden. These countries have had very low rates of prosecution and even lower rates of conviction even though surveys show that stranger rapes are less common than IPSV. In Poland and Russia, the first two countries to remove the marital rape exemption, marital rape continues to be a serious social problem that is under-reported and unacknowledged by the courts and police. Explicit criminalisation removes ambiguity in the law, sends a strong message of condemnation, and creates the conditions for social change. This approach is espoused by human rights groups, the Council of Europe and the United Nations. The UN model legislation for violence against women, for example, states:

The legislation should specifically criminalise sexual assault within a relationship (ie, ' marital rape '), either by: providing that sexual assault provisions apply ' irrespective of the nature of the relationship ' between the perpetrator and complainant; or stating that ' no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation '

International human rights law and the due-diligence standard clearly require that states no longer exempt married women from legal protections against rape by their spouse, and that marital rape, like rape generally, must be subject to criminal sanctions. Conclusion: Why criminalising sexual violence in intimate relationships is essential for the protection of women's Equal Rights

Intimate partner sexual violence is a form of gendered violence which breaches women's fundamental human rights. Criminalisation of IPSV is one use of state power necessary to the protection of women's human rights, including, most importantly, rights to equality, autonomy and bodily integrity. Engaging criminal law to bolster the protection of human rights and to empower local and international struggles to end gendered violence is not a new strategy. On the contrary, it has been and remains a crucial plank of the struggle to seek state accountability and end impunity for a range of rights violations. Engaging the power of criminal law is only one important, but by no means exclusive, component of feminist strategies to remedy and end gendered violence in women' s lives. Furthermore, an insistence on the criminalisation of marital rape can, and necessarily does, coexist with robust critiques of the practices and effects of the criminal justice system and the many deficiencies in criminal law responses. Many of the criticisms of those feminists who believe that the criminal justice system should play a role in remedying gendered violence miss the fact that femi- nist work in the area of criminalisation has largely

been cognisant of the perils of engaging this very system. Indeed, alongside calls for criminalisation of gendered violence, feminist scholars and activists have worked vigorously for criminal law reform to improve criminal law responses and this remains a fundamental component of criminalisation strategies. Law and human rights movements such as feminism exist in dynamic interplay. The World Bank Report of 2016 identifies the link between law reform and the social movements seeking equality and human rights. The Report observes that over the past 25 years, the number of economies introducing laws addressing domestic violence has risen precipitously from close to zero, to 118. This increase has been driven by international and regional human rights conventions and campaigns. This fiinding speaks to the importance of engaging the language and protections offered by human rights law, domestically and internationally. There has been a sea change in reconfi guring social relationships of gender, at both the structural and the micro levels, in the direction of more full and equal protection of women's human rights. Criminalisation of marital rape articulates, at the social level and in the public sphere, the message that sexual violence in the domestic and private sphere is not to be tolerated. Criminalising spousal sexual assault repudiates the view that a woman becomes a man ' s property upon marriage, and fundamentally challenges traditional and patriarchal social norms that confer upon men unlimited rights of sexual access to the women who are their spouses. Eradicating legal immunity for men who sexually violate their wives or other intimates is predicated on principles of equality and signals a significant move towards establishing new social norms of gender equality, consent, autonomy and sexual personhood for women. This is one crucial element of the broader structural social change sought by those concerned with human rights and equality for women. T he United Nations, the World Health Organization and the World Bank describe gender-based violence, including that in marriage, as a global pandemic. While a majority of the world ' s countries recognise, in theory at least, that gendered violence in the form of marital rape requires criminal legal remedies, too many countries fail to protect married women, and fail to observe their due diligence obligations by persisting in inadequately criminalising, or not criminalising at all, this form of violence against women. These are legal gaps that must be closed as a crucial step towards protecting all women from gendered violence.

SLAVERY OF MEN BY WOMEN

German writer Esther Villar In her book "The Manipulated Man" that caused outrage and hostile criticism from women explains how women since the earliest times have manipulated men and turned them into their slaves, they have pretended to be the oppressed sex while in the real sense they are the oppressors.

She explains how a woman manipulates a man skillfully by steps like courtship and finally marriage, hence the saying "a man chases a woman until SHE catches him".

In her book she explains how the man is tricked to care for the woman all his life

and her offspring. He rolls the stone like Sisyphus and in turn gets rewarded by a few minutes of sexual pleasure. We can, by observing Esther Villars assertions that a man is a slave of his desires and the woman uses and has used it for thousands of years as a stick and carrot to keep the man chasing vanity and commit his life to serving her. She goes ahead to explain the rivalry of women, how each woman feels the powerful urge and need to own a male for herself. Like a slave owner she detests any move the man would make to offer his services to another woman. She uses all means to keep the man to herself and her offspring alone.

Esther Villar's sentiments are captured by Nigerian Poet, critic and writer, ChinweizuIbekwe in his book, "The Anatomy of Female Power" (AFP) and Will Farrel's, "The Predatory Female".

They all push the theory that all societies are matriarchal and not patriarchal as we are pushed and forced to believe. Matriarchy has ruled not through brawn but wits and tricks; women feigning weakness to be protected etc. Thus the male becomes the most exploited sex in human history, (in wars the man is always ready to die for the woman; he has been trained to do that).

Chinweizu calls the idea of dating and courtship, training, like that of a horse. It is during this time that a woman having kept the man on a leash by denying him sex and getting him addicted to her by false charms, trains and breaks him to whatever she wants him to become.

The marriage celebration becomes a celebration for the woman and her friends, and they all congratulate her for having succeeded in getting herself a slave. A man on that wedding day waves goodbye to his independence and his coalition of males and commits himself to a Sisyphean life, rolling the stone, an act he cannot abandon having society and the government checking on him and always ready to jail, shame or exile him for absconding his duties.

Thus the government and society helps the woman in keeping her slave in check.

Chinweizu gives a narration of how women are trained by older matriarchs to tame men. He explains how a man is trained to rely on women by his own mother. A man is shamed for cooking for himself and other domestic chores by his own mother who is an agent of the global matriarchal rule.

By getting the man to hate domestic works and having it enforced by culture which warns men against going into the kitchen, doing laundry etc., the mother trains his son for the woman who will captivate him and when the time comes she takes hold of the man's stomach and by getting the man addicted to her body she holds him by

the two, in bed and in the kitchen. With those two weapons she manipulates the man and turns him into her plaything.

In the "Myth of the Male Power", Esther Villar's " A Man's Right to the Other Woman"; "The Polygamous Sex", the authors of those books challenge the narrative that men oppress women, and by detailed research across African, Western and Eastern both in ancient and modern societies, the authors unravel the hidden power of the ruthless matriarchal power that rules the world.

Presidents, Emperors and Kings are all puppets of the matriarchy forces that rule the World by pulling the strings from behind the curtains.hence the saying "the man is the head of the family but the woman is the neck that turns that head".

THE MARRIAGE AND DIVORCE BILL

The main purpose of the Marriage and Divorce Bill is to bring existing legislation relating to marriage, separation and divorce into compliance with Article 31 (1) of the Constitution of Uganda, which provides that men and women are entitled to equal rights in matters relating to marriage and its dissolution, and with Uganda's international obligations.9 The Marriage and Divorce Bill has been on the table for over 14 years, yet despite strong advocacy campaigns led by human rights and women's rights NGOs, the bill is yet to be adopted by parliament. The Marriage and Divorce Bill does not introduce entirely new concepts to those included in existing Marriage and Divorce laws. However, it sets minimum standards for all regimes of marriage provided for under the law, supplemented by separate provisions governing the conclusion of Christian, Hindu, Customary and Bahai marriages. The draft law includes a number of provisions that would significantly increase protection for women's rights in accordance with Uganda's international obligations.

Twists and turns in the passage of the bill

In 2009, a "Domestic Relations Bill" was presented to parliament. After protests from some groups within the Muslim community, which opposed provisions they considered to be contrary to Sharia law, including the prohibition of polygamy, the Domestic Relations Bill was withdrawn from parliament and the text was divided into three separated Bills. The first part, dealing with domestic violence, was eventually adopted as the Domestic Violence Act, in 2010 (see infra). The second part, the current Marriage and Divorce Bill, was scheduled to undergo two parliamentary readings in the last parliament. However, the second reading was cancelled for lack of quorum. It is now on the list of 23 Bills that have been sent to the new parliament for consideration. This version of the Bill does not apply to Muslim marriages. The adoption of third separate law, the Administration of Muslim Personal Law, has been put aside for later agreement.

Increased protection but some significant gaps

The Marriage and Divorce Bill fixes the minimum legal age for marriage for both sexes at 18, grants women the right to choose their spouse and the right to divorce spouses for cruelty and prohibits the practice of "widow inheritance". It also defines matrimonial property, provides for equitable distribution of property in case of divorce and recognises some property rights for partners that cohabit. However, the draft does not prohibit polygamy. Nor does it prohibit the practice of paying a dowry or "bride price", although it does provide that such payments are non-refundable. These two provisions were seen as a bargaining chip by proponents of the bill to strike a compromise on the rest. Some of the main advances also constitute the main points of contention:

The ownership and division of property: The law defines marital property and the rules applying to the ownership of property acquired during marriage, including the notion of spousal contribution towards improvement of matrimonial property. These provisions are aimed at entitling women to their fair share of property in marriage and upon divorce. They have been criticized by some opponents to the bill, including some parliamentarians and religious leaders, as "unbalanced, favouring women", and "encouraging women to be hostile towards men and accumulate wealth".

Cohabitation: Through this provision, the draft law aims to provide some protection to couples who cohabit without being married, representing the majority of Ugandan couples. The draft law provides for the possibility to enter into an oral or written agreement relating to property. This provision only relates to cohabitation and does not apply to married couples. However, this point is unclear to many, including within the NGO community. The law is perceived by many, including some faith-based leaders, to be promoting cohabitation versus marriage, or as recognising cohabitation as a form of marriage.

Marriage gift or dowry: (still commonly called 'bridal price'). The draft law does not prohibit the marriage gift or dowry but provides that it is non-refundable. This is seen as key to breaking the financial constraints that often prevent a woman from being able to separate or divorce her husband. The term proposed by the Bill, 'marriage gift' is problematic to some, including members of Parliament, who have difficulties abandoning the commonly used term 'bridal price'.

As the draft law does not apply to Muslim marriages, many women in Uganda - where an estimated 12% of the population are Muslims - are excluded from its application, unless they decide at the time of marriage that the law will apply to them, by contracting a civil marriage. It is concerning that Muslim women will not receive the same protections of their rights. The creation of different laws for different groups violates international human rights norms and international law and in particular the principle of non-discrimination, which is also enshrined in the Ugandan Constitution.

The obligation on states to protect women from discrimination applies to all women, irrespective of their religion. Strategies towards adoption of the Bill

"Women NGOs are very active and I am confident that Parliament will enact the Marriage and Divorce Bill during current legislature. However, awareness raising still needs to happen at the local level".

Hon. Syda Bbumba, Minister for Gender Equality and Labour

Several persons interviewed by the FIDH/FHRI mission, including the Minister for Gender Equality and Labour, Hon. Syda Bbumba, and members of the Law Reform Commission, considered that the Bill still needed to gather sufficient support from religious leaders and at community levels. The Minister for Gender Equality and Labour considered that, before further consideration of the bill, further awareness-raising actions and advocacy are required, targeting faith-based organizations and rural communities, which would serve as a basis for defending the bill before parliament. All those interviewed admitted that, in addition to resistance from grassroots, religious and community leaders, the level of resistance among Parliamentarians themselves is strong. Some suspected that Parliamentarians resistance related to their personal situation, which they felt could be affected by the Bill, including the property and cohabitation provisions. Other key players such as FIDA-U and Uganda Women Network (UWONET) considered that the consultative phase had been sufficient, and that the Bill should be tabled early in 2012. In particular, they felt they could rely on key support by the new female Speaker of Parliament, who had given assurances to reschedule a second reading of the Bill. In order to contribute to countering some of the negative public perception of the Bill, UWONET, a lead advocacy organization, proposes changing the name of the Bill to eliminate the reference to Divorce. An alternative strategy, favoured by some as being more realistic, entails further 'splitting' the Bill. The provisions of the draft text would be adopted in the form of several independent amendments to existing legislation, including the Marriage and Divorce laws and relevant provisions of the Penal Code. However, this approach would contribute to piecemeal and fractured protection.

RECOMMENDATIONS

On the basis of the findings of this report, we issue the following recommendations.

To the Ugandan government

Strengthen efforts to eliminate harmful practices and stereotypes that discriminate against women. A strategic action plan geared to achieving this objective must be put in place without delay, involving both governmental and non-governmental actors. This objective should not be perceived as long-term, distant or unattainable.

Eliminate remaining discriminatory legislation and adopt laws to increase protection of women's rights. Remaining discriminatory laws, including the Succession Act, must be reformed urgently. Implement all relevant decisions of the Constitutional Court on succession, divorce, defilement etc. without delay. Laws including the Marriage and Divorce Bill and the Sexual Offences Bill must be urgently adopted to increase protection of women's rights. A marriage and divorce law protecting Muslim women's rights, in conformity with the Constitution and international law, must also be adopted urgently, with a view to eventually adopting a unified Act.

Take measures to ensure the effective implementation of the Domestic Violence Act. Implementing regulations, the necessary budget, and an implementation scheme must be adopted without delay. Such implementation scheme must include the following as priorities: Adoption by government of a training scheme for actors in the justice and law sector; Review of the Local Council Act to include the duties under the law as part of their mandate; Provision of training to local authorities on their new duties under the Law; Launch of a media awareness raising campaign on the Law, including air-time for NGOs; Include awareness raising/training module on the Law in police standard curriculum, and specialized training for community services officers; Improve Ministry of Health/NGO cooperation with a view to enhancing the capacity of health professionals under the law.

Enforce the prohibition on FGM, including through prosecution and inter-governmental cooperation.

Ensure women's access to justice, by adopting measures to overcome obstacles, including the costs of criminal investigations and failures in the collection of forensic evidence, police investigations and trials.

Ensure women's and girl's access to education and basic health services. Government measures must be strengthened to ensure that girls' have access to free education, including in rural areas, and that they remain in school. Ensure free access for women and girls to family planning services and appropriate, age-sensitive sexual health services. Ensure access to safe, medical abortion at least in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus, in accordance with the Maputo Protocol.

Review affirmative action schemes to strengthen the current application, including by extending it to public services, including the judiciary.

Strengthen the means of independent institutions, including the Human Rights Commission and the Equal Opportunities Commission, and ensure the complementarity of their work.

Support civil society organizations to strengthen their action in favour of women's rights throughout the country, including rural and conflict-affected areas. The current coverage of Kampala-based CSOs is an estimated 5 to 8% of all Ugandan Districts.

To the international community

The international community, including the UN, the African Union, the African Commission on Human and Peoples' Rights, the European Union, the Commonwealth and donors should support the government of Uganda in its efforts to address discrimination and violence against women.

The international community and donors should support civil society organizations to strengthen their action in favour of women's rights throughout the country, including rural and post-conflict areas.

CHAPTER TEN

A NEED FOR REFORM ON EMPLOYMENT/ LABOUR LAWS

There is a widespread belief that labor law is amid a protracted existential crisis, in part caused by uncertainty over the discipline's justification and normative foundations. Against this background, the purpose of this thesis is to examine human rights as potential foundations for labor law and deepen our understanding of the relationship between labor law and human rights. It argues that human rights are an important justificatory idea for labor law and provide a normative benchmark and moral standard that can be used to evaluate existing legal frameworks and guide reforms. In developing this claim, the thesis first identifies a 'normative gap' in labor law's traditional justificatory narrative, which is rooted in the idea of counteracting employees' unequal bargaining power, and suggests that a pluralistic approach be pursued to filling this normative gap. It then argues that a normative and philosophical approach must be adopted to fully understand the relationship between human rights and labour law, with a specific philosophical conception of human rights being adopted as the basis for the analysis. A theory of human rights is then set out and used to identify the normative implications of human rights for labor law. Under this theory, workers' human rights must be legally protected against employer infringements, and legal frameworks must be established to secure decent working conditions for all, as well as mechanisms that enable workers to exercise voice and make themselves heard. Finally, the thesis demonstrates how human rights theory can be operationalised to assess existing labour law rules, by scrutinising the reforms introduced by the Trade Union Act 2016 from philosophical and legal human rights perspectives. In sum, the thesis demonstrates that human rights are an important foundational perspective for labour law and can provide a philosophical framework to address pressing issues facing the discipline.

Employment is the relationship between master and servant that is to say, employer-employee relationship. Employment also refers to the relationship between two parties usually based on a contract where work is paid for, where one party which may be a corporation, not for profit organization or other entity is the employer and the other the employee. Employer means any person or group of persons, including a company or corporation, a public, regional or local authority, a governing body of an unincorporated association, a partnership, parastatal organization whatsoever, for whom an employee works or has worked, or normally worked or sought to work, under a contract of service, and includes the heirs, successors, assignees and transferors of any person or group of persons for whom an employee works, has worked, or normally works. Employee means any person who has entered into a contract of service or apprenticeship contract, including, without limitation, any

person who is employed by or for the government of Uganda, including the Uganda Public Service, a local authority or parastatal organization but excludes a member of the Uganda People's Defense Forces.

The employment relationship in Uganda is principally governed by the Employment contract between the Employer and the Employee governed by the Employment Act of 2006 as the primary Law. Aside from the Employment Act there are other laws and regulations governing Employment in Uganda to include among others as listed in chapter one. Employment laws and regulations arose due to the demands by workers for better conditions, and the Employer's demands to restrict the powers of worker's many organizations and to keep labor costs low. The state of labor law at all times is therefore both the product of, and a component of, struggles between different interests in society. As earlier seen, the concept of employment laws and regulations in Uganda was re-defined by the advent of colonial administration and since then, many changes in the Employment industry have been witnessed.

During the pre-colonial era, there was no capital and most activities dealt/ depended on land. For example: Agriculture. The concept of Employment was unheard of and only labour force was relevant for providing community services for the general population and building administration offices. In Buganda for example there was a concept of "Burungi bwansi", literally for the good of the nation, whereby chiefs led by the able adults into community service which was compulsory and punishments were given inform of more labor to those who tried to abscond. In the colonial Uganda like many other African countries, the colonial masters had to forcefully get people into growing cash crops, and because people also had to work in their plantations, there was shmtage of labor and in a bid to reduce this; the colonialists started hiring people with payments. The first form of Employment led to the introduction of hut tax where people were to be forced to work to get cash to pay for various taxes.

In 1912, the hut tax labor was turned into Kansanin labor with the padding of labor regulations. However, the disadvantage with these regulations was that the peasants resisted and avoided recruitment by running away or bribing chief. Others employed means of sabotage. Around this time, the international agencies like the LON, heavily attacked the use of forced labor and by 1920, the colonial administration had to abandon it. After independence, most Employment laws and regulations like the Employment Act, 2006 were originally established as decrees in the rule of General Idi Amin Dada, until recently, Uganda has been using these 1970's decrees for its Employment policies. Although Uganda has new policies on investment. Am in's labor policies were still in use until when the government changed all the decrees into Acts without debate. However. today. Parliament is empowered to enact laws to provide for the rights of persons to work under satisfactory safe and healthy conditions. The constitution of the Republic of Uganda recognizes the importance of good working environment of all workers and their rights.

Article 34(4) of the 1995 constitution of the Republic of Uganda as amended not only looks at the labor force but also children who are supposed to be protected from social or economic exploitation. Article 39 of the constitution further provides that, Workers have a right to a clean and healthy environment. Nonetheless the International Labor Organization estimates that two million workers die as a result of occupational accidents and work related diseases every year and an equivalent of the world GDP lost as a consequence of these occurrences. According to the Uganda Bureau of statistics in 2006, 3.5Million people of the labor force belong to working poor category and the incidence of working poor is highest among those engaged in primary sector followed by those in manufacturing sector. 58 Furthermore, despite all the provisions above, the laws and regulations governing Labor rights under the concept of Employment need to be examined due to the contradictions therein and the drastic transformation in the nature of Employment in Uganda Today.

STRUCTURE OF THE DIRECTORATE OF LABOUR

At this stage, it is also necessary to provide a brief description of the bodies responsible for the administration and enforcement of the country's labour laws. The Ministry currently responsible for overseeing labour related issues in the country is the Ministry of Gender Labour and Social Development (MGLSD). The MGLSD is divided into a number of Directorates, including the Directorate of Labour. The Directorate of Labour, in turn, has three departments:

1) Employment Services; -

2) Occupational Safety and Health; and

3) Labour, Industrial Relations and Productivity.

Labour officers, appointed pursuant to the Employment Act, are responsible for conducting workplace inspections and ensuring compliance with the employment standards set out in the Employment Act. 59 They are also called upon to facilitate the settlement of employment disputes and are empowered to institute criminal or civil proceedings in the Industrial Court in respect of any violation of the Employment Act60 Unfortunately. as will be discussed in greater detail: the Industrial Court has not been operational since 2006. Labour inspectors. appointed pursuant to the Occupation Safety and Health Act (OSHA), are responsible for conducting workplace inspections to ensure compliance with, the standards set out under the OSHA. Proceedings instituted under the OSHA are brought before magistrate courts. Labour officers operate under the Employment Services Department but the responsibility for appointing and administering labour officers has been delegated to the individual districts as part of the country's shift towards decentralization. Responsibility for labour inspectors, however, has not been delegated to the districts and their appointment and facilitation remains with the Directorate of Labour, under the Occupation Safety and Health Department.

CHALLENGES OF ENSURING COMPLIANCE WITH LABOR LAW IN UGANDA

Weak enforcement: In practice the government does not always enforce the law making it an offence to obstruct union organizing. Employers in the fish industry for example were not penalized for prohibiting workers from joining a union. Similarly, the government has not enforced the rights of some employees to join unions in newly privatized industries and factories.

Hostile employers; over all companies operating in hotel, textile, construction and transport sectors continue to be hostile to trade union and refused to recognize and negotiate with them. Such incidents are often not investigated by the government authorities. No collective bargaining in the public service; Uganda has failed to enforce implementation of the right to organize and collective bargaining laws as enshrined in the International Labor Organization convention. International Labor Organization Country Communications Officer, Ms. Grace Rwomushana said Uganda government has failed implement amended labor laws due to lack of

legal policy guidelines. Although the 2006 Labor Unions Act provides procedures under which employers can be punished for contravening the laws, it is silent on investor's or employers' labor guidelines. "The government enacts labor laws but is reluctant to implement them for fear of discouraging investors·'.63 No public service unions, including medical staff and teachers. were allowed to negotiate their salaries and employment terms during the year. The government fixed the terms and conditions for all civil service , workers.

LABOUR LAWS IN UGANDA

In January 2000, the Uganda Labor law reform project was initiated under the funding of the United Nations Development Program (UNDP), with the primary objective of overhauling of the legal fi·arne working the field of employment to make it compatible with ongoing socio-economic reforms, whilst promoting ratification of ILO Conventions, and giving effect to the principles and rights concerning freedom of association and collective bargaining, non-discrimination and the emanation of forced labor and the elimination of child labor. The development objective of the project was to achieve a coordinated labor law reform process and to update labor legislation in Uganda that will foster amicable labor relations within a legal framework that is consistent with basic human rights as enshrined in the 1995 Constitution64. This project resulted into the enactment of various labor Acts, including the Workers Compensation Act 2000, the Minimum Wages Act 2000, the Employment Act 2006, The Labor Union [Arbitration and Settlement] Act 2006 and the Occupational Safety Act 2006. The laws remove barriers to organizations and in March2006, four labor ref01m bills were passed, namely the Employment Act, the Occuational and Health Bill, the Labor Union Bill, and the Labor Dispute Bill, all of which significantly

improved labor laws concerning workers' rights. 65 The Labor Union Act repeals the Trade Union Act of 2000 and with it the requirement of a minimum of 1,000 employees, representing 51 percent of the workforce in order to form a upon.

The Labor Union Act does not specifically recognize the right to collective bargaining. Uganda has made positive steps towards the promotion of labor standards to protect the rights of workers by ratifying key ILO Conventions and enacting relevant legislation to transform Conventions into municipal law. Ensuring that all Ugandans enjoy their rights and opportunities and access to education, health services, work, shelter, clothing and food security among others is one of the national objectives and directive principles of state policy under Uganda's 1995 Constitution66 It stipulates economic rights to include the right to work under safe, satisfactory and healthy conditions. Equal pay for equal addition. it provides for the rights or workers namely the right to join trade unions, collective bargaining and representation, withdrawal of labor; and maternity and post-natal protection by employers. It therefore incorporates the principles of the International Covenant on Economic, Social and Cultural Rights which provides for the right to work, the enjoyment by every person to just and favorable conditions from economic and social exploitation68.

Uganda has also ratified the ILO Convention on the right to organize and collective bargaining and a Labor Unions law is in place which regulates their establishment, registration and management amongst others69. However, as mentioned earlier, despite the existence of an adequate legal regime, enforcement has been limited. Many workers in Uganda do not belong to a labour union. Government of Uganda, through its Ministry of Gender, Labor and Social Development, recognizes the National Organization of Trade the right to rest and reachable working hours as well as paid holidays. National Organisation for Trade Union (NOTU) as a representative organization of employees and the Federation of Uganda Employers as the representative organization for employers. The Government consults the two organizations before arriving at decisions related to ratification or denunciation of Conventions. The recent Labor Unions Act also recognizes the Central Organization of Free Trade Unions (COFTU) as a second federation for workers unions in Uganda.

The Employment Act has provided for the rights of workers such as the right to rest, the entitlement to annual and sick leave amongst others. To ensure enforcement and compliance with the Employment Act, officers are empowered to engage in labor inspection which securing the enforcement of legal provision relating to the conditions of work and the protection of workers. The labour officers are also empowered to supply technical information and advice to employers, employees and their organizations concerning the most effective means of complying with the legal provisions. Although the Employment Act could be drawn on to regulate the formal sector, the circumstances in the informal sector are quite different, for example the issue of leave and rest may not easily be applicable to the informal sector where working for long hours is necessary to meet ends meet. particularly business is run by

one person. In relation to forced labor, Uganda ratified the Forced Labor Convention which requires states to unde1iake to suppress the use of forced or compulsory labor in all its forms within the shortest possible period. The constitution prohibits holding any person or slavery or servitude and requiring any person to perform forced labor. The current Employment Act also prohibits forced labor. On the issue of child labor, Uganda has ratified the United Nations convention on the Rights of the Child and the African Charter on the Rights' and Welfare of the Child, which recognizes the right of the child to be protected from economic exploitation, and perfonning any work that is likely to be hazardous, interfere with the child's education or to be harmful to the child's health, or physical, .mental, spiritual, moral or social development. The laws also call for the fixing of minimum wages for admission to employment as well as regulation of hours and conditions of employment, and providing for appropriate penalties for enforcement.

The country has also ratified the two key ILO Conventions on child labor. The Minimum wage Convention calls upon member states to pursue a national policy designed to ensure the effective abolition of child labor and to rise progressively the minimum age for admission to employments or work to a level consistent with the fullest development of young persons. The Worst Forms of Child Labour Convention prohibits the engagement of children in any forms of slavery; using children for prostitution or pornography; using a child for illicit activities such as drug trafficking; or work, which by its nature, or the which it is carried out, is likely to harm the health, safety or morals of the child.

As stated earlier Uganda's Constitution prohibits the engagement of children in hazardous or dangerous work is also prohibited. Pornography is criminalized under the Penal Code. The Constitution specifies an age limit of employment of children in hazardous work at not less than I6 years while the Children's Act also prohibits harmful employment for all children arid empowers Local Councils to safeguard children and promote their welfare within their areas. Uganda has also ratified the ILO, Minimum Wage Fixing Machinery Convention which requires member states to put in place mechanisms by which minimum wage rates can be set for employees, and the Minimum Wage Advisory Boards and Wage Councils Act is in place providing for the establishment of the boards. However, as mentioned earlier, in view of the extensive time lapse and the developments within the labor market, the prevailing minimum wage is not proportionate with the existing standards of living. Also, Minimum wages are not easily enforced in the informal economy except if prescription is made according to sub-sectors.

The Occupational Safety and Health Act, addresses the occupational safety and health related issues for all workers in Uganda. It covers all working environments and workplaces including all places were workers are found as a consequence of their work. This provision could be drawn on to provide for the workers in the informal economy through regulations specifically tailored to their situation, and

ensure their well being. However, in a number of instances it is the responsibility of urban councils to provide the necessary services in workplaces in the informal economy and they need to be reminded to fulfill their obligations.

The Labor Disputes (Arbitration and Settlement) Act is also in place and establishes the industrial court and takes the labor services nearer to the people through enhancement of the powers of the Labor Officer in labor dispute resolution. The above infers that Uganda has an adequate legal regime to address the work deficits yet, overall, it is acknowledged that when laws are enacted they have not been adequately enforced.

There are adequate laws and regulations that provide for various rights of an employee both during employment and after specifically the right to leave and further there are institutes that an aggrieved party can get remedy just in case their right has been breached and these include the labour officer, the courts to mention but a few and on record there are cases to show that these institutes have up held the rights of employees.

This chapter represents the first sustained examination of the relationship between labour law and human rights from a normative and philosophical, as well as legal, perspective. It significantly deepens existing academic understanding of the relationship between labour law and human rights, and clarifies the role that human rights can play in justifying and providing a foundational perspective for labour law. It is hoped the thesis will have significant impact in academia, and open new avenues for future research, by demonstrating how a philosophical human rights perspective can be used to evaluate existing legal frameworks and address pressing issues facing labour law. By demonstrating how human rights theory can help provide coherent and convincing normative foundations for labour law the thesis also equips labour lawyers with an important response to ideological and de-regulatory critiques of labour law.

This chapter also has the potential to impact outside of academia. By clarifying and highlighting the values that underpin labour law, the argument developed in this thesis can help guide the courts' interpretation and application of the law, particularly in cases where they are assessing the proportionality of existing legal frameworks. By providing a normative benchmark and moral standard by which existing labour law frameworks can be evaluated, this thesis also provides a tool by which policymakers can identify areas of law which fail to meet this threshold and are therefore in need of reform. More specifically, the analysis of the Trade Union Act 2016 from a human rights perspective may be useful for trade unions or NGOs considering bringing a human rights challenge to this legislation.

There is a widespread belief among labour lawyers that the discipline is undergoing

a protracted existential crisis,1 underpinned and in part caused by uncertainty over labour law's normative foundations. This book contributes to the current debate on the justification and normative foundations of labour law, by examining human rights as a potential foundational perspective for the discipline.

Dissatisfaction with labour law's traditional justificatory narrative, that it exists to counteract unequal bargaining power between employers and employees,2 has caused a 'crisis of confidence' among labour lawyers,3 and prompted a search for a 'new normativity'.4 There are concerns that labour law's traditional justificatory narrative does not equip labour lawyers with the tools to adequately respond to ongoing ideological and economic attacks on the discipline, which portray trade unions as possessing unjustifiable monopoly power, and labour rights as unnecessary interventions with the efficient operation of labour markets.5 The lack of clear and coherent normative foundations has also contributed to labour law's failure to keep up with changing patterns of production and labour market practices. This perceived need to identify new sources of labour law's normativity has led to a surge in theoretically-minded literature examining the idea, goals, purposes, and foundations of labour law. Until recently however, there was relatively little literature on the justification of labour law; philosophers 'have had much more to say about welfare rights and ideal distributions than about labor rights'. Despite existing as a legal field for over a century therefore, philosophical enquiry into labour law's foundations is only now 'emerging as a new field of scholarship'.

It is against this backdrop that this book sets out to examine the relationship between labour law and human rights, and the potential for human rights to offer foundations and normative guidance for the discipline. This thesis provides the first full-length analysis of these issues from a normative and philosophical, as well as legal, perspective. It makes an original contribution in several ways. It identifies the need to pay greater attention to human rights theory, and to specific philosophical conceptions of human rights, when examining the relationship between human rights and labor law. It clarifies and makes explicit the different ways in which human rights are relevant for and connected to labor law. It also works through the normative implications of a specific theory of human rights for labor law, demonstrating how and why human rights can provide foundations for key aspects of the discipline, and how the insights gained from human rights theory can be used to analyze and evaluate existing labor law legislation and doctrine.

WHY HUMAN RIGHTS?

It is important to better understand the relationship between human rights and labour law given that the two are already frequently aligned in practice. Many human rights documents contain rights relevant to labour law and human rights litigation has been used to protect workers' rights, albeit with mixed success. In addition, labour law issues are frequently discussed and analysed through the lens of human rights

and the two fields are increasingly aligned in NGO and trade union campaigns. To date, however, there has been little research into the relationship between human rights and labour law at the theoretical level, or the philosophical legitimacy of using human rights as foundations for labour law. Much of the literature on human rights and labour law addresses the protection of non-labour-related human rights at work rather than human rights as potential foundations for the discipline,or does not examine the relationship between human rights and labour law from a normative perspective.But without sound philosophical arguments 'we cannot in good faith invoke' human rights as foundations for labor law Indeed, advocating human rights as foundations without making these Supporting arguments is likely to actively undermine the justification of labour law.

Another reason for choosing to focus on human rights is that they seem to be a natural, and potentially important, foundational idea for labour law. Intuitively, both human rights and labour law seem to be concerned with improving the human condition and to have common 'moral goals'.18 Although contested human rights are often regarded as a potentially valuable foundational perspective for labour law largely because the salience and moral weight of human rights are thought to offer a strong normative grounding for the discipline. Given this, and the relative lack of existing research on these issues, it is important to determine whether human rights do in fact provide coherent and attractive foundations for labour law, and what a human rights-based labour law might look like.

HUMAN RIGHTS WITHIN A PLURALISTIC VISION OF LABOUR LAW

One important point to emphasise before going further is that this thesis does not propose that human rights should be regarded as the sole normative foundation for labour law. Instead it merely defends human rights as one important strand in a pluralistic vision of labour law's foundations. Human rights are not mutually exclusive with other justifications of labour law, such as those based on freedom as capabilities or non-domination,democracy,social justice, and economic arguments. This reflects the fact that labour law may well be morally over determined, with the discipline having multiple possible justifications.

Although not always made explicit, there is an emerging consensus in favour of this pluralistic approach to labour law's foundations.26 The literature can often 'be read as articulating views about what should be regarded as the principal aim of labour law, without denying that other aims and principles could be sensibly incorporated into labour law as well. This is welcome, because the 'contextual' nature of labour law, in that it regulates a specific context or aspect of life, means any single theory is likely to provide only partial foundations for the discipline. This chapter should be read in this spirit of pluralism. It endorses the view that the process of renewing the foundations of labour law must be 'multipronged' that focusing exclusively on a

single justificatory framework blinds us to the benefits of other approaches and that we should seek to understand all the 'diverse justifications' that exist for labour law. It aims to contribute to this research agenda by developing a deeper understanding of the relationship between labour law and human rights.

THE NEED FOR FOUNDATIONS

The lack of extensive philosophical or theoretical work on labour law's foundations reflects the more practically-minded approach that has dominated the field, due to the sociological method and pragmatic attitude of labour lawyers Historically, the discipline has 'mostly comprised technical legal analysis for the purpose of assisting legal practice, or evaluative discussion about the policies embodied in legislation, or calls for activist interventions through the legal process and collective industrial action by workers'. It might therefore be asked why it is necessary to break from this tradition and enquire into labour law's normative foundations. This view is perhaps best captured in Hepple's statement that '[l]abour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power relationships.' Hepple's dismissal of the necessity and importance of philosophical thinking about labour law is unwarranted however; labour law cannot help but be an exercise in applied ethics. The first reason for this is that all law is necessarily an exercise in applied ethics. Law embodies the coercive power of the state, and necessarily has distributive effects so should not be used to enforce rules that are morally unjustifiable. Lawmakers must attempt to ensure the law is consistent with moral principle, which is not possible without knowing the principles that underpin the law. In addition, ethical considerations are important when courts are interpreting legal rules and principles, so the development and application of labour law by the courts cannot avoid being an exercise in applied ethics to some extent.

Furthermore, labour law must be an exercise in applied ethics because it concerns the legal regulation of a hugely important aspect of our economic and social lives. Labour law has significant distributive effects, influences people's ability to participate and live a decent life in their community, and impacts many basic human interests including autonomy and wellbeing. The rules dealing with a subject such as this cannot avoid having moral implications, and labour law is therefore a particularly appropriate site for law being regarded as involving applied ethics. Normative theorising about labour law is also important for practical reasons. A sound philosophical account and justification of labour law is essential to adequately respond to ideological and economic critiques and deregulatory political agendas; 'careful reflection about underlying moral and political principles and values can serve to provide firmer foundations' for the discipline. Understanding the foundations of labour law also helps us scrutinize and identify problems with existing labour law rules, by providing an appropriate benchmark against which to evaluate legislation and case law.

More positively, the normative foundations of labour law can be used to guide reforms and work out how the law can be improved or updated.Philosophical thinking about labour law's foundations 'should help us to understand better what we believe should be the proper scope and purpose of the subject' Bogg also points out that answers to theoretical questions about labour law can be 'of great practical significance' because they can influence courts decision-making.Courts need a good grasp of the foundations and aims of labour law when they are interpreting and filling gaps in legislation, particularly if they adopt a purposive approach to interpretation,45 as well as when determining the proportionality of labour law protections in constitutional litigation. If judges appreciate the underlying values of labour law protections they are more likely to interpret and apply the law in ways that are favourable to workers.

Finally, without an understanding of labour law at the theoretical and philosophical level we have no way of identifying or knowing what labour law is, i.e. what the boundaries and content of the subject are and without a 'constituting narrative' of some kind there is no reason for viewing or teaching labour law as a distinct area of law.48 So while Hepple is correct that labour law is the result of social struggle,49 there is still room for 'normative theorizing about how things should be reducing labour law to class conflict is 'normatively unappealing as a complete account of the field. Similarly, the fact that 'the forces of political economy' rather than normative theorizing 'will almost certainly determine the individual and collective fate of workers does not mean that theoretical enquiries are of no consequence. Hepple's 'militant empiricism' should therefore be rejected and theoretical research into labour law be viewed as no less important than other approaches.

The task of identifying the normative foundations of labour law is complicated by the ongoing debate about the proper scope and boundaries of the discipline, and the symbiotic relationship between the philosophical foundations of labour law and its content and scope.In some sense an '"empty" functional definition of labour law would suggest that labour law includes all the norms that concern the labour market.'But in order to be useful in the ways described above, a theory of labour law must justify and provide foundations for the norms and protections that are generally recognized as making up the core of labour law. As Collins says, it 'should justify the existence and weight of such typical rules and principles of labour law as minimum wages, safety regulations, maximum hours of work, the outlawing of discrimination against particular groups, and the recognition of a trade union for the purposes of collective bargaining'.This thesis therefore focusses on the relationship between human rights and those legal protections generally recognised as labour law's core domain; 'labour law' is used here to encompass the law dealing with trade unions, collective bargaining, and industrial action, but also individual labour standards and protections such as health and safety law, statutory minimum wages, protections from unfair dismissal and discrimination at work, and limits on working time.

A normative account of labour law is not one which merely describes legal protections or explains their historical development, but rather gives an account of the philosophical theories and normative values which underpin and justifies these protections. While some degree of fit is needed between any proposed foundational framework and existing legal rules, this need not, and cannot, be perfect, because the content of labour law is the result of political conflict and compromises. The 'contextual' nature of labour law means that it cannot exist simply for its own sake and the normativity of labour law must come from some external source. Justifications of labour law must therefore draw on broader values and ideas from moral and political philosophy. However, there is a need for caution when seeking to identify the philosophical foundations of labour law in moral and political theory. It may not be legitimate to simply 'transplant' methods or concepts from moral and political theory to the labour law context if these were originally developed to analyse the state. Normative theory may also only be able to provide limited guidance on concrete legal questions, as the 'questions that interest those seeking to find the normative foundations of labour law will simply not be answered except in broad terms'.Finally, when theorising about labour law we must be avoid the trap of simplifying or failing to do justice to the complex realities of life, and recognise the contested and contextual nature of moral theory. These considerations should not stop us from theorising about labour law, but they do indicate that care is needed when doing so.

Fundamental labor rights are laid out in Articles 6-9 of the International Covenant for Economic, Social, and Cultural Rights and include: the right to work, the right to just and favorable conditions of work, the right to form and join trade unions and the right to social security. From all the above, flow several upshot rights such as the right to fair remuneration, right to safe and healthy working conditions, to reasonable working hours and rest and the right to strike. A good number of these rights have been incorporated into domestic laws within the frame work of the Constitution of the Republic of Uganda, primarily Article 40, which protects a wide range of economic rights.

The employment relationship in Uganda is principally governed by the Employment contract between the Employer and the Employee governed by the Employment Act of 2006 as the primary Law.2 Notwithstanding the 1995 Constitution of the Republic of Uganda and the Employment Act, there are a number of other laws and regulations regarding labor rights in Uganda to include among others: The Worker's compensation Act 2000, The Occupational Safety and Health Act No. 9 of 2006, The Labor Union's Act No.7 of 2006, The Labor Disputes (Arbitration and settlement) Act No. 8 of 2006, The minimum wages Advisory Boards and wages Councils Act cap 164, The Business Technical Vocational Education and Training(BTVET) Act 2008, The Employment (Recruitment of Uganda Migrant Workers Abroad) Regulations, No. 62 of 2005.These laws have become a manifest of transformation in Uganda.

BRIEF HISTORY OF EMPLOYMENT LAWS IN UGANDA

Historically, Employment laws and regulations arose due to the demands by workers for better conditions, and the Employer's demands to restrict the powers of workers many organizations and to keep labor costs low. The state of labor law at all times is therefore both the product of, and a component of struggles between different interests in society.1The 1995 Constitution of the Republic of Uganda 2 Section 27(1) of the Employment Act, 2006. In Uganda, the concept of employment laws and regulations was re-defined by the advent of colonial administration and since then, many changes in the Employment industry have been witnessed. At some point in 2006, the former Minister of Gender, Labor and Social Development, Hon. Bakoko Bakoru, observed that the laws were absolute and did not address the challenges and needs of the new work environment and modem labor market thus explaining the rampant strikes at places of work, increased forced and child labor and poor working conditions. Further, she intimated the need for the harmonization of the Uganda law with regard to the international conventions on labor to which Uganda is a signatory.3 Today, Parliament is empowered to enact laws to provide for the rights of persons to work under satisfactory safe and healthy conditions. 4

The 1995 constitution of the Republic of Uganda together with other laws and regulations stated above recognize the importance of good working environment of all workers and their rights. Article 40 of the said constitution being the supreme law of the country provides for economic rights and under this, parliament among other things is mandated to ensure equal payment for work without discrimination; and to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays. The Employment Act of 2006 and other laws and regulations governing labor rights together with the constitution however contradict with the provisions of regarding the issue of labor rights at common law, for example, equal treatment of every worker as women are given more work rest days than men5 among others. While Uganda's labor laws combined with the Constitution now provide strong legal protection for labor rights, research indicates that in practice, employees largely do not reap the benefits of these new and improved legislations.

Employees suffer not because the laws protecting the workers are bad but because the social, political and economic conditions do not favor implementation of the laws. Reports of inhuman treatment of workers and illegal dismissals from work have been commonly reported in the press for long. Prompting outcries from different sectors of Ugandan society. for New Employment Laws for Uganda. The New Vision, Tuesday April 4, 2006 Article 40 of the 1995 constitution of the Republic of Uganda. Sections 56 and 57 of the Employment Act, 2006 strengthening of the enforcement of labor laws. There is need for a critical analysis of the legal application of labor laws in Uganda and how far they have improved the conditions of the working population.

The country's workforce plays an important role in the development process and towards poverty reduction in the country. The purpose of this study is to provide an insight of the contradictions within the employment laws, regulations together with the constitution regarding labor laws and the legal analysis of how effectively they are applied at common law in Uganda. A presentation on Labor Rights in Uganda by the international Law Institute- Uganda9 pointed out that Uganda does not have a social protection policy and the current formal social security arrangements do not cater for the informal sector. Overall, social security arrangements are inadequate in meeting the domestic capital formation and social insurance needs of Uganda because of its limited scope. Some categories of workers such as low paid and migrant workers are often exposed to harsh conditions, lack personal security, live in unsanitary conditions and, women in particular are vulnerable to sexual harassment. Informal sector workers, low paid workers, the urban unemployed, plantation workers are some of the vulnerable groups in Uganda and their vulnerability arises mainly out of poverty. The fact that a good number of these workers are also paid in cash with very minimal wages render difficult for them to have formal social security arrangements.

With the exploitation of workers, it appears that the absence of minimum wage had led to exploitation of workers to larger extent. A report by the Platform for Labor Action in 2010 pointed out that: although Uganda has ratified a number of United Nations human rights instruments and ILO Conventions on the rights of workers, the Constitution also provides for a comprehensive range of human rights as required under the different conventions, workers' rights are not yet fully respected." The absence of a minimum wage has also led to exploitation ofworkers. On decent work and decent work deficit, the first expression and formal mention of decent work' was in the Director General's Report to the International Labor Conference in 1999, where it was referred to as "productive work" under conditions of freedom equity. Security and dignity in which rights are protected and adequate remuneration and social coverage are provided. Other attributes to decent work include productive and secure work. respect of labor rights. Provision for an adequate income. union freedom. collective bargaining and Presented at the National Consultation Conference- in November 2006 by Lillian Keene-M ugerwa of Platform for Labour Action. 10 Platform for labor Action Annual report 2010.

Participation balancing work and fatnily, education for children, absence of child Labor, gender equality, ability to compete in the market place and ultimately human dignity. The issue of workers' freedom of association generally and the right to organize has received only limited attention in Ugandan labor law and industrial relations literature, although internationally, this is a much written about subject. However, no detailed analysis of the right has taken place particularly in light of the new labor laws. John Jean Barya's PhD thesis analyzed the development of labor law and trade unions from the colonial period up to 1987. He was condemned with the role of law in the development of trade unions in Uganda over that period. The conclusions studies are still relevant in so far as they described the ideological and

political role of the law in circumscribing rights of workers both organizational and substantive. A broader sweep of the existing labor law was made by the same author, a year later. 13 The paper concluded with proposals for the amendment of all, labor laws including aspects concerning the right to organize. Most of the proposals made have now been incorporated into the new (2006) labor laws. Subsequently, an analysis was made of the expansion of organizational space brought about by the 1993 trade union law14 and of the provisions in Uganda's 1995 Constitution relating to the rights of labor noting, among other things, that while the 1995 Constitution generously opened workers' organizational or what we called associational space, the 1993 law itself made some reasonable openings only within the context of the regime's corporatist political agenda. 15The new laws have further-expanded the associational space and are much more in conformity with the provisions of the 1995

CONSTITUTION AND ILO STANDARDS ON FREEDOM OF ASSOCIATION

A number of other works by the author were concerned with specific or broader issues of concern to workers but not freedom of association. For instance one compared the policy impact ofNOTU (National Organization of Trade Unions) and UMA (Uganda Manufacturers' Association) 2002, another with different aspects of the termination of employment contracts in different African jurisdictions, 2004 or the general relationship between trade unions and policies in Uganda particularly since 1986.

Other writers have black letter law expose of the law relating to trade unions. For instance, Angeret basically analyzed the Common Law position and the Trade Unions decree without much reference to the operation of the law in practice.In a later study, he dealt with the technical aspects related to rights and limitations on the termination of the contract of employment and records some cases in this respect. The author has also considered the relationship between rights, generally and government economic policy, particularly in relation to health and education but did not deal with the relationship to workers freedom of association. On his part, Juma Okuku assessed the involvement of trade umons m the political and economic reforms under the National Resistance Movement (NRM) government, the interface with civil society and NGOs, the impact of globalization and nee-liberalism on the labor movement generally and the implications for the democratic process.He noted the debilitating effects of structural adjustment policies and nee-liberalism on Ugandan society and the labor movement in particular. However Okuku was not specifically concerned with rights or organization as such but observes that SAPs in general 'have brought in the formula of casual laborers and that most employers in Uganda today would wish to have only casual laborers where no written contracts

On the other hand, a number of unpublished theses have dealt with issues of labor in general albeit with minimal focus less on organizational rights. For instance J.

Muwawu 1999 21 was specifically concerned with the broad rights of workers in the process of privatization while Asuman Kiyingi focused on the limitations of the existing social security law in Uganda?2Some of the most prolific writers on labor have been researchers at Uganda's Centre for Basic Research (CBR) especially in the period 1989 - 2000. The studies have covered inter alia conditions of labour of specific types of workers such as those on commercial dairy farms in 16 Angeret, Stephen, (1998), Trade Union Law in Uganda (self-published) 17 Angeret, ibid 18 0kuku, J., (1995}, Workers' Conditions and Struggles at Nyanza Textiles Industries, Jinja 1970- 1990, CB.R Working Paper No. 47. 19 Ibid at47 20 1bid at 44 21 Muwaw u J. (1999), The Impact of Privatization on l abour Rights in Uganda, LL.M, Dissertation, Makerere University. 22 Kiyingi Asuman, (1995), Limitations of Social Security Law: The case of the Aged in Uganda, ll.M Thesis, Makerere University.

Kabale, Mulindwa Rutanga 19892'3or migrant labor on coffee Shambas in Masaka?4 S. Rutabaijuka 1989 or fisher laborers on Lakes Kyoga and Victoria25 or specific struggles related to attempts to improve terms and conditions of services as in the former UGIL,26 MULC027 or NYTIL. 28 One particular CBR study was interesting for survey of health and safety conditions in four industries in Uganda.29

Overall if ever these works were generally concerned with the microcosmic aspects of workers' conditions, unrelated to the questions of organization and the labor movement, or they dealt with specific historical incidents and struggles as part of what the authors saw as social movements in the general struggle for democracy. The only other writer that attempted to deal with questions of rights of organization for workers has been Ralph Gonsalves whose work is now rather dated.30 Nevertheless, this thesis provides one of the more detailed macro analyses of the development of trade unions, their political role and the hurdles created by the law to workers struggles in the colonial period and over the first decade of independence. The thesis raises questions related to the use of law by the state to control and subjugate or incorporate trade unions within the state structures particularly under the UPC/Obote I regime.

The literature related to or affecting workers' freedom of association in Uganda is not simply Uganda specific. Because labor law and labor rights are historically and in certain respects currently derived. or derivable from international sources, reference to relevant workers international work and standards is also pertinent. The major relevant sources are ILO standards that are applied or are applicable in Uganda. Therefore, a study on workers' freedom of association in any country that is signatory to the ILO Constitution and Conventions requires an assessment of the extent to which ILO standards are embedded in our laws in general and. In this particular case, the right to associate or organize specifically.The law itself, more certainly the new labor laws and the Labor Unions Act are inspired by ILO standards and input.

Literature on ILO standards and its relevance to developing countries is enormous. It is of relevance to Uganda in so, far, as in the present case, it deals with the issue of freedom of association for workers. The ILO has been at the subject of workers' freedom of association for several years. More recent relevant works date from 1992 for instance, ILO's Freedom of

Association and Collective Bargaining, General Survey, which is a basic discourse on freedom of association and collective bargaining.31 The book looks at freedom of association for workers and trade union rights as part and parcel of traditional constitutional civil liberties and is basically an expose of Convention 8732 and Convention 98. The book explains the meaning and practice of the right to establish organizations, the right to organize and manage them freely, the right to strike, the right to collective bargaining and the need for protection against acts of anti-union discrimination and for the promotion of collective bargaining.

The same themes are covered in a Special Issue of the International Labor Review by various writers.34 For instance; Nicolas Vaiticos argues that international labor standards and human rights are universal and although progress had been made on these issues in the last half century, one can foresee another difficult period as a result of the advent of as yet unbridled globalization and economic liberalism. He argues that human rights and social protection could be extensively eroded. 35 Valticos is of the view that "to confront this threat to social justice and to human rights adapted forms of standard-surfing and "regulation" in place oftoday's extreme deregulations is evidently in order."36 Otherwise the ILO has also produced publications that present cases and texts clearly illustrating and interpreting different aspects of freedom of association for workers.37 These analytical and interpretative publications are of great assistance in assessing our own new labor laws and the Labor Unions Act in pa1ticular in so far as the Act (as the other new ones) drew inspiration from the provisions ofiLO Conventions.38

Literature from elsewhere in Africa shows that in Southern Africa for instance "the conditions under which trade unions operate vary significantly. In some countries, workers enjoy basic labor and organizational rights whereas in others they are exposed to suppression and intimidation by employers and the state, the former including Zimbabwe and the latter South Africa".39 In addition, it is also clear that in most African countries "far too many workers in the small business sector are cun-ently not unionized" yet they "present an enormous potential for membership growth" and the poor conditions of employment in large parts of the informal sector "can only be improved through a combination of protective legislation and unionization"

while a further challenge for the unions is to pay more attention to the needs of women workers and young workers. The impact of globalization on trade unions and labor rights has been extensively commented on. For instance, Ramasamy has

identified four major challenges responsible for the negative impact of globalization on the labor movement in general and trade unions in particular. First is the challenge arising out of the "reorganization" of production and the development of new management strategies of "capitalism" which include "Toyotism, liT, flexible production and employment of contract labor that have negatively impacted the independence and autonomy of the labor movement"

Secondly, the internationalization of capital has led to the fragmentation of the labor movement due to the rise of the informal sector, the creation of a flexible labor force, the sub-contracting of employment and the use of female labor which have all "introduced serious divisions within the labor movement." Thirdly, although the state has succumbed to the dictates of the deregulation of markets and thus withdrawing certain welfare provisions to labor, it has remained an active partner on the side of global capital. It has not been weakened; instead, its coercive attributes have been strengthened. Therefore, the state is still a force in trying to tame and discipline the labor movement. Finally, globalization has undermined public sector employment due to the reduction of public expenditure. Deregulation and the removal of the welfare related functions. The loss of jobs has led to a reduction in Union membership. In the case of Uganda however, although privatization and retrenchment of the public service employees reduced the numbers of workers, unionization in the public service increased due to changes in the law. This is because between 1968 and 1993, all public service employees, except group employees were prohibited from joining trade unions. It is only in 1993 that a new law allowed unionization in the public service.

Related to globalization, is the whole question of neo-liberal economic policies, first introduced by World Bank and IMF in the 1980s and 1990s with a devastating effect on workers and their livelihoods. Today, many governments adopt similar policies and describe them as their "own" invention and according to Muneku and others for instance "Namibia, South Africa and The New Partnership for Africa's Development (NEPAD) are typical examples in this regard.46

They also argue that governments have ignored alternative proposals to these policies by the labor movement as in Zimbabwe and South Africa, preferring to listen to the business lobby and the IMFI/World Bank "advisors." Indeed, in the case of Uganda, the Poverty Eradication Action Plan (PEAP) is claimed to be Uganda's own policy framework "prepared through a consultative process involving central and local government, parliament, donors and civil society."47 And yet, the Poverty Eradication Action Plan (PEAP) reproduces standard IMF/World Bank economic recovery/poverty eradication prescriptions. Most writers see the way forward for labor as taking up a more overt political role. For instance, H R Schillinger, argues that though weak and undermined by an ongoing "informalisation" of African economies on the one hand and the consequences of neo-liberal globalization on the other, umons remain a political force to be reckoned with, as they continue to

be one of the very few societal organizations in Africa with a sizeable constituency, counliy ·wide structures and the potentialfor mobilizing members on social or political matters. On their part, some scholars on Southern African labor movements have concluded that due to the antagonism from both capital and the state "unions will have to develop strategic alliances with other progressive organizations to create the necessary grounds well to force governments into a change of policy while Ramasamy tentatively suggests "that exploring social movement unionism specifically in alliance with the new global social movements as a 'new feature of global anti-hegemonic solidarity against globalization' may be of great assistance to workers and the trade unions. "

THE RIGHT TO WORK AND THE CURRENT WORKING CONDITIONS

According to the Bureau of statistics 2011, Uganda's working population increased from 12.9 million in 2009/10 to 13.9 million in 2012/13. The proportion of working females decreased from 52% in 2009110 to 51% in 2012113. 72 perfect of the working population was engaged in the Agriculture sector in 2012113, only 19.8 percent of the females in the work force have attached at least secondary school, the share of the jobs advertised in the public Administration sub-sector decreased 50 percent. The GDP at current market prices is shs58, 865 billion.

The most fundamental labor right is the right to work Enshrined in Article 23 of the Universal Declaration of Human Rights. The right to work is further seen as "the right of everyone to the Opportunity to gain his living by work which he freely chooses or accepts" and places an obligation on member states to take steps to protect this right.

Article 6(2) of ICESCR, elaborates on this obligation stating steps to be taken by a State Party to the present Covenant to achieve the full realization of this right and that shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment w1der conditions safeguarding fundamental political and economic freedoms to the individual. While Article 40(2) of the 1995 Constitution of the Republic of Uganda guarantees the right of every person in Uganda to "practice his or her profession and to carry on any lawful occupation, trade or business,"80 the current levels of Unemployment and underemployment in the country present significant barriers to the fulfillment of this right.

Unemployment and underemployment.

Employment is the most important concept for determining the legal protection associated with different forms of paid work. Employment establishes the boundary between the economic zones of commercial relations. Entrepreneurship and

competition, on the one hand. and the economic zone of labor protection. Economic dependency: and regulation on the other. Unemployment is defined under the Black's Law Dictionary, 61hEdition to mean an economic condition marked by the fact that individuals actively seeking jobs remain un hired whereas, Under employment refers to an employment action that is insufficient in some important way for the worker, relative to a standard.

According to the Millennium Development Goal Report for 2010, Uganda has made impressive steps in working towards economic development: Uganda's macro-economic reform program is generally viewed as having supported economic growth well beyond what could be expected from the recovery and reconstruction process. These reforms, often considered among the most comprehensive in Africa, have reduced barriers to trade and liberalized prices and markets previously subject to state control.

Improved management of monetary and fiscal policy has produced stability and has brought down the triple-digit inflation rate of the late 1980s. Unfortunately, while the government's neo-liberal economic policy may have resulted in an increase in investment and GDP to date this growth has not translated into a significant reduction in unemployment or improved job security for the citizens of the country. It has also come at the expense of strong enforcement of the country's new labor laws, since the government sees protection of labor rights as being at odds with a liberal economic policy as will be discussed later in great detail. Thus, while the government has fulfilled its obligation under Article 7 of the International Covenant of Economic Social and Cultural Rights (ICESCR) to take steps to implement policies to achieve steady economic development, it has failed to achieve a corresponding social growth.

The overall unemployment rate as at 2002 was 5% and the urban unemployment rate was at 10%.82 Although high, this figure is not wholly representative of the unemployment crisis the country is experiencing. More telling is the rate of under employment (those working less than 40 hours a week) which stands at 65% (75% of women and 55% of men).83Given the high grow1h rate of Uganda· s population unemployment and underemployment are poised to increase if current trends continue. According to Uganda's Population Report, released by the

Ministry of Finance in 2010:

In Uganda, like many other African countries, the rate of labor force supply has outstripped that of job creation. Uganda's total labor force was estimated at 1 Og million persons in 2006 (UNHS 2005106) and is projected to reach 19million by 201584 Studies further show that less than 5% of the total labor force has permanent jobs85Further,wage employment (employees earning a regular wage) currently accounts for less than 20% of Uganda's labor force,86is concentrated in the public sector and, by the government's own admission, has not been growing as envisaged.

Some have speculated that the growing discontent with the level of unemployment is a time bomb for social unrest: Go and stand on Awich Road or Kilgum Road to Gulu town every morning, you will see a stream of thousands of young men and women flowing to town like water to look for what to do, but in most cases they get disappointed, they don 't get the jobs. What will you expect if the situation remains as it is? They will get tired, and finally, they will revolt. The consequence of the high unemployment rate has been to create a labor market wherein workers have no bargaining power. Employees feel lucky just to get work and are therefore reluctant to enforce their statutory rights. Employers are free to dedicate the terms and conditions of employment, an imbalance that is reflected by the high number of casual laborers and laborers working without a written contract of employment. According to the Uganda Bureau of Statistics report 2016, the Unemployment rate in Uganda decreased to 3.80 in 2013 from 4.20 percent in 2012. Unemployment rate in Uganda averaged 3.63 percent from 2003 until 2013, reaching an all time high of 4.20 percent in 2010 and a record low of 1.90 percent in 2007.

Youth unemployment

Youths in Uganda are the youngest population in the world, with 77% of its population being under 30 years of age. There are 7,310,3 86 youth from the ages of 15-24 years of age living in Uganda. The youth Unemployment rate for young people aged 15-24 is 83%.89 Unemployment and under employment of youth (ages 18-30) is of particular concern in Uganda and with 56% of the population under the age of 18 and the average fertility rate at 7 children per woman, this issue is only expected to get worse.90 Uganda currently has over 40,000 university graduates entering the job market each year but only 8,000-10,000 obtain employment.91This has fostered negative views of the education system, since paying for a university education is not seen as fruitful when so many graduates are unable to find employment. The Population Report notes that despite the high youth unemployment rate there remains a shortage of skilled labour and attributes this to an education system that is not responsive to the needs of the market.92 In an attempt to address the issue of youth unemployment the government has announced 3 initiatives:

(1) Decreasing the mandatory retirement age of government employees.

(2) Creating the Industrial Processing Venture Capital Fund and

(3) Creating the joint youth venture capital fund.

Decreasing the Mandatory Retirement Age of Civil Servants

The Ministry of Public Service in early 2010 was directed to reduce the mandatory retirement age of civil servants from 60 to 50 years, in the hope that these positions would be filled by the educated youth. The directive has yet to be debated by

Parliament, but there has already been a great deal of resistance to the proposal. Those affected by the directive have argued that it would amount to a fundamental and unilateral change in the employment contracts of public servants.93 At 50, many people still have children in school and, when budgeting for this expense, relied on the expectation of working until age 60. Implementing the change without a transition period would be very damaging to these individuals as there is a large variation between what an individual can make in I 0 years of public service versus what they will receive in I0 years of pension payments. It is imperative to note that as much as it is hoped that these positions will be filled up by youthful people, compulsory retirement will have a negative effect especially in cases where the ones being forced to retire are still physically active, mentally alert and bubbling with experience. Further, there is cause to seriously question whether the government would be able to pay the large number of pensions which would suddenly become due if this change were implemented and as of August 2010, the Ministry of Public Service was short by 300 billion shillings to clear pension payments that have accumulated since the late 1970s. 94

A spokesperson for the Government and Allied Workers' Union suggested that instead of substituting new graduates for experienced workers, thereby losing much of the public services' skilled labour, the goverument should focus on filling the60,000 posts in local government that currently remain empty.95 Implementing this suggestion would unfortunately also require government capital that may or may not be available. An alternative and softer measure to reducing the mandatory retirement age would be allowing for voluntary retirement at age 50.

The Industrial Processing Venture Capital Fund

The second proposed change, which may yield a more fruitful outcome, is the development of the Industrial Processing Venture Capital Fund. The fund established to provide skilled youth with the necessary stmiup capital for business a low interest rate. 96 The aim of the fund is to foster entrepreneurial activities an1ong youth to assist the domestic economy m1d decrease unemployment. In June 20 I Othe government announced that it had allocated 4 billion shillings in the 2010/2011 budget for the development of the fund.97 How this money is to be spent over the coming year and the impact that it has should be closely monitored.

Joint Youth Venture Capital Fund

The government signed an agreement with three commercial banks on 21st March 2012 to create 25 billion shillings youth joint venture fund. The money is meant to support the growth of business ventures owned by the youth aged between 18 and 35 years and help create jobs for young people. The money will target start-up and small businesses to address bottlenecks of accessing affordable loans, the funds will also focus on improving the competitiveness of the business environment

to enable the private sector to play a dominant role for employment generation, which will be enforced by vocational training. It is also aimed to support viable and sustainable small and medium-sized enterprises across the country because they comprise over 90% of the private sector. However, the greatest challenge is that at present, the government does not have any legal policy on the both the Youth Joint Venture Capital Fund and the Industrial processing Venture Capital Fund. There is no legislative framework providing for the aforementioned funds.

There is still a big gap within the Employment Industry in Uganda regarding a right to work in Uganda as many people especially the youth as analyzed above are left jobless. Therefore, government should put in place enforcement measures to reduce this contradiction.

EMPLOYMENT STANDARDS AND APPLICABILITY OF EMPLOYMENT LAWS

This part examines the current level of enjoyment of the right to just and favourable working conditions as provided in Article 7 of the ICESCR and pursuant to the 1995 Constitution. Emanating from the right to work is the right of everyone to enjoy just and favourable conditions of work. Article 7 of the ICESCR provides for this right as follows:

The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

a) Remuneration which provides all workers, as a minimum, with:

1. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; A decent living for themselves and their fatnilies in accordance with the provisions of the present Covention.

b) Safe and healthy working conditions;

c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay. Article 40(1) of the Constitution, mirrors this provision of the ICESCR with one exception: it only goes so far as to guarantee equal pay for equal work, failing to codify the entitlement to fair wages. Uganda's new Employment Act goes a long way towards protecting these rights, however implementation and enforcement

of this Act is lacking, particularly in the private sector.

The right to work under safe and healthy working conditions is discussed in the following chapter of this report: Occupational Safety and Health. The contract of employmen An employee's contract of service may be written or oral and the provisions of the Employment Act apply equally to both. If an employee is unable to read or understand the language of the contract of employment, the contract must be attested to in accordance with the Act. 100 Except where expressly permitted by the Employment Act, a contract of employment may not derogate in any way from the rights set out therein and any clause which purports to exclude a provision of the Act will be deemed void. Casual labourers and workers employed for a fixed term are rarely given written contracts, a practice which makes enforcement of their rights very difficult. The Platform for Labour Action noted that attempts to sensitize workers about the importance of demanding a written contract have not been fruitful. They explained that, given the current rates of unemployment, employees do not feel they are in a position to make demands "There is no work [so] people work with or without contract letters."

Section 59 of the Employment Act stipulates that upon entering into a contract of employment, whether written or oral, an employee is entitled to receive written particulars of that contract, including: hours of work, the date upon which service began, the employee's wages and the interval at which they are to be paid.103Unfortunately, this provision of the Act is little known and rarely followed. 104

Equal pay for equal workVersus Minimum wage debate.

Pursuant to Article 7 of the ICESCR and Article 40 of the 1995 Constitution, employees are entitled to equal pay for equal work. As stated in the ICESCR, this means that employees are entitled to equal remuneration for work of equal value without distinction of any kind. Further, pursuant to the Employment Act, employees are entitled to freedom froth discrimination in employment on several enumerated grounds including: race, colour, sex, religion, political opinion, national extraction and social origin. Discrimination in employment was not one of the more prevalent complaints uncovered by FHRI in its research. However, the Uganda Horticulture and Allied Workers Union (UHA WU) did report that wage at Tilda do not necessarily correspond to an employee's position and level of experience but are instead set based on the discretion of management; in other words, employees working in the same position for the same number of years may be paid significantly different wages. 106 The Uganda National Teachers' Union also noted that discrimination on the grounds of HIV status is an issue in the education sector:

We have many cases where, when the teachers get to know that a teacher is HIV positive and starts maybe falling ill, they go to the district education

officers and they tell them to have that teacher transferred to another school. Transfer on the grounds of HIV status is directly contrary to section 6(3) of the Employment Act which prohibits discrimination on the grounds of HIV status and defines discrimination as any distinction, exclusion or preference made on the enumerated grounds.

Section 71 of the Employment Act further states that an individual's HIV status shall not constitute a just cause, for dismissal.

Reasonable working hours and adequate rest

Part IV of the Employment Act sets out the rights and duties of employees and employers in the employment relationship, including the right to: weekly rest; work no more than 48 hours per week; annual leave and public holidays; sick pay and maternity/paternity leave. Weekly rest Employees are entitled to one day of rest for each 6 consecutive days of work. In the course of this research, it was observed that the requirement for weekly rest was fairly well adhered to for permanent employees but that casual workers were less likely to get the required day off.

This may be attributable to Section 52 of the Employment Act, which states that workers whose pay period is one week or more cannot be deducted pay for their mandatory day of rest. 110 In other words; workers whose pay period is less than one week (i.e. casual labourers) do not have to be paid for their statutory day of rest. As a result.most casual labourers will opt to forfeit their weekly day of rest in order to maximize their earnings.

Workweek

Employees may not be employed for more than 48 hours per week and 10 hours per day without being paid ove1iime. 111 Although there are several exceptions, such as shift work, even for these employees a limit of 56 hours per week on average is set.Failure to pay overtime was reported as a problem in the private sector. National Union of Education Institutions has this to say: The only problem we have in this area is if people go beyond working hours there is no specific arrangement for paying them extra hours of overtime inpublic Universities they are paid overtime. In schools, primary and secondary institutions and colleges there is no specific arrangement for that.

The requirements for weekly rest and payment for overtime as set out in the Employment Act are not mutually exclusive, however, and compliance with one carmot be traded off for non-compliance with the other.

Sick leave

Employees who have performed at least one month of continuous service for their employer and are contracted to work for at least sixteen hours a week are entitled to pay for the first month's absence from work at the full rate of pay. It was found out that many employees fail to notify their employers of their absence and that this failure sometimes results in dismissal:

They [workers] are also dismissed when they get ill and cannot report on time. When they are finally able to get to a phone to call in, they are already dismissed without a fair hearing. 116 Pursuant to the Employment Act employees are required to give notice to their employer of their absence, but only as soon as is reasonably practicable. 117This provision in the Employment Act seems to take into consideration reasonable causes that may delay an employee from calling in. Even if they are not able to call in at all this failure does not justify summary dismissal. Section 41(6) of the Employment Act provides instead that an employee who fails to show up for work without notice will not be entitled to pay for that day unless they have completed at least 3 months continuous services and the absence is due to an 'exceptional event,' such as a summons to or the death of a family member. The Act also provides that, where requested by employers, employees will provide a medical cetiificate substantiating their iilness.118This is also difficult for some employees with limited access to medical services: Also, the process of getting sick leave is difficult. If you are sick, in order to be paid for your time off, you must access a hospital to document that you are ill. IJ9 In some areas, this takes so long that some teachers are not benefiting. 120

This section of the Act should be amended to require medical certificates only for absences of one week or more.

Annual and maternity leave

Employees who have performed more than six months of continuous service for their employer and who are contracted to work for sixteen hours a week or more are entitled to 3 weeks of paid vacation per year, to be taken at a time agreed between the pmiies.121 While this is reasonable on its face, it was found that some employers avoided granting annual leave on ground that the requested times were not convenient. To address this issue, section 4(1) (a) of the Employment Act should be amended to state that annual leave may be taken at a time consented to by the employer, which consent may not be unreasonably withheld. Again, entitlements to annual leave appeared to be well respected in the public sector but less so in the private sector:

Women are entitled to two months of paid maternity leave and their husbands to 4 days paternity leave.l56 Women are also guaranteed the right to return to the job held

immediately before taking maternity leave or a suitable alternative on terms no less favorable than the previous employment.

Despite their entitlements, for some employees taking leave is very difficult in practice: Theoretically, teachers are given leave. But those in the rural areas are vulnerable. When they leave, there is no one to take their place, so when they take leave there is no teacher for that class. The Uganda National Teachers Union reported that it has been advocating for increased funding for the education sector and pay rise for teachers because the low salaries paid to teachers has been an impediment to recruitment resulting in a shortage of qualified teachers.

Wrongful dismissal

Wrongful dismissal is where an employee has been dismissed without notice or an employee has not- been given the right amount of notice, or the employment is terminated contrary to the contract. Wrongful dismissal is based upon the actual contract between the employer and the employee and so breaches of that contract by the employer could give the employee the right to sue for wrongful dismissal.

Legislative Framework

Most contracts of employment may be terminated by either party giving the necessary notice of termination. This is what is called dismissal by notice a was in Ridge VS Baldwin the learned judge held that dismissal on proper notice is lawful regardless of the motive behind it, that is to say, at common law there is no obligation upon the employer to give reasons for dismissal.

An employee cannot be terminated without adequate notice, compensation in lieu of notice, or just cause. Summary termination occurs where an employer terminates the service of an employee without notice or less notice than the employee is entitled to under section 58 of the Employment Act. Summary dismissal is only justified when an employee's conduct amounts to a fundamental breach of his or her obligations under the employment contract. 128Prior to reaching a decision of whether or not to dismiss the employee, the employer must explain to the employee the grounds that may lead to his or her dismissal and the employer must hear and consider any representations of the employee. Of significance in a country where so many people are paid monthly, where an employee's pay period is longer than the period of notice to which he/she is entitled, the employee is entitled to notice equivalent to that pay period.

Probationary employees

The above restrictions on termination do not apply to employees who are on probation, however probationary employees are entitled to a minimum of 14 days'

notice or payment of seven days wages in lieu of notice prior to dismissal. All other employment standards apply equally to probationary employees, subject to the provisions of the Employment Act. A probationary period can be up to six months with the possibility of a six-month extension with the agreement of the employee. The allowance for a six-month extension is another provision of the Employment Act that leaves employees vulnerable in an economy where employees have little to no bargaining power.

Dismissal without just cause

Summary dismissal is primarily a problem in the private sector. For example, the General Secretary of the Uganda Nurses and Midwives Union reported that: The government has procedures in place to ensure that people are not wrongfully dismissed. But in some private hospitals they can just dismiss a worker at any time. It is common there, but in government there are disciplinary measures. Fear of summary dismissal acts as a significant deterrent to employees attempting to enforce their rights: "Workers are often dismissed right away when they ask for better working conditions." Prohibited grounds for summary dismissal as set out in the Employment Act include: pregnancy. HIV status. Initiation of a complaint against an employer. or an employee·s membership in a trade union or participation in activities of a trade union. This latter ground for dismissal was the most frequently complained of. While employees who are members of a union are' more susceptible to wrongful termination they are also more likely to seek redress in the event of summary dismissal. Union representatives will usually act quickly to file a wrongful dismissal complaint with a labour officer where an employee is dismissed without notice. If a labour officer decides that an employee's complaint of unfair termination is well founded then the, labour officer can order that the employee be reinstated or appropriately compensated. Unfortunately, without guidance or facilitation, this remedy is not always practically accessible for non-unionized employees. Other factors inhibiting access to justice include the chronic shortage of labour officers and the in operation of the industrial Court, which is the only avenue for appealing the decision of a labour officer.

Foreign Investors.

In addition to issues of wrongful dismissal, one of the most frequent complaints heard on the subject of employment standards is in respect of foreign investors: Many investors come to this country and you wonder whether they have been shown the labour laws of this country. Uganda has one of the best labour laws in Africa, but they come and violate the workers' rights the way they want.

Julian Nychwo, 'Industrial Relations Officer with the Federation of Uganda Employers, defended the larger multinational corporations as being generally respectful of local labor laws explaining that it is the smaller foreign operations that are more likely

to be uninformed about their legal obligations.137 The General Secretary of the Uganda Building Construction, Civil Engineering, Cement & Allied Workers' Union (the Construction Union), stated that foreign investors in the construction industry are notorious for flaunting the country's labour laws: African governments have recently collaborated with the Chinese government. They are coming here to invest in Africa. They have come in a big force. But they abuse workers a lot.They don't accept unionization and human rights. This is something we want to talk about very clearly. Labour inspectors have also encountered difficulties with foreign investors when attempting to conduct routine inspections to enforce occupational safety and health laws: The challenge is that some of the foreign investors are not in Uganda for development; they are in Uganda for profit. Sometimes politicians guarantee them protection. So we have the laws, and when we come to enforce them, the investors hide behind the promises of the politicians.

There are times when some political leaders say that the investors should not be disturbed. Then when you come, the investors away that so and so said this and you need to get this and that letter in order to come. We have the law that we are able to rely on, but we are going around in circles to the police etc. 139 The current practice of government insulating business is not limited to foreign investors. As explained by the former Secretary General of NOTU, most politicians in Uganda are receiving political and financial support from local and international companies and, in a bid to retain their support, they will sometimes intervene on their behalf to see that investigations into labour related issues are dropped. 140 In addition to poor enforcement of employment standards, a common concern with foreign investors is the failure of business owners and management to engage translators to communicate with the workers.

Minimum Wage

On this issue of the minimum wage, Dr. Sam Lyomoki, Chairman of COFTU has this to say: The President kept saying that he was consulting to get the right figures. Up to now we have put pressure, but still waiting. .. For him he just says he is consulting. He has been consulting since 1997. He has been consulting for 13 years.

Union representatives and employees unanimously expressed the need for enactment of a law providing for a minimum wage. The UDHR states that ··everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worth of human dignity."Uganda has ratified the ILO Minimum Wage-Fixing Machinery Convention which requires member states to "create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in ce1iain trades."143 The last minimum wage in Uganda was set in 1984 at 6,000/= per month. However, in 1986 there was a cu!Tency fold, so today this would equate to 60/= per month (roughly USD $0.03). In 1997 the Minimum Wage Advisory Board, established two years prior, recommended a minimum wage of 75,000/= (USD$32)

but "the President and the Ministry of Finance rejected the Board's proposals, and indeed any idea of a minimum wage at all."145 Wages in Uganda's agricultural industries (such as rice, tea, sugar and tobacco) are particularly low a fact which, coupled with employees' grievances over poor living and working conditions, has led to a number oflabour disruptions and even business closures.

Until recently, flower farm employees were among those employees at the bottom end of the pay scale, making as little as 2,000/= per day (thereby putting these employees below the world poverty line). 146 However, after a long struggle which involved numerous labour disputes, the lower sector has emerged as rare good news, having recently signed both recognition and an industry wide collective bargaining agreement with the Uganda Hmiiculture and Allied Workers Union (UHA WU).147 This has hopefully resulted in an increase in pay for flower sector employees. Low wages have also led to 'brain-drain' (emigration of the country's most educated workers).

For example, Ministry of Health revealed that in 2010, 808 nurses left the country to seek higher-paying work abroad despite the country's shortfall of2,290 nurses in government hospitals alone. This exodus of nurses is representative of the larger trend with Uganda reportedly losing at least I ,400 skilled professionals each year. Uganda is presently the only country in East Africa which, practically speaking, has no minimum wage. No doubt this is perceived by some as a competitive advantage that will attract investment under the new EAC common market, as well as from the broader international community: They say they cannot fix the minimum wage because this is a liberalized economy. So they want the market to fix the wags, which is very unfortunate. When you leave it to the market to fix the wage, then you are subjecting these workers to exploitation. What this neo-liberal strategy overlooks, however, is that at the root of almost every industrial action in the country is a complaint about wages. The cost borne mmually by companies due to closure of businesses and remediation of labour disputes may well outweigh the cost of increasing salaries to the level of a reasonable living wage. If Uganda wants to focus on diffi·acting foreign investment, employees and employers would both ultimately benefit from scraping the race to the bottom strategy in favor of alternatives such as tax and transport incentives.

On 1 December 2010, Cabinet passed the National Employment Policy, which had been under review since 1998. Among other things, the Policy recommends the establishment of a Minimum Wages Advisory Bom·d to undertake research on the impact of minimum wages on employment and wage trends in key sectors. For employees who have watched the government drag its feet on implementing a minimum wage for the last two decades under the presence of seeking feedback, the time for research is long past. It is hoped by all, and will be closely watched to see, that the promises made under the National Employment Policy shall swiftly turn into action.

The Universal Declaration of Human Rights states that "everyone has the right, to just and favourable conditions of work and to protection against unemployment." The International Covenant on Economic, Social and Cultural Rights fmiher obligates member states to: "recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular safe and healthy working conditions."In addition to these international human rights instruments, the government of Uganda has ratified a number of ILO conventions for the protection of workers' safety and health. Uganda's international commitments are reflected in section 40 of the 1995 Constitution, which states that Parliament shall enact laws "to provide for the right of persons to work under satisfactory, safe and healthy conditions. This constitutional obligation was realized with the enactment of the Occupational Safety and Health Act and the Workers Compensation Act.

On paper, these laws provide broad preventive and restorative measures to protect the safety and health of workers at the workplace. The OSHA sets out the duties of employers and minimum standards of workplace health and safety while the Workers Compensation Act establishes employer liability in the event of workplace accidents and injuries and an obligation to insurance to provide compensation for these incidents. The Key common Law principle is that the employer owes a duty of care to his employees as individuals. In Paris Vs. Stepftev Bough Council, 158Mr. Paris worked as a cleaner, part of his duties consisted of scrapping rust from .the Underside of vehicles, this was not a normal practice for each employer to provide goggles for this task. Mr. Paris had only one good eye and when a splinter of rust entered his only functioning eye, Mr. Paris was totally blinded. Court held that the employer owes a duty of care to the employee as an individual Mr. Paris's employer should have foreseen that there was a great risk to injury and acted accordingly. In Wilson & Cycle Coal Co. Vs US English 159 it was held that the liability for safety and health of employees must lie only on the employer Thus though performance of safety duties may be delegated the responsibility remains with the employer, in other words, the vicarious liability principle operates to hold the employer liable.

Preventive measures

As pointed out by the General Secretary for the National Union or Plantations and Agricultural Workers (NUPAW), when it comes to occupational safety and health, enforcement of preventive measures should take priority. In Berry Vs Stone Nanganese Co. Ltd.The employees worked in an area of the works in which noise level was high, the employer provided ear defenders but little effort was made to ensure that employees actually wore them. Court held that in view of the known danger to employees from the high noise level and in view of the fact that the danger may not have been apparent to many of the employees; the employer had a duty to ensure that protective equipment was not only supplied but that the employer must see to it that they were actually used. Employers have to often not be reluctant after providing protective wears; they should ensure that proper use of the same safety

equipment is implemented. A lot of workers... are injured, others die, and they are cut by machines. Even compensation becomes a problem because they engage their lawyers and there is always a problem to compensate. But compensation is not the thing because to compensate when you have lost your arm, you have lost one eye... the thing which should be done is to protect the worker, not to compensate. It may not be enough.

The Occupational Safety and Health Act requires all employers to take "as far as is reasonably practicable, all measures for the protection of his or her workers and the general public from the dangerous aspects of the employer's unde11aking at his or tier own cost."'These measures include provision of protective equipment where required. maintenance of machinery.

Employee education on preventing workplace accidents and medical monitoring of employee health.

The OSHA further requires employees to report workplace hazards, and stipulates that employers shall not require employees to continue working in hazardous situations. Employer compliance with these requirements is varied at best. Reports from the agricultural sector, where employees are often living in collective housing at the plantation, were particularly dismal: You find that what is supposed to be given at the factories and the plantations, workers are not protected When they are not protected the workers will operate dangerous machines which are in poor condition. They are living in poor houses, no proper sanitation, no proper toilet faculties. You know, they are drinking water which is from unhygienic sources. All these are issues of health and safety. Even the inspectors from the Ministry of Labour are supposed to inspect the places to ensure that they follow the safety regulations and, but they don't. The above comment from the General Secretary of the National Union of Plantation and Agricultural Workers highlights some of the primary safety and health issues observed, including: unhygienic drinking water, insufficient protective gear and a general lack of enforcement of legislated Occupational Safety and Health standards.

Drinking Water

There were reports of a number of workplaces failing to make safe drinking water available to their employees. Section 50 of the OSHA states: Provision of act equate wholesome drinking water. An adequate supply of wholesome drinking water shall be provided and maintained at suitable points in a workplace, conveniently accessible to all workers. For example, at the time of writing this research, the water collecting plant at Phoenix Logistics (Uganda) Ltd was out of use and employees were required to either come with their own water or go without. Similarly, representatives from the NUPA W reported that plantation workers living on site often Jive in poor and unsanitary conditions and drink water from unhygienic sources.166 For example at Kasaku Tea Factory, employees may either bring their own Water or drink pipe water.

Representatives from the Uganda National Teachers Union (UNTU) also advised that- some public schools do not have drinking water within the school compound.

Protective Equipment

Section 13 of the Occupational Safety and Health Act obligates employers to provide adequate personal protective equipment to guard against the risk of accidents or adverse effects on health.169Compliance with this requirement is low. Employee failure to keep and/or wear protective equipment was frequently cited by employers as an excuse for non-compliance with the requirement to provide protective gear. On a tour of the Uganda Tea Corporation's plantation it was noted that none among a group of sprayers working in the field were wearing masks, gloves or goggles. 170 Sprayers at UTC use a blend of two chemicals to control the growth of weeds roundup (glyph sate) and 2-4D (aphenoxy herbicide). Overexposure to 2-4D may cause a variety of side effects including nausea, vomiting, abdominal pain, decreased blood pressure, muscle weakness or muscle spasms.171 Exposure to these chemicals has also been linked to increased risk of Parkinson's disease. 172When asked about this, Vikram Singh Giauhan, General Manager at Uganda Tea Corporation, noted that protective equipment is provided to employees, 173 as well as training on the proper handling of chemicals, but explained that the company was faced with the problem of employees selling their equipment: For them they get a gumboot and after that its sold. You give it to them again and they sell it again. They also have to realize the difficulties which can come if you don't' use the gumboots. We are providing them with soap and everything, but (if someone takes the soap and sells it what can I do? As frustrating as this may be, .the responsibility to ensure that employees are wearing the required protective gear ultimately rests with the employer. This is even explicitly set out in the section of the OSHA which mandates the provision of protective clothing and equipment where the level of pollution and chemical substances in a working environment exceed exposure limits:

Section 19(2) states that 'It shall be the duty of an employer to ensure that personal protective equipment provided under subsection (1) is used wherever it is required' In Wilson& Cycle Coal Co. Vs English 175 court held that the liability for safety and health of employees must lie only on the employer. Thus though performance of safety duties may be delegated the responsibility remains with the employer. Enforcement of the use of protective equipment can be accomplished through the development of a workplace policy that sets out progressive disciplinary measures for employees who fail to wear their equipment. In fact, the OSHA obligates any employer with 20 employees or more to have a workplace health and safety policy in place that is known to employees and enforced. The alleged practice of employees selling their equipment could be curbed by requiring employees to leave protective equipment with their supervisors at the end of each day or check equipment in and out of a designated storage space on a daily basis. Another excuse which the researcher frequently heard for the failure to provide required protective equipment

was financial hardship. At Phenix Logistics, a textile plant, a manager who wished to remain anonymous emphasized the need to make a profit: When you look at a factory, it is creating jobs. Yet it needs to profit. The employer is responsible to look after the workers' health, but it cannot continue without making a reasonable profit. So the employer needs to look at how to make profit.

Lack of funds or a decreased profit margin is similarly not an excuse for the failure to provide required safety equipment. If employers cannot afford to operate safely then they cannot operate legally. Employers arguing that safety can be traded-off for profit are a reflection of the current attitude of government which prioritizes investment over enforcement of labour rights and which views the two objectives as being at odds. As discussed elsewhere in this report. Labour rights should be enforced first and foremost because they are rights and because it is the law, but also because failure to enforce employment standards will only provide savings in the short term. The ultimate cost of non-compliance can be tenfold the short-term savings. This is particularly true of the consequences of failing to enforce minimum safety standards as workplace accidents could result in damages, ranging from expensive lawsuits to the closure of the business while accidents are investigated or employees on strike. In the case of fatal workplace accidents, employers must pay the family of the deceased a sum .equal to sixty times the employee's monthly earnings as well as expenses of medical treatment and burial of the deceased.

Enforcement

The Occupational Safety and Health Act requires the appointment of labour inspectors to conduct workplace inspections and ensure compliance with occupational safety and health standards. Any proceedings instituted under the OSHA are brought before magistrate courts. 179Due to the funding constraints faced by the Ministry of Gender, Labour and Social Development there are presently only 22 labour inspectors in the entire country. 180 Training programs for labour inspectors have also been slashed; new labour inspectors now receive only one month of training after being appointed. 181 The obstacles faced by labour inspectors in attempting to fulfill their mandate were summarized as follows: We currently have three operational vehicles. One is being repaired, so we will soon have four operational vehicles. This is an area that has been lacking. Also facilitation for inspectors when they need to go upcountry or somewhere for inspection, and they need to stay there for some time, they need a maintenance allowance but there is no money for it. We also face challenges in the timely production of reports. We currently share three computers between us, which slows our ability to produce written reports quickly after completing an inspection.

Safety inspections have become so rare an occurrence that they are commonly assumed to have stopped altogether: I remember in the past, the Ministry of Labor had a department of Occupational Safety and Health They used to go to workplaces and even check workers, especially in the government sector, [but] I don't see it being

done anymore. 182 the support and facilitation of government, labour inspectors have been stripped of their effectiveness as a tool for enforcing the requirements of the OSHA In the absence of regular workplace inspections, it is left to employees and union representatives to bring violations of the OSHA to the attention of labour inspectors. Many employees, however, are too afraid of reprisal to blow the whistle on their employers. In the course of this research, it was leamt that employees were dismissed simply for rep01iing a workplace accident (a requirement under the OSHA):

There are employers who threaten employees that 'if you report about an accident we will terminate your contract' and in most cases they do when you get an accident and you report, instead of treating you, you may be issued a termination letter. 183 As a result, numerous OSHA violations go unnoticed and unrepmied. On the bright side, those violations of the OSHA that do come to the attention of labour inspectors are then prosecuted in magistrate courts, rather than the Industrial Court. Employees are therefore not at the, same disadvantage when it comes to prosecuting OSH violations as they are with labour relations disputes and employment standards complaints.

Liability and compensation for workplace injuries.

The Workers' Compensation Act establishes absolute employer liability for any personal injury resulting from accidents that occur in the course of a worker's employment including accidents occurring while an employee is travelling to or from their workplace. 184 Compensation for workplace accidents may include up to five years' salary replacement (including the value of benefits such as food, accommodation, and other benefits in kind supplied by the employer), as well as the cost of medical treatment associated with the illness or injury. Employers are required by the WCA to maintain insurance to cover compensation claims. Common law has it that, a master is liable for his personal acts and omissions together with breach of his primary duties to supply hours of work, health and welfare, a safe system of work, proper appliance and efficient personnel. In JURNA VS NYTIL 187 an accident had occurred involving Asile, a laboratory assistant who was mixing sulphuric acid and using new containers for the purpose of some industrial process.

In the process the container collapsed, the mixture of the acid poured on the floor and his boots and as he tried to avoid it and was later hospitalized for 2 months and he claimed damages for permanent disability. It was held that at common law, an employer owes a duty of care to his employee to maintain safe premises, a safe system, safe appliances, implement and plant. The duty consists of the employer taking reasonable, precautions for the workman's safety. Workplace accidents must be reported to employers who are then obligated to report them to the labour district officer.The employer must then arrange to have the employee examined by a qualified medical practitioner at no charge to the employee.189 The employer and employee may then, with the approval of a labour officer, come to an agreement as to

compensation, provided the amount is not less than that stipulated under the WCA. If the employee and employer fail to come to an agreement within 21 days from the date of the accident then the worker may make an application to enforce his/her claim to the court having jurisdiction in the district in which the accident occurred. The unfortunate reality for most employees, however, is that a workplace injury means unpaid time away from work.

In Byarugaba Vs Kilembe Mines Ltd the plaintiff who was a minor, employed by the defendant claimed damages for injuries sustained in a rock fall in the mine as a result of which both legs were amputated, aged 22 years earning 350Ugx he was fitted with artificial limbs. It was held that provided that he was working this was merely on unauthorized method of doing work and his employers were liable in negligence. Despite all this, the government has failed to address the issue of employers who fail to compensate for workplace injuries and. without the threat of penalty; many employers simply neglect to maintain the required insurance policies. The problem is compounded by a situation where; employers don't want to maintain insurance because the premiums are high but, insurance premiums are high because so few employers have subscribed. Failure to carry workers compensation insurance is an issue which extends even to the public sector. Dr. Sam Lyomoki, the Chairman of COFTU, recalls the tragic deaths of 39 health sector workers in 2007/2008:

We have cases of workers who died because of the Ebola virus in different hospitals, but getting compensation for those workers was very difficult because the government had not provided for the money in the budget. Enforcement of the requirement to carry insurance could be achieved by requiring employers to show proof of an up to date insurance policy in order to have their trading licenses renewed.

Conclusion

Violations of the employees right to leave stems from various factors like weak workers associations which cannot fight for its members right to leave since such associations are penetrated by the employers themselves who influence the internal running of such associations, the other factor is enforcement of such laws that are in existence since government lucks enough man power to monitor both employers and employees. Review on the employment laws and regulations in Uganda.

The Primary laws in Uganda governing Labor rights include; The Workers' Compensation Act 2000, the Minimum Wages Act 2000, the Employment Act 2006, the Labour Union Arbitration and Settlement Act 2006 and the Occupational Safety Act 2006. Under the Employment Act 2006, the conditions of employment in Uganda are stated. The aspects of employment covered here are contract of service, termination of contract, termination notices, and protection of wages, hours of work, rest and holidays, employment of women, employment of children and care of employees. Sections 29 and 37 under which protection of wages lies, gives workers

a right to their pay which may be a salary or wage, failure of which can result into the termination of a recruitment permit for an employer who does not pay.

Section 38 under which hours of work, rest and holidays fall, sets out an eight-hour working day and any overtime worked must be paid at one arid a half times the normal rate of pay. It is further stated that, an employee whose hours of work exceed six a day, is entitled to at least an hour's break or more so that he or she does not work continuously for more than five hours. An employer is required to give his or her employee holidays with full pay at the rate of at least one and a half working days for every month of actual service. "The law does not allow any agreement to forego such as actual service is deemed to include days of weekly rest, public holidays and days of absence from work due to sickness not exceeding 30 days per year. As for public holidays, it is stated, employees are entitled to resting on all public holidays as gazetted under the Public Holidays Act otherwise, "the employer is obliged to pay an employee who works on a public holiday double the normal rate or grant them a day off later with normal

Pay". Dismissing workers at v;ill is a violation of the law. The right procedure to be followed according to the Ministry of Labour is to give a prior notice for service that has lasted for less than a year. 15 days· notice for service that has lasted a year but is less than three years and one months· notice for sen·icc that has lasted three years but is less than five years. Two months notice should be given for service that has lasted at least five years but is less than ten year and three months' notice ifthe service has lasted 10 years.

Under the Workers Compensation Act 2000, it is stated that an employee is entitled to compensation for any personal injury from an accident arising out and in course of his employment even if the injury resulted from the employee's negligence. "Under this Act, compensation is automatic. The compensation is to be paid by the employer whether the worker was injured as a result of his own mistake or not," it is stated. For an injury that leads to death, the compensation should be equivalent to an employer's monthly pay multiplied by 60 months.

A REVIEW ON THE WORKING CONDITIONS IN UGANDA

Fixing of Minimum Wages under the Statutory Machinery provided under the Minimum Wages Advisory and Wages Councils Act is an important and necessary safeguard for all unskilled workers especially those who may not be covered by collective bargaining. Decent work does not permit exploitation of workers and there is a need to have a minimum wage in Uganda. According to newspaper reports, Dr. Sam Lyomoki, a workers' MP, said that work Policies were reducing workers to "slavery and brutality," and that workers should be mobilized throughout the country to struggle against such policies. There are many incidents of non-payment of wages, unlawful dismissal/termination and non-payment of terminal benefits. This

is evidenced in the number of workers seeking legal aid from NGOs. In 2004 alone, for example, 246 clients sought legal support and representation from Platform for Labour Action (PLA) and in 2005, 640 sought legal aid to resolve labour related claims.197 These abuses are common in many formal workplaces affecting, for example, teachers, security guards flower farm workers and big enterprises such as fishing. Safety, poor working conditions, abuse of workers' rights, lack of capital, lack of proper work tools and the difficulty of collecting payments from customers are some of the major challenges facing urban informal sector employees.The working conditions in most urban informal economy sites are appalling long working hours with no rest as well as lack of adequate toilet racilities storage space for their goods and child facilities.

ASSESSMENT ON THE APPLICATION OF LABOR LAWS IN UGANDA

Uganda's labour laws promote the rights of workers. However, the level of enforcement of, and adherence to, these laws is in limbo. Work deficits can be reduced when the labour laws are adhered to by both the employers and employees and this includes ensuring that labour disputes are fairly heard. The commercial justice system is deemed by many especially within the informal sector as being expensive, slow and corrupt. Labour rights can also be recognized when workers sensitized on their rights at work. This can be done through civic education using the structures of labour unions and NGOs. The Labor Disputes (Arbitration and Settlement) law is an opportunity for the labour officers to resolve disputes nearer the people. They however, lack facilities and resources to carry out their work. The Government should allocate resources for labour dispute resolution. The Industrial court should be facilitated to develop regulations and a chief judge be appointed to preside over the court to enable the law to be functional.

Uganda ratified the ILO Right to Organize and Collective Bargaining Convention which provides for workers' rights to freedom of association and collective bargaining as well as workers' (unions) protection against anti-union discrimination. Uganda's Constitution also provides for a comprehensive range of human rights as required under the different conventions. Despite these provisions in Uganda over the years, the right to freedom of association by workers has continuously been threatened. Some unscrupulous employers block workers from organizing and forming trade unions, contrary to the Uganda Constitution of 1995.199

Uganda has labour laws and regulations, but their enforcement has been weak and inconsistent due to capacity constraints at different levels of Government. The Constitution of Uganda provides for the right of every person to join workers· associations or trade unions and the law allows unionization if the majority of the work force supports it. Further, the law prohibits forced or bonded labour but the lack of resources prevented the Government from enforcing this prohibition effectively.

Also, the law prohibits employers from hiring workers below the age of18. However, due to weak enforcement, child labor is common. Most working children are employed in the informal sector, often, on the subsistence farms of extended family members or as domestic servants. Uganda is a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination against Women and to the Vocational Rehabilitation Employment (Disabled Persons) Convention of 1983, though it has not ratified yet the relevant ILO Conventions Finally minimum wage legislation exists, but the minimum wage rate has not been adjusted since the 1960s.

RECOMMENDATIONS

While some progress has been made as seen above, there is need to also highlight the challenges facing Ugandan workers and also find a way forward. The fundamental challenges facing workers in Uganda range from an erratic wage system due to the absence of a minimum wage, the lack of standardized working hours, both in the private and public sectors, low involvement of workers in policy matters that affect their plight, the absence of performance incentives, to the absence of a vibrant and all-inclusive national labour platform to protect and promote the rights and interests of workers.

Above and beyond. Uganda is one of the few countries without a comprehensive National Employment Policy. The absence of this policy leads to sporadic and haphazard planning and decision making regarding human resource management as there is no standardized policy guideline to set the benchmarks for employment in Uganda. There is need to have a census to take stock of the various current human resources that we have. The National Planning Authority should, therefore, take the lead in taking stock of the various professionals in the labour force that Uganda is blessed with. In this regard, the following recommendations were sought from different sectors;

To Government

The government is required to re-consider the rationale that enforcing labour rights is at odds with a strong economy and may discourage Investment and cease sheltering foreign investors

• Do NOT make union registration contingent upon prior recruitment of a - minimum

Number of members as this would run counter to the Constitution and several International legal instruments; and

• Do NOT limit the number of unions, which can be present in one workplace or sector as this would directly contradict Section 24 (1)(d) of the Labour Disputes Act and the freedom of association as articulated in the Constitution.

To the Directorate of Labour:

• Increase funding and facilitation of labour inspectors.

• Support labour officers in providing increased protection for the freedom of association

through enforcement of sanctions against employers who fail to recognize and bargain with unions and who punish employees for - participating in union activities:

• Review complaints made to the Registrar under section 24(3) of the Labour Disputes Act and require employers to respond within the mandated 21 days explaining their failure to

comply with the Act.

To the Judiciary:

• Until the Industrial Court is constituted, the High Court should be adjudicating labour related matters instead of referring them to the in operational Industrial Court.

To Civil Society and Unions:

• High Court decisions referring labor cases to the defunct Industrial Court 'should be appealed.

• Continue efforts to sensitize employees about their rights and duties under the new labor laws and provide procedural information on how to access justice.

• A radio program could be an effective means of achieving these ends.

• Monitor the implementation of the Industrial Processing Venture Capital Fund and expenditure of allocated funds to ensure effectiveness.

• Increase sensitization of employers. Employees, union representatives and government officials about the rights and definition of casual laborers.

• The formation or co-operatives among business owners in the informal sector should be facilitated in order to foster better working conditions in this sector.

CHAPTER ELEVEN
A REFORM ON EDUCATION IN UGANDA

"Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mine worker can become the head of the mine that a child of farmworkers can become the president of a great nation. It is what we have, not what we are given, that separates one person from another."

– Nelson Mandela

The Education Sector is not just any public sector, it is an investment sector; a sector dealing with human capital. When the right investments are made, the benefits for the individual and the country as a whole would be great.

Uganda's education system has undergone a series of reforms since independence. These reforms encompass numerous attempts and interventions to ensure that the system is robust and meets the challenges of a rapidly changing labor market and a continually globalizing world. In recent years, the introduction of Universal Primary Education (UPE) creating opportunity for millions of children to enroll in school epitomizes the positive outcomes of these reforms. However, the promise of equity and equality in education remains elusive.

The main objective of this policy brief is to bring to the attention of Ugandan policy makers, the executive and parliament, the requisite changes needed to transform our country's education system into a more equitable and high quality education system. The briefing paper is based on a more comprehensive study on the political economy of Uganda's education policy reforms and background papers presented at the High Level Policy Dialogue on Education Policy Reforms in Uganda.The dialogue mainly focused on the state of Uganda's education system and, the political economy of Uganda's education policy reforms. Based on this work, the briefing paper proposes actions required to correct the deficiencies and failures of past reform attempts. The nature of recommendations advanced in this brief are considerations for a sector-wide reform and not piece-meal reform for each individual sub-sectors.

DELIVERING EDUCATION REFORM: THE UNFINISHED BUSINESS

There is general consensus that the problem with Uganda's public education system is systemic and cannot be addressed with only knee-jerk interventions.With the introduction of Universal Primary Education (UPE) and Universal Secondary Education (USE), the quality of graduates has continually deteriorated. They are increasingly out of touch with the job market. Yet, demand for education in Uganda

has never been greater with the population rapidly growing at 3.2% per annum and with approximately half of the population under the age of 183. For the education sector, a young population implies that the government must invest significantly in the provision of education as a public good. Investment in education takes different forms including financial, infrastructural, managerial, good governance, outcome tracking and measurement, and system-wide integrity.

The importance of education as a public good and the role of education in human, economic, and capital development behove government to perform the moral and economic responsibility to provide quality and equitable education. The Education Sector is not just any public sector; it is an investment sector–a sector dealing with human capital. When the right investments are made, the benefits for the individual and the country as a whole would be great.

Over the last 30 years, the government of Uganda has made several attempts at reforming the education system focusing on equal access, equity, and the quality of education. The system has however been encumbered by systemic failures. These failures cannot be addressed by just fixing some parts of the system but rather by a comprehensive effort to overhaul the current system.

Yet, the nature and implementation of reforms in Uganda's education system has failed to address the need for a systemic redesign, which has resulted into ad hoc fixes that leave a lot to be desired. A system-wide reform requires, among others, significant changes in the existing accountability and governance mechanisms both for school and government administrators and student achievement measurements.

One of the aims of education in Uganda as stipulated in the Government White Paper on Education of 1992 is "to eradicate illiteracy and equip the individual with basic skills and knowledge to exploit the environment for self-development as well as national development, for better health, nutrition, and family life, and the capability for continued learning." As a low income country aiming at a middle income status, Uganda's education would serve the country and citizens well, if the system produced high quality and competitive graduates in a world that is continually globalizing. To do this, the government must invest in system-wide reforms that are proactive, outcome-oriented and have the effect of combating the culture of failure and inequity.

The government's strategies to achieve the aims of education are contained in several policy documents including the Uganda Vision 2040, the National Development Plan 2010/11 – 2014/15, the Revised Education Sector Strategic Plan (2007 – 2015), the Education Act of 2008, the Government White Paper on Education (GWPE) of 1992, and the annual Ministerial Policy Statements of the Ministry of Education and Sports. In particular, the GWPE has been the basis for all education policy in Uganda since 1992, following recommendations of the Education Policy Review

Commission Report of 1989. At best, these strategies and reform attempts can be explained as layered piecemeal efforts that attempted to address systemic failures without thorough conceptualization, prioritization, piloting, and time bound implementation plans.

Many of the post-independence crises in the education system are well articulated in the EPRC report of 1989, and continue to hamper progress. High dropout rates, low completion and graduation rates, understaffing, teacher absenteeism, lack of scholastic materials, inadequate funding, poor infrastructure, and achievement gaps along geographical location, all contribute to poor educational outcomes at all levels. The attempts at reform over the past 30 years have aimed at improving access, equity, and the quality of education in Uganda. These three issues are addressed here.

ACCESS TO EDUCATION

At the heart of unequal access to education in Uganda is the challenge of poverty based on the general poor-non poor distribution as well the rural- urban poverty divide. Table 1 below shows the current statistics on poverty and literacy along the rural-urban divide.

Table 1: Poverty and Literacy Distribution

Rural Urban Poverty (national = 24.5) 27.2 9.2

Literacy (national = 73) 69 (M = 77; F = 62) 88(M = 90; F = 86)

Source: 2012 Statistical Abstract, UBOS

The rural-urban poverty divide in Uganda continues to challenge development policy and practice, including education. Currently, 15 percent of Uganda's population lives in urban areas and 85 percent live in rural areas. The concentration of poverty in rural areas implores government to devise redistributive policies especially in education, and equal access is one such policy. There is also concentration of illiteracy in the rural areas with females more illiterate than males. With the introduction of UPE in 1997 and USE in 2007, the intent of the government of Uganda was to ensure increased access to education especially for the poor and those in rural areas, many of whom primary education is the highest level of formal education they will get6.

Indeed, with Uganda's "bang" approach to universal education, the World Bank lauded Uganda for doubling enrollment rates from 3.4 million to 6.9 million pupils, with a concomitant political commitment to ensure transparency and accountability in the system7.

Overcrowded classrooms, low morale among the teachers, puny salaries for teaching and non- teaching staff, infrastructural deficiencies, and a collapse of governance at the school, district, and national level have all contributed to systemic failure which shows enrollment in primary schools by numbers since 2000. Although enrollment rates seem to have increased over the twelve year period, the Education statistics show that during the same period dropout, rates have averaged five percent. What may not have been clear at the time was that the adoption of free primary education was more political than rational as it was announced at the pick of presidential campaigns in 1996. No empirical work was undertaken to guide the implementation of the UPE programmes expressed as a political pronouncement.8 As a consequence, the well intentioned universal education has resulted into a decline in the quality of education and its general delivery as a service. Overcrowded classrooms, low morale among the teachers, puny salaries for teaching and non-teaching staff, infrastructural deficiencies, and a collapse of governance at the school, district, and national level have all become part of this systemic failure.

EQUITY IN EDUCATION

Historically, the issue of equity has hinged on providing education to students with special needs, the girl child, orphans, and targeting schools in needy and "hard to reach areas". Although laudable to an extent, the affirmative action strategies government has put in place to ensure equity in education such as the district quota system and targeted bursaries for girls and students with special needs have immense policy distorting effects. For example the guidelines for district quota systems are vague and lack transparency. This makes it difficult to understand what qualifies a student for a district quota scholarship; would it be district of decency, residence, or school attendance? There is need for clear and systematic policy implementation strategies and guidelines.

THE QUALITY OF EDUCATION

To improve the quality of education in Uganda, the government proposes strategies that improve in-classroom indicators such as: decongesting classrooms, enhancing instructional quality, strengthening the teaching force, and review of curriculum, to mention a few. All these strategies would inevitably require enormous financial commitment. These finances would be used to train teachers and reduce pupil-teacher ratios and, equip students and instructors with scholastic materials including textbooks and library resources. A 2011 UWEZO report10 shows that the national average on pupil-teacher ratios stands at 58.9, which is considered to be on the higher side. In some districts, for example, Amuru, pupil-teacher ratios are as high as 75:1 and pupil-classroom average 112:111. The Uwezo report also shows weekly pupil absenteeism averaging 23.9 percent; while only 30 percent of the schools in the sample report to have library facilities; and 11 percent of pupils go without mid-day meals. All these factors undoubtedly have a significant impact on the quality

of a child's education and need to be addressed if the quality of education is to be improved.

RECOMMENDATIONS: WHAT NEEDS TO CHANGE

Building a successful 21st century education system will require a coherent strategy that builds the individual's knowledge base, critical thinking abilities, and leadership. Most importantly, the 21st century global knowledge economy will require effective political and policy leadership. Ultimately, both the strategy and leadership must focus on delivering what Barber describes as the four factors of what it might mean to be considered well educated: ethical underpinning, knowledge, thinking and leadership.

He also advances a synthesis of building blocks that are critical for successful education systems for the future, hinged on standards, accountability, human capital, structure and organization as shown below. According to Barber, success requires a system-wide approach to reform with a coherent design and effective reform execution.

The building blocks of world class education

Standards and Accountability human Capital Structure and Organization Globally benchmarked standards Recruit great people and train them well Effective enabling central department and agencies Good transparent data Continuous improvement of pedagogical skills and knowledge Capacity to manage, change and engage Every child on the agenda always in order to challenge inequality Great leadership at school level Operational responsibility and budgets significantly devolved to school level Source: Report on the International Education Roundtable, Singapore, 2009

Strengthen political and policy leadership for education

If Uganda has not developed an education system that delivers equity and quality to its learning population, it has never been due to lack of trying. As shown in the preceding sections, numerous attempts at reform have been made over the last half a century although the results remain minimal. Evidence suggests that there has not been a shortage of political will for education reform13. It is argued here that the failure to deliver quality education in Uganda is more due to the absence of political and policy leadership than the absence or lack of political will.

Political will is defined here as the political articulation or general expressions of political support for particular policy positions. Politicians at all levels make wide ranging promises to the electorate and citizens on their intentions to take action to improve the quality of public service delivery. For example, almost a decade after the Report of the Education Policy Review Commission, the introduction

of Universal Primary Education was first announced as a campaign promise by President Museveni during the 1996 elections. That was a clear expression of political will to take action. Similar declaratory statements have been made with regard to vocationalization as a political commitment to transform Uganda's labour force through a skills development program. 14 Political will can therefore be discerned from the speeches of political leaders, the campaign manifestos of political parties or the policy narratives to be found in national policy and strategy documents.

As opposed to political will, political and policy leadership connotes three important things: First, political leaders and policy makers appreciate and are able to articulate the "big policy and programmatic ideas" that are likely to have a transformative effect on the social, economic and political landscape of the country or the target community across time and scale. Second, the leaders have the capability and skill to mobilize the entire population around the proposed agenda. Third, the leaders have the capacity to ensure systematic implementation of the proposed ideas and accountability for failure. They are able to deploy public resources in a strategic manner and put together a package of incentives and disincentives to stimulate action and reduce opposition to the agenda. The appropriate concentration of political and policy leadership at the national, local government and service delivery unit level is what is required to shift Uganda's education system from the routine to a transformative phase.

Develop indicators to monitor and correct leadership and governance failures in the education service delivery system

In order to build on the progress that has been made over the last half a century of education sector reforms, it is important to develop and adopt indicators that enable the country to detect and correct any leadership and governance failures in the Nation's education system. For example, at the ministerial level, what are the gaps that explain why corrective political actions cannot be taken to address the glaring problem of low academic achievement and poor completion rates? Or in the case of funding, what mechanisms exist to hold those who are charged with managing funding for education to account when there are failures on the delivery of public funds to the beneficiary education services delivery units? Similar questions may be asked about schools that have deplorable physical infrastructure or consistent underperformance.

Mainly because there are no systematic criteria for monitoring and detecting governance and leadership failures in the delivery of education services, some of these failures are accepted as routine and consequently become embedded as part of the system that is incapable of reforming itself. Very little analytical work has been undertaken in this area and yet policy makers and political leaders require evidence to be able to take appropriate action. It is therefore important that appropriate

investments be made to undertake empirical research and analytical work that can provide a basis for the development of criteria and indicators for detecting and correcting leadership and governance failures in the education services delivery system.

Give Poor Parents "Choice" Over Their Children's School

The concept of "school choice" has generated much debate in education circles especially in developed countries, notably in the United States. School choice is a range of programs – including school fees vouchers and charter schools that give parents liberty to choose where their children will go to school without geographical or economic encumbrances. Proponents of school choice argue that choice improves school quality and efficiency through competition among schools for top performing students; enhances opportunities for students from disadvantaged backgrounds who may be trapped in bad schools; and spurs innovation through greater administrative autonomy in choice schools.

In Uganda, well off parents have a choice because the only limitation to school choice is economical. For the poor, their only choice is the poor schools in their neighbourhood. Yet, many bright children who attend the poor schools because of financial limitations get lost in the system. Currently statistics show that, per pupil expenditures in primary schools stand at approximately Uganda shillings 4,657 annually and each government aided school receives a threshold of Uganda shillings 100,000 per month for a total of nine months equivalent to the school year16,17. This pittance arguably shows how much government is committed to education: not only is it sad, but it is embarrassing. Equity and school choice would mean pupils from low-income families and the disabled would get assistance vouchers from government to attend either private schools or government aided schools with higher standards so that poor yet gifted pupils are not left behind because of system inequities.

"The purpose of school choice must be to give every child an opportunity to get a decent education". Specifically, to avail school choice to parents, government can pursue the following strategies.

■ Expand options for learning that connect well performing schools to rural or poor schools through use of technology in classrooms such as use of virtual education programs, through which students from poor areas benefit from their peers in good schools.

■ All good performing public schools should be required to open their admissions to voucher students. For those schools which are oversubscribed, admission could be done by lottery to avoid a systems capture where influential parents have an unfair advantage.

■ Parental preferences for choice as revealed through the popularity of schools or districts should be reflected in funding formulas such that the preferred choice schools are allocated more resources to meet enrollment demand.

■ Schools that continuously perform poorly or are undersubscribed should be restructured or closed to increase competition between the well performing schools for both students and resources.

Reforming the education funding architecture

There are fundamental issues that need to be resolved with regard to the financing of education at all levels. A new financing architecture that gives more authority to local governments in determining funding priorities, ensures performance based allocation of funding, and creates an environment for competition among local governments is necessary to change the current education landscape.

The education sector budget has averaged about 18% of the national budget for the past five financial years, only second to security as the highest funded sector in the budget. 21 Available local government expenditure data shows that on average, every local government in Uganda spends approximately 50 percent of its budget on education.22 Total Overseas Development Assistance (ODA) to education in Uganda for the financial year 2010 amounted to $188 million23 (equivalent to approximately Uganda Shillings 489 billion or 45 percent of the education budget). The intra-sectoral public expenditure allocation in the education sector is shown in table 2.

Table 2: Intra-Sector Public Expenditures (Actual Outturn, billion shillings)Unit 2007/08 2008/09 2009/10 2010/11

Pre-Primary and Primary Education - 25.8 25.02 30.45 32.6
Secondary - 59.26 71.27 109.53 118.58
Special Needs Education, Guidance & Counseling - 0.7 0.91 1.55
Higher Education - 6.33 3.683 14.07 8.04
Skills Development - 23.35 24.34 28.25 36.43
Quality and Standards - 12.53 17.6 17.27 20.1
Physical Education and Sports - 0.96 1.78 2.09 2.62
Policy, Planning and Support Services - 0 9.86 13.3 7.79
Universities -79.34 86.36 99.85 119.04
Local governments - 572.06 529.99 586.58 746.91
Total 779.63 770.603 902.3 1093.66

Source: Budget Performance Reports, Ministry of Finance, 2012

While it is not disputable that the education sector may require a lot more funding because of its short and long-term strategic importance, the current quality of service delivery is not reflective of the levels of public investments in the sector. There are fundamental governance challenges that undermine accountability and responsibility for failure of the system to ensure optimum returns on public investment. While education services covering nursery, primary, secondary, trade, special education, and technical education have been decentralized, concomitant decentralization of expenditure on these services has not fully happened. Government therefore needs to take bold actions and change the current financing architecture by transferring public expenditure responsibilities for education services to the local government in order to bridge the gap between the responsible entity and the citizens as consumers of education services.

Create incentives that reward best performers in education services delivery

If the role of education is to imbue knowledge, then teachers are the dispensers and fountains of knowledge. No amount of technological advance will replace the role of the teacher. Unfortunately, the teaching profession in Uganda has been greatly undermined and this partly explains why education outcomes are falling as well. The government must revive the vocation to distribute talent and make the teaching vocation competitive, reputable, and rewarding. The poor welfare of teachers in terms of remuneration, living and working conditions, and how ill-equipped they are with scholastic materials generally lowers the morale of teachers.

A wide range of market-based incentives that can be considered to achieve this policy objective include the following:

■ Market-based incentives for rewarding teachers which ensure that the cost and sacrifice teachers incur serving in varied environments is not greater than the benefit. For example, the current policy on service in hard to reach areas must be determined by market forces and not arbitrarily.

■ Rewarding good performance with performance based pay and raising standards for teachers at all levels. Performance based pay can be based on student outcomes and leadership quality of the teachers. This requires development of indicators to track performance for both students and teachers, including measuring the extent to which teachers motivate students to learn.

■ Restructuring staffing and deployment decisions by selectively identifying and retaining top talent. Identifying top talent involves widening the pool from which to draw teachers to other professions to interest people of diverse skills and experiences.

■ Developing leadership skills for teachers and other instructional staff (e.g. lab assistants, librarians, teaching assistants) by setting learning expectations, supporting

development of teaching plans, coaching for staff, and establishing avenues for collaboration among peers to share experiences and good teaching practices.

Establish centers of excellence

There was a time when Makerere University was the paragon of higher education in Africa: what happened? There are universities in the world that have not lost their lure because they have sustained their image as centers of excellence: Yale, Harvard, Cambridge, and Stanford, to mention a few. What if reform models in Uganda especially in higher education would establish centers of excellence either along geographical lines or along fields of specialization and make them competitive and inviolable such that pupils and students in the whole of sub-Saharan Africa aspire to get into one of those centers? In other words, why doesn't government gear the sector reform towards creating our own Yales and Harvards? The benefit of such centers of excellence recognized world over would be enormous. First, as a nation, Uganda would attract human capital (expert trainers and students) by positioning our education system as the best in the region. Secondly, it would curb down on the brain drain that currently stifles human and economic development because the nation's best talent choose greener pastures elsewhere. Third, positioning those centers of excellence as hubs of innovation, research, and development would create ripple benefits that spill into other sectors of the economy, and put the nation on a fast track to development and transformation.

A similar strategy can be replicated at the primary, secondary and vocational level. Policy actions that create centers of excellence in vocational training, entrepreneurship, business and leadership increase the production of talent and employability of the labor force. This is even more urgent and relevant given the wide range of companies interested in investing in Africa.

The current situation where Uganda's higher institutions of learning are increasingly relying more and more on foreign aid for funding physical development, research and innovation is not only undesirable but also self- defeating. A new uncompromising approach that focuses on investing in building and strengthening education centers of excellence at all levels of our education system must become the basis for redefining our education policy and our renewed commitment to leadership in inspiring learning, producing talent and nurturing leaders on the continent. The selection criteria for these centers of excellence should be based on geographic representation and insulated against political gerrymandering that has come to define our policy actions.

Increase capacity of institutions to manage, coordinate and sustain reform

Reform is likely to succeed when there is a clear institutional framework that establishes clear institutional mandates, responsibilities, and accountability relationships. The assessment of whether an institution has the capacity to manage

and sustain reform can be based on four important factors: the quality of the human resource capital at its disposal; the volume and predictability of financial resources it commands; the degree of legitimacy it enjoys among its peers; and ability to operate within the obtaining political economy landscape. Besides, sector wide reforms require a strong national institution that is not only able to offer leadership of the reform process but also ensure effective coordination and taking responsibility for the failure of the reforms.

Given previous failed attempts to coordinate reforms in the education sector, it is important to undertake an empirical assessment of the capacity of the institutions in the sector to manage, coordinate and sustain the reforms. Outcomes from such an assessment would be the basis for strengthening these institutions. Such an assessment should answer key questions regarding implementation of policy decisions in the sector. For example, how was it possible that UPE was introduced without bothering to establish how to deal with issues of quality? How come our curriculum does not keep pace with the skills requirement in the labor market and yet we have a national institution – the National Curriculum Development Centre (NCDC) dedicated to curriculum reform. Who ensures that what the NCDC does with the curriculum is consistent with the examinations model designed by the Uganda National Examinations Board (UNEB). And when these are not consistent, who is to be held accountable?

Given the current failures or the slow pace of reforms of Uganda's education system, Government should consider at least two important actions to strengthen capacity to manage, coordinate and sustain reform in the sector. These are:

■ The Ministry of Education and Sports should take overall responsibility for ensuring that the reform commitments and targets in the sector are clear and time bound, and they are communicated to the country in a clear manner. In this regard, the Ministry should on an annual basis publish a "reforms calendar" that shows what reforms are being undertaken, the progress that has been made during the year, the institution directly responsible and the time frames within which the reforms are to be approved by Cabinet or any other institution vested with the powers of approval.

■ Government should create a High Level Policy Forum on Education System Reform that brings together all the institutions that are vested with policy reform mandates to work together in a vertical and horizontal manner to deliver the reforms that can structurally and on a long-term basis transform Uganda's education system. Vertically, the High Level Policy Forum on Education System Reform should ensure that there are continuous reforms that enable the education system respond to the changes in the labor market. Horizontally, the Forum should ensure that the education system is configured to produce relevant human capital at any level. Such a Forum should be able to take decisions that are binding on all institutions that come together

to direct the reform process.

CONCLUSION

The Government of Uganda has made numerous attempts at reforming the education system to make it relevant to national needs and responsive to the changes in the labor market. However, the momentum of reform triggered by the publication of the Report of the Education Policy Review Commission (EPRC) in 1989 and the Government White Paper in 1992 were not sustained as should have been the case. Since then, the recommendations from that process have been implemented piecemeal without overhauling the entire system of education as recommended by the EPRC report. More importantly, there have been widespread policy inconsistences with regard to the philosophy of education, emphasis on higher education vis a vis primary and tertiary education and a whole range of grey areas, rendering education policy largely ineffective.

Consequently, it is important to observe and point out that the unsatisfactory state of Uganda's education system today is not for lack of trying at reform but the failure to articulate a coherent education policy and pursue its implementation persistently and relentlessly. The policy options presented in this briefing paper are intended to trigger a national debate on the strategic policy reforms required to advance Uganda's education policy and make Uganda competitive regionally and globally. Because it is often tempting to focus on the nuts and bolts of reform in any education policy debates, we have opted to raise what we believe are strategic policy issues that need to be resolved in order to address the conditions for effective policy engagement and implementation. Most importantly, we have raised the issue of policy and political leadership for managing and implementing reforms in the education sector. We believe that previous reforms have not delivered the desired outcomes because of absence or failure of such leadership. Yet, confronting these challenges in a forward looking and relentless manner could determine the future position of Uganda in an integrated East African Community and the continuously evolving global economic architecture

CHAPTER TWELVE
A REFORM ON MEDICAL RIGHTS IN UGANDA

The right to health is one of the fundamental rights for all human beings and several international and regional legislative instruments have been put in place to ensure the realization of this right globally and regionally. Following this guidance, the national level constitution mandates the state to promote, respect and fulfil this right by making provisions to observe health. Considering its supremacy, writing the text in the constitution is just as important as translating it into action. On its own, the constitution is not a practical guide for daily operations because it is full of general and abstract principles. Constitutional implementation is a process designed to ensure the full, effective and continuous application of a constitution by promoting, enforcing and safeguarding it. Failure to implement the provisions therein leaves its goal unattained, and if implementation is left to State leaders or officials, the objectives will not be met.

While there is evidence of health benefit in countries where the right to health is explicitly enshrined in the substantive parts of the constitution, there is a paucity of knowledge on implementing implicit constitutional provisions on the right to health in Uganda. This case study identifies the pros and cons of realising an implicit right through political, judicial and popular mechanisms.

The objectives are threefold: to review the international, regional and national law on the right to health;

b; to analyse the role of the political, judicial and popular mechanisms of constitutional implementation in the realisation of the right to health in Uganda;

To identify the challenges in the implementation of constitutional provisions on the right to health.

The Ugandan government has ratified a significant number of international and regional instruments which recognize and guarantee the right to health. They elaborate its prerequisites, components and the standard to which it should be enjoyed. They further impose obligations on various stakeholders such as the state, individuals, civil society and international community to promote and implement the right. Furthermore, they reinforce the right to health by providing for other supportive rights and freedoms such as life, equality, dignity and access to information, thereby creating an increasingly enabling environment for implementation.

In Uganda, the text on human rights was generally first adopted in the 1995

constitution which is currently in force. The constitution has explicit provisions on enforcing rights such as the rights to life, privacy, freedom from torture, and education, among others, but not explicitly the right to health. The right to health was included in several provisions under the national objectives and directive principles of state policy that can be used to protect the right to health. Uganda has also enacted numerous statutory laws to enforce the right to health.

Having documented legal provisions is not enough to realize the right to health. The political will to create and enforce polices that support the realization of the right to health is a factor in the constitution's implementation.

The report presents a number of policy documents that have been put in place to reflect international commitments, including in line with the United Nations Sustainable Development Goals. They are guided by Uganda Vision 2040, which provides direction to all governmental initiatives that aim to fulfil duties and responsibilities, including in for providing health care. The vision also commits the government to ensure that Human Rights Based Approach is applied in policies, laws, and programs to strengthen government officials' capacity to respect and protect human rights.

Specific to health, government has laid out policies and plans to ensure universal health coverage. There is a documented policy shift from facility based health service delivery to household based service delivery, although the framework for this is not yet in place. Mechanisms to ensure transparency and accountability system in health care system are also still unclear in policy documents. Collaboration between different ministries, departments and agencies, important for realization of the right to health, is still not reflected in a multisectoral strategy to support it. Political implementation of the right to health through the decentralized structure is challenged by weak health systems.

Another form of implementation of constitutional provisions is through the judiciary. Article 129 of the Ugandan Constitution establishes the hierarchy of Ugandan courts through which legal redress can be sought in the event of violation of the right to health. While there is increasing litigation on the right to health, documented in the report, it is still scanty. This could be explained by a lack of understanding of human rights doctrine by judicial officers or their caution on litigating on social transformation.

There has been a rise in popular implementation of constitutional provisions, with cases described in the case study. This form of implementation has created national discussions on government spending and also empowered individuals and groups to make government accountable on their delivery of health services. Popular activism has also leveraged social media in the mobilisation of citizens by quickly garnering people from different regions behind a cause or event. Unfortunately, this

has sometimes met resistance, violence and threat, and it has been sporadic and unsustainable.

The case study thus raises a number of challenges in implementing the constitutional provisions on the right to health. These range from constitutional; legislative and policy and institutional barriers. It also points to the economic and service; cultural and religious barriers that need to be addressed to implement the right to health; and the strengthening of as social mobilisation and accountability mechanisms.

While the right to health is yet to be explicitly incorporated in the Ugandan constitution, the case study points to a number of ways to implement it. Several issues merit future attention to support this, including developing increased measures and capacities for accountability, integrating a rights based approach in a multi-sectoral response, ensuring adequate resources to the health system, strengthening judicial understanding, implementation of health rights ,strengthening issue based civil society groups and processes that are focused on advancing the right to health with the intention to realize positive public and policy outcomes.

The right to health is a fundamental human right which forms the foundation of human existence. Human rights work is fuelled by a dedication to the protection of the rights essential to the respect of all individuals and requires an understanding of socioeconomic factors and the interconnectivity of human rights. For example, the right to the highest attainable standard of health is closely related to other human rights, such as the right to food, housing, and education. The World Health Organisation (WHO) defines health as the state of complete physical and mental wellbeing and not merely the absence of infirmity or disease (WHO 1946). Thus, the right to health extends itself to the causal determinants of health such as adequate sanitation facilities, health infrastructure, trained workers and essential drugs. In essence, health is both an inalienable prerequisite for, as well as an indispensable outcome of, the enjoyment of all other human rights.

Several international, regional and local legislative instruments provide for the right to health, whether explicitly or by implication. Unfortunately over half of the countries worldwide do not have the right to health enshrined in their national constitutions (Heymann et al, 2013). However, the ones who have recognized it both globally and Africa-wide require that it is enjoyed to the highest attainable standard as found in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 16 of the African Charter on Human and Peoples Rights (ACHPR) (UN, 2008; OAU, 1982). Taket (2012) suggests that this obliges states to put in place policies and plans which avail the population with access to health services in the shortest delays possible. This creates a positive standard free from any written constraints. In reality however, it is rather ambiguous, ever-changing and risks being elusive to implement.

In an effort to resolve the ambiguity, some instruments have elaborated the precise components of the right to health, such as in ICESR Article 12; Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Articles 12 and 14; Convention on the Rights of Persons with Disabilities (CRPD) Article 25; ACHPR Article 16; Women's Protocol to the ACHPR Article 14 (UN, 1979; 2007; 2008; OAU 1982). For instance, Article 14 of the ACHPR unambiguously provides for health and reproductive rights and empowers women to control their fertility, decide whether to have children, their number and spacing. It further obliges state parties to take appropriate measures to establish and strengthen existing pre-natal, ante-natal, post- natal and nutrition services for women and their children.

Closer to home, Article 118 of the Treaty for the Establishment of the East African Community (EAC) obliges the partner states to promote harmonised national health policies and regulations, enhance the efficiency of health care systems and cooperate in the development of reproductive health services (EAC, 1999). Although Uganda is a signatory to many of those instruments and recognises the right to health in national legislation, its constitution lacks an express provision for it. Instead, the right is merely inferred from several other guarantees under the national objectives of state policy, including: Article 21 on equality, Article 22 on life, Article 31 on family rights, Article 32 on affirmative action, Article 33 on women's rights, Article 39 on the right to clean and healthy environment, and Article 41 on information access, among others (Republic of Uganda, 1995a).

Both qualitative and quantitative studies show the benefits of nations enshrining the right to health in their constitutions (Kavanagh, 2016). As the supreme law of the land, when a constitution guarantees the right to health, it endorses its legitimacy and sets its implementation as a priority. Constitutional clauses on the right to health also serve as points of reference and advocacy tools. However, on its own, the constitution is not a practical guide for daily operations since it contains general and abstract principles. This gap therefore warrants framing of legal steps to operationalize it and enable the text to infiltrate the perceived reality of people (Fombad, 2016).

CONSTITUTIONAL PROVISIONS ON THE RIGHT TO HEALTH IN THE REGION

In 2010, CEHURD, under the Regional Network for Equity in Health in East and Southern Africa (EQUINET) conducted a desk review of the constitutional provisions on the right to health in fourteen countries in the region (Mulumba et al., 2010). The study found that health is incorporated in various international and regional human rights treaties as well as national constitutions, laws and policies. They also established that many constitutions are silent about the right to health, which necessitates its inference from other complementary rights that are explicitly stipulated such as life, equality, safe working conditions and freedom from torture.

Accordingly, the study assessed the sufficiency of the constitutional framework on health rights in line with General Comment No.14 of the constitution which outlines six core obligations of the respective governments to ensure the following for its citizens: I. access to health facilities, goods and services without discrimination; II. freedom from hunger by access to essential, nutritionally adequate and safe food; III. access to basic shelter, housing and sanitation with safe, potable and adequate water; IV. provide essential drugs, as defined by the WHO Action Programme V. equitable distribution of all health facilities, goods and services; and VI. adoption and implementation of a national public health strategy and plan of action.

Most constitutions were found to limit other rights in the interest of public health and safety. Some constitutions restricted the right to health to principles of state policy and objectives, which render it non-justiciable and unenforceable by the courts, while others provide for only isolated elements of the right. Consequently, even if a national constitution is silent on the right to health, countries such as Uganda can still invoke related constitutional rights and provisions of international and regional laws to enforce it.

EQUINET's previous study was limited by three substantive aspects. First, the scope of its subject matter was limited to the black-letter law as stipulated in the constitution, and did not explore the implementation and enforcement of the right to health. Thus, this responsive study extends the scope of the investigation to a situational analysis of the constitutional implementation of the right to health. Secondly, the depth of analysis of Uganda's constitutional provisions on the right to health was constrained by the regional and wide nature of the study. Given the high number of countries studied, specifically 14 countries, it was difficult to perform an in-depth analysis of each constitution. As a result, this study is focused on Uganda and provides an analysis of its constitutional provisions on the right to health. Finally, the initial study was substantively informed by a desk review of the constitutional provisions on health, and it did not concern itself with the implementation of these provisions. This study extends the methodology to cover this gap. We show with this study that although the Constitution is not explicit about the right to health, there are increasing efforts to implement the implicit provisions in the national objectives.

Implementation of constitutional rights to health

Constitutional implementation is a process designed to ensure the full, effective and continuous application of a constitution by promoting, enforcing and safeguarding it (Fombad, 2016). It is commonly applied through political, judicial or popular implementation, and failure to do so leaves its goal unattained, the populace disillusioned. To that end, Article 58 of the Constitution of Uganda requires the parliament to go beyond its traditional role of creating laws, by formulating policies and running programmes that facilitate the enjoyment of human rights. Further, Article 20(2) of the Constitution obliges all government agencies and persons to

respect, promote and uphold every human right and thus provides a wide human rights implementation scope (Republic of Uganda, 1995a).

Both the executive and the legislative branches implement human rights proactively, while the judiciary generally interacts with them when triggered by litigation by, or on behalf of, an aggrieved citizen. Government efforts are in turn reinforced by individual or corporate citizens and civil society organisations. This study therefore analyses how the different branches of government and the citizens in Uganda implement constitutional provisions on the right to health, with a focus on MCH, even when they do not appear in the substantive provisions.

There are three forms of constitutional implementation that can occur in any country - popular constitutionalism, political constitutionalism and judicial constitutionalism (Gewirtz, 2015). Popular constitutionalism is interpretation and enforcement of the law by the people. The Ugandan constitution belongs to the people as illustrated in the preamble, "we the people", and it should therefore reflect our desires. In the event that the constitution is abused or threatened, then the people have a mandate to protest and defend. The people are usually represented by individuals and civil society organizations that can interpret the constitution for greater good. These include the media fraternity who can investigate and objectively report violations to increase public awareness, or legal experts who should play watch dog for the rule of law and can step up to defend those with less knowledge as amicus curiae (Fombad, 2016; Gewirtz, 2015). Other players can be business persons or activists with vast knowledge of human rights issues.

Political constitutionalism refers to enforcement of the constitution by the executive (the president) and the legislature. This may include opposing of, or refusal to vote for legislation that is interpreted to violate the constitution by law makers. In the event that unconstitutional legislation is passed by law makers, then the president has authority to reverse this decision, with strong evidence of violation of the constitution.

Judicial constitutionalism is the most common form of constitutional implementation worldwide and is based on the premise that the constitution is the supreme law and it is the mandate of the courts to apply the law. No statute therefore can precede the constitution, but rather arguments in the constitution can lead to nullification of a statute or regulation. Furthermore, political constitutionalism may be biased to advance selfish interests, and therefore the judicial process ensures that the political process is controlled.

In the medical world, patients consign their fate and life to doctors because they blind-trust in the doctors' knowledge and skills. And as such, society entrusts the sacred duty of preserving the virtues of life and good health to the medical professionals.

Hence, only the most qualified individuals should engage in this profession.1 Imbued with compelling, state interest, the licence to practice medicine may at any time and for cause be revoked by the government.2'3 In addition to these state checks and balances, doctors recognise and accept their great responsibility to society and have time in memorial imposed upon themselves, self-regulating code of discipline and ethical rules4 to govern their profession. As such, where a medical professional fails to give due regard to the health and welfare of their patients as governed by their oath and deviates from the normal practice of the profession, causing injury, damage or death, may thus amount to medical negligence. Medical negligence has been defined by case law5 as "the omission to do something which a reasonable man would do or doing something which a reasonable man would not do". Black's Law Dictionary defines medical neglect as the failure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness. Cases of medical negligence have become a common occurrence in Uganda causing damages, injury and death.

The Government of Uganda is committed to promoting and providing medical care and services at the same time ensuring the protection of patient's safety with regard to health care procedures and facilities. Uganda has taken a number of steps towards the fulfilment of this commitment including the ratification of international treaties, conventions and declarations; and the establishment of legal and institutional frameworks that govern and protect peoples' rights to health.

The Uganda's health care system, aims at achieving and sustaining good health and health services for its growing population. The health care system has been evolving over the past 3 to 4 decades to handle emerging concerns and challenges within the health sector countrywide. Uganda's health care delivery is predominately through modern and traditional9 practices. Modern health care delivery is done through a decentralized framework comprising of Health Centre II; III; IV; regional referral hospitals, national referral hospital, faith based health facilities and of late the emerging private health facilities. The District health structure is responsible for all government structures in the district with the exception of Regional Referral Hospitals.

Despite the above initiatives, cases involving medical negligence are a frequent occurrence in the health care system of Uganda leading to a number of undesirable consequences such as death, injury and damage. For example, cases like Watsemwa & Anor V Attorney General10, Kayamugule & Anor. Vs. Attorney General & 3 Others11, Centre for Health Human Rights and Development (CEHURD) & 4 Others vs. Nakaseke District Local Government , the media reported case involving the famous Dr. Ssali, the director of the Women's Hospital and Fertility Centre with regards to the death of one Mercy Ayiru13 and the death of Cecilia Nambozo at Mbale Hospital14 among others. As a result of such occurrences, this study is intended to establish the causes, frequencies and nature of cases related to medical

negligence, with the view of establishing the gaps in the system in order to propose legislative and non-legislative interventions.

THE 1995 CONSTITUTION

The Constitution of the Republic of Uganda is the supreme law of the land and any law, culture or custom contrary to it is void to the extent of its inconsistency as cited in Article 2 of the Constitution (Republic of Uganda, 1995a). The Constitution takes precedence over all laws and all health laws must thus adhere to its provisions or else it may be nullified. For the first time in Uganda's history, the 1995 Constitution ushered in a bill of rights which guarantees Ugandans their inherent entitlements. However, it does not expressly stipulate the right to health. Instead, the constitution has a number of health-related provisions, which are discussed in the following section. Since 2005, Article 8A requires the state to be guided by national objectives and directives of state policy in applying or interpreting the constitution. Previously, the Ugandan courts held that national objectives were not justiciable, but scholars argue that Article 8A now renders them legally binding and enforceable. (Uganda Constitutional Court, 1999; Mbazira, 2008).Accordingly, judicial views have evolved to recognize that government has a negative obligation to respect the rights and embrace cases to determine whether state affirmative duties are fulfilled to allow for the realisation of rights (Soohoo and Goldberg, 2010). For instance in the landmark case of David Mugerwa vs. A.G & Others, the Court explicitly held that the right of the deceased mother to basic medical care was violated by the district hospital due to its failure to provide emergency obstetric care (Uganda High Court, 2012). This requirement for appropriate maternal health care delivery is based on several provisions: Objective XIV on social and economic objectives, Objective XV which recognises the role of women in society, Objective XX on the state's duty to ensure the provision of basic medical services to the population, Objective XXI which provides for clean and safe water at all levels and Objective XXII which provides for food security and proper nutrition. The substantive constitutional provisions of the right to health in Uganda include the following:

Article 20(1) declares human rights as including those that are inherent and not granted by the state. Specifically, Article 20(2) imposes a duty on all government organs, agencies and persons to respect promote and uphold every human right including health related ones.

This is the premise for the implementation of the constitutional right to health as it creates obligations for both public and private duty bearers. These obligations are reinforced by Article 21(4) which guarantees that no provision against discrimination prevents Parliament from enacting laws necessary for the implementation of policies and programmes aimed at redressing any imbalance in society or providing for any matter acceptable and demonstrably justified in a free and democratic society. The obligations set out above are threefold. The duty to respect human rights is a negative

obligation which requires the state and all persons to refrain from interfering with the enjoyment of the right to health. The duty to promote is a positive role which requires the government to create an enabling environment for the realisation of the right to health. Such efforts include legislative, administrative, judicial and financial advancement of the right. Finally the duty to protect is also positive and necessitates the state to shield the right to health from violating acts by third parties. For instance, thestate has a duty to censor the production of restricted drugs, ban compulsory labia elongation in boarding primary schools and smoking in public spaces.

Article 21(1) provides for equality before and under the law in all spheres of life.

Article 21(2) prohibits discrimination on grounds of sex, birth, religion, social or economic standing, or disability (Article 21(3)). Any of those parameters can affect the enjoyment of one's right to health as later discussed in chapter three. In the case of Law and Advocacy for Women (Uganda) v Attorney General (Constitutional Petition No.6 of 2005).the petitioners successfully challenged the constitutionality of sections in the Penal Code Act which criminalised adultery against women but not men (Republic of Uganda, 2005). The Court found the sections were discriminatory and offended Articles 2 and 21 of the Constitution, and declared them void. Quite interestingly, Article 21(5) allows anything permitted under the constitution to favour certain groups and to be applied differently across groups. For instance if any initiative is preferentially undertaken to boost access to and affordability of health services in remote or poorer areas, those in more privileged locations cannot deem such corrective action as discriminatory, since it is permitted by the same constitution.

Article 22 protects the right to life of all, including the life of an unborn child, by prohibiting its unlawful deprivation.

This article's effect is that a loss of life caused by a wilful procedure (e.g. abortions, executions ordered by a competent fair following a fair trial) must be done according to a specific law passed by Parliament. All other deaths arising out of ill-health including maternal and child mortality are contrary to the constitutional right to health and life. As it stands today, Parliament has not fulfilled its duty to legislate and legitimise abortion under justifiable circumstances. Instead, the Penal Code Act under Sections 141, 142, 143 and 212, criminalizes abortion and penalizes any person, including mothers and health workers who unlawfully enable the termination of a pregnancy. Consequently, women risk engaging in undercover and risky abortions without professional health care out of fear of being prosecuted for murder. However, Article 14(2) of the Women's Protocol to the ACHPR legalized safe abortion under justifiable circumstances, and enjoined the state not to criminally prosecute or punish women who so abort, as well as exempt health workers from prosecution or disciplinary reprisal when they provide abortion and post-abortion services to protect women (AU 2003). Such cases of authorized medical abortion

include pregnancy arising from sexual abuse, incest and endangered health of the mother or unborn child. In a similar spirit, the Uganda National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights 2012 recognises when a pregnancy threatens life, and caters for the management of access and use of safe abortion and the prevention of unsafe abortion (Mulumba et al., 2017). Such cases include severe cardiac or renal disease, Preeclampsia, Eclampsia and foetal abnormalities incompatible with extra-uterine life which are also a lawful defence under Section 224 of the Penal Code Act (Mulumba et al., 2017).

Article 23 further prohibits the deprivation of personal liberty, except in specified circumstances which include quarantines instituted to prevent the spread of an infectious or contagious disease, restraining a child for their welfare or restraining a person reasonably suspected to be mentally ill or addicted to drugs or alcohol, so as to care or treat them or to protect the community.

In this instance, the need to enforce the right to health becomes the basis for limiting the right of the affected person from enjoying their personal liberty. This article confirms that good health is a prerequisite for the full enjoyment of other rights, thereby proving the complex interdependence between human rights. A more practical illustration of the intersection of the rights to health and personal liberty is when hospitals detain patients who fail to pay their medical bills (News of Africa, 2017). Constitutionally, such healthcare providers violate Article 23 of the patient's freedom of movement, yet, contractually, their constitutional right to derive livelihood from one's profession under Article 40 and the contractual right to receive sufficient consideration for the medical care provided is also breached by such patients. Such detentions therefore constitute prisons for indebted patients, which, in turn, greatly harm the new-born's post-natal health. However, it is still unclear whether this practice is illegal since Article 23(1)(h) allows for the restriction of theright to personal liberty in a variety of general circumstances. Future case law is likely to elaborate on this unexamined constitutional tension.

Article 24 provides for the respect of human dignity and freedom from torture, cruel, inhumane and degrading treatment.

Despite this provision, pregnant women continue to be treated in cruel, inhumane or degrading ways, even at the hands of health service providers. In the case of Joyce Nakacwa v Attorney General & 2 others (Constitutional Petition No.2 of 2001), the petitioner delivered a baby by the roadside near Naguru Hospital. She proceeded to the Maternity Clinic with the baby still attached to her after birth to complete the birth process but received no medical care and was instead referred to Mulago Hospital without a referral letter. She lost her baby and sued claiming that the hospital's denial to offer her a decent place to complete the birth process violated her right to freedom from torture and cruel, inhuman and degrading treatment. The court acknowledged

that the medical worker's omissions contributed to the death of the child. Nakacwa's case highlights the torturous situations to which pregnant women are confronted to in the health care system (Uganda Constitutional Court, 2001).

Article 26 protects the right to property and prohibits the deprivation of property except in the interest of public health, safety or order.

Property rights are relevant to the right to health in so far as a patient is entitled to access and use essential medicine and other health facilities. The UN Assembly tasked states to ensure access to safe, effective, affordable and good quality medicines fundamental to the full realisation of the right to health (UN General Assembly, 2004). There are many challenges to the availability and accessibility of quality medicines, such as limited health infrastructures, budgetary allocations, procurement, distribution and use of medicine, and high prices for medicines due to high costs of production met by pharmaceutical companies to protect their pharmaceutical patents under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) (Twinomugisha, 2015). Property rights dictate social wellbeing in Uganda, which is tied to womens' ability to exercise their maternal rights (Nyakato and Rwabukwalib 2015).

Under Article 27, the Constitution guarantees the right to privacy by prohibiting unlawful searches and access to the person, their information or their property.

This article lays the foundation for a bundle of professional duties of care owed by health personnel to their patients, such as maintaining confidentiality, and procuring informed consent from the patient to administer specific medical care. Similar caution must be exercised in the handling of patient records to avoid unauthorised disclosure of their health conditions. The article's breach thus amounts to professional negligence. Other common violations of privacy manifest themselves in moralistic religious and cultural circles. Examples include churches, school and parental homes where women or girls who become pregnant out of wedlock are stigmatised, forced to apologise in public and excommunicated from their communities for exercising their sexual and reproductive rights (Republic of Uganda, 1995a).

Article 28 provides for the right to a fair public hearing for all civil and criminal matters before a competent, independent and impartial court or tribunal. The right to health is a civil right and its violation constitutes actionable wrongs in both civil and criminal law. The Ugandan courts have increasingly adjudicated cases on the right to health. Details of the relevance of a fair hearing to a high standard of health are further discussed in a later section.

Article 29 guarantees freedom of expression, conscience, assembly, association and religion.

These factors fundamentally influence whether and how one enjoys their right to health in so far as they determine the social, political and economic context of its application. For instance, freedom of expression and conscience determines whether a woman uses contraceptives, and if so, which ones. Likewise, free speech impacts the information women receive about their health because some topics such as sexual rights are taboo. Similarly, freedom of assembly, association and movement enable women to visit their health providers for maternity check-ups, counselling and post-natal care, while its constraint limits the enjoyment of the right to health. Religion curtails the right to health through actions such as the proscription of contraceptives amongst some Catholics, or Pentecostals who demote and expel their ministers and flock for out-of-wedlock pregnancy to deter sexual sins (Republic of Uganda, 1995a).

Article 30 provides for the right to education, which is highly relevant to the right to health as it is a powerful vehicle for information sharing.

It can be used to inform individuals about health risks, prevention measures and best-health practices. It is also relevant to the right to health as it is essential in building a competent and skilled health work force aware of effective health strategies. Education may be formal or informal depending on the forum and avenues used to deliver the material. Formal education is regarded as the more credible and reliable source of health information and it may be provided by both the public and private sector, through the school curriculum right from elementary to tertiary levels and from professional health workers. In contrast, informal education sensitizes citizens through less structured avenues such as the media, music, drama and peer interactions. Unfortunately, the right to education occasionally supersedes one's right to health. The most common case is the expulsion and stigmatisation of female students from school when found pregnant (Lall 2007). Arguably, the student should stay in school to ease her access to information on her maternity. However, there are legal, public policy and morality imperatives which justify the exclusion of child or teenage mother from centres of learning (UBOS and ICF, 2017).

Article 31 entitles every woman and man of full age to voluntarily found a family, and enjoy all marital rights on an equal basis.

This provision is particularly progressive as it supports women's power to negotiate and make decisions about their sexual and reproductive rights (e.g., through family planning). It also empowers them to participate in their family wellbeing in matters such as nutrition, housing and sanitation without facing discrimination. In the case of Best Kemigisa v Mable Komuntale & Another, the Court found that the Tooro tradition which barred a woman from inheriting property on the basis of her sex was repugnant to the Constitution (Bagonza, 2016). This decision reaffirmed the rights of women to enjoy their property and make decisions for its use towards accessing quality and affordable health care. Equally, Article 32 provides for affirmative action

and Article 33 stipulates the rights of women. Both viewed separately and combined, they prohibit any negative customs and practices that are against the dignity and welfare of women. In the case of Maliam Adekur & Another v James Opaja & Another, the Constitutional Court held that the custom in Pallisa allowing widow inheritance went against the spirit of the Constitution (Uganda Constitutional Court, 1997). It is however important to mention that lawful cultures must be enjoyed and promoted under Article 37, as they are not oppressive and can be useful to the holistic development of individuals. For example, the role of Traditional Birth Attendants cannot be underestimated in rural areas as they provide affordable and accessible maternal health care. Thus, it is imperative to explore ways to preserve the services, knowledge and skills of reliable and effective Traditional Birth Attendants.

Article 34 provides for the rights of children, including the right to be cared for by their parents.

The welfare and best interests of the child are to guide every decision and action taken, as was established in Re Justine Waiswa Bakama & Nauma Catherine Adongo (infant) (Uganda High Court, 2014a). This is essential to maternal health because of the dependency of children on their mother's well-being, especially for infants who are still breast feeding. Equally, this provision can be used to safeguard mothers and their dependent children from being separated against their will, which is a common trend for teenage and rural mother, but perhaps not surrogate mothers (Republic of Uganda, 1995a).

Article 35 protects persons with disability (PWDs) by entitling them to respect and human dignity, and by requiring that Parliament enacts additional protective laws according to their needs.

An example of such a law that has yet to be adopted is one that compels all health centres to have ramps or lifts making them accessible for PWDs. In the case of Legal Action for People with Disabilities v Attorney General & Others, the applicants sought a declaration that the respondent's failure to make their premises easily accessible to PWDs violated their fundamental rights (Uganda High Court, 2014b). The Court rejected this claim stating that it cannot order a prompt enforcement of the law because of the hardship that such enforcement would entail. This reasoning serves as a clear example of the predominant attitude which favours saving financial resources over facilitating PWDs access to affordable health services. Overall, PWDs face accessibility challenges every day that have yet to have been recognized by the Court and which constitute a threat to the country's health (CEHURD, 2016). Articles 32-35 are strengthened by Article 36 which provides for the protection of minority rights and end the tyranny of numbers. Of course, PWDs are not the only minority, although the Courts are yet to develop a universally accepted definition of a minority group in the context of Uganda. This subjectivity in the face of wide

judicial discretion to dismiss cases raises the evidential burden and standard of proof for whoever seeks to assert their health rights as a minority. Accordingly, this is another area of further investigation into what constitutes minority rights in Uganda, and how minorities can assert their constitutional right to health based on their unique circumstances.

Article 39 of the Constitution provides for the right to a clean and healthy environment, a precondition to the enjoyment of health. This ride can be maintained through proper hygiene and waste management.

For instance, pregnant woman should have the right to deliver and raise their children in a clean and healthy environment with access to clean water and air. An effort to enforce this right in relation to health was exemplified in The Environmental Action Network v British American Tobacco, where the applicants sought a declaration that the respondents failed to warn customers of the health risks of smoking and the Court issued an order to compel them to place warning labels on its packs and advertising materials (Republic of Uganda, 1995a). Article 40 provides for economic rights and requires that Parliament enact laws to ensure that all people work under satisfactory, safe and healthy conditions. When applied, this article entitles workers to protective gear in the work place, compensation for harm caused by occupational safety risks, job security, paid maternity and sick leave and protection from termination due to pregnancy. The latter is a common practice for employers, especially for those from the private sector. In the case of Salvatori Abuki v Attorney General, the Court held that an individual's means of livelihood can be associated to the right to life, with the understanding that once that means of livelihood is terminated, there is no life left to protect (Uganda Constitutional Court, 1997). Furthermore, when an individual is dismissed from their work, one can argue that their right to own property was taken away from them. Article 40 thus provides for some elements of a right to health but is limited in application to employees in the workplace. Individuals should, however, be protected and have access to the right to health in all spheres of their lives. The lack of a general right to health cannot be justified by the presence of Article 40. In cases of a breach of Article 40, Article 42 is also often evoked as it provides for the right to just and fair treatment in administrative decisions.

Article 41 provides for access to information. This is an effective tool for citizens to request information from their government on the performance of their services and hold them accountable to the resources allocated to the health sector. It is also the basis for powerful sensitisation means such as access to educational information on topics including family planning, nutritional foods, warning signs of disease and accident prevention. This information sharing contributes to empowering citizens into making informed decisions about their health and well-being.

Article 43 is of a particular interest because it establishes general limitations on the

enjoyment of all rights, which include interests of public health and safety. In doing so, it establishes public health as a national priority with the potential to justify the violation or restriction of a constitutional right. Considering that the constitution is silent on the overall right to health, including public health as a possible ground for a right limitation is a significant stride in grounding health as an inherent and superior right under the constitution.

Article 45 states that the fundamental human rights and freedoms not specifically mentioned under the Bill of Rights shall not be taken as to exclude other rights that are not expressly provided therein. This is another progressive provision which reinforces the duty to observe, promote and enforce the constitutional right to health in Uganda, despite the fact that it is not expressly provided in the constitution. This article reaffirms the existence of the right to health.

Articles 48 to 51 establish institutional recourse avenues for cases where the right to health is violated. These matters are under the jurisdiction of the High Court of Uganda and the Ugandan Human Rights Commission (UHRC). Individuals whose rights have been violated can seek redress through litigation and review procedures in these courts.

NATIONAL LEGISLATION

Uganda has a collection of laws which complement the constitution or fill in some of its gaps. Article 79 of the Ugandan Constitution mandates Parliament to make laws for the peace, order, development and good governance of Uganda. This provision establishes Parliament as the primary legislator. For each act proposed by Parliament to have the force of law, it must be approved by the President and must conform to the Constitution. A series of acts are dedicated to the protection, fulfilment and respect of the right to health. For instance, the Food and Drugs Act, Cap 278 focuses on preventing food and drug alterations that are unsafe for human consumption and the Water Act, Cap 152 governs the use, protection and management of water resources. Another category of acts focuses on the state implementation of Parliament's constitutional duties by establishing public agencies responsible for providing health services. Some examples include the National Medical Stores Act, Cap 207 which established the country's hub for efficient and economical procurement of quality medical supplies for public health services. There is also the National Drug Policy and Authority Act, Cap 206, which set up an authority to ensure the availability of efficacious and cost effective drugs, and the National Environment Act, Cap 153, which oversees the management of a clean and healthy environment in line with Article 39 of the Constitution (Republic of Uganda, 1959; 1993a; 1993b; 1995a; 1995b; 1997a).

Health workers have laws that govern them in their different categories. The Uganda Medical and Dental Practitioners Council (UMDPC) regulates the conduct of all

medical and dental practitioners in Uganda guided by the Medical and Dental Practitioners Act, Cap 272. The Council has a code of ethics which spells out the obligations that health workers have in the protection of human rights. The Uganda Nurses and Midwives Council (UNMC) similarly is regulated by the Nurses and Midwives Act, Cap 274 which requires nurses and midwives to protect human rights. The professionals have ethical codes set out standards through which human rights can be protected. The Code of Ethics for medical and dental practitioners for example under Rule 4 requires medical and dental practitioners to respect and protect human rights but phrases their respective obligations as ethical responsibilities (Republic of Uganda, 1996; 1998).

Health workers in the public sector are collectively regulated by the Health Service Commission which was created under the Health Service Commission Act of 2001 (Republic of Uganda, 2001). The act recognizes the duty of health workers in relation to rights of patients by phrasing them as responsibilities. The Act recognizes the duty of health workers to act in the best interest of patients at all times, to ensure informed consent, respect the privacy and confidentiality of a patient, avoid conduct detrimental to the community and abide by all laws and regulations governing their professions. However, the law is silent on the rights of health workers as well as the Patients' Right Charter, though the Charter clearly specifies the rights of patients including the right to emergency medical care, the freedom from discrimination, the right to a clean and healthy environment, the right to participate in decision-making and the right to medical information among others. Unfortunately, the provisions of the Patients Charter are limited in effect because they do not have binding force of the law and can only be applied at the health worker's discretion (AGHA undated).

While there are many laws that advance the right to health, there are still others that are old laws, with gaps in relevant provisions on this right.

The Public Health Act of 1935 (amended in 2000) is very old and is not anchored on human rights principles. It focuses primarily on the control of sexually transmitted infections and the nature of sexual offenses against vulnerable groups (Republic of Uganda,1935). The sexual offences bill has been in place for the last two years but has faced resistance by many law makers

The HIV and AIDS Prevention and Control Act of 2014 is reported to have commendable provisions and presents an opportunity for intensifying response to a global health security crisis (Republic of Uganda, 2014). The act advances pre-test and post HIV counselling; voluntary HIV testing; state responsibility in HIV control; Legislation against discrimination in access to employment and other social opportunities on the grounds of HIV status, and creation of the AIDS Trust Fund. After the law was passed, a number of civil society organizations arose to contest certain clauses of the law, including mandatory testing of pregnant women and

their partners, and disclosure of HIV status of a client by health workers to people who according to the health worker are at risk of being infected by this client. This contest led to a constitutional petition No. 24/ 2016 challenging discriminatory HIV Criminalization Legislation (UGANET, 2016).

INTERNATIONAL AND REGIONAL INSTRUMENTS

In addition to national legislation and policies, Uganda has ratified a number of international and regional treaties and declarations addressing issues relating to human rights to which the right to health care is imbedded. These include the International Covenant on Economic, Social and Cultural Right24; The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)25;

The Convention on the Rights of the Child (CRC)26; The Convention on the Rights of Person with Disability (CRPD)27; African Charter on Human and Peoples' Rights (ACHPR)28; Treaty for the establishment of the East African Community29; United Nation Declaration on Human Rights (UNDHR) 30 and the Abuja Declaration.31

These covenants and declarations list down the steps to be taken by the state parties to the maximum of available resources and with financial and technical assistance from development partners, with a view of progressively achieving the full realization of the right to health. The ratification of these international conventions and declarations creates an obligation upon Uganda and her development partners to ensure that legal and institutional frameworks are in place to provide healthcare within the minimum standards so as to protect its citizens against any acts that may infringe their enjoyment of the right to health including incidence of medical negligence.

However, all the above mentioned provisions places an obligation upon Uganda as a member state to provide medical healthcare that meet the basic minimum standards as a right for the citizens to enjoy the right to health and the breach of these minimum standards are leading to the increase in reported medical negligence cases. This chapter is intended to explore how these gaps can be addressed in the law by developing legislation and non-legislative proposals to govern medical negligence in Uganda. In addition such measures would be in line with and also further Uganda's obligations as a state party under the international conventions and treaties.

The Health Care Concept was introduced at the 1978 Alma Ata conference in an attempt to address the inappropriateness of the health structures inherited by developing countries to tackle their predominant health problems. There was a need to broaden the concept of health (health beyond disease and health care) and also of understanding of the wider causes of ill- health (poverty, literacy, sanitation etc.). There was further a desire to incorporate a greater involvement of communities in decision-making and also shift development thinking towards social ends (human development rather than just economic).

Five main themes of Health Care were considered and adopted at the Alma Ata conference, and these were: importance of equity as component of Health (PHC = Equity = Wider Development); community participation in decision-making; multi-sectoral approach to health problems; adoption and use of appropriate technology; and emphasis on health promotional activities.

The health system in Uganda has undergone a number of changes since independence in 1962. In the period proceeding independence, the health system development in Uganda was characterized by establishment of an extensive network of health units and hospitals, with home-hygiene and preventive programmers run by a network of health inspectors complementing this health care infrastructure. During that time, the health facilities were designed around provision of curative care with a doctor as the kingpin. A hospital was established in each district. Ugandans enjoyed free and relatively easily accessible health care, but this system relied strongly on extensive investment in the health sector by the government for support and sustainability.

With the economic decline and bad governance that followed during the Idi Amin era, coupled with the global recession of the 1970's, the health system became unsustainable and services deteriorated. Most public health programmes collapsed and health facilities faced staff and drug shortages. Under the table payments became prominent, and there was a resurgence of use of traditional medicine.

So the health concept was a timely innovation, and very welcome in Uganda. It was subsequently adopted by Uganda after the Alma Ata conference as the focus of its health system development. This was a major paradigm shift, with the focus therefore changing from provision of hospital-based care to more community oriented health services.

From 1980 to 1983 was a period in which policy makers and health workers were sensitised about Health care. About the same time, a debate on whether to implement comprehensive PHC or selective PHC took place. Selective PHC was the preferred strategy. So the introduction of vertical programmes/projects took place defeating the idea of horizontal holistic implementation of Health Care programmes.

The Control of Diarrhoeal Diseases (CDD) programme was introduced around 1983, and about the same time, UNICEF introduced a programme emphasizing Growth monitoring, Oral rehydration therapy, Breast feeding, Immunisation, Food security, Family planning, and Female education. In 1986, the Expanded Programme on Immunisation (EPI) was relaunched; the Maternal and Child Health (MCH) programme; Family Planning and the AIDS control programmes were also introduced. Over the period 1989 to 1993 a further expansion of vertical programmes/ projects took place, and by 2000, there were 57 programmes in the health sector.

So right from the onset, implementation of PHC in Uganda was fragmented and uncoordinated. Some of these vertical programmes had substantial and considerable external/donor funding and in many cases were not really under Government control.

HEALTH SECTOR REFORMS

As a response to the global economic decline of the 1970s and 1980s, the World Bank and IMF introduced Structural Adjustment Programmes (SAPs) in some developing countries. These programmes entailed complete overhaul of economic policies and the allocation of resources to the social sectors was to be cut. One of the conditions contained in these adjustment programmes was the condition that user-fees be charged for social services. The philosophy was that social services are not universal human rights as commonly claimed. Further arguments by economists were that public goods/services benefit society as a whole whereas private goods/services benefit the individual concerned (Atkin et. al 1987) so public goods like immunisation benefit society as a whole and the state should finance them while on the other hand private goods like anti-malarials benefit individuals and should therefore be paid for by the affected individuals. In a nutshell, preventive services should be financed by the state and curative services by individuals.

In the 1980s and early 1990s, there were scarce resources for health in the poor countries, with for instance health expenditure for most Sub-Sahara African countries in 1990 estimated to be less than US $ 20 per capita. Further, there was inefficient use of these scarce public resources, which were largely spent on inappropriate and cost-ineffective services with characteristic poor input mix; emphasis on tertiary rather than primary care and poor value for money in procurement. Lastly, there was poor utilisation of services both supply (unmotivated and poorly trained staff, inadequate supplies and drugs etc) and demand side issues (access, poor quality services).

Accordingly a package of reforms was proposed to address problems in the health sector, and these were called health sector reforms. The World Bank/IMF defined these reforms as fundamental, sustained, and purposive changes aimed at defining priorities, refining policies and reforming the institutions through which those policies are implemented.

The package contained four strategies; namely broadening health financing which included charging users of public facilities, providing health insurance or other risk coverage and establishing community pre-payment schemes; decentralisation of health services; privatisation and broadening the provider mix with emphasis on effective use of non-governmental resources and targeting improvements in human resource management (Atkin et. al 1987). A number of African countries adopted these reforms and these included Kenya, Ghana, Uganda, Cameroon and Zimbabwe.

Health Sector Reforms in Uganda

Uganda started implementing these reforms in 1987 in the form of broad decentralization including the health sector; broadening health financing by the introduction of user charges and later community pre-payment schemes; working with Private Not For Profit and Private Healthcare Providers and also encouraging the autonomy of public hospitals; planning and resource allocation systems (bottom-up intentions vs. top-down practice); and lastly human resources management systems under which there was retrenchment, pay reform, transparent remuneration structures, and decentralised human resource management.

Primary Health Care and Health Sector Reforms

As mentioned above, the Primary Health Care (PHC) concept was introduced at the 1978 Alma Ata conference and was subsequently adopted by Uganda as the focus of health system development. Its implementation, however, was hampered in the early 1980's by continued bad governance and civil strife. By 1986, the health system was in a shambles. With the failure of the public system to provide for the health care needs of the population, private providers had easily entered the health care market with associated inequities and inequalities of all sorts, with a resultant lack of recognisable PHC activities.

Uganda therefore did not perform to expectation in implementing the PHC objectives, goals and strategies agreed on in Alma Ata in 1978. With the advent of the NRM government in 1986, a process of reconstruction and rapid development was started. The government had an opportunity to start planning for the country on a new platform. In 1986, the Expanded Programme on Immunisation (EPI) was relaunched; the Maternal and Child Health (MCH) programme, Family Planning and the AIDS control programmes were also introduced. The early 1990's were further characterized by the implementation of the health sector reforms. Central to these were decentralization, and the Structural Adjustment Programmes that urged government to reduce its responsibility for paying for social services, such as health, that produce few benefits to the society as a whole. This was aimed to free resources so that more could be spent on the 'poor'.

The decentralization process on the other hand had started in 1986 with power decentralization through 'resistance councils', and was reinforced as a government policy for effective service delivery in the 1995 constitution. The Local Government Act, which put into effect the provisions of the constitution, was passed in 1997 and substantially devolved powers previously exercised by the central government to the district local authorities. The Ministry of Local Government was made the key intermediary between Local Authorities and the Central Government.

The decentralised system is based on the district as a unit, under which are lower local

governments and administrative units. The care delivery health system was designed along this decentralised public system, with a corresponding health unit level for each level of local government or administrative unit. There was a resultant multi-layered health care system from Health Centre I – IV as lower level units, with a district hospital for each district. Above this were the regional and national referral hospitals. Responsibility for clinical care was built up this system. However, management of the delivery of the Primary Health Care services was the responsibility of the District Medical Officer, who reported to the Ministry of Health.

Conclusion

The major objective was Health for All by the Year 2000 emphasising the concept of equity. That of the HSR was the better functioning of health systems, emphasising efficiency and it was actually more of a health care systems reform. For PHC, the main players were WHO, UNICEF and for HSR, the main players were the World Bank and IMF. There was however some considerable overlap between the contents of PHC and HSR.

Both PHC and HSR faced similar and dissimilar challenges. First of all, there has been lack of information for appropriate decision making mainly caused by a weak HMIS and a weak culture of using evidence for decision making. Secondly, PHC and HSR have been hampered by institutional issues (failure of delivery systems or the behaviour of people) and scarce resources. There have also been the problems of specifying priorities, objectives, monitoring outputs and outcomes, and tracking use of resources.

A three-year health plan was launched in 1993, and from 1994 to 1999, preparations for a new health policy took place. Eventually a National Health Policy was released in September 1999 as the main vehicle for establishing and implementing PHC in Uganda. As a guiding principle, the policy reiterates the role of PHC as the basic philosophy and strategy for national health development. A 5 year Health Sector Strategic Plan was also subsequently formulated and released in 2000 as the main mechanism for implementing the NHP, and by extension PHC. This plan embodies the concept of PHC and all the Health Sector Reforms and so will hopefully begin to deliver on the objectives, goals and strategies agreed upon in Alma Ata in 1978.

Uganda has had a turbulent constitutional history deeply rooted in militarised politics. In the pre colonial era, the country was organised and governed along tribal kingdoms headed by cultural leaders such as the Kabaka of Buganda and Omukama of Toro and Chiefs in the north and east. In 1894, Uganda became a British Protectorate and the kingdoms signed power agreements with the British (Examples include the 1900 Buganda Agreement and Toro Agreement; the Ankole Agreement, 1903; the Bunyoro Agreement, 1933; The British legislated by way of Orders in Council, 1902 and 1920). In 1902, the British passed the Uganda Order in Council which set

up a centralised system of governance, which included a legislature, judiciary and executive to govern the whole country (Mukholi, 1995)

In 1962, Uganda became independent with a new Constitution that entrenched federalism. In 1966, the Prime Minister Milton Obote abrogated the Independence Constitution, declared himself President under an Interim Pigeon Hole Constitution, and mandated Parliament to draft a new constitution. In 1967, the Republic Constitution was introduced, abolishing kingdoms by restoring centralized governance (Constitutionnet, undated). In 1971, General Idi Amin seized power and ruled by constitutional decrees until 1979 when he was ousted by a coup d'état. In 1985, Milton Obote was re-elected president, but was expelled in 1986 by the National Resistance Movement which enacted Statute 5 of 1988 and embarked on a constitutional reform by an elected Constituent Assembly (Constitutionnet, undated). All of these constitutions did not include the right to health.

In 1995, the current constitution was promulgated. It made unseen efforts to recognize human rights and freedoms in Uganda. However, like its predecessors, it ignored several social economic rights such as the right to health, and tucked it in the national objectives and principles of state policy which guide policy development and implementation. However, it did not define the standards of enjoying the rights which are justiciable (Uganda Constitutional Court, 2012). Substantive provisions, such as Chapter Four, introduced a bill of inherent rights not granted by the State (Republic of Uganda, 1995a). They specifically guarantee the right to life, to a clean and healthy environment as well as freedom from discrimination and torture, but not the right to health. In 2005, the Constitution Amendment Act was passed and introduced several changes, including Article 8A, on national interest, which bolstered the justiciability of the national objectives and directive principles, and Article 32(2), which reinforced affirmative action for women.

This section analyses the national Ugandan laws that are applicable to the right to health. It then examines the role of the current constitution in the realisation of the right to health, within the broader context of the international and regional laws mentioned in the previous section and which Uganda has domesticated.

CHAPTER THIRTEEN
TAX EVASION VS TAX AVOIDANCE

Tax avoidance and evasion are pervasive in all countries, and tax structures are undoubtedly skewed by this reality. Standard models of taxation and their conclusions must reflect these realities. This paper first presents theoretical models that integrate avoidance and evasion into the overall decision problem faced by individuals. Early models of this area focused on tax evasion, modeled as a gamble against the enforcement capability of the state. More recently, the literature has examined more general models of the technology of avoidance, with the additional risk bearing caused by tax evasion either being a special case of this technology or one aspect of the cost of changing behavior to reduce tax liability. If the cost of evasion and avoidance depends on other aspects of behavior, the choice of consumption basket and avoidance become intertwined. The paper then relates the behavior predicted by the model to what is known empirically about the extent of evasion and avoidance, and how it responds to tax enforcement policy. The paper then turns to normative analysis, and discusses how avoidance and evasion affect the analysis of vertical and horizontal equity as well as efficiency costs; a taxonomy of efficiency costs is presented. Acknowledging the variety of behavioral responses to taxation changes the answers to traditional subjects of inquiry, such as incidence, optimal progressivity, and the optimal mix between income and consumption taxes. It also raises a whole new set of policy questions, such as the appropriate level of resources to devote to administration and enforcement, and how those resources should be deployed. Because there are a variety of policy instruments that can affect the magnitude and nature of avoidance and evasion response, the elasticity of behavioral response is itself a policy instrument, to be chosen optimally. The paper reviews what is known about these issues, and introduces a general theory of optimal tax systems, in which tax rates and bases are chosen simultaneously with the administrative and enforcement regimes. We argue that the concept of the marginal efficiency cost of funds is a useful way to summarize the normative issues that arise, and expand the concept to include administrative costs, avoidance, and evasion.

Why avoidance, evasion and administration are central, not peripheral, concepts in public finance

Most economic analysis of taxation presumes that tax liability can be ascertained and collected costlessly. As a description of reality, this is patently untrue. For example, in the U.S. the Internal Revenue Service (henceforth IRS) estimates that about 17% of income tax liability is not paid ‘; the figure for most other countries is probably higher. Furthermore, the resource cost of collecting what is paid can be large, in the U.S. probably about 10% of tax collections . The tax structures themselves are undoubtedly skewed by the realities of tax evasion, avoidance, and administrative costs. The standard models of taxation and their conclusions need to be modified in

the light of these realities. Many practitioners of tax advice in developing countries believe that this change in emphasis is essential; for example, Casanegra de Jantscher (1990, p. 179) goes so far as to say that, in developing countries, "tax administration is tax policy"3. Bird (1983), Mansfield (1988), and Tanzi and Pellechio (1997) are useful summaries of the practical problems of the interaction of tax policy and tax administration in this context, We believe that these issues are also critical in developed countries. In this setting, the issue is not the feasibility of certain taxes, but rather the optimality of alternative tax structures. For example, while in many developing countries an income tax that relies on self-reporting cannot be administered at all in a developed country the question is to what extent optimal tax design should reflect the reality of evasion, the necessity of enforcement, and the costs of collection. In fact, tax systems do reflect these issues, although there is little systematic guidance offered by the academic public finance literature. The objective of this chapter is to collect and critique the now sizable literature that addresses these questions.

THE EVOLUTION OF TAX STRUCTURES

Scholars of the historical evolution of tax structure, notably Hinrichs (1966) and Musgrave (1969), have also stressed the importance of tax administration issues. They note that modern tax structure development has generally been characterized by a shift from excise, customs, and property taxes to corporate income and progressive individual income taxes4. This shift has been made possible by the expansion of the market sector and relative decline of the rural sector, the concentration of employment in larger establishments, and the growing literacy of the population. Further changes in the technology of tax administration, including globalization and financial innovation, may now be pushing us away from progressive income taxes toward tax systems that rely more on broad-based consumption taxes such as the value-added tax (VAT), flatter rate structures for income taxation, or the "dual income tax" system recently adopted by certain Scandinavian countries, and described in Sorensen (1994). Alt's (1983) treatment of the evolution of tax structure stresses the role of administrative and compliance costs. He argues that it has become increasingly easy to collect taxes from organized business rather than from households, and that one explanation for the widespread adoption of the VAT is that it imposes compliance costs without raising administrative costs, through incentives for self-policing. Kau and Rubin (1981) focus on changes in the cost of collecting taxes, and successfully relate growth of the U.S. federal government to reasonable correlates of collection cost, such as the literacy rate, the extent of female labor force participation, and the extent of the agricultural sector. Balke and Gardner (1991) contend that declining marginal collection costs can explain the stepwise growth in the size of government and the changes of taxation observed in the U.S. and U.K. They argue that major wars coincide with permanent improvements in tax instruments and tax collection technology, which facilitated permanent expansions in government size thereafter. Putting aside the role of administrative issues in explaining the evolution of tax levels and tax structures, it is indisputable that these considerations are critical

determinants of tax policy at a point in time. For example, an important set of generic aspects of income tax structure, such as the absence of taxation of imputed rents from consumer durables, taxation of capital gains (if at all) on a realization basis, and pre-set depreciation schedules, are undoubtedly largely driven by practical concerns of administerability. For these reasons, we believe that consideration of evasion, avoidance, and administration is essential to the positive and normative analysis of taxation. Our view corresponds closely to that of Blough (1952, p. 146):

It is tax policy in action, not simply the wording of the statute that determines how much the taxpayer must pay, and the effects of the payment. Knowledge of the statute is only a start in knowing a tax system. The interpretations placed on language by administrators and courts, the simplicity and understandability of tax forms, the competence and completeness of audit, the vigor and impartiality of enforcement, and the promptness and finality of action all influence the amount of revenue collected, the distribution of the tax load, and the economic effects of the tax.

In this book we organize, explicate, and evaluate the modern literature that incorporates these considerations into the economics of taxation5. We do not claim to have put together a comprehensive survey of this literature, which is huge and multi- faceted, rather a guide to what we feel are the most important issues and contributions in this area.

GENERAL INTRODUCTION AND THE BACKGROUND OF TAX EVASION AND AVOIDANCE IN UGANDA

Ayoki, Obwoni and Ogwapus' state that tax evasion has been universal and persistentproblem throughout history with manifold economic consequences. Two thousand fivehundred years ago, Plato was writing about tax evasion, and stated that the Ducal Palaceof Venice had a stone with a hole in it, through which people once informed the Republicabout tax evaders, Plato stated that 'Just as it is impossible not to taste the honey or thepoison that finds itself at the tip of the tongue, so it is impossible for a governmentservant not to eat up at Least a bit of the king's revenue". The basic assumption was thatwithout control, man self-serving by nature, would appropriate more than his share of theking's revenue.

Ayoki and others further state that tax evasion has been a major problem in most revenue authorities established to manage administration of tax in different countries. Means of evading tax has continuously been formulated by non- compliant tax payers, bribe payment for example to tax officials is perceived as a means of gaining favors in the form of reduced tax obligations or payments. Widespread corruption, bribery, smuggling, falsification, forging of documents, under-declaring of goods and income tax fraud in the tax system has undermined growth in revenue in Uganda. They further argue that Corruption has persisted despite several anti Corruption measures undertaken by the government, including privatization of some of the Customs

operation and use of automated system in customs and the Value Added Tax(V.A.T operations), special services of revenue protection/anti~smugg1jn~ (Para-military) unit, and the better pay of Uganda Revenue Authority (U.R.A) employees4it is from this background that this research has analyzed ways through which tax evasion occurs in Uganda, its effects and reasons as to why evasion is still high and proposes measures to curb tax evasion in Uganda.

Major tax reforms have been implemented since 1990s aimed at addressing tax evasion in Uganda which aimed at rationalizing the tax structure and rates, widening the tax base, reducing exemptions and simplifying tax procedures. High and Differentiated taxes and tariff rates, burdensome bureaucratic requirements, discretionary exemptions and tax incentives were considered to be a source of inefficiency in the tax system. Uganda Revenue Authority was set up in 1991 as a semi-autonomous agency to collect taxes.

Value-added-tax was introduced in 1996, and a new Income Tax Act was enacted in l997. Substantial attempts were also made to modernize and automate customs and Value Added Tax (V.A.T) administration. In addition, Tax Identification Number, the Large Tax Payer Department, pre-shipment inspection and General Agreement on Tariff and Trade (G.A.T.T) valuation system and the Tax Appeal Tribunal, as well as a system of paying taxes through commercial banks were introduced8. As a result, revenue increased from 7.82 percent of G.D.P in 1990/91 to 12.6 percent in 2008/09. In 2009/2010 domestic revenue was below the budget by 15%~. The reforms had a bigger impact on direct taxes than on indirect taxes, suggesting that tax evasion is still a major problem for indirect taxes especially import duties'°. The government relies on tax revenues as one of its major sources of funds for fulfilling its obligations towards its citizens. The Government further imposes taxes for mobilization of capital for investment, stabilization of the economy by checking on the fluctuation in the prices and maintaining economic stability and distribution of wealth by attempting to reduce the gap between the rich and the poor'~. Where the citizens do not realize this and continue evading, this habit therefore threatens to seriously curtail government activities, thus the need to find ways to strengthen tax compliance in the country. On ~ March 2007 Allen Kagina the Uganda Revenue Authority's Commissioner General in a seminar on tax education at hotel Africana said that the level of ignorance about taxes was still very high among Ugandans She said, "People are evading taxes when they do not need to," and added that businesses were also failing because proprietors were ignorant of their tax obligation, this occurs despite tax clinics' that Uganda Revenue Authority (U.R.A) has been conducting. Therefore tax evasion becomes a serious issue that needs urgent attention.

It is important to note from the onset that this area of study has been widely researched and written on; policy reforms implemented have been as a result of the recommendations from the previous research. However most of the writings reflected tax evasion during their time thus the need to revisit the field and analyze

taxpayers' compliance behavior for instance whether evasion is still a major problem and recommend measures to curb it.

Bird Richard and Oldman (19~7~ "Reading in Taxation in Developing Countries14", conducted a research on non compliance in developing countries and blamed evasion on perception of tax revenue misuse by the authorities. They stated that taxpayers will not comply with their obligation of paying tax if they believe that the revenue is not well spent. They further stated that however where there are fierce detection, enforcement and punitive measures then the taxpayers will be left with no option but to pay. Bird and Oldman argue that voluntary compliance depends on national attitudes towards a tax system and administration. This research was written long time ago, it was extensive and outlined most of the general reasons as to why taxpayers evade tax. It however needs to be revised in relation to the reforms that have been lately carried out in Uganda and analyzed closely in relation to the present condition.

Mr, Kaweesa Kiwanuka Christopher. Taxation and Investment in Uganda, Structure and Trend (May 2OO4)~~. The paper was presented to the business community in London. It discussed the measures that have been taken to reduce on evasion for instance broadening the tax base by bringing the hitherto difficult to tax areas of the economy16 under the tax net, and among others improving on compliance by reducing tax burdens, and increasing the level of awareness through intensive taxpayer education programs such as proactive information dissemination, The paper further stated that various strategies have been adopted such as seminars, workshops, and tax clinics, live radio talk shows on tax education, tax literatures and the UR.A website. The research however failed to appreciate the weakness of the measures that have been implemented. I would argue that the aim of the paper was to encourage investors more than to analyze the issue of tax evasion.

On 1st of March 2007 AlIen Kagina'7, the Uganda Revenue Authority's Commissioner general in a seminar at hotel Africana in Kampala, while advocating for the incorporation of tax education into the university syllabus stated that the level of ignorance was still very high thus leading to rampant evasion. This seems to have departed from Kawesa's earlier report making it insufficient to be relied on as reflecting the current true position.

QckJ-HeIg~ Fleldstacl -Corruption in Tax Administration, Lessons from Institutional Reforms in Uganda.'8 - The Researcher analyzed the level of corruption in U.R.A and concluded that despite the semi-autonomous nature of Uganda Revenue Authority (U.R.A), the respectable salaries of the workers and improved working conditions of the officers, corruption still thrives. He stated that in an environment where the demand for corrupt services is extensive, monitoring ineffective wage increase may end up functioning as an extra bonus on top of the bribes taken by corrupt officers. The researcher proposed for the breaking the influence of kin-based

network on the operations of the revenue administration. He further advocated for introduction of a rotational system for the staff where revenue collectors remain only for a short period in the same post and stated that the danger with this system is that the uncertainty which is thereby created for employees, may result in increased corruption as collectors will try to enrich themselves while they are stationed in the most lucrative post.

The rotation system he said may also give corrupt superiors undue power, for instance they might 'sell' assignment to attractive positions or reassign officials to remote stations as a punishment for honesty. The scarcity of qualified personnel like auditors and accountants further reduces the potential of rotation system in poor countries. Odd-Helge Fjeldstad's research analyzed in depth the issue of corruption in Uganda Revenue Authority (U.R.A). The present research will thus analyze whether some of the recommendations forwarded by the author have been implemented, and whether corruption is still to be blamed in U.R.A.

Ayoki Milton, Obwoni Marios, Ogwapus Moses. Tax reforms and domestic revenue mobilization in Uganda (Jan 2], 2OO5'~). The paper tackled tax evasion with clear elaboration; however the findings of this paper were restricted to the reforms that were done up to 2004. It is a good reference material in this subject, but does not reflect as to the current level of evasion thus this research is geared towards closing the gap created between 2004 and present, analyzing what has been done and its response in tax compliance. The paper suggested that improving revenue performance will require a major improvement in tax administration, increase in the level of employment and reduction in tax exemption and corruption. The authors further stated that further adjustments in tax rates except tax threshold and some excisable goods were not possible at that moment, and that efforts should be directed to improving tax collection and reducing corruption, improving welfare through employment generation and other poverty reduction strategies. Measures that could be undertaken to reduce corruption include winning public confidence through improved service delivery and government payment for goods and services.

Ole Therkilsden. The rise and fall of mass taxation in Uganda (1900-2005) DIls working paper ~ iance and ~ovemance2° The paper stated that to collect tax in a reliable and efficient manner requires quasi-voluntary compliance. Taxpayers must be encouraged to "volunteer" to pay while non-compliant must be coerced to pay if they are caught and that unless constituents are coerced, induced or motivated to pay tax, they will minimize payment or if the situation permits not pay at all. Ole Therkilsden argues that quasi-voluntary compliance depends on many factors; perception of the fairness of the tax (compliance by other taxpayers), perception about thebenefits (services in the broad sense) that the tax authorities provide in exchange for tax revenues and perception of the legitimacy of rulers based not only on the material benefits of the tax payments but also on the norms and beliefs. The writer further states that in western Europe quasi-voluntary compliance emerged through

a bargaining process, this brought rulers and potential taxpayers to negotiate about who was to be taxed, the basis for assessing taxes, how taxes should be collected and the purpose for revenue use. I do concur with the author on use of quasi voluntary methods for nurturing compliance. This book has analyzed the effectiveness of the penalties for evasionunder the tax legislations.

Improving Tax Administration: A case study of the Uganda Revenue Authority21. The author in her Paper presented to the Cambridge University states that it is one thing to know that taxes can help finance government expenditure and quite another to have a system that actually collects and manages tax revenue effectively. She adds that a good tax system depends largely on two things; a good tax policy and a good tax administration to implement this policy. She further stated that improving administration will significantly improve revenue performance since the weaknesses in Uganda's tax administration explains at least to some extent Uganda's poor tax revenues. The author criticizes the nature of autonomy that Uganda Revenue Authority enjoys noting that the autonomy has been undermined partly by the fact that the Ministry of Finance still influences the recruitment of some revenue officials, sets unrealistic revenue targets that it uses to asses U.R.A's performance and controls its operational cost by requiring U.R.A to prepare a budget for the Ministry's approval.

Kangave Jalia blames corruption in U.R.A on constant interaction between the taxpayers and officials since taxpayers have to file returns physically thus the interaction may encourage the two parties to negotiate tax liability. She furthers adds that U.R.A employees salaries are not competitive compared to private sector wages and this may force officials to engage in corrupt practices. On this I do disagree with the author having read from Odd Helge Fjeldstad22 article on Corruption in tax Administration Lessons from institutional reforms in Uganda, who stated that increased wages can act like extra bonuses in addition to the money that the employees get from corrupt practices in an environment where corruption is preferred, a clear description of the corrupt environment in Uganda. Kangave Jalia states that tax evasion occurs due to lack of intensive audits and absence of pre-determined audit criteria and the low level of computerization in the U.R.A, This she bases on the fact that U.R.A has incomplete accounting modules for Value Added Tax and Income Tax, meaning that some tax procedures has to be conducted manually making it harder to detect evasion, She also blames administration inefficiency on arrogance of U.R.A employees towards taxpayers. This she notes develops from lack of employee incentives which reduces employee morale and may translate into a disregard for customer service. She proposed for introduction of electronic filing of returns or mailing them instead of taxpayers taking them physically to the tax office. She also criticized the Income Tax Act 199723 for not expressly mentioning tax evasion as an offence and states that under Section 136, a person who does not pay tax is liable to pay interest on the tax due or any penalty thereon, Section 137 provides for the failure to furnish a return while Section 142 provides for making false or misleading statements. However no where in the whole Income Tax Act is tax evasion explicitly

mentioned as an offence.

EVASION, AVOIDANCE, AND REAL SUBSTITUTION RESPONSE

We begin with some definitions. The classic distinction between avoidance and evasion is due to Oliver Wendell Holmes, who wrote
"When the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as evasion, what is meant is that it is on the wrong side of the line ..."

Bullen v. Wisconsin (1916), 240.US. 625 at p. 630.

Thus, the distinguishing characteristic of evasion is illegality 6. In practice, of course, there are many gray areas where the dividing line is not clear, and sometimes the tax authorities may inappropriately characterize particular cases. One can draw a further distinction within the class of legal responses to taxation. At times we will refer to real substitution responses, or real responses for short, as those responses which come about because the tax law changes the relative price of different activities, and that induce taxpayers to respond by choosing a different consumption basket. Conceptually distinct from real substitution responses are efforts to reduce one's tax liability without altering one's consumption basket, which we will refer to as avoidance. These are actions taken in response to the tax system that do not involve shifts along a given budget set. This definition covers a broad range of behaviors. One example is to pay a tax professional to alert one to the tax deductibility of activities already undertaken. Another example is to change the legal form of a given behavior, such as reorganizing a business from a C corporation to an S corporation , recharacterizing ordinary income as capital gain, or renaming a consumer loan as a home equity loan. A third example is tax arbitrage, when economically equivalent, but differentially- taxed, positions are held simultaneously long and short, producing tax savings. Finally, retiming a transaction to alter the tax year it falls under is an example of avoidance. Fine distinction among the types of behavioral response to taxation is not possible and is for many issues not crucial. In general, changes in the tax structure will induce all the different kinds of response. Indeed, one of the goals of this chapter is to emphasize the common analytical aspects of issues that have traditionally been kept distinct.

GENERAL FRAMEWORK

Although there may be reasons, discussed later, for distinguishing among these categories of response to taxation, there is a common framework for analyzing these issues. Given the structure of the tax system and enforcement process, taxpayers are faced with opportunities to reduce their tax payments, or expected tax payments. There is a private cost to taking advantage of these opportunities, which may take the

form of an altered consumption basket, an increasing probability of detection of, and penalty for, evasion, and/or a real resource cost of effecting avoidance or concealing evasion. This private cost depends on policies of the government that include, but are not limited to, the setting of tax rates and bases. The parameters of the tax administration and enforcement policies also matter, but these policies themselves are usually costly. The tax system establishes the relative prices among this broad set of taxpayer activities. In the standard model, it establishes the relative price of leisure and other goods, as well as the relative price among the set of goods. In a more general framework it also sets the price of "honesty", meaning the incentives to evade, and establishes the cost and reward to legally reducing taxes via avoidance activities. The dimensions of taxpayer response interact. For example, real behavior may alter the cost of avoidance or evasion, thus changing the effective prices of real activities. Although these are common themes, the literature to date has tended to isolate pieces of the overall problem. We follow that practice here, by beginning in Section 2 with a discussion of the now standard economic model of tax evasion8. Then, in Section 3, we introduce models that apply more generally to both evasion and avoidance. We then look at the empirical evidence, first in Section 4 about evasion, and then in Section 5 on avoidance. The remainder of the chapter addresses the implication for tax analysis of introducing these issues. Section 6 examines the fundamental issues of positive tax analysis, while Section 7 addresses normative issues. Section 8 concludes.

THEORETICAL MODELS OF EVASION

The Allingham-Sandmo-Yitzhaki model

Suppose that the true tax base is known to the taxpayer, but is not costlessly observable by the tax collection agency. Then, under certain circumstances, the taxpayer may be tempted to report a taxable income below the true value. In the seminal formulation of Allingham and Sandmo (1972) (henceforth A-S) 9, what might deter an individual from income tax evasion is a fixed probability (p) that any taxable income understatement will be detected and subjected to a proportional penalty (0) over and above payment of the true tax liability itself. Later we introduce and discuss at length a "technology of evasion", in which evasion involves costs to the evader that might depend on the income and the amount of tax evaded. In the A-S model, all real decisions, and therefore taxable income (y), are held fixed; only the taxpayer's report is chosen. The risk-averse taxpayer chooses a report (x), and thus an amount of unreported income y-x, in order to maximize expected utility:

EU = (1 -p) U(v + t(y-x)) +pU(v - (y -x)), (1) where v is true after-tax income, y(l - t), t being the rate of (proportional) income tax. The von Neumann-Morgenstern utility function U(.) represents the individual's preferences toward risk. In this model the choice of whether and how much to evade is akin to a choice of whether and how much to gamble. Each dollar of taxable income understatement offers a payoff of t

with probability (1 - p), along with a penalty of 0 with probability p. If and only if the expected payoff to this gamble, (1 -p)t -pO, is positive, every risk-averse taxpayer will chance some evasion, with the amount depending on the expected payoff and the taxpayer's risk preferences. A critical issue, pointed out by Yitzhaki (1974), is whether the penalty for discovered evasion depends on the income understatement, as A-S assume, or on the tax understatement, as more accurately reflects practice in many countries. In the latter case, the maximand becomes (1 - p) U(v + t(y - x)) + pU(v - Ot(y - x)), and the expected payoff per dollar of evaded income becomes (1 - p)t - pOt. This is an important change, because it means that the tax rate has no effect on the terms of the tax evasion gamble; as t rises, the reward from a successful understatement of a dollar rises, but the cost of a detected understatement rises proportionately. The first- order condition for optimal evasion becomes

U'(yA) (I P) (2) U'(yu) pO where YA and yu refer to net income in the audited and unaudited states of the world, respectively. Note that t does not appear in Equation (2), other than via an income effect in the definition of YA and Yu. Compare this to the original A-S formulation, where t would be a multiplicative factor in the denominator of the right-hand side, implying that increases in t would proportionally increase the reward to getting away with understating income, but not proportionally increase the penalty, making evasion more attractive. Regardless of whether the penalty depends on the tax understatement or income understatement, more risk-averse individuals will, ceteris paribus, evade less. Individuals with higher income will evade more as long as absolute risk aversion is decreasing; whether higher-income individuals will evade more, as a fraction of income, depends on relative risk aversion. Evasion relative to income will decrease, increase or stay unchanged as a fraction of income depending on whether relative risk aversion is an increasing, decreasing, or constant function of income. Increases in either p or 0 will decrease evasion. Increasing t has both an income effect and, possibly, a substitution effect. If the taxpayer has decreasing absolute risk aversion, the income decline makes a less risky position optimal. An increase in t has a substitution effect, increasing the relative price of consumption in the audited state of the world, and thereby encouraging evasion, if the penalty is related to income, rather than tax avoided. In the latter case, if the penalty is related to the tax evaded, a tax increase has no substitution effect, so that an increase in t reduces evasion as long as there is decreasing relative risk aversion 10 This simple version of the A-S model has been criticized on the grounds that it fails a simple reality check. If p is the fraction of returns audited in the U.S., about 0.015, and 0 is the statutory penalty for non-criminal evasion, about 0.2, then based on the degree of risk aversion exhibited in other situations people should be evading a lot more than they apparently do. The intriguing question becomes why people pay taxes rather than why people evade. Much subsequent research, some of it surveyed below, has been addressed to reconciling the facts with the theory . In the A-S model what limits the amount of evasion attempted is the taxpayer's risk aversion. At some point further evasion becomes just too big a gamble, so that at the chosen amount of evasion the marginal gain in expected tax savings is exactly offset by the marginal

disutility of the extra risk taken on 12. The model also predicts that a risk-neutral individual would either remit no tax at all, or do no evasion, depending on whether evasion has a positive expected payoff. This "either-or" prediction is eliminated if the probability of detection is an increasing function of the amount of evasion, which is likely to characterize most tax systems. The implications of introducing an endogenous p depend on the precise relationship betweenp and evasion. For example, consider the case [discussed in Yitzhaki (1987)] where p is an increasing function of evaded income (y - x). The risk-neutral taxpayer chooses x to maximize expected income,

EY - ((1 -p[y -x])(r +s) +p[y -xl](- Os)), (3)where s _ t(y - x) is understated tax. If p' -_ p/(y - x) is positive, the first-order condition becomes -p -pO = p'(+)(s/t). (4)

In this case, evasion will be constrained by the fact that p increases to offset what would otherwise be an increase in expected income. The either-or prediction in the case of a risk-neutral taxpayer is also eliminated if there are distinct sources of income, each of which is subject to its own. For example, employee labor income has a high p (due to information reporting by employers and computer matching), while "moonlighting" income has a much lower p. Faced with this situation, a risk-neutral individual reports all or none of each of the several sources of income, but may certainly report a fraction of total income The endogenous probability of detection can of course be applied to the case of a risk-averse taxpayer. In this case, at the margin the gain in expected value is offset by a combination of increased risk-bearing and an increased probability of detection. Cremer and Gahvari (1994) generalize this notion by introducing what they call a "concealment technology", which in our notation takes the form p(y - x, ((y - x)/y), m), where m represents taxpayer expenditure on concealment. The notion that the probability of detection can be increased by the taxpayer's expenditure is also present in Usher (1986), Kaplow (1990), Cowell (1990a), and Mayshar (1991).

JOINTNESS WITH LABOUR SUPPLY

Of particular interest is the relationship between the tax report decision and other consumer decisions. Most attention has been paid to labor supply, where the individual chooses how much labor to supply and how much labor income to report. The decision about how much income to report is made simultaneously with the decision of how much to work, so that it is impossible to adjust labor supply based on whether one is caught evading. This problem may be posed as how much of a homogeneous labor income to report, which is equivalent to simultaneously choosing one's consumption basket and exposure to risk 14. Models that belong to this group are based on extensions of the A-S model. Alternatively, the problem may be posed in the context of a model of the underground economy, in which there are two sectors with possibly different equilibrium wage rates and other different circumstances. The latter class of models allows for wage adjustment in response

to policy changes, and thus are general equilibrium in nature. In the extensions of the A-S model, the first-order condition for labor supply differs from that in a model without tax evasion only in that it contains mean marginal, instead of marginal, utilities. Whether mean marginal utility is bigger or smaller than the marginal utility depends on the sign of the second derivative of marginal utility, which is the sign of the third derivative of the utility function. On top of that, if utility is non-separable, the marginal utility functions depend on the sign of cross- derivatives, which further complicates the problem . Baldry (1979) and Pencavel (1979) stress the difficulty of reaching any clear-cut comparative statics conclusions from such a model; the response of reported income to changes in tax rates, penalties, and fines becomes ambiguous. Thus, most models are based on particular restrictive assumptions about the utility function. For example, if the utility function is separable in consumption and leisure, then the marginal utility of leisure is independent of consumption. If, in addition, the marginal utility of consumption is linear (as in the function U(C, L) = a + C + yC2 + 6L), the first-order condition for optimal labor supply is (1 - t)wU [wL + (-p)s] = U2[L], (5) where s is the tax evaded and (1 -pO)s is the expected gain from evasion. Because evasion increases expected consumption for any given amount of leisure without changing the real wage, leisure would increase, and labor supply would decline. The real wage does not decline because the evasion opportunities are independent of the amount of work done. The critical importance of the relationship between the real consumption choices and the evasion or avoidance opportunities comes up again in the more general models discussed in Section 3. There we discuss cases where the avoidance opportunities do affect the real wage. In situations where labor income in the formal sector is reported by the employer to the tax enforcement agency as a matter of course, the only way to evade tax may be by "moonlighting" - working extra hours at a different job - or by switching completely to the informal sector or "underground economy".

Other uncertainty

The basic model can also be extended to deal with other sources of uncertainty. Andreoni (1992) introduces a temporal nature to the tax evasion decision, recognizing the fact that the penalty for tax evasion, if detected, is assessed later than the tax saving. Andreoni deviates from the majority of the literature which assumes efficient market environments, and instead assumes that the taxpayer is constrained by credit rationing. Due to uncertainty, the income of the taxpayer fluctuates, as does the shadow price of income. Provided that non-monetary punishments are high enough to deter one from non-repayment of penalties and tax evaded, evasion may be viewed as a way of "borrowing" from the IRS. A constrained taxpayer may find it optimal to borrow when the shadow price of money is high enough during evasion and relatively low during repayment 16. Andreoni models a situation where, in bad times, individuals evade as a way to smooth income streams; thus the IRS is a "loan shark". The conditional repayment of the loan occurs in a better state of the world. Another aspect of uncertainty concerns the unpredictability of the tax liability itself,

which arises when the "correct" tax liability is not clearly defined . Uncertainty of true tax liability can be modeled by extending the Allingham and Sandmo framework. Scotchmer and Slemrod (1989) construct a model where, upon audit, the assessed tax liability is symmetrically centered around a known value with an equal probability of one-half. In this case the very concept of income understatement becomes problematic because the taxpayer is uncertain whether any given income declaration is correct or not. There are now three possible outcomes that the taxpayer must consider. If the return is not audited (with probability 1 -p), true taxable income is irrelevant - the taxpayer merely pays the tax due on his declared taxable income. If the return is audited, there are two possible outcomes, depending on what the assessed tax liability turns out to be. Scotchmer and Slemrod (1989) show that increasing the dispersion of possible assessed taxable incomes induces increased compliance, given weak conditions about the taxpayer's attitudes toward risk. The intuition is that, for a given reported income, more dispersion lowers income in the least desirable state of the world, when the taxpayer is audited and his taxable income is determined to be the highest possible value. This increases the marginal utility of income in that state of the world, which is accomplished by increasing reported income and thus subjecting oneself to a lower penalty in the event this state of the world occurs. As long as the taxpayer exhibits declining absolute risk aversion, increasing the report is the optimal response. Beck and Jung (1987) show that this conclusion may not hold when there is a continuous range of possible taxable income assessments. In this case one marginal benefit of increasing the income report is that it reduces the probability that a fine will be assessed. For a taxpayer reporting income below the mean of possible assessment, an increased dispersion of possible assessed incomes decreases the likelihood that the income report will be declared insufficient and a fine assessed, so that this component of marginal benefit is reduced. Thus, it is theoretically possible that increased dispersion will cause a lower report. Note that uncertainty does not reduce tax evasion by as much as it reduces aggregate noncompliance in the sense of true aggregate tax liability minus tax paid. This is because one effect of uncertainty is to induce some taxpayers to pay more tax than they are legally obligated to pay, which reduces aggregate noncompliance but not the amount of individual tax evasion. Scotchmer (1989) allows for the possibility that, by expending resources, the taxpayer can reduce the uncertainty of tax liability. The resources can be in the form of research by the taxpayer himself, or in the form of professional assistance hired. In this case the cost of unpredictability includes not only the disutility caused by uncertain tax liability but also the resources expended to reduce the uncertainty.

General equilibrium considerations

The A-S model and its direct descendants address only the demand for tax evasion by (potential) taxpayers. One might also consider the "supply" of evasion, and ponder the general equilibrium considerations of demand having to equal supply. One context for this extension is the underground economy. Kesselman (1989) develops a

set of models in which there are two sectors - above-ground and underground - which produce two distinct goods. Workers are homogeneous in their gross productivity in each sector of the economy (and in their consumption preferences), but must work only in one sector or the other. The workers, though, have differential distaste and risk aversion for tax evasion, and differential efficiency in concealment and other skills needed to operate successfully in the underground economy. Although the precise results are model-dependent, three general conclusions obtain: (i) much of the gain from evasion may be shifted from the evaders to the consumers of output through lower prices, and the "marginal" evader gains nothing; (ii) relative price effects tend to dampen the impact of tax rate changes on the extent of evasion, and (iii) the effects of evasion on the marginal revenue response to tax rate changes will depend on consumers' elasticity of substitution between the sectoral outputs. A key aspect of the foregoing model is that the act of tax evasion is tightly tied to the production of a distinct good. This need not be true, as is indicated by the simultaneous presence of above-ground and underground housepainters, repair people, and so on. Still, there is certainly evidence that evasion is concentrated in particular sectors, such as those that supply services directly to homeowners, because of the small scale of production that can aid concealment and the lesser need for receipts compared to services provided to businesses.

GENERAL MODELS OF AVOIDANCE AND EVASION

Because Allingham and Sandmo addressed tax evasion as a gamble, much of the subsequent literature focused on models in which taxpayers' risk aversion, and therefore higher-order characteristics of utility functions, play an important role. This focus has to some extent obscured other important aspects of the issue, such as the tax concealment technology, and also obscured the common aspects of evasion and what we have called avoidance. To highlight these issues we turn now to more general models of behavioral response to taxation. Mayshar (1991) poses the taxpayer's problem as max U(Y,L) subjectto X=w[L-S-m(E)], Y=X-T(X,S,E), (6) X,S,L,Y where X is output, S is sheltering effort, L is total labor effort, and Y is consumption. Mayshar labels T( ) the "tax technology"; it specifies the maximal taxes, T, collectible from a base X, when the tax authority selects a vector E of policy instruments, while the taxpayer devotes S in labor units to sheltering activity. It is reasonable to assume that Tx> 0 and Ts < 0 and, by construction TE > 0. The function m(E) represents unavoidable compliance costs associated with taxpaying, measured in labor units. Although evasion as a gamble is not explicitly treated in this model, Mayshar argues that it can be presented in this framework; to do so S is defined as that certain payment which causes the same expected utility loss as the extra risk an evader takes on, for given expected tax payments. This forms the link between the A-S models of tax evasion and the models discussed in this section 18. From the perspective of an A-S evasion model, Ts < 0 means that more evasion can lower expected tax payments, at a cost of more uncertainty. Consider the first-order conditions with respect to L and S, respectively, where asterisks indicate an optimal

value:

- ,UL(Y*, L*)/Ur(Y*,.L*) = w[- Tx(X*,S*, E)], (7) w[1l - Tx(X*, S*, E)] > -Ts(X*,S*, E), (8) where Equation (8) holds as an equality if S* > 0.

Expression (7) looks familiar: the marginal rate of substitution between consumption and leisure equals the net wage. But note that the effective marginal tax rate, Tx(X*,S*,E), permits more complex marginal tax rates than the standard linear tax model, where T(X*,S*,E) would equal tX*, and so Tx would equal t. In Expression (7), the effective marginal tax rate may depend on the sheltering activity of the taxpayer and/or the policy instruments of the government, interpreted more broadly than simply announcing a tax schedule. Expression (8) states that, because sheltering is accomplished by using labor, at an interior optimum its opportunity cost w(l - Tx( )) will be equal to its marginal private gain, which is the marginal tax saving, -Ts. Slemrod (2001) investigates a related model in which the private cost of achieving reductions in taxable income (denoted A, for income avoidance) is C(wL, A), where wL is true labor income; he argues that, in general, C1 < 0 and C2 > 019. If we imbed this avoidance technology into the taxpayer choice under a linear income tax, the maximization problem becomes max

U(Y,L), subject to Y = w(l -L)- t(w(l -L)-A)-C(wL,A). (9) L,A

Before pondering the general implications of this formulation, first consider the special case where C(wL, A) = C(A). In this case the first-order condition for labor supply is identical to the standard model without avoidance. The first-order condition for A is simple and straightforward, C' = t, implying that avoidance ought to be pursued until its marginal cost equals its marginal saving in tax liability, equal to t. In this situation a tax rate hike unambiguously increases A. Furthermore, its effect on L is no different than in the standard model, except to the extent that the income effect is altered by the possibility of avoidance. The story is enriched when the avoidance, or tax, technology becomes C(wL,A). The effective marginal return to working becomes w(l - t - C1), where -wC 1 is a subsidy to working that Slemrod (2001) dubs the "avoidance-facilitating" effect; for example, a given level of allegedly work-related deductions looks more plausible if it is taken against a larger gross income. The term (t - C1) is analogous to Tx in Mayshar's model, and makes explicit how the avoidance technology influences the incentive to supply labor. Several insights emerge from this modeling of the tax environment. First of all, the substitution effect of labor supply does not respond identically to the two components of the statutory after-tax wage rate, w and (1 - t). Changes in (1 - t) trigger avoidance responses which are not triggered by changes in w. While both labor supply and avoidance respond to both w and (1 - t), they do not do so symmetrically. This implies that econometric studies of labor supply (and avoidance) ought to differentiate responses to w and (1 - t). Furthermore, one should not conclude, as does Rosen (1976), that

a differential response to w and (1 - t) necessarily represents "taxpayer illusion"20; instead it could be reflecting the avoidance technology. Mayshar and Slemrod addressed the possibility that changes in the tax system will induce from taxpayers all three types of behavioral response. For example, an increase in the rate of a proportional income tax will provide an incentive to substitute leisure for goods, to (depending on the penalty structure) increase evasion, and increase avoidance. Other interactions among the three types of behavioral response have been investigated, as well. Cowell (1990a) develops a model in which the taxpayer can evade, but can also legally shelter income for a fixed cost r and a constant marginal cost y, where $y < t$. These cost assumptions generate the result that if an honest (or highly risk-averse) person shelters any of his income (Y), then he will automatically shelter all of it, and will do the latter if $F + yY < tY$. Cowell then investigates whether sheltering will co-exist with evasion, and asserts that the optimum is not characterized by an equality between the marginal cost of avoidance and evasion. This is because sheltering reveals to the tax authority that the taxpayer's true income must be at least $F/(t - y)$. He argues that there may be a class of shelterers who would also have been evaders, had it not been for the attention drawn by sheltering, and that in some cases there may be a complete polarization between evaders and avoiders. In Cross and Shaw (1982), taxpayers must make expenditures to learn about and (in the case of avoidance) document both avoidance and evasion activities 21 . Two avenues of interaction arise. First, in a progressive tax system, expenditure on avoidance or evasion reduces the marginal tax rate, thus reducing the return to engaging in the other22. Second, investment in avoidance may reduce the marginal cost of evasion, or vice versa. For example, while investigating an illegal but undetectable "tax shelter", a (barely) legal tax shelter arrangement may be uncovered without much additional investment of time.

DESCRIPTIVE ANALYSIS OF EVASION AND ENFORCEMENT

The extent of tax evasion and Data problems

Ascertaining the extent and characteristics of evasion immediately runs into two problems - one conceptual and one empirical. The conceptual problem is that, although one can assert that legality is the dividing line between evasion and avoidance, in practice the line is often blurry. Sometimes the law itself is unclear, sometimes it is clear but not known to the taxpayer, sometimes the law is clear but the administration effectively ignores a particular transaction or activity. The importance of these factors certainly differs across situations. The other difficulty is that, by its nature, tax evasion is not easy to measure merely asking just won't do. Several different approaches have been attempted. One approach relies on inferring the level or trends in noncompliance from data on measurable quantities, such as currency demand or national income and product accounts. The monetary indirect estimates are based on the presumption that most unreported economic activity takes place in cash, and that some time in the past the underground economy was small. In

Gutmann (1977), increases in the ratio of currency to demand deposits since 1937-41 measure the underground economy; in Feige (1979), changes since 1939 in the ratio of total dollar transactions to official GNP since 1939 measure it. Tanzi (1980) estimates regressions explaining the ratio of currency to money defined as M2, and interprets the portion explained by changes in the tax level as an indication of changes in the size of the underground economy. None of these approaches is likely to be reliable, however, as their accuracy depends either on unverifiable assumptions or on how well the demand for currency is estimated. The indirect noncompliance estimates based on discrepancies between national accounts measures of income and income reported to the tax authority are also problematic. For one thing, national income estimates of several key forms of income are based on tax return data. Second, there are many inconsistencies between how income is defined for tax purposes and for national accounts. However, Engel and Hines (1999), in a study of tax evasion dynamics which focuses on the possibility of retrospective examination of previous-years' returns, study this measure of evasion in the U.S. for the years 1947 to 1993 and find that it responds as their model predicts. For example, annual fines and penalties imposed by the IRS subsequent to audits are correlated with contemporaneous and several lags of tax evasion as calculated from national income statistics. The most reliable source of information about tax compliance concerns the U.S. federal income tax, and exists because of the IRS's Taxpayer Compliance Measurement Program, or TCMP. Under this program, approximately every three years from 1965 until 1988 the IRS conducted a program of intensive audits on a large stratified random sample of tax returns, using the results to develop a formula used to inform the selection of returns for regular audits. The TCMP data consist of line-by-line information about what the taxpayer reported, and what the examiner concluded was correct. This data formed the basis for the IRS estimates of the aggregate "tax gap", and provides much useful information about the patterns of noncompliance with respect to such variables as income, occupation, line item, region of the country, age, and marital status. While informative, it is widely recognized that even the intensive TCMP audits imperfectly reveal particular kinds of noncompliance, such as income from the underground economy. Patterns of noncompliance

We cannot adequately review here what is known about the extent and nature of tax evasion for all taxes in all countries at all times. Rather, in what follows we offer a few salient facts about the recent U.S. income tax, mostly gleaned from the TCMP data just discussed. (1) With audit coverage hovering at about 1% and an extensive information reporting and matching program, evasion is estimated to be 17% of true tax liability23 . (2) The extent of evasion varies widely across types of gross income and deductions; for example, the 1988 TCMP reports that the voluntary reporting percentage was 99.5% for wages and salaries, but only 41.4% for self-employment income (Sched- ule C). These percentages clearly correlate positively with the likelihood of income understatement being detected. (3) Evasion (as measured by underreported income, not tax liability), rises with income but at a less than proportionate rate. Christian (1994) reports that in 1988, taxpayers with (auditor-

adjusted) incomes over $100 000 on average reported 96.6 percent of their true incomes to the IRS, compared to just 85.9 percent for those with incomes under $25 00024. (4) Within any group defined by income, age, or other demographic category, there are some who evade, some who do not, and even some who overstate tax liability25 . For example, of middle-income (auditor-adjusted income between $50 000 and $100000) taxpayers in 1988, 60% understated tax, 26% reported correctly, and 14% overstated tax [Christian (1994, p. 39)].

Determinants of evasion

Empirical attempts to more systematically establish how compliance responds to aspects of the tax environment have met with limited success, primarily due to the data problems discussed in Section 4.1.126. Three approaches dominate the literature Cross-section analysis

Clotfelter (1983) was the first attempt to make use of the TCMP data to investigate how noncompliance responded to changes in the environment. He estimated a tobit model, explaining, for each of ten audit classes, noncompliance as a function of the combined federal and state marginal tax rate, after-tax auditor-adjusted income, and a set of demographic variables available on tax returns. The most striking conclusion is that noncompliance is strongly positively related to the marginal tax rate, with the elasticity ranging from 0.5 to over 3.0. This finding is apparently consistent with the basic A-S model, but not with the extension proposed by Yitzhaki. Beron, Tauchen and Witte (1992) investigate TCMP data aggregated by the IRS to the three-digit zip code level. They find that increasing the odds of an audit significantly increases reported AGI and tax liability for some, but not all, of the groups. In an attempt to deal with the potential endogeneity of the intensity of enforcement, they model the simultaneous determination of tax reporting and the log odds of an audit for each of the several audit classes in each zip code area. Their instrument for this is the level of IRS resources relative to the number of returns 28. Although Beron, Tauchen and Witte argue that it is a valid instrument because the IRS has not been able to distribute its resources among districts so as to achieve its goals, this is not convincing: it is reasonable that the IRS attempts to target its resources toward areas believed to be particularly noncompliant, thus invalidating use of IRS resources as an instrument. Subsequent studies have produced mixed results. Of particular interest is work by Feinstein (1991), who performed a pooled cross-section analysis of 1982 and 1985 TCMP data, thus mitigating the problem that in a single cross-section (other than for cross-state differences) the marginal tax rate is a (complicated, non-linear) function of income, making it difficult to separately identify the tax and income effect. Feinstein's analysis suggests a negative impact of the marginal tax rate on evasion, which contradicts Clotfelter's results but is consistent with the A-S model as adjusted by Yitzhaki. Klepper and Nagin (1989) investigate the characteristics of evasion across line items, and find that noncompliance rates are related to proxies for the traceability, deniability, and ambiguity of the items, which are in turn related to

the probability that evasion will be detected and punished. They also find evidence of a "substitution effect" across line items, such that greater noncompliance on one item lowers the attractiveness of noncompliance on others, because the latter jeopardizes the expected return to the former by increasing the probability of detection.

Time-series analysis

Dubin, Graetz and Wilde (1990) make use of state-level time series cross-section data from 1977 through 1986 to investigate the impact of audit rates and tax rates on tax compliance. They do not, though, have a direct measure of noncompliance, but instead use tax collections per return filed and returns filed per capita as (inverse) measures of noncompliance. They conclude that the continual decline in the audit rate over this period caused a significant decline in IRS collections - amounting to $41 billion by 1985.

Controlled experiments

As discussed above, analysis of both cross-section and time-series historical data is subject to severe difficulties of measuring the parameters of the environment and in knowing the source of any variation in these parameters. Controlled experiments can avoid all of these problems, but, for cost and other implementation reasons, are rare. One recent exception is reported by Slemrod, Blumenthal and Christian (2001), in which the State of Minnesota Department of Revenue conducted a randomized controlled experiment with respect to four aspects of the tax compliance environment: the threat of an audit, the provision of special return preparation information services, moral appeals, and a redesigned tax form. With regard to the first, they find that, for low- and middle-income taxpayers, a threat of certain audit29 produced a small, but statistically significant, increase in reported income, which was larger for those with greater opportunities to evade. However, for high-income taxpayers the audit threat was associated with on average a lower income report. The authors speculate that sophisticated, high-income, taxpayers view an audit as a negotiation, and view reported taxable income as the opening (low) bid in a negotiation which does not necessarily result in the determination and penalization of all noncompliance. Based on the same experiment, Blumenthal, Christian and Slemrod (2001) find no evidence that either of two written appeals to taxpayers' consciences had a significant effect on aggregate compliance. Descriptive analysis of avoidance

Dimensions of avoidance

Stiglitz (1985) distinguishes three basic principles of tax avoidance within an income tax: postponement of taxes, tax arbitrage across individuals facing different tax brackets (or the same individuals facing different marginal tax rates at different times), and tax arbitrage across income streams facing different tax treatment. Many tax avoidance devices involve a combination of these three principles. In an example

used by Stiglitz, the basic feature of an Individual Retirement Account (IRA) is the postponement of tax liability until retirement; if the individual faces a lower tax rate at retirement than at the time the income is earned, then the IRA also features tax arbitrage between different rates. Finally, if the individual can borrow to deposit funds in an IRA and the interest incurred to finance the deposit is tax deductible, then the IRA is a tax arbitrage between two forms of capital, one of which is taxed, and the other of which is not taxed. Stiglitz argues that, with perfect capital markets, these three principles can be exploited to eliminate all taxes while leaving the individual's consumption and bequests unchanged relative to the zero tax case, and facing no more risk than in the original situation. But capital markets are not perfect, and therefore all tax liability is not eliminated by tax avoidance and to reduce tax liabilities distorting actions (such as investment in sectors where it is easier to convert ordinary income into capital gains) are utilized. There is considerable empirical evidence testifying to the extent and tax sensitivity of these kinds of avoidance behavior.

Retiming

There is abundant support for the notion that the timing of certain transactions can be extraordinarily responsive to changes in tax rates. Perhaps the most striking example was the response of capital gains realizations to the tax rate increase scheduled to occur on January 1, 1987, but fully anticipated by the fall of 1986. Aggregate realizations in 1986 were twice what they were in any previous year or for several years thereafter. As Burman, Clausing and O'Hare (1994) document, capital gain realizations on corporate stock in December of 1986 were seven times higher than in the previous December. Another striking example of timing response is provided by Goolsbee (2000), who documents that, in advance of the expected 1993 increase in the U.S. top individual tax rate, corporate executives realized a huge amount of income in 1992, primarily through exercising non-qualified 3 3 stock options. Sophisticated econometric techniques using panel data have been developed for separately identifying the timing responses to tax rate changes over time from the permanent behavioral response to a changed tax rate. These new techniques have been applied to both capital gains realizations [Burman and Randolph (1994)] and charitable contributions [Randolph (1995)]. In both cases the results suggest that the retiming effect dominates the permanent effect.

Tax arbitrage

Tax arbitrage activity takes advantage of inconsistencies in the tax law, featuring economically offsetting positions which have asymmetric tax treatments. Examples range from sophisticated derivative financial instruments to the more mundane cases of doing tax-deductible borrowing to finance tax-deferred IRA contributions or tax-exempt bond purchases.

The classification of income

The classic example of income reclassification, also termed income shifting, is turning ordinary capital or labor income into preferentially-taxed capital gains. In another example, Maki (1996) and Scholz (1994) have documented that, following the Tax Reform Act of 1986, there was a large shift from no-longer-deductible consumer interest into still-deductible mortgage or home equity loans. There is anecdotal evidence that, following the introduction of the R&D credit in the United States, much business activity was "discovered" to have a significant research component. Gordon and MacKie-Mason (1990, 1997) have investigated how, when the Tax Reform Act of 1986 lowered the top individual rate below that of the corporate rate, there was a large shift from C corporations into S corporations, which are taxed like partnerships and therefore are not subject to the corporation income tax. Gordon and Slemrod (2000) discuss the shifting of income between the corporate and individual tax base via the method of compensation, and document evidence of such shifting in the United States.

The extent of avoidance

No one has attempted to calculate for avoidance a counterpart to the aggregate evasion "tax gap". There is, though, some indirect evidence that the avoidance tax gap is large. Gordon and Slemrod (1988) calculated that the U.S. tax system of 1983 raised approximately zero revenue from taxing capital income, due to the combination of legislated deviations from a pure income tax and tax arbitrage 34. As to the incidence of the avoidance opportunities, Agell and Persson (1990) and Gordon and Slemrod (1988) argue that the availability of tax arbitrage opportunities will generally benefit those at the bottom and top of the tax rate distribution, to the disadvantage of those in the middle. This generally corresponds to low- and high-income individuals, respectively, but there are exceptions to that rule; high-income individuals benefit through their ownership of tax-preferred pension assets.

Fundamentals of tax analysis

Having completed a review of the positive, or descriptive, analysis of tax evasion and avoidance, we turn now to the normative analysis of taxation. However, before we proceed to that task, we must first reconsider the fundamental building blocks of tax analysis - the evaluative criteria of equity and efficiency - to check whether these concepts need to be revised.

Equity and Vertical equity

Analyses of the distributional impact of taxation, especially those based on tax return data, ought to account for the presence of evasion. The evidence cited in Section 4.1 - that noncompliance as a fraction of true income declines with true income - suggests that standard analyses of incidence based on the statutory rates and base

may understate the progressivity of the tax burden35; Bishop, Chow, Formby and Ho (1994) find this for the United States using the 1985 TCMP data, although Alm, Bahl and Murray (1991) reach the opposite conclusion about Jamaica36.

Horizontal equity

Horizontal equity - the idea that equals should be treated equally by the tax system, or that tax liability should not depend on any of a set of irrelevant characteristics - is central to an assessment of the impact of tax avoidance and evasion. To see this, compare two tax situations, one in which there is a linear income tax rate of 20% and everyone reports their true income, and another in which the tax rate is 40% and everyone (costlessly) reports exactly half their income. In this case the two systems are identical with respect to both horizontal and vertical equity. Now imagine that, in the second system, on average everyone reports half their income, but that the fraction differs systematically by income. In that case replicating the progressivity of the first tax system will require a more complicated, non-linear, system of rates. If, however, evasion varies within income classes, no revision of the tax rate schedule can compensate, and there will be horizontal inequity. In the context of the A-S model of tax evasion, the horizontally inequitable tax burden will depend on the taxpayer's degree of risk aversion. Less risk-averse households will gain more from the availability of a gamble with given positive expected value. In contrast, common parlance would ascribe any horizontal inequity to variations in honesty, with the honest, or dutiful, citizens left holding the bag by the dishonest. In the typical economic model, though, there are no honest or dishonest individuals, only utility-maximizers; thus, this distinction can be introduced only artificially by simply positing that some individuals do not pursue tax evasion. The same kind of artificial differentiation across people can be made with regard to tax avoidance by positing that some people have an aversion to such behavior; as Steuerle (1985, p. 78) says: "Some taxpayers simply do not enjoy playing games no matter what the certainty of the return; the U.S. tax system is designed to insure that such individuals pay a greater share of the tax burden than those who are not so hesitant". Steuerle (p. 19) concludes that "taxpayers pay unnecessary taxes because of the simplicity of their filing response or their lack of knowledge of the tax laws".

Incidence

The theory of tax incidence - who bears the burden of a given tax structure - begins with three basic principles: (i) the burden of all taxes must be traced back to individuals; (ii) individuals with relatively elastic demand (or supply) of a taxed good tend to escape the burden of tax imposed on that good; and (iii) in the long run the incidence of a tax levy does not depend on which side of the market bears the legal responsibility for remitting the tax to the government. Introducing avoidance and evasion preserves the methodological importance of the first two principles but calls the third into question. A complete analysis of the incidence of a particular tax

requires specifying the remittance process and positing an avoidance technology for both the suppliers and demanders of the taxed good. Avoidance opportunities alter the analysis of incidence for two separate reasons. First, their presence affects the behavioral response to a change in the tax system, and this alters what otherwise would be the change in equilibrium prices. Second, the presence of avoidance alters the link between tax-inclusive prices and welfare. This suggests that the incidence (not to mention the efficiency) of a tax may depend on which side of the market the responsibility for remittance falls. That is in stark contrast to the standard model, under which that is irrelevant to the long-run incidence 38.

Are changes in the social welfare function necessary?

In models with heterogeneous citizens, the standard objective function is a social welfare function which has as arguments the utility level of each citizen - accepting the individuals' own relative valuations of goods and services - where the shape of the social welfare function implicitly determines the social value placed on the distribution of utilities as opposed to the sum of utilities. In the presence of uncertainty, the expected utilities of individuals are the relevant arguments - accepting the risk preferences of consumers. Cowell (1990b) questions the appropriateness of according the same social weight to investigated and guilty taxpayers as is applied to the innocent or uninvestigated, and argues that there may be a case for putting a specific discount on the utility of those "who are known to be antisocial" (p. 136). Cowell investigates a few alternative social objective functions, including one in which any private benefit derived from the proceeds of evasion is assigned a social weight of zero, but in our opinion no convincing alternative that provides reasonable policy prescriptions has yet been presented.

A taxonomy of efficiency costs

In the standard model the efficiency cost of taxation is entirely due to the fact that, because of the change in relative prices, individuals are induced to select socially suboptimal consumption baskets - to substitute away from relatively highly-taxed goods to relatively lightly-taxed goods, such as leisure. A standard exercise in optimal taxation theory is to describe the tax system that minimizes these costs, or to describe the tradeoff between these costs and the distribution of welfare in the society. In the presence of avoidance and evasion, a broader concept of efficiency cost is needed. In what follows, we describe and comment on three additional components of the social cost of taxation and discuss the problems that arise in introducing these costs into formal models of optimal taxation.

Administrative costs

Tax administrations deal, among other things, with information gathering. But this is a difficult element to model because information varies in quality. There is a

qualitative difference between an auditor "knowing" that a given taxpayer is evading and having sufficient evidence to sustain a court finding to that extent. Also, the cost of gathering information depends on how accessible the information is, and whether it can be easily hidden. There are several advantages to taxing a market transaction relative to taxing an activity of the individual such as self-consumption. First, in any market transaction there are two parties with conflicting interests. Hence, any transaction has the potential of being reported to the authorities by one unsatisfied party. A second property is that the more documented the transaction, the lower is the cost of gathering information on it. For this reason it is easier to tax a transaction that involves a large company, which needs the documentation for its own purposes, than to tax a small business, which may not require the same level of documentation. Finally, market transactions establish arms-length prices, which greatly facilitate valuing the transaction. Administrative cost may also be a function of the physical size and the mobility of the tax base (it is harder to tax diamonds than windows), whether there is a registration of the tax base (e.g., owners of cars, holders of drivers' licenses), the number of taxpayer units, and information sharing with other agencies39. It is also an increasing function of the complexity and lack of clarity of the tax law. Administrative costs possess two additional properties that complicate the modeling of tax administration issues: they tend to be discontinuous and to have decreasing average costs with respect to the tax rate. To see the first property, consider two commodity tax rates, denoted by t and t2. If tl = t2, then only the total sales of the two commodities need be reported and monitored. If, however, the two rates differ even slightly, then the sales of the two commodities must be reported separately, doubling the required flow of information. There are decreasing average costs because the cost of inspecting a tax base does not depend on the tax rate (except to the extent that people are more inclined to cheat with a higher tax rate). Hence, a higher tax rate reduces the administrative cost per dollar of revenue collected [Sandford (1973)]. Administrative cost may also be a function of the combination of the taxes employed and their rates, because the collection of information concerning one tax may facilitate the collection of another tax (e.g., inspection of VAT receipts may aid the collection of income tax).

Compliance costs

Slemrod (1996a) estimates that, for the U.S. income tax, the private compliance cost is about 10 cents per dollar collected. Sandford (1995) presents estimates for a variety of taxes in several countries. Some of that cost is an unavoidable cost of complying with the law, and some of it is voluntarily undertaken in an effort to reduce one's tax bill, but in either case it approximately represents resource costs to society. In almost all cases the private compliance costs dwarf the public administrative costs of collecting taxes, which the IRS estimates at 0.6 cents per dollar collected for all the taxes it administers. Integrating compliance costs into formal models in a meaningful way is tricky. As an example of the modeling difficulties this topic poses, consider the following problem: when is it optimal to delegate to employers the

authority to collect taxes and convey information about employees, thus requiring the administration to audit both the taxpayer agent and the taxpayer himself, and when is it optimal to deal only with the employee? Clearly, given that the employer already has the necessary information, it would save administrative costs to require him to pass it along to the tax administrator. This might also reduce total social costs if the cost of gathering information by the administration is higher than the increase in cost caused by imposing a two-stage information-gathering system40. However, the potential efficiency of involving taxpayers in the administrative process must be tempered with a practical consideration. Administrative costs must pass through a budgeting process, while compliance costs are hidden. Hence, there may be a tendency to view a policy which reduces administrative cost at the expense of an equal (or greater) increase in compliance costs as a decrease in social cost, because it results in a decrease in government expenditures. We will discuss this issue further in Section 7.

The risk-bearing costs of tax evasion

In the Allingham-Sandmo model, tax evasion occurs only if the taxpayer expects to increase his expected income by evading taxes, including the expected fines that he would have to pay if he were caught; it continues until, at the margin, the increased expected income is offset by the increased risk-bearing. Hence, a taxpayer who evades taxes increases both his exposure to risk and his expected income. This additional exposure to risk is a deadweight loss to society. In principle, the taxpayer could be better off under an agreement whereby the taxpayer pays at least as much as the government currently collects, while the government ceases to audit. Assuming a risk-neutral government, the risk-bearing cost of tax evasion is equal to the risk premium that the taxpayer would be ready to pay in order to eliminate the exposure to risk [Yitzhaki (1987)]. Depending on the other assumptions about the probability of detection, the penalty structure, and risk aversion, the risk-bearing costs of evasion may be a continuous function that increases with the tax rates. These costs are in addition to the compliance costs voluntarily incurred by an individual attempting to minimize the expected cost by camouflaging the evasion or shifting to an otherwise less remunerative occupation.

NORMATIVE ANALYSIS

Optimal tax administration and enforcement

Avoidance and evasion pose two challenges for the normative analysis of taxation. First, they introduce a new set of policy instruments whose optimal setting is at issue. These include the extent of audit coverage, the penalty imposed on detected evasion, and the structural integrity of the tax code itself, which determines the extent and nature of avoidance opportunities. Second, they invite a rethinking of standard taxation problems, including the optimal setting of commodity tax rates and optimal progressivity.

Optimal penalties

Consider the A-S model of a representative consumer whose true income is exogenous and whose only choice concerns how much of that income to report. This choice depends on two policy instruments set by the government, p, which has a resource cost due to the need for auditors and the related infrastructure, and 0, which is a fine for detected evasion, which is a transfer with no resource cost. It has been well known since Becker (1968) that in this setting a government concerned with maximizing the ex ante utility of its representative citizen will want to set 0 as high as possible, allowing p to be as low as possible. This policy of "hanging violators with a probability of zero" deters evasion while minimizing the resource cost of the deterrent - p represents a real resource cost but 0 is simply a transfer. But this kind of model ignores, inter alia, the possibility of a corrupt tax administrator who abuses the system or, alternatively, harshly punishes someone who commits an honest mistake 41. The harsher the penalty, the more damage that can be inflicted by a corrupt administrator or, in the case of an honest mistake, the more capricious the system is. Hence, the harsher the penalty, the more detailed and cautious the prosecution process should be, although this may increase its administrative costs. In the absence of modeling the interaction between the penalty rate and administrative costs, analytical models usually assume a ceiling on the penalty rate.

Optimal randomness

Auditing some taxpayers and not others inevitably introduces some ex ante uncertainty and some ex post horizontal inequity. This suggests a link to an earlier literature in public finance, in which Stiglitz (1982) and Weiss (1976) each argued that, even in a world of risk-averse citizens, it may be optimal for the government to introduce some randomness into its net tax (or transfer) to individuals. The argument depended on the second-best nature of the problem, in which an income tax distorted the labor-leisure choice. For some utility functions, Stiglitz and Weiss argued, the introduction of random payments induced people to work harder, thus mitigating the labor market distortion; in some cases the value of the increased labor more than offset the utility loss from the randomness introduced. This argument has clear implications for the optimal enforcement of the income tax, because it suggests that one of the presumed social benefits of greater enforcement - the reduced uncertainty of payment of a given expected value of taxes - may be mitigated by the increased labor supply distortion. Weiss uses approximations around the point of no evasion to describe the condition under which allowing some degree of evasion can both increase revenue and increase welfare. However, Yitzhaki (1987) shows that, in the examples used by Weiss, the condition that allows successful evasion is identical to the condition that the solution is on the declining portion of the Laffer curve; in this case, any reduction of the tax rate would increase welfare and increase revenue. This suggests that the improvement was not caused by allowing evasion. We conclude that neither the practical nor hypothetical relevance of this point has yet been demonstrated.

The optimal extent of enforcement

For a given penalty structure how much resources should be devoted to enforcing the tax laws? Or, in other words, what is the optimal probability of detection, p? Many widely-used textbooks and several IRS commissioners presume that the answer is to increase p until the marginal increase of revenue thus generated equals the marginal resource cost of so doing. As Slemrod and Yitzhaki (1987) show, however, this rule is incorrect. Intuitively, although the cost of increasing p (hiring more auditors, buying better computers, etc.) is a true resource cost, the revenue brought in (through assessed fines as well as higher compliance) does not represent a net gain to the economy, but rather a transfer from private citizens to the government. The correct rule equates the marginal social benefit of reduced evasion to the marginal resource cost; the social cost is not well measured by the increased revenue, but is in this model related to the reduced risk bearing that comes with reduced evasion42. This result implies that privatization of revenue collection will inevitably lead to a socially excessive amount of resources devoted to that purpose unless restrictions are put on the resources and behavior of the agency.

Optimal auditing rules

One of the key simplifying assumptions of the Allingham-Sandmo model is that the probability of evasion being detected is fixed and unrelated to any actions of the taxpayer. In Section 2.1 we investigated the implication ofp increasing with the amount of evasion, but this relationship was exogenously imposed. Other models allow the audit strategy of the tax collection agency (henceforth the IRS) to depend on the report of the taxpayer in a way that maximizes an explicit objective function; the taxpayer, in turn, forms some expectation of what the IRS' auditing rule is, and acts accordingly. In modeling the game between taxpayers and the IRS, researchers have generally assumed that the IRS attempts to maximize net revenue collected. As we discussed earlier, this is not likely to characterize the social-welfare-maximizing solution to how big the enforcement budget ought to be, although it might characterize the optimal allocation of resources for a given IRS budget. Another critical model element is whether it is assumed that the IRS can commit to an announced audit rule, or whether it cannot commit, and therefore will opportunistically audit whatever returns it wishes once the returns are filed. Finally, it is critical whether the IRS budget is assumed to be fixed. Following Reinganum and Wilde (1985), models of this question generally assume that the probability of audit depends on reported income only. Most papers conclude that the optimal strategy in this context is to randomly audit individuals who report below some threshold level of income. In equilibrium only low-income individuals report honestly, while high-income taxpayers report exactly at the threshold level of income and are never audited. Sanchez and Sobel (1993) derive this result in the context of risk-neutral taxpayers with a continuous distribution of actual income and no labor supply decisions, and where penalties for detected evasion are bounded and exogenously set. Cremer and Gahvari (1996) reach similar conclusions when they allow for endogenous labor supply, although

they consider just two types of individuals. Mookherjee and Png (1989) consider risk-averse individuals. Imposing mild restrictions on the level of risk aversion, they show that the optimal policy is characterized by random audits and finite penalties. It is still true that above some income level taxpayers are not audited, but it is no longer true that everyone reporting an income below that level is honest43. Scotchmer (1987) relaxes the assumption that the IRS can only observe the taxpayer's report, and instead assumes that it is possible to assign taxpayers to a number of audit classes based on observable characteristics. Although the optimal audit policy within each class is similar to that described above, this policy introduces a regressive bias to the effective tax system, because the agency will audit taxpayers with low-income reports with higher probability than high-report taxpayers, thus making it less attractive for low-income taxpayers to underreport income. This bias may be difficult to undo through the statutory tax system if the tax code cannot depend on the audit class. This state of affairs provides an obvious temptation to the IRS to reverse its pre- announced audit rule and instead to audit only those taxpayers that report exactly the threshold level of income; those that report below the threshold are, after all, reporting truthfully. Because of that temptation, an announced precommitment is not likely to be credible. Describing the equilibrium outcome in the absence of precommitment is more complex, as Andreoni, Erard and Feinstein (1998) discuss. One class of models, first investigated by Graetz, Reinganum and Wilde (1986), introduces a set of taxpayers at each income level who report truthfully regardless of their incentives to do otherwise. This enriches the model because it implies that at each level of income report there are both honest and evading taxpayers. Melumad and Mookherjee (1989) take another tack by assuming that although the government cannot commit to a particular audit policy, it can commit to the total amount spent on audits. In this context they demonstrate that the problem of commitment may be solved by delegating this task to a separate agency, and they describe the optimal contract that guarantees a unique equilibrium and provides incentives for the agency to audit optimally. Such a contract is welfare improving. In the context of models of tax compliance in which the strategies of both the taxpayers and the IRS are objective-maximizing, the impact of a change in, say, the tax rate, depends on one's forecast of how both sets of actors respond. For example, if the tax rate increases it may become optimal for the IRS to audit more returns; in Graetz, Reinganum and Wilde (1986), with an unconstrained budget, an increase in the tax rate on the high-income taxpayers who are potential evaders decreases evasion. Whether this prediction turns out to be accurate depends on whether in practice the IRS budget increases concomitantly with the tax rate, and there is no empirical evidence that supports this.

Optimal allocation of enforcement resources

Administrative costs are inputs into the revenue raising process. But what should be the target of the administration, and how should economic considerations be introduced into the tax-revenue production function? To address this issue, one has to define the

objectives of the tax administration and its production function - how much revenue is produced with different combinations of inputs (subject, of course, to the tax law). Then one can analyze whether the allocation of funds for administration is efficient or to check whether, as Tanzi and Pellechio (1997) put it, "personnel are often assigned to tasks that have low productivity while important functions get unattended". Yitzhaki and Vakneen (1989) develop a model that introduces microeconomic considerations into the management of tax administration 44. They assume that the objective of the administration is the maximization of revenue and that taxpayers can be classified into groups based on having returns of similar complexity. These assumptions allow them to present the inspection process of tax returns as a decision tree in which the "inspector" has to spend a given amount of his time to review the return, and the reaction of the taxpayer (whether to appeal) is determined by the quality of the assessment. If they continue to disagree, the results are determined by the court. The solution to this decision tree problem can be determined in a dynamic programming model. Estimation of the decision tree enables one to estimate the present value of future tax revenue that is collected by each activity of the tax administration. Yitzhaki and Vakneen argue that an administration should equalize the rate of return, in terms of tax revenue, for each activity. This principle should govern sampling of tax returns for inspection, as well as which items on the return to inspect.

Optimal tax systems

The previous section addressed how to evaluate the appropriate setting of tax enforcement instruments, for a given specification of tax base and rates. The more general problem is to consider all of these aspects simultaneously, what Slemrod (1990) calls the theory of "optimal tax systems". Certainly, the ease of administering various taxes has critical implications for the optimal structure of tax systems. Tax codes which are based on unobservable and practically un measurable quantities (such as an ability tax) often look desirable on paper. Integrating the issue of administrative ease into normative tax theory requires a shift of emphasis away from the structure of preferences, which has been the principal focus of optimal tax theory, toward the technology of tax collection.

The choice of tax instruments

With some exceptions, optimal tax theory has dealt with the issue of administering a tax by making extreme assumptions about what kinds of taxes are available to the policymaker. The fundamental results of optimal tax theory depend on implicit assumptions about which taxes can be administered and which cannot. The problem of optimal commodity taxation is interesting only because the possibility of lump- sum taxation is ruled out45, presumably because it is infeasible. Production efficiency is desirable only if all commodities can be taxed and 100 percent taxation of profits is feasible (or if no profits exist). When consumers are not identical, an ability tax dominates an income tax because it causes no distortion in behavior. The

study of optimal income taxation is appropriate when ability taxes are ruled out, usually by appealing to the difficulties of measuring ability for the purpose of basing tax liability on it. Extreme assumptions about the feasibility of tax instruments are analytically convenient, but incorrect. Ability can be measured, although with some expense and error. On the other hand, income cannot be measured perfectly, and the degree of accuracy in income measurement depends on the resources expended toward this goal. Extreme assumptions about the feasibility of tax instruments may also preclude consideration of fundamental changes in policy 46. For example, a common assumption made in optimal taxation models of developing countries is that income and consumption arising in the agricultural sector are not taxable, although marketable surplus is taxable. Much interesting analysis proceeds from this assumption, but none asks at what point it makes sense for a country to attempt to tax agricultural income, even assuming that it will have only limited success in doing so. There is clear evidence [Riezman and Slemrod (1987)] that countries with low literacy rates tend to rely on highly distorting but (relatively) easily collectable import and export taxes, and shy away from efficient but administratively difficult land taxes. Under what conditions should an imperfect land tax be tried? The answers to these questions depend on the resource cost of administering the new tax instrument relative to its effectiveness, or degree of success. This latter notion has several dimensions, including the true revenue yield and the extent and nature of the mistakes that are made in administration. Stern (1982) models the choice between an optimal nonlinear income tax, in which income is costlessly observable, and a system of differential lump-sum taxes based on characteristics of taxpayers which can be ascertained with some error. The lump-sum tax system is superior if there are no errors in classifying individuals but, when enough mistakes are made, income taxation may be the preferred system. Stern's analysis recognizes that the two tax systems each have their own information requirements (the lump-sum system requires classifying individuals, the income tax system requires observing incomes). The two systems will also likely have different administrative costs as well, although for the sake of simplicity Stern assumes these costs are identical. Greater accuracy in the classification of individuals could be achieved with higher cost, as could more accurate measurement of income47 . The optimal tax system framework has also been applied to a more immediately policy-relevant choice, that between direct and indirect taxes. It has frequently been claimed that a shift from income taxation to value added taxation can combat evasion by taxing the spending on goods from the compliant sector by individuals who evade taxes on their income. Boadway, Marchand and Pestieau (1994) consider the optimal mix between a general non-linear income tax and commodity taxes under the assumption that evasion is possible only for the income tax. Granting this assumption provides a strong case for commodity taxation to supplement an income tax. The authors recognize that the results would have to be "seriously adjusted" (p. 73, fn. 2) if there is more evasion on indirect than on direct taxes. In contrast, Kesselman (1993) concludes that changing the tax mix toward indirect taxes will have little or none of the claimed anti-evasion effects. Underlying this conclusion is a two-sector model

in which the income tax is paid only by workers in the above-ground sector, and the indirect tax is paid completely by above-ground workers but incompletely in the underground sector. This is justified on the grounds that to evade the income tax successfully requires evasion of the indirect tax on output as well, since honest reporting of gross sales for the indirect tax would signal to the authorities the extent of the income tax evasion. Which analysis better captures the reality depends on the technology of tax avoidance and evasion.

Presumptive taxes

The general nature of the optimal tax systems problem is well illustrated by considering a class of taxes - known as presumptive taxes - which are a pervasive element in the tax systems of many developing countries. This kind of tax makes sense in cases where the otherwise desirable tax base is difficult for the tax authorities to measure, verify, and monitor. As a substitute for the desired base is the "presumed" tax base, which is derived from a formula, which itself may be simple or complex, based on more readily monitored items4 8. For example, at one time in Israel a taxi driver had a choice of a tax based on book income or a levy on the accumulated mileage of the taxicab; for shopkeepers, the alternative to a tax on book income was a tax based on the square footage of the shop and other observable characteristics of the business. The wide variety of presumptive taxes used in the developing world is nicely surveyed in Tanzi and Casanegra de Jantscher (1989) and in Rajaraman (1995). The problem that presumptive taxes address - the difficulty of monitoring certain potential tax bases - is not confined to developing countries, and use of presumptive taxes, albeit with different names, is also widespread in developed countries. Examples include the use of fixed depreciation schedules in place of asset-specific measures of the decline in asset value (economic depreciation), taxation of capital gains on a realization basis, and floors on deductible expenses. Slemrod and Yitzhaki (1994) and Kaplow (1994) analyze the U.S. standard deduction as a presumptive tax; a higher value reduces the administrative and compliance cost of monitoring itemized deductions, but it increases horizontal inequity by increasing the range of taxpayers for which the "proper" amount of deduction is replaced by a single number 9. Upon reflection it is clear that all taxes are presumptive, to some degree. The conceptually pure tax base - be it the flow of income, wealth, sales revenue, or something else - cannot be perfectly measured, and the tax authority is constrained to rely on some correlate of the concept. We label particular taxes as presumptive when the calculation of the tax base deviates in a substantial way from the ideal concept. But there is a pervasive tradeoff between accuracy and the costs of complexity5°.

Optimal commodity taxes

The characterization of optimal commodity taxes is a cornerstone of the standard theory of optimal taxation, dating back to Ramsey (1927). The standard theory, though, assumes that taxes on all commodities can be verified and collected costlessly. Yitzhaki

(1979) investigates the optimal size of the commodity tax base in a representative consumer economy when there is a resource cost, related to administration, to adding goods to the tax base. If, as he assumes, preferences over all goods are Cobb-Douglas, then uniformity of rate for all taxed goods is optimal. Expanding the tax base to cover more goods will reduce the excess burden of taxation, but it increases the administrative cost. The optimal tax system equates the marginal excess burden of raising a dollar of revenue to the marginal administrative cost, and thus minimizes the total resource cost of raising revenue. Wilson (1989) generalizes the framework to constant-elasticity-of-substitution utility functions. The fact that changes in administrative costs are likely to be discontinuous with respect to changes in tax policy is important in more general treatments of the optimal set of tax instruments. The theory of optimal taxation tells us that, except in special cases, all goods should be taxed at different rates. However, it is likely that administrative cost depends on the number of different tax rates as well as the number of commodities taxed. This is not an issue when one assumes a utility function that implies uniform optimal taxes (e.g., Cobb-Douglas), but is very important under more general preferences; in that case there is a tradeoff between administrative and compliance costs on the one hand and the standard excess burden on the other. Both the Yitzhaki and Wilson papers assume that a commodity is either in the tax base and taxed at the uniform rate, or out of the tax base entirely. Boadway, Marchand and Pestieau (1994), Cremer and Gahvari (1993) and Kaplow (1990) investigate general characterizations of optimal commodity taxation with evasion, administrative costs and costly enforcement51. In Cremer and Gahvari (1993), the optimal tax on a commodity is, ceteris paribus, lower when the elasticity of induced avoidance response to a tax increase is higher; intuitively, this increases the marginal social cost per dollar raised from taxing that commodity.

Optimal progressivity

In the optimal linear income tax literature, where only a demogrant and single marginal tax rate are chosen, what constrains redistribution is the marginal excess burden caused per dollar raised by the marginal tax rate, and the fact that this ratio increases with the marginal tax rate levied. Cremer and Gahvari (1994) investigate how the introduction of evasion and concealment expenses change the optimal setting of a linear income tax, when the audit probability is also optimally chosen. They characterize the optimal marginal tax rate in the presence of evasion, but conclude that one cannot hope for an unambiguous result in general about whether in a model with evasion the marginal tax rate higher or lower is compared to in a model without evasion. If other aspects of the tax system are not set optimally, there is no presumption that the tax rate that is optimal, given the value of the other instruments, is also the global optimum. To be concrete, if enforcement instruments are set suboptimally, so that the marginal cost of raising revenue is higher than it need be, then the optimal tax rate will appear lower than if the enforcement parameters are set optimally. The point is that the optimal level of taxes or tax progressivity can be

properly assessed only simultaneously with the instruments the government uses to control avoidance and evasion. Slemrod (1994) constructs an example of this issue by modeling a two-person economy in which the only possible response to taxation is avoidance. The government must choose three instruments to maximize social welfare: a demogrant, a (single) marginal tax rate, and an avoidance-control policy denoted p, which at a cost reduces both the level of avoidance and its responsiveness to changes in the marginal tax rate. An example shows that, with p set suboptimally, the optimal policy can be to lower t; however, a superior policy is to raise both p and t. The intuition here is that the calculation of marginal excess burden of the marginal tax rate should be done assuming the other policy instruments are set optimally. Using the metaphor of Okun (1975), the "leak" in the revenue system, which limit both redistribution and the size of the public sector, can be "fixed", albeit at some cost. Slemrod and Kopczuk (2001) expand on this notion by isolating the effect of a policy instrument on the elasticity of taxable income, which summarizes the magnitude of the behavioral response to taxes that limits optimal progressivity. They formally characterize the optimal elasticity, emphasizing that in many settings it is appropriate to think of this as a policy choice rather than an exogenous constraint. In a special case where the policy instrument is the breadth of the tax base, Slemrod and Kopczuk show that more egalitarian societies will feature lower elasticities of taxable income, as will societies with a lower marginal cost of tax administration. Thus, this research simultaneously addresses optimal progressivity and the optimal ease of collecting taxes, and focuses on a critical difference between real substitution responses on the one hand and avoidance and evasion responses on the other. Economists nearly always assume that the former is an immutable, or primitive, parameter that is immune to policy (or any kind of) manipulation. Whatever the truth of that assumption as it applies to, say, labor supply response to taxation, it is certainly untenable as it applies to avoidance and evasion responses. Their availability is certainly a (perhaps highly constrained) policy choice. Truly optimal tax policy does not accept the current state of administration and enforcement as given, but instead chooses these aspects and the statutory tax structure together.

The marginal efficiency cost of funds

A principal theme of this chapter is that acknowledging the range of behavioral responses to taxation suggests a rich set of new empirical and conceptual issues and alters the answers to some fundamental questions of public finance. For some other questions, though, the anatomy of behavioral response may not matter. For example, Feldstein (1999) argues that, for the purpose of calculating the marginal efficiency cost of taxation, the critical parameter is the tax rate elasticity of taxable income, and the etiology of the elasticity - be it increased leisure, evasion, or increased untaxed fringe benefits, for example - is irrelevant. The intuition is that at the margin people are willing to incur a dollar's worth of cost to save a dollar of taxes, and that cost may take the form of a distorted consumption basket, a fee to an accountant, or increased exposure to the risk of punishment for evasion. However, because Feldstein derives

this conclusion in a model which allows real substitution response but neither avoidance nor evasion, it begs the question of whether the taxable income elasticity is a sufficient statistic for measuring the efficiency cost of raising taxes and for comparing the relative efficiency of alternative ways to raise revenue. This problem has been treated in the context of the concept referred to as the marginal cost of funds or marginal efficiency cost of funds, and was developed by Usher (1986), Mayshar (1990, 1991), Wildasin (1984), and Slemrod and Yitzhaki (1996). This model also allows us to place the issues raised above into a more general normative framework. We first discuss the concept in the absence of administrative costs, evasion, or avoidance, and then extend it to apply to these issues 52. Following Mayshar (1991), assume that the government sets a level of public goods, G, and a vector E of tax policy instruments so as to maximize V(U*(E, w), G), where w is the wage rate and U* is the utility derived from private goods. He shows that the optimum is characterized by MBF = MCFi, where MBF is the social marginal benefit of funds (in terms of private consumption), and MCFi is the marginal cost of funds of tax instrument i. Mayshar and Yitzhaki (1995) decompose the MCFj term into:

MCFi = DC7MECFi, (10) where DCj is Feldstein's (1972) distributional characteristic of the tax instrument, while MECFi is the marginal efficiency cost of the tax instrument. In the absence of evasion or avoidance, MECF, is equal to XJ/MR/, where Xi is the change in revenue assuming no behavioral response, and MR (marginal revenue) allows behavioral response. Thus, in the case of an income tax, Xi/MRi equals 1/ (1 + Ei), where ei is the elasticity of taxable income with respect to tax instrument i. Note that the above interpretation is not limited to reforms involving tax rates. One may define the marginal cost of funds with respect to marginal changes in any parameter of the tax system (e.g., income brackets, exemption levels, penalties for tax evasion, etc.). Nor does its application rely on an assumption that tax policy has been set optimally. As Slemrod and Yitzhaki (1996) show, away from the optimum the MECF concept can be used to identify incremental changes in the tax system that would increase social welfare. To see how the MECF can be extended to evasion and avoidance, recall that the potential change in tax revenue (assuming an inelastic base) is Xi but, because of taxpayers' response, the government collects only MRi. We can divide the potential tax Xi into two components as follows:

Xi = (Xi - MR) + MR/, (11)

where MRi dollars are collected and (Xi - MRi) "leaks" outside the tax system. The critical question is how to evaluate, from a social point of view, the leaked dollars. To do this one must ask how much a taxpayer is ready to expend (on the margin) to save a dollar of taxes or, alternatively, how much utility loss he is willing to suffer to save a dollar of taxes. The answer is that a rational taxpayer will be ready to sacrifice up to, but no more than, one dollar in order to save a dollar of taxes. Hence, on the margin the private cost, which is equal to "leaked" dollars multiplied by their cost per dollar, is Xi - MRi; the collection of MR, dollars results in a loss of (X, - MRj)

to the taxpayer over and above the taxes paid. If we assume that the utility loss to the individual (private cost) of the leaked tax revenue should be accorded the same social cost as the utility loss due to the taxes paid, then the cost to society of transferring a dollar to the government is (Xi - MRi)/MR = (Xi/MRi) - 1. The total marginal cost to the individual taxpayer, including the taxes paid, is X/MRi. Consider now a taxpayer who also has the option to evade part of the additional tax. On the margin, he would be ready to sacrifice utility valued at one dollar (in additional risk bearing due to evasion and/or due to substitution to cheaper but less rewarding activities) in order to save a dollar of taxes. Hence, we do not have to know whether the "leak" was through evasion or real substitution to evaluate the costs to society. The same rule applies to avoidance activity and, in fact, to any activity under taxpayer control. Therefore, all one needs to know is the potential tax (i.e., assuming an inelastic tax base) that will be collected from a change of a parameter of the tax system, and the actual change (taking into account all behavioral responses) in order to evaluate the marginal efficiency cost of raising revenue. It is in this sense that Feldstein's (1999) claim about the central importance of the elasticity of taxable income generalizes to avoidance and evasion. Calculating the MECF involves two critical assumptions that deserve further attention. The first of these is that at the margin the taxpayer sacrifices exactly one dollar (instead of up to one dollar) to reduce tax liability by one dollar. However, it may be that the taxpayer is at a corner solution with respect to behavioral response, so that the marginal utility loss may be less than a dollar. For an example of a taxpayer at a corner, consider the case of Individual Retirement Accounts (IRAs). An employee can contribute up to $2000 per year into an IRA, deduct the contribution from taxable income, pay no tax on accrued earnings in the account, and pay tax on the principal when withdrawn. Although IRAs were designed to increase saving, there is nothing to prevent an individual who in the absence of taxes would have invested $4000 in a similar account from diverting $2000 into the IRA. There may be a cost to this, as IRAs have early withdrawal penalties which in some cases limit the flexibility of using these funds. Thus, contributing to an IRA can save taxes, does not require a change in one's consumption basket, but may entail some cost. However, it cannot be presumed that, at the margin of an IRA contribution, the private value of the sacrifice is equal to the tax saving; the IRA contribution is limited to $2000 only because of the statutory limit on contributions. As another example, consider the MECF of raising the tax rate on labor income in a situation where, in an economy with two taxpayers, one taxpayer reports no labor income at all and, at that corner, is bearing risk valued at 20 cents (rather than a dollar, as would be true at an interior solution) to evade, including penalties, an expected value of one dollar. The other taxpayer, with identical labor income, reports all of it. Assuming no labor supply or avoidance response, the MECF with respect to an increased tax rate is 1.2. To take account of the possibility of the taxpayer being at such corner solutions, one can generalize the expression for the MECF by introducing a parameter 7, $0 < y < 1$, which is a weighted average of the marginal value to the taxpayers of the leaked revenue, Xi - MRi. Introducing y reduces the simplicity of the MECF expression because its value varies depending on the situation under study. The second critical

assumption is that the cost borne by taxpayers in the process of reducing tax liability is equivalent to the social cost. This is certainly true in many situations, such as when the private cost takes the form of a distorted consumption basket. But in some cases the private cost is not identical to the social cost. An example is when the act of the taxpayer causes some externality. Consider the case where being caught evading imposes a stigma on the taxpayer, as in Benjamini and Maital (1985) or Gordon (1989), and assume that the larger the number of evaders the lower the stigma attached to each act. In this case the social cost of evading taxes diverges from the private cost because the potential evader does not take into account the impact of his action on other members of the society. Fines for tax evasion present another example of the potential divergence between the private and social costs of tax-reducing activities. The possibility of a fine for detected tax evasion is certainly viewed as a cost by the taxpayer, but from society's point of view it reduces the amount of revenue that would otherwise have to be collected. (This is in contrast to imprisonment, unless the prisoner is forced to produce socially valuable products while imprisoned.) Thus, the MR term should include fine collections. Note that, if the fine itself is the policy instrument, this argument implies that its MECF could be close to zero, and almost certainly less than one, making an increase in fines look like an attractive policy option indeed. As discussed in Section 7.1.1, there are reasons unrelated to efficiency cost minimization which render undesirable increasing fines for tax evasion without limit. Applying the MECF rule to administrative and compliance issues clarifies the common thread running through models of optimal tax systems. In the generic problem, there are two ways to raise revenue: to increase a set of tax rates, and by so doing to increase excess burden, or via an alternative which involves increasing administrative costs [e.g., by broadening the tax base as in Yitzhaki (1979), or by increasing the probability of a tax audit, as in Slemrod and Yitzhaki (1987)]. On the margin, it is optimal to equalize the marginal costs of raising revenue under the two alternatives. If one defines the costs of taxation as deadweight loss plus administrative costs, at an optimum the MECF of each tax rate should be equal to the MECF of administrative improvements that raise revenue. In calculating the MECF of administrative improvements, it is important to account for the fact that these expenses come out of funds that were presumably raised with tax instruments that have an MECF in excess of one. In other words, administrative improvements that raise net revenue decrease the excess burden; hence, on the margin and for given revenue, the saving in excess burden should be equal to the increase in administrative costs. In this way, the MECF criterion can be applied to tax administration, too 53. Compliance costs are additional costs imposed on the taxpayer. Therefore, they should be added to the burden imposed on the taxpayer. They serve as a substitute to administrative costs, but the expenses are borne directly by the taxpayer rather than through the government budget. The revised MECF that includes all these factors, derived and discussed in Slemrod and Yitzhaki (1996), is

$$MECF_I = \frac{(X - MR_i) + C_i + MR_i MECF}{MR - A_i}, \quad (12)$$

where y is the social value of the utility the taxpayer is sacrificing at the margin in order to save a dollar of tax. Ci is the marginal private compliance cost associated with the ith instrument, Ai is the marginal administrative cost, and MRi - Ai is the net revenue collected at the margin. The intuitive interpretation of the expression is the same as before, with some qualifications. The potential tax is Xi. Xi - MRi is leaked at a social cost of y per dollar, MRi is collected by the government, and Ci is the additional involuntary compliance cost. Hence, the total burden on society is the sum of those components. Of the MRi collected by the government, Ai is spent on administration, leaving MRi -Ai in the coffers. The MECF is the burden on society divided by what is collected after subtracting the cost of doing business. This yields the marginal costs of a dollar collected. Because in Equation (12), Ci is added in the numerator and Ai is subtracted in the denominator, the key conceptual difference between the two is explicit - only the latter uses revenue raised from taxpayers. To illustrate this difference, consider that a tax for which Ci = MRi (with Ai and Xi - MRi 0O) might conceivably be part of an optimal tax regime (if the MECFs of other instruments exceed two), but it would never be optimal to have Ai = MRi, for at the margin this instrument has social cost but raises no revenue. As emphasized in Slemrod (1998), applying this notion using empirical estimates of the taxable income elasticity must be done with care. Foremost is the need to consider the elasticity of the present value of tax revenues. Recall that a class of avoidance responses involves the retiming of taxable-income-generating events. If a tax policy change causes retiming, focusing only on the revenues in a subset of periods will bias the findings. For example, the taxable income response to an anticipated future decrease in tax rates must consider the lost revenue in the period before the tax rate changes54. Similarly, if a tax change causes an increase in deferred compensation, the increased future tax liability must be netted against any decline in current tax payments. Furthermore, any change in taxable income in one tax base must be netted against changes in taxable income in other bases. For example, if a decline in personal tax rates causes a shift from C corporation status to S corporation status, the increased personal taxable income must be netted against decreases in corporate taxable income.

The possibilities for evasion and the difficulties of administration have always shaped tax systems. Until recently, formal analysis of taxation largely ignored these realities. After a quarter of a century of research on the topic, it is time to put to rest the claim that this is an understudied area. Instead, it is a vibrant area of research that has clarified the positive and normative analysis of taxation. The research has clarified that when the tax structure changes, people may alter their consumption basket, but they also may call and give new instructions to their accountant, change their reports to the IRS, change the timing of transactions, and effect a set of other actions that do not directly involve a change in their consumption basket. In many cases, particularly for high-income taxpayers, this latter set of responses has larger revenue and welfare implications than the real substitution responses, such as labor supply, that tax analysis has traditionally focused on. Early models of this area focused on

tax evasion, modeled as a gamble against the enforcement capability of the state. More recently, the literature has examined more general models of the technology of avoidance, with the additional risk bearing caused by tax evasion either being a special case of this technology or one aspect of the cost of changing behavior to reduce tax liability. A critical aspect of this technology is whether the avoidance is inframarginal, in which case only income effects are involved, or whether its cost depends on other aspects of behavior. If the latter is true, the choice of consumption basket and avoidance become intertwined because certain activities may facilitate avoidance, which alters their effective relative price or return. Acknowledging the variety of behavioral responses to taxation greatly enriches the normative analysis of taxation. It changes the answers to traditional subjects of inquiry, such as incidence, optimal progressivity, optimal commodity taxation, and the optimal mix between income and consumption taxes. It also raises a whole new set of policy questions, such as the appropriate level of resources to devote to administration and enforcement, and how those resources should be deployed. A recurring question that runs throughout this chapter is whether the standard toolkit of positive and empirical analysis can be applied to avoidance, evasion, and administration. The answer is a qualified yes, as this chapter hopefully demonstrates. In one respect, though, the policy perspective does change in an important way. The magnitude of real substitution response, such as labor supply, to taxes is presumed to be an immutable function of preferences, and not susceptible to policy manipulation in a free society. With respect to avoidance and evasion, though, this hands-off approach is not appropriate. On the contrary, there are a variety of policy instruments that can affect the magnitude and nature of avoidance and evasion response, ranging from the activities of the enforcement agency to how tightly drawn are rules and regulations. The same kind of cost-benefit calculus applies to the choice of these instruments, implying that the elasticity of behavioral response is itself a policy instrument, to be chosen optimally. A key challenge for the future is to add more empirical content to the theoretical models of taxpayer and tax agency behavior. This will require, inter alia, addressing the technology of raising and avoiding taxes. This is the analogue to the critical role for traditional taxation theory of the empirical investigation of the structure of individuals' preferences. Although by their nature the appropriate data are often difficult to come by, new approaches such as controlled field experiments and analysis of changes in tax administration are promising. It would also be fruitful to incorporate public choice considerations into the analysis. In some case administrative difficulties as well as widespread avoidance and evasion are caused by the inability of compromise-seeking legislators to agree upon a well-defined law. Furthermore, there is apparently no political constituency for tax simplicity and facilitated adminstration. Combining analysis of the public choice mechanisms that produce tax systems with the kind of normative analyses discussed in this chapter may lead to a more complete understanding of the reality of taxation.

AN ANALYSIS OF THE METHODS USED IN TAX EVASION.

The methods vary and are difficult to detect since taxpayers try to conceal them from the tax authorities at whatever cost. Interviews relating to such proved unfruitful however some of the methods frequently used discovered in this research has been outlined below.

Tax Evasion in Business Firms

The analysis of tax evasion by firms differs since different firms may evade taxes by underreporting of revenue/sales or over reporting of costs31, untimely filing of the tax return or payment of amounts due32. Another way that firms use in evading tax is non-declaration of income.

A report by the World Bank on an interview of business firms in Kampala in April 2000 revealed that in most business firms' tax evasion was favored as a means of business competition, also disagreement over tax exemptions, tax assessment and tax audits encouraged the firms to evade. Corruption is also to blame in fostering evasion in business firms. One in four of the audited firms reported incurring additional costs such as bribes. Firms whose own tax assessment differed by 100% or more from that of the revenue authority reported that they always had to pay bribes to tax officers, however on average surveys other firms reported that they were required to pay bribes only seldomly. This trend has not achieved much change in that business firms still engage in evasion as a means of competition being encouraged by corrupt tax officers who are prone to taking bribes.

Tax Evasion in the Customs Department

The major cause of evasion occurring in the Custom Department34is largely blamed on corruption on the part of tax administration. Examples of corrupt practices undertaken by tax administration officials in return for bribes include:

1. Deletion or removal of a taxpayer's records from the tax administration's registration, filing and accounting systems.

2. Closure of a tax audit without any adjustment being made or penalties being imposed for an evaded liability.

3. Manipulation of audit selection35. Examples of corrupt practices undertaken by customs administration officials in return for bribes include:

1. Facilitating the smuggling of goods across the border to avoid tax and duty payments. Uganda Revenue Authority claims that it has effectively reduced smuggling by road thus smugglers have resorted to water transport thus security will

be strengthened on Lake Victoria to curb this vice. Among the frequently smuggled goods are Supermatch cigarettes, polythene bags, textiles and electronics36.

2. Facilitating the avoidance or understatement of a tax or duty liability through acceptance of an undervaluation or misclassification of goods in the processing of a customs entry. Occurs where the importer declares less quantity on importation document than the actual goods being imported, this deliberate evasion is largely blamed on the importer. Occurs where goods are given a lower value than they actually have. Undervaluation often happens out of ignorance, negligence or connivance at the customs control by both the importers and custom agents thus aiding smuggling indirectly. All the goods that are imported into the country have different international codes, the last figure of the code usually identifies the goods and customs officers use these to value goods. In case the goods have no specific code then they can be valued according to the code of the goods similar to those in question.

"But what happens is that customs officials usually use codes of goods with veiy low value, which attracts lower tariffs and ask traders to pay less, "said a source who spoke on condition of anonymity.

This occurs where goods are declared under a different class of imports particularly to attract lower rates with intent to reduce the tax liability. This again may happen out of ignorance, negligence or deliberately and aids smuggling38. Documents pertaining to certain goods are tampered with in their particulars with intent to benefit the taxpayer by a reduction in tax.

This is very common with COMESA39 and NON-COMESA states because of the lower tariffs rates for goods originating from COMESA member states.Transit goods are those goods which are destined to other countries through Uganda for example goods from abroad through Uganda to Rwanda or D.R.C. Re-export are goods which come into the country but subsequently exited. In both these cases smuggling occurs when the goods finally end upon the Uganda market leading to total evasion of taxes. In January, 2007 a truck was found loaded with candles on transit to DR Congo being offloaded illegally in Kampala40.

Products raw materials. An example of this involved an agro company in Kampala that had imported 4,400 tons of Tiger Head Batteries worth US$ 87,296 (in February 2004). The goods were declared as hoes and pangas(agricultural implements are allowed deduction under the Act41). The goods were detected at the railways goods shade in Kampala and the tax revenue of USh 54,249,344(about US$ 30,138) recovered, plus a fine of Ushs 52,381,00442

3. Allowing goods that are held in a bonded warehouse to be released for consumption

in the domestic market without payment of tax or -duty, For example in October 2004 imported polythene bags and petroleum worth US$42,248.5 was removed from customs control using documents of prior consignment. This seems to have been facilitated by some customs official. Fortunately this was discovered and the importer made to pay a fine of Ushs.21, 181,668 in addition to the tax of Ushs. 36,251,857.

4. Facilitating false tax and duty refund claims through certification of the export of goods that have been consumed in the domestic market or that have not been produced at all.

Tax Evasion on Market dues

This occurs by mainly dodging tactics of the vendors especially in markets which are semi-closed. Revenue in such markets is collected through issuance of receipts on a daily basis from every stall, thus vendors in most cases station themselves strategically outside the market and sell their goods without paying revenue, others connive with receipt issuers who in return collect less amounts later in the day from such traders and keep it to themselves. Hawking also plays a major role in eroding this type of taxes, thus traders will roam with their goods around town carefully being on the lookout for city council revenue enforcement officials and thus evading taxes which are levied from selling in specified locations.

Tax Evasion and the Informal Sector

The starting point here must be to define precisely the informal sector and its participants. Are these individuals who mainly operate in small and medium size enterprises? Are they mainly self employed professionals? Or individual proprietors and farmers? There is no single definition that is universally accepted; indeed all taxpayers are hard to tax in one way or another. However, there is a group of taxpayers that are considerably difficult to tax than the rest but a problem usually arises in identifying them.

Terkper and She (2OO3)~~ define the participants in the informal sector as taxpayers who fail to register voluntarily and even when they do register they generally fail to keep appropriate records of their earnings and costs, they often do not file their tax returns and they frequently tend to be tax delinquent.

Das Gupta and Amdan (1994)~~ also include professionals in this category; they state that while salaried employees derive income from a single transaction with their employers and find it hard to hide their income, professionals derive their income from multiple transactions with clients and find it easier to hide their income.

Independently of the right definition or model, there is considerable consensus regarding the identity of those in the informal sector. Both Terkper and Seth (2003)

and Das Gupta and Amdan (1994) identify these agents, with small and medium sized firms, professionals and, farmers. Schneider and Enste state that the general characteristics of those in the informal sector is that they are always unwilling to provide the tax authorities with relevant information that the tax authorities have a hard time extracting from them46.

In conclusion therefore the shadow economy includes all unreported income from the production of legal goods and services either from monetary or barter transactions and so includes all economic activities that could generally be taxable were they reported to the state (tax) authorities. A more precise general definition seems quite difficult if not impossible as the shadow economy evolves over time adjusting to taxes, enforcement changes and general societal attitudes. Foster V and Yepes T, States that the Informal businesses account for around 50 % of economic activity in Uganda. They argue that this presents a significant obstacle to tax collection as unregistered businesses do not pay taxes47.They further state that the tax base broadens whenever informal businesses becomes formalized. Even though U.R.A implemented the presumptive taxation to tax the small businesses, difficulties of identification and unwillingness to maintain records mainly makes it very hard to tax them thus evasion in this area becomes greater.

EFFECTS OF TAX EVASION

Tax evasion has the potential of eroding the tax base. Where base erosion is substantial, then the fundamental revenue, efficiency and equity goals of the tax system are compromised. This may lead to budget deficit due to low tax revenue and therefore increased domestic borrowing by government to finance the deficit. Increased government borrowing from the domestic market will lead to higher interest rates and discourage investment. Some forms of tax evasion like dumping will have the effect of killing the local industry leading to unemployment and slow economic growth, tax evasion poses welfare implications. It constitutes a deadweight loss28 for the society. In any case, tax evasion causes two additional types of social costs:

First, taxpayers invest effort and money in order to conceal tax evasion.

Second, tax authorities bear the costs of auditing in order to detect tax evasion.

Hence, a given tax system does not only influence the amount of tax evasion or the size of a country's shadow economy; it also has immediate consequences for the extent of wastefully invested resources in the concealment-detection contest between taxpayers and tax authority, tax enforcement and concealment going along with cheating are costly not only for the individuals involved, but also for the society, since these resources could otherwise be used for productive purposes. Consequently, this cost can be viewed as further excess burden of taxation the society has to bear. The effects and consequences of rampant corruption in the tax system are very serious. It reduces state revenues and thus diminishes the capacities of the state to fulfill

its obligations. The losses in revenues and thus subsequently in public spending are often completely out of proportion to the amounts paid as bribes. One of the other effects of corruption in this field is that it reduces the distributive function of tax collection and hence contributes to increasing income inequality. Another major impact area is that by driving resources away from public spending, corruption in this field exaggerates scarcities and contributes to growth of corruption across whole of public sector.

In general, the level of corruption and tax evasion in the economy both depend on similar structural and institutional features, such as the degree of risk aversion, the wealth of taxpayers and the wage of public officials, the overall tax burden of the economy, and the organization and the efficiency of the enforcing authorities

Richard, M.Bird3° also states that Tax evasion, corruption and lack of transparency in the tax system are not only ethical issues, but they strike at the heart of good public financial management. They deprive governments of desperately needed resources for development, engender criticism and disillusionment with the process of economic management and can lead to political alienation and the withdrawal of legitimacy and support for the regime, in turn triggering political tensions and instability. Tax evasion and corruption are like cancers which if left unchecked can quickly spread and destroy the moral fiber of society as well as its economic and political structures and processes. Vigorous action by African countries is therefore required to combat this menace.

MAJOR TAX REFORMS IN UGANDA

The goals of tax reforms in Uganda have been four-fold: broaden tax base; increase efficiency of collection; create incentives for the private sector; and ensure equity of taxation. The major reform measures started as early as 1991, it included: reforming tax administration, introduction of VAT to broaden the tax base, broadening the bases for personal and corporate income taxes, reduction of import duties, and simplification of the rate structure and abolition of export-related taxes. The tax laws were therefore amended and some repealed with the view to aligning them with the best practice. Reforms were directed at improving administrative efficiency and to ensure better taxpayer compliance. It aimed at rationalizing the tax structure and rates, reducing exemptions and simplifying tax procedures. High and differentiated taxes and tariff rate, burdensome bureaucratic requirements, discretionary exemptions and tax incentives were considered to be a source of inefficiency in the tax system50.

Administrative Reforms

The Uganda Revenue Authority (U.R.A) was set up in September 1991 as an autonomous agency to collect taxes. Prior to this three separate departments in the Ministry of Finance Customs and Excise Department, Inland Revenue and the

Income Tax Departments, collected taxes for the government. U.R.A was expected to improve revenue collection through enhanced autonomy, acquisition of skilled staff, increased integrity and effective use of automated system. The authority was expected to adopt private sector-style management practices in its administration, with competitive staff remuneration, high caliber staff and adopt a code of conduct to guard against corruption. All these measures were expected to result in sustainable increase in revenue collection and to achieve a tax to Growth Domestic Product (G.D.P) ratio comparable to countries such as Kenya, Mauritius, Zambia and Singapore51.

U.R.A introduced measures aimed at increasing taxpayer compliance. These included taxpayer education and tax advice facilities, and the Tax Identification Number (T.I.N) to reduce the time taxpayers spend fulfilling their tax obligations. The Large Taxpayers Department (L.T.D) was set up in 1998 to offer corporate service on all domestic taxes to the top 100 tax payers and their subsidiaries. The Tax Appeals Tribunal (TAT) was also introduced in August 1998 to provide an independent mechanism to which taxpayers who are aggrieved by U.R.A decisions can go for redress52. Other measures included computerization of the income Tax Department in 1994, automation of U.R.A operation using ASYCUDA++ system in Customs and the VENUS53 system in the VA.T department (1996) for recording revenues and tracking receipts; merging the department of V.A.T and Internal Revenue in April 2000 to create a one stop centre of internal revenue for the medium and small taxpayers. In addition U.R.A instituted tax investigation mechanisms to ensure greater accountability on the part of revenue collectors and to strengthen the procedures for investigating allegations of corruption.

Value Added Tax (VAT)

Another major reform was the introduction of VAT in 1996 (at 17% for most goods, currently the rate is 18%) to replace Sales Tax (which was charged at 12% - 30%) and taxes on services called Commercial Transaction Levy (C.T.L). V.A.T was introduced on the ground that it had a higher revenue potential compared to the sales tax. It was also considered to be a fairer tax than sales tax because it can reduce or eliminate the cascading effect (paying tax upon tax) of sales tax. The other strength of V.A.T over sales tax is the existence of an audit trail that could be used to verify V.A.T amounts declared under the V.A.T system54.

Prior to the introduction of V.A.T, most of the changes to the tax system in the 1990s seem to have been concerned more with raising revenue than equity, and relied greatly on ministerial discretion. Examples of these are the introduction of sales tax on all zero rated and exempt products in 1989/90 and the removal in 1993/94 of all exemptions from tax except those under bilateral agreements with foreign countries and accredited international institutions (those granted to investors under the Investment Code except for construction materials were retained), Over the

years, Uganda has witnessed a distinct move away from ministerial discretion in tax policy (exemptions). The VA.T Act of 1996 prohibited the granting of exemptions (discretionary exemptions have reduced). Under the present VAT Act55, supply of most basic goods and services which accounts for disproportionately high percentage of low-income household spending is exempted or zero- rated for example basic foodstuffs56. In addition to equity concerns, certain sales are exempt or zero-rated for general development reasons for example educational and health services and passenger transport services57. Generally a number of V.A.T exemptions appear pro- poor. Exemption of public passenger transport is progressive because public transport is usually the mode of transport for the poor, the same with food as it has been known since the time Engel coined his famous law (Engel's Law), the poor tend to spend more of their budget on food than do the rich58 It can also be argued that the exemption gives a greater tax relief to the better off than the poor because the actual amount spent by the rich on food is more than the amount spent by the poor. Rich people tend to buy more expensive varieties of food and may throw food away more easily.

To ensure equity in the tax system preferential treatment had to be given to drugs, medicine and medical services so as to be affordable to the majority poor population, however there is no convincing evidence that the poor population are using the services provided, instead the main beneficiaries of the tax relief are the better off with spend more on medicine and medical services and who can afford to pay for services at private health facilities59.

Ayoki, Obwoni and Ogwapus6° however argue that the list of V.A.T exemptions needs to be reassessed and kept to a minimum to broaden the tax base and to facilitate compliance by taxpayers and control by tax administration. They say the zero rates should be applied exclusively to exports (and items required by international convention) since extending zero rates to many sectors result in more difficult control systems and an increased number of refund claims which sometimes cannot be managed by the tax administration.

Income Tax

With respect to direct taxes, reforms aimed at reducing overall complexity of the tax structure by ensuring that each of the sources of personal incomes are similarly taxed and that those in the less formal sector are brought into the tax net by use of a presumptive tax to ensure equity payment between all sources of income. The Income Tax Decree of 1974 allowed considerable discretion to the minister to declare any class of income to be exempt from tax. This loophole was eliminated by the new Income Tax Act of 1997. The new Income Tax Act aimed at broadening the definition of taxable income61 and abolished discretionary exemptions, tax holidays, and reduced the personal income tax rates to four main bands (0%, 10%, 20% and 30%)62, setting an annual threshold income subject to income tax at Ushs.

1,560,000 (approx. US$ 900 or over 3 times per capita income), the poor are by definition 'exempted' from personal income tax. Otherwise the main exemptions include pensions; salaries (official employment income) of employee of the Armed Forces (of Uganda), the Police Force, and the Prison Service other than a person employed in the civil capacity63; bequests and gifts not arising from a business relationship; charitable donations are allowed as deductions64; non-business capital gains; and income exempt under normal international convention. Exemptions of pensions, charitable donations, bequests and gifts, and items required under international convention are normal and support equity.

Import Duty

The current tariffs in Uganda are based on the Harmonized Code (HC)65 – having changed it from the Standard International Trade Classification (S.I.T.C) system66 in 1995/96. Customs tariff reform have evolved including reduction in tariff rates, simplification of the structure, reduction of exemptions and phasing out import bans, import license requirements and pre- shipment inspection. The tax rates charged on international trade (imports) have been reduced to three standard rates: 0%, 7% and 15%. Plant and machinery is zero-rated, while raw materials and final goods from non COMESA countries are subject to a 7 percent and a 15 percent duty, respectively. Rates for similar goods originating from COME5A countries are 0%, 4%, and 6%. To compensate for the reduction in tariff, government introduced excises of 100/0 on the imports. The excise was meant to protect domestic producers against imports from COMESA countries67.

Meanwhile, import bans on cigarettes, beer, sodas, and car batteries were removed in 1998/99, and replaced by temporary import surcharge. In 1995/96, Government amended Section 22 of the 1991 Investment Code to abolish the granting of discretionary exemptions on import duties (and all other taxes) payable on imported plant and machinery for investors licensed by Uganda Investment Authority. Consequently, the tax system became more transparent, easier to administer and has contributed to an increase in the revenue yield68.

Outcome of the Reforms

The reforms had a bigger impact on direct taxes than on indirect taxes, suggesting that tax evasion is still a major problem for indirect taxes especially import duties. Improved performance of direct taxes can be explained by the contribution of the Income Tax Act 1997, which improved the administration of income taxes, reduced discretionary exemption and made the tax procedure simpler for taxpayers and revenue administrators. There is room for further improvement in collection of direct taxes by strengthening the capacity of U.R.A to register more eligible taxpayers into the tax net69.

More Recent reforms

U.R.A implemented a restructuring programme that was initiated in 2004 and runs till present. It had been realized that fresh initiatives were needed to transform the way in which U.R.A does business if the objective of turning the organization into a client focused organization was to be achieved and tax payers compliance improved. It implemented goals which are to be achieved by;

(a) Putting the client at the center of goals and objective settings so that the services rendered remains relevant to clients needs.

b) Staff empowerment, training and support in plan implementation.

(c) Opening to pubic scrutiny in all areas of its operation.

(d) Development of systems by linking process, people and automation in an efficient way. The modernization Programme7° set for three years ended June 2009 were to apply

in the following areas;

Customs.

(ii) Domestic tax.

(iii) Non-tax revenues.

(iii) Corporate services for instance in human resource management.

(iv) Integrity enhancement, quality services and Public and taxpayers education71.

In January 2010, the U.R.A introduced the e-filling and e-payment system for large and medium taxpayers for PAYE, withholding tax, VAT, local excise duty and gaming and pool betting.

Recent Reforms on Custom Department

In March 2007 the Kenya Revenue Authority (K.R.A)72 and U.R.A joined hands inexchanging information across the borders in order to curb custom and transitmalpractices; they launched the Revenue Authorities Digital Data Exchange(R.A.D.D.E.X) which is aimed to facilitate this. It will also help to improve efficiency inU.R.A's ASYCUDA++ and K.R.A's Simba73. Enoch Walugembe U.R.A's AssistantCommissioner for enforcement in an interview published in New Vision on 13th ofMarch 2007 stated that 'Data on exports, re-export and transit declaration to andthrough Uganda passed in Kenya 's Simba 2005 system will be promptly andelectronically submitted to ASYCUDA + +, upon receipt of the submitted dataASYCUDA++ will send information to Simba"74

These systems aim at checking on mal practices like under! miss declaration of

goods and smuggling because the authorities will be able to follow up on outstanding exports, re export and transit transactions. Walugembe Enoch further stated that U.R A has also actively involved the public in revenue intelligence gathering by giving them confidence and assurance to react promptly and swiftly to information received and providing feedback, and that U.R.A has also implemented the reward system which pays 10% of taxes recovered to people who report about smuggling. There has also been efficient co~ordination with agencies like the army, police and the local authorities. These has thus greatly improved the ability to control smuggling levels. Sanctions for smuggling has been kept high, criminal prosecution has been implemented since smuggling is criminal under the Penal Code.

Fines/penalties have also been implemented under the East African Community Customs Management Act 200475.Smuggled goods are also seized and owners made to either pay taxes or fines or forfeit the goods to the state whichever is found punitive, cars used in smuggling are seized and forfeited to the state or the owners made to pay fines.

Prosecution Policy

U.R.A also implemented the Prosecution policy operated under the legal service which was approved by its Management Board on Feb 2006. Before they used to rely on the police and government core lawyers to follow up tax related crimes many of which ended in a stalemate. (U.R.A) now has 13 tax prosecutors and since May 2006 has registered and handled more than 60 cases where they have obtained convictions and sentences76.

Conclusion.

In conclusion therefore some of these recent reforms are yet to be fully tested since they have just been introduced to analyze whether the reform measures have the capability of reducing on tax evasion and improving compliance.

REASONS AS TO WHY EVASION IS STILL PREVALENT DESPITE REFORM MEASURES IMPLEMENTED.

Corruption.

This affects almost all the types of taxes especially where remittance is based on physicalcontact between two human beings, and even in cases of automation, to a lesser extentcorruption has crept in to deny the authority of the much needed revenue. Corruption occurs in tax field by the tax officials being collusive (colluding with non-payers) or abusive (that is by extorting money from the compliant taxpayers). Several indicators can be used to determine the existence of corruption in a state's taxadministration.

Indicators Related to the Institutional Context78

Institutional features, such as excessive taxes on income, red tape and inadequate enforcement of regulations are, if not indicative of corruption, definitely a factor that increases the likelihood of corruption in the tax system. In a highly corrupt environment, tax evasion is more likely to occur than in a regulated environment with generally functioning institutions. While tax evasion is by itself not necessarily linked to corrupt activities, it can nevertheless create the opportunity for illicit deals when it is detected. An assumption of a connection between perceived corruptibility of public officials and the underreporting of income by private persons can thus be made.

Along the same lines, corruption (and certainly inefficiency) in tax administration can but does not have to be suspected if there is an unexplained discrepancy in the ratio between the estimated amount of cash in circulation and the actual tax revenue.

The lack of effective access to information provisions (which would ensure taxpayers are aware of their rights and less exposed to discretionary treatment by corrupt officials) and the absence of credible review mechanisms increase the risk of corrupt dealings.

Staff-related Indicators

As is the case in any public sector environment, the evidence of public officials living beyond their means for instance living in a higher standard than their income would normally enable them to be is an indicator for the existence of corruption. The absence of measures designed to maintain the integrity of staff such as the promotion and enforcement of ethical standards, merit based recruitment and promotion procedures and regular staff rotation schemes to prevent the building of networks, increases the likelihood of staff exploiting corrupt opportunities.

Low ethical standards among professions linked to the tax system such as accountants are an indicator for the existence of corruption among those in charge of protecting the system against abuse.

Finally, the perception of corruption of tax officials among members of the public is certainly suggestive of corruption actually taking place. The perception of additional income to be made from illicit deals is highly likely to attract the wrong kind of people into tax administration.

Corruption in U.R.A

Ayoki, Obwoni and Ogwapus in their work on tax reform and domestic revenue mobilization in Uganda stated that Corruption in the tax system is very complex, seemingly well organized, and difficult to detect79. It is thus a challenge to Uganda

Revenue Authority because corrupt individuals operate in a network thus when a member of staff of U.RA is dismissed and joins the private sector, the knowledge of the workings of the tax system and inside contacts in U.R.A only strengthens the corruption networks. In fact, many clearing firms and tax audit firms in Kampala and Entebbe are owned by former U.R.A employees. To defeat this corruption problem would require identifying and cracking down these corruption networks80.

Corruption is worsened by the past method of recruitment in U.R.A which appeared to be influenced by having good connections and less by professional qualifications. Moreover, the tax laws are unclear and administrative procedures, including the procedures for reporting tax revenues lack transparency and are poorly monitored within the tax administration itself and by the office of the Auditor General. Revenue officers are considered to have wide discretionary powers to interpret tax laws81.

Government has tried several measures to end corruption. These included privatization of some of the customs operations, for example, verification of imports through pre shipment inspection companies (was tried between 1996 and 1999, only to be abandoned in June 2000); and automation of customs and V.A.T operations by introducing ASYCUDA++ and the VENUS system in the customs and the V.A.T department respectively (however use of forged receipts to release goods in customs has not stopped, even with ASYCUDA++ in place).

Others measures included enforcement of tax compliance using a special military unit, the Anti- smuggling Protection Unit, and the Special Revenue Protection Service; recruiting 'born again' Christians into U.R.A because they were perceived to be more trustworthy; and introducing a system of reward (in 1998) for instance a cash prize of l0°/o of the face value of tax revenue recovered to any person who volunteers information leading to recovery of tax revenue; as well as dedicating a telephone-hotline and email address for the public to report any tax-related malpractices. In addition, taxpayers' education program and anti-corruption efforts through the office of the Inspectorate of Government (IGG) have been used to reinforce other measures. Instead, corruption seems to be increasing82.

In 2002, because of public concern, the President appointed a commission of inquiry to investigate the alleged corruption in the U.R.A. Implementing the outcomes of the report however has not been done83.

Political interferences causing evasion.

Usually accused of abating tax evasion, Uganda Revenue Authority says political interference is among the factors to blame for the high incidence of evasion. A Publication on taxation that appeared on the Daily monitor84 revealed that sources within the tax body told Business Week that certain taxpayers enjoy patronage from "political big shots" who helps them flout tax rules.

"It is true that there is political interference. Even though the laws are in place, there is undue interference. We are human, we have failed because our hands are tied" said U.R.A.'s Assistant Commissioner for Tax Education Mr. Christopher Kiwanuka Kaweesa85.

He said in some cases the tax body tries its best to compel tax evaders to pay but some politicians whom he could not name interfere and fail the process. There was a comment by a trader in the Publication who said: "On many occasions government people have smuggled in goods and sold them at the open market. You heard about DANZE clearing firm which was involved in smuggling," said Mr. Mukasa Lukomwa, a trader on Luwum Street. DANZE was alleged to have indulged in smuggling and in the process avoided paying billions of shillings in tax; The Company whose ownership was clouded in mystery waslater linked to the National Resistance Movement secretariat86. Recently Michael Mabikke was reported inciting vendors in his constituency not to pay taxes; this led to the vendors evading tax especially those operating on markets dues. However Kampala City Council (K.C.C) vowed to drag the Member of Parliament to court to make sure he pays for the evaded tax.

Inequity of the Tax system and the inconvenience of the payment period and amount to be paid, a case study of market vendors Endaire emphasizes that deterioration of the perception of fairness causes concerns in a tax system based on voluntary compliance since citizens tend to exchange tax for benefits thus if inequity is perceived in this exchange citizens become more inclined to correct the imbalance by cheating on taxes in the future. This largely explains the situation in Uganda where most taxpayers get reluctant because they don't feel the benefits that they expect to accrue from the tax that they pay. Market vendors complain that they still sell in their poor structures, they lack sanitary facilities yet they pay taxes on a daily basis90.U.R,A on the other hand quickly defends itself saying it's task is only collecting taxes but not allocating resources as this is the sole function of the government, however true this could he the negative effect that such perception creates on the minds of the taxpayers become of importance at the end of the day thus the need to rectify the perceived inequity. Endaire J9' adds that in order for taxation to be effective it should be based on principles of economic, political and social factors. A good tax ought to be levied at the time or in the manner in which it is most likely to be convenient for the contributor to pay it. Most market vendors are dissatisfied with the period of tax collection and thus they preferred that taxes should be paid either in the middle of the year or at the end of the year, this they say is attributed to the fact that most business took place in the middle of the year and it is at the same time beginning of the fiscal year, in cases of the appropriate month majority of the market vendors showed preference that they should pay tax at the end of the month92. Inconvenience of the time of paying leads many to evade since at such time many of them usually don't have that sum that is required from them for instance vendors who pay licenses are made to pay at the beginning of the year when most businesses are not making profits which sometimes isdue to too many occasions at the end of the year which leads to money scarcity.

Low Levels of Education and Insufficient Tax Education

Low levels of education have also been identified as being a major cause of reluctancefor Ugandans in paying taxes. Basemera Bahiyyih93 notes that the highly educatedpersons are less likely to evade tax compared to the less educated. This could be due tothe fact that the highly educated persons easily understand the tax regulations mainly theaccounting and record keeping requirements, and they maintain proper records and do taxcomputations themselves thus reducing the compliance cost. Illiterate taxpayers do not do tax computation themselves thus increasing their compliance cost and could encouragetax evasion. Taxpayers' negative attitudes toward paying their taxes stems from insufficient taxeducation. Change of this behavior can be improved by putting more emphasis on taxeducation that points to the fact that tax evasion and cheating are serious crimes. Oninterview94 it was discovered that even some university students did not understand thebenefits of paying taxes, however, on pin pointing to them some of the benefits theyindirectly accrue from the taxes paid, they quickly had a change of mind an indicationthat emphasis on tax education can do a great work.

Uganda Revenue Authority (U.R.A) argues that it has spent the last 10 years educating Ugandans on taxation95, however the widespread negative attitude even among the elites show that there is still more to be done thus insufficient tax education proves to be one of the reasons of reluctance in paying tax. This could either be attributed to poor methods of teaching, reluctance of Ugandans to know or poor methods of reaching out to the taxpayers.

Perceived Dishonesty of other Taxpayers and Tax revenue 'Misuse' by the Government. This directly results from the taxpayers social norms which can be classified into two basic categories.

(a)The first relates to how the taxpayer judges his or her own compliance behavior in

light of the individuals own feeling about what is proper, acceptable or moral behavior what might be termed as "internal norms".

(b)The second relates to whether other taxpayers are perceived as paying their fair burden of taxes and to how the taxpayer feels he or she is treated by the government in such

areas as the payment of taxes, the receipt of government services or the responsiveness of government decisions96.

Perceived dishonesty of other tax payers has also been noted to be a major cause that leads to reluctance in payment of tax thus the more taxpayers perceive others as being dishonest the greater the non-compliance, this is best summed up in the

statement, "Why should I pay all my taxes when other people are not paying?". This creates a negative attitude towards the taxpayers as they feel that paying taxes will be doing injustice to themselves. In Kenya for example Members of Parliament were until August 2010 before the promulgation of the new Constitution exempted from paying taxes causing outrage among the public, some of them threatening to evade taxes. On the other hand those who flout without being detected develop a system which eventually turns out to be a habit thus getting out of such a habit becomes more of impossibility. This can be blamed on the tax enforcements agents since their reluctance in detecting such people who flout payment of taxes goes hand in hand with the idea of perceived dishonesty of other taxpayers.

Revenue misuse falls more on the administration and the government at large, thus tax payers in most instances will not comply with their obligation of paying taxes if they believe that the revenue collected is not well spent. However Bird Richards and Oldman97 argue that where there is fierce detection, enforcement and punitive measures the taxpayer will not be left with an option but to pay. They further argued that voluntary compliance depends on national attitudes towards the tax system and tax administration. Thus willingness of taxpayers largely depends on the fact that funds taken from them are put to some good use. This explains largely the current reluctance to pay tax in Uganda.

The government has continuously been involved in what taxpayers term as misuse of their money, this has not been a new phenomenon, tracing back from the incidence of purchase of the Junk Choppers and to the Recent allocation to Members of Parliament grants amounting to sixty million in installments each for purchase of Motor Vehicles, which apart from few all others approved, all this sums up to perception of misuse of taxpayers money leading to reluctance to pay tax.

In conclusion therefore even though revenue collection has been gradually on an increase and evasion on income tax and V.A.T is low, in other areas revenue continues to grow especially where detection is difficult like in the informal sector, and customs department. Even though most tax officers from U.R.A argue that the level of corruption had been effectively trimmed, they on the other hand could not explain why there has been a continuous reported case of capture of goods whose tax has not been paid leaving the U.R.A warehouses, falsification of documents and misclassification of goods. It is true that U.R.A has done commendable work towards tax administration and fostering compliance, however, loopholes are still evident thus the need to advocate for the government to effectively assists them especially in formulating its policies and to make sure that the politics of the government do not antagonize between the taxpayers and the tax collectors.

Challenges

(a) Limited resources; this directly flows from the fact that most taxpayers will pay as long as they feel that non-compliance may cost more, that is the penalties likely to be suffered is higher incase evasion is detected, thus with limited resources of U.R.A. they argue that it's administration will not be perfect to play the policeman role for every potential taxpayer.

(b) An alternative to the above would be self assessment; however self assessment will resort in high levels of compliance only if accompanied by serious sanctions under the law against non-compliance

(c) The extent of institutionalization of corruption, low standards of public morality and the negative attitudes towards compliance of peers, all affect effective administration of taxes thus posing a great challenge in reducing evasion. Political factors for instance the extent of acceptance of government decision (the recent intended Mabira giveaway) and the extreme government expenditure also creates a challenge in fostering tax compliance.

GENERAL RECOMMENDATIONS

Tax administration should be viewed as a production process where inputs consist of men/women, materials and information and the outputs consist of revenue for the government and taxpayer's equity and taxpayer rights.

Administrative Reforms

Effective tax administration requires qualified tax officials. Tax authorities must provide for training and retraining of staff as needed. The tax authorities need to collect the information needed for effective administration from taxpayers, relevant stakeholders, and other government agencies. The information must be stored in an accessible manner and most importantly it must then be used to ensure that those who should be on the tax rolls are identified, that those who should file returns do actually file, that those who should pay do pay on time, and that those who do not comply are identified, prosecuted and punished accordingly. Countries such as Singapore are models of what can and should he done, and such models should be studied closely and once adapted as necessary, implemented98.

The first task of any tax administration is to facilitate compliance. To improve on tax administration and also encourage voluntary compliance, a simplified but comprehensive document on tax policies and administrative measures should be published by the government. This requires making sure that those who should be in the system are in the system and that they comply with the rules.

Firstly, taxpayers must be found. If taxpayers are required to register, the registration process should be as easy as possible. Systems must be in place to identify those who do not register voluntarily. The tax authorities should adopt an appropriate unique taxpayer identification system to facilitate compliance and enforcement.

Secondly, tax authorities need a process for determining tax liabilities. This may be done administratively (as with most property taxes) or by some self-assessment procedure (as with most income taxes and Value Added Tax.

Thirdly, the taxes due must be collected. In many countries, this is best done through the banking system. It is seldom appropriate for tax administration officials to handle money directly.

Finally, changes on tax legislation should be given sufficient publicity so that taxpayers understand how they might be affected and there should be a mechanism in place where by taxpayers can have their queries answered. Tax authorities should provide adequate taxpayer service in the form of information pamphlets, forms, advice agencies, payment facilities, telephone and electronic filing to make taxpayer compliance with the system as easy as possible.

This approach rests on treating the taxpayer as a client (albeit not a willing one) to be served and not a thief to be caught. Unfortunately, the latter attitude seems to prevail in many developing countries.

The main areas of tax administration are taxpayer's registration, taxpayers audit and collections. Improvements in each of the following are feasible, for instance taxpayer's registration can be increased via better use of third party information like cross references between tax reporting, social security records and data from the financial systems. Audits can he made more effective via adoption of modern audit technology, including more systematic selection of returns for audits. This has been appreciated in Chile and Spain99.

An effective audit program should be able to identify individuals who do not file tax returns as well as those who underreport income or over claim deductions. Collection can be improved by applying non-harsh penalties often and consistently and relying more heavily on source withholding'°°. In implementing reforms that will enable the administration to view the taxpayer more as a client, emphasis should be placed on;

(i) Promoting taxpayer education and developing taxpayer services to assist the taxpayer in every step of their filing returns and paying taxes.

(ii) Broadcasting advertisement that link taxes with government services.

(iii) Simplifying taxes and the payment of taxes.

(iv) Promoting voluntary compliance by lowering the cost for taxpayers associated with filing their taxes.

(v) Ensuring relative stability of the tax system.

(vi) Putting more emphasis on the exercise of the taxpayer-tax administrator code of ethics.

(vii) The rates should be made favorable to the taxpayer. This should he analyzed basing on government needs and the need to encourage development, since lower marginal rates encourages compliance.

Reforming the negative attitude towards tax compliance

The existence of the social norm which suggests that an individual will comply as long as he/she believes that compliance is the social norm needs reform since on the other hand when non-compliance becomes pervasive, then the social norm of compliance disappears. The negative attitude can be reformed by;

(a) Government policies

This should be implemented putting the citizen's interest more at the forefront; this is because one of the factors that encourage evasion is the perception that taxpayer's money is being misused by the government'01.

(b) The role of taxpayer's involvement in decision making

Greater individual participation in the decision-making process (especially on revising tax tariffs) will foster an increased level of compliance in part because participation implies some commitment to the institution and such commitment in turn requires behavior that is consistent with words and actions

(c) Increase in provision of public goods to the citizens.

It is believed that effective provisions of public goods and services by the government will increase compliance for instance taxpayers will develop the feeling that their tax payment is being well utilized.

Controlling corruption

Tax officials should be professionally trained, promoted by merit, and judged by their adherence to the strictest legal standards and morality. To remove temptation, payments should he kept out of the tax administration; emphasis should be placed such that officials have relatively little direct contact with taxpayers and even less discretion in deciding how to treat them. How they behave in such contacts must be monitored in some way for example creating an internal police.

Sanctions and Penalties

Penalties for evasion should be strengthened. Currently, the Income Tax Act 1997 (part XV) provides the legal basis for various penalties (fines, interest, imprisonment) for a number of tax offences. Unpaid taxes may result in fines or additional interest payment, but there is no provision for imprisonment except under Sections 139,141,and 142 of the I.T.A. Fines can also be charged for failure to comply with tax recovery provisions, maintenance of proper records, and provision of requested information. Finally, fines apply if misleading or false information is given; taxpayer identification numbers (TIN) are misused; or tax officials are obstructed or bribed. In total, eight types of offences may result in fines or other monetary penalties. Five types of offences may, in addition, result in imprisonment: misuse of the TIN; knowingly making false or misleading statements;

helping others to commit a tax offence; receiving bribes (tax officials) or giving bribes (other persons). The three first mentioned offences carry imprisonment of up to one year, while the latter two offences may give not less than three months in jail. Penalties and sanction should be increased with

(1) The potential revenue loss due to the tax offence;

(2) The difficulty and cost of detecting the offence.

(3) The effect of the offence on other taxpayers;

(4) The offender's state of mind (a higher penalty should apply if the offence is

deliberate and pre-planned); and

(5) Recidivism'02, in addition, penalties should depend on the similarity of the offence to actions which are punishable under other laws, given the cultural context. For example, penalties for non-compliance should be inversely related to the ease of compliance and

the information about obligations which tax-payers may reasonably be expected to have, taking into account such things as the availability of forms, the aid provided to taxpayers in filing returns, and taxpayer education programmes'°3. This means that penalties for non-compliance should be inversely related to the ease ofcompliance and the information about obligations which taxpayers may reasonably be expected to have. 103 Bird Richard M. Asia-pacific tax bulletin March 2004.

Modernization/Computerization

Computerization should be increased, thanks to U.R.A's efforts of implementing theASYCUDA ++ and the more recent R.A.D.D.E.X system. Special consideration shouldalso be placed on the following departments.

(i) Systems related to taxpayers records and tax collections

(ii) Systems related to internal management and control over resources

(iii) Systems related to legal structure and procedure and systems that will help lower taxpayer's compliance cost.

The positive effects of computerization have been felt in Singapore in developing a system of handling trade declarations electronically known as the TRADENET which allows filing of declarations by traders through their personal computers. However before implementing the new technologies there should be enough resources for training of staff on using them otherwise a complex system may engender resistance and problems.

Specific reform measures to include

Making the tax procedures very simple and transparent so that the taxpayers know what their obligations are towards revenue collection, as well as educating them (taxpayers) on tax laws and collection systems. These ought to be presented in the simplest possible way for an average taxpayer to understand (interpretation in major local languages could also help). Possibly, ignorance of the tax laws and procedures is partly responsible for generating the environment for corruption in the tax system.

In addition, effective use of automated systems (for example computerization of the clearing system), and improving information flow within and across departments and strengthening tax audit ate needed to improve tax collection and monitoring system. It would also help in evaluating refund claims and in preventing possible frauds associated with these claims. Developing an effective mechanism that monitors documentation of goods from Mombasa to the final delivery point is also needed in order to cut down on falsification of documents by officials at various checkpoints, and to ensure continuous monitoring of the tax body.

Consideration should also be given to strengthening tax administration including staff investigative machinery and human resource management system, particularly system of rewarding staff in order to attract skilled and high caliber employees. Employees must feel that they actually represent the most valuable asset of the organization and that top management is prepared to invest in their future. So the issues like career development need urgent attention. A well designated training program is necessary if capacity of staff is to improve. The point here is that the URA administration must rely on a number of human resource management instruments not only remuneration to be effective and efficient. While salary rise may help, it won't stop revenue officials from taking bribes. Pay level is only one of several factors affecting the behavior of tax officers. In a situation in which the demand for corrupt services is extensive and monitoring ineffective, wage increases may end up serving as an extra bonus on top of the bribes taken by corrupt . Similarly, it is not

enough to 'fire' corrupt officials without reforming aspects of the system that provide opportunities for stealing and ensuring that honest officials are being appointed in position of trust. Where personal contact is a problem, the introduction of elements of unpredictably as to which particular official may handle a matter or certain category of clients, and routine transfers may also help. Finally, anti-corruption effort in the tax system needs to be extended to embrace other efforts towards achieving good governance rather than being handled in isolation. For instance, how transparent is the government procurement system, the awarding of government tender, ministerial discretion of providing preferential treatment to some industries and companies. How is the policy enviromnent?

For instance, what has been done to correct the misalignment in policies which generates an environment for corruption such as cross-border differences in the tariffs regime?

Some of the smuggling activities are reactions to misalignment in the policies of Uganda and her neighbors, and the policy that provides over protection to some industries.

Conclusion

Uganda's tax structure resemble the tax structures of most of the other African countries and conforms to the principles of good tax structure thus the main point on emphasis for reform is administration. Vito Tanzi105 noted that tax administration has a crucial role in determining the real effectiveness of a tax system. Professor Bird'06 adds that the best tax policy in the world is worth little if it cannot be implemented effectively, thus he adds that Tax policy design must take into account the administrative dimensions of taxation.

Hope fully with implementation of the reform measures tax compliance behavior will grow rapidly.

CHAPTER FOURTEEN
A REFORM ON THE RIGHT TO KILL (EUTHANASIA AND THE RIGHT TO LIFE)

Questions regarding death and dying have recently become popular topics for discussion by lawyers, physicians, theologians, philosophers and the public. Is euthanasia murder? Should steps be taken toward legalization? Is private regulation an effective method for control? These questions and numerous others are being asked with in- creasing frequency. These are urgent questions that require careful and thorough analysis and comprehensive answers.

This part examines these questions and some of the answers that have been developed.' Hopefully, it will provide the reader not only with some basic reference material for more thorough evaluation of the now "controversial" concept of human death, but also with a frame of reference, a rational, logical and persuasive perspective from which to consider death and dying. This, then, will not be a detailed legal analysis, that would make it unnecessarily redundant; this will not be a lengthy exposition that would make it counterproductively boring; this will merely be a brief intrusion into the mystically evasive and deeply personal realm that death occupies in the human mind.

We are about to examine a subject that has invited intellectual indulgence since man acquired a perception of the inevitability of death. Of late, it is receiving attention of monumental proportions from members of the public and the legal, theological, philophical, journalistic and medical communities. Much of the discourse devoted to death, however, is of dubious value because it does not seek to make death less palatable, frightening, terrible or impounderable. Rather, it advocates a cold, mechanistic approach to death.' This observation is really my -point of departure for this paper. With all due respect for those who have considered "death" before me, whose immense intellectual capacities far exceed mine, with awe at the care and diligence in their work, and with deference -to their integrity and honorable intentions, I submit that it is to life not death that we must turn our attention. By developing and improving life- our concept of it, our respect for it, and our concern with improving the quality of it-we can construct the foundations for a moral, ethical and legal environment in which death may then be perceived, dealt with and allowed to occur as a natural terminating function of life.

SEMANTICS-WHICH "TYPE" OF "EUTHANASIA" SHALL WE CONSIDER?

One of my favorite law professors liked to tell a story about a lawyer who in 'the course of oral argument before the United States Supreme Court answered one of the

justices' questions with the casual observation that "It's only a matter of semantics, your Honor." The professor was then serving as clerk to Mr. Justice Frankfurter, -who was not often motivated to stir during oral argument. Upon this occasion, however, -the esteemed justice rumbled, rose and roared, "Young man, the law is semantics!" To avoid the obvious pitfalls in taking the semantics of this discussion for granted, perhaps a brief look at the terminology involved will be helpful. The definitions that follow are those of the writer, and are submitted only for purposes of this discussion. If they be deemed erroneous, so it may well be but since there has been very little agreement among scholars in this regard, they are likely to be as accurate as any. Throughout this paper it is hoped the reader will keep in mind that its subject is a matter of "bio-ethics" and not one of "medical ethics." The former term is generally used to denote the moral considerations and principles concerned with life and living things, a broad and wide-ranging topic which is not confined to the perspectives of any single profession or field of endeavor.' Bio-ethics is inter-disci- plinary. The latter term, on the other hand, denotes a set of profes- sional standards applicable only to the practice of medicine a far nar- rower concept. Viewing questions about death from the standpoint of medical ethics would, therefore, necessarily exclude legal, theological and other implications which are indispensable -to a comprehensive treatment of them. Thus, we are concerned here with a subject that is properly within the scope of 'bio-ethics, not simply medical ethics. Beyond agreement that "euthanasia" literally means "happy death,"' there is no consensus as to its precise colloquial meaning. The word generally connotes the taking of human life for other than malicious purpose. It implies that some sort of humane or compas- sionate motivation is the prime-mover in the taking. But definitional problems arise in defining the character of the manner in which the taking of life is accomplished. Terminology such as "negative," "voluntary," or "passive-" eu- thanasia, and its inverse corollary, e.g. "positive-," "involuntary-," or "active-" euthanasia has proliferated. While the prefixes vary the distinction is generally accepted that the former group describes the taking of human life by the omission of some act essential to the preservation of life' and the latter indicates the performance of some affirmative conduct which directly results in the taking of life. Regardless of the specific term used or its precise definition, a common thread ties them together; euthanasia is the taking of human life, regardless of its motivation, or of whether it is an act or omission. Euthanasia is not permitting death to occur or allowing the inevitable to come about. To be sure, it could be defined to include these things, but this would destroy any value the word might have.

By rejecting a definition of "euthanasia" that includes allowing death to occur, a potentially valuable analytical perspective can be gained. Making a distinction between "euthanasia" and "allowing death"' permits discussion of their respective implications without incurring the substantial semantic difficulties that have consumed to much attention in prior discussions.

Perhaps the only other words in need of definition at this point are three that represent the essence of the law, theology and philosophy in this country: morality, ethics and law.9 specifically, it is the interrelationship and interdependence of the concepts implicit in 'these words that should be defined to help clarify the discussion about to be presented. The following definitions are offered. "Morality" is the recognition of qualities, such as correct or incorrect, and the application of values, such as good or bad, to those qualities in order to achieve a frame of reference within which to conduct the affairs of life. There are a multiplicity of sources from which the morality of our society has been drawn, but probably the most influential of these has been theology." "Ethics" is the systemization of a morality in which standards of conduct are established." The efficacy of any such system depends upon its voluntary adoption by the group of people to which it applies.' Religion exemplifies this. The mandatory nature of "law" is the feature of that system of standardizing morality which distinguishes it from ethics. Thus, while both ethics and law erect standards of conduct for -the persons to which they apply, 'they differ with respect to the methods of enforcement they use.'

There is a common theme in morality, ethics and law: they all involve making value judgments regarding the conduct of some person or group of people. Each, with increasing degrees of particularity as these value judgments progress from morality to ethics to law, defines the idea of -the quality of life; and each, with increasing force, influ- ences and regulates that quality. Theoretically, at least, if one of the voluntary value judgment procedures is working effectively, then the next successive one should not be required. For example, if an ethical principle is generally adhered to by those to whom it applies and is otherwise acceptable and desirable, then a law erecting a standard for the same conduct should not be required. I Although it may seem unexpected, no definition of death will be presented at this point. It is sufficient for the moment to state that death is the cessation of life. In addition, no specification of a particular class of persons, e.g. the terminally ill, is offered at this point to identify the targets of the practices being discussed. Defining either of these concepts now would be premature in the context of the organization of this book.' 6

CREATION AND CONSTRUCTION OF A CONTROVERSY-SURVEY

This section contains descriptions of some of the thoughts and arguments of selected commentators on euthanasia. Selections were made to provide a sample of the opinions that abound in the spheres of legal, theological, medical and general literature. For ease of consumption, the following survey is categorized by area of endeavor: law, theology and medicine. No inference that this method of presentation is indicative of significance to be attached to any subdivision is intended.

LEGAL SCHOLARS

1. Helen Silving's

Ms. Silving, as a Research Associate at the Harvard Law School, made her contribution -to -the euthanasia controversy ostensibly as more of an academic exercise than as an expression of viewpoint. As such, it purports to be an exploration of the criminality of euthanasia in various systems of law. Ms. Silving draws a distinction between several unnamed, types of euthanasia and thereby makes a case for the need to reform the criminal law in this country to accommodate motives that lack the desire to do harm, as well as the desires of the person whose life is in the balance." (She avoids recommending that some measurement of the value of the life in question be included in the law reform she advocates). Though she considers legalizing euthanasia, she appears to favor lessening criminal penalties for mercy- motivated murder.2 Her conclusion is that euthanasia is murder within the context of contemporary criminal law in this country because it includes the elements constituting that criminal offense, regardless of what it might be called. This argument for criminal law reform has interested sub-sequent legal scholars far less than proposals for legislation legalizing some "form" of euthanasia. Nevertheless, Ms. Silving's recommenda- tion that reform is warranted to bring the criminal law into harmony with the manner in which it is frequently administered in euthanasia cases is well presented and reasoned.

2. Yale Kamisar 23 and Glanville Williams

In 1958, and in response to noted legal scholar Glanville Williams, Professor Yale Kamisar of the University of Minnesota Law School re- butted Williams' proposal to statutorily legalize "voluntary" euthanasia. In Kamisar's article, "voluntary" euthanasia was defined by example: "the cancer victim begging for death."

Because he considers his views to be those of a non-religious utilitarian ethician, Professor Kamisar challenges the ideas upon which proposals for legislation to legalize euthanasia are most often predicated. He orients his argument to Williams' views, but aims it at all those who would support them.

Although it is impossible to capsulate Kamisar's detailed exposition, the following is a summary of the highlights of his article. To Williams' contention that legislative action is necessitated by inequal application of the criminal law in cases where euthanasia is apparently involved, Kamisar observes that "if inequality of application suffices to damn a particular provision of the criminal law, we might as well tear up all our codes . . ".2. Kamisar then argues that it is properly within the purview of a jury to consider moral issues in its deliberations and states that Williams' proposal would not cure the ills in existing law, but would compound them.28

To Williams' argument that decisions regarding euthanasia should be left to the

discretion and common sense of physicians, Kamisar raises the central arguments in his: rebuttal-the possibility of mistake and abuse, and the likelihood that "voluntary" euthanasia legislation might someday be extended to include "involuntary" euthanasia." Kamisar agrees with Williams that the battlefield is civil liberties but questions whether the premature and unnatural death of but one individual by mistake is worth relieving the pain and suffering of any number of others.

Mistakes and abuses can be prevented, or at least minimized, only by erecting elaborate legal machinery or by somehow assuring the infallibility of all physicians' medical judgment and moral scruples. The former alternative would preclude any possibility of expeditious administration, and the latter would impose a burden upon medical technology that it is incapable of assuming and that its practitioners are unwilling to accept. Additional mistakes can be introduced into whatever procedure might be established by difficulties in assessing whether the person who purportedly requests death is in fact capable of making such request freely and voluntarily, and by the possibility however slight-that an advance or breakthrough in medical technology could save and preserve, if not fully restore, the life in question. Williams himself acknowledged the possibility and, inferentially, predicted the future acceptability of putting to death aged senile persons , defective -infants and others whose mental or physical deficiencies make their lives somehow worth less than others when measured on some abstract scale of quality of human life. Williams' reasons for anticipating this form of euthanasia are that someday -these "defective" people will cause problems in our society sufficiently serious to warrant a change in present public opinion. Kamisar dismisses Williams' reasons for even raising -the possibility of extending legislation to "defective persons" with a kind of moral pragmatism and the statement that since he finds the proposal itself undesirable, the extension of it would be even more so. He then applies his legal version of the political "domino" theory and in asking "Where do we, how do we, draw the line?" finds the killing of "defectives" utterly unacceptable." One of the least emphasized but perhaps most persuasive arguments by Kamisar is that since virtually all of the cases on the books deal with "involuntary" euthanasia, -the proffered need for legislation regulating "voluntary" euthanasia (grounded upon disapproval of the rationale or results in -those cases) is at best imagined and is at worst the crass commercialization and exploitation of a topic to which the public is sensitive. In spite of this, many scholars have persisted to disregard -their self-imposed definitional distinction between "voluntary" and "involuntary" euthanasia, and have -used inconsistencies in the law regarding the latter to justify acting upon the former. Whenever such reasoning is relied upon as as: the basic premise for an argument -favoring legislation regulating "voluntary" euthanasia, it is hopelessly illogical and therefore cannot be accepted without serious reservation.

3. George Fletcher

After Professor Kamisar's article and Williams' rejoinder to it, there was a lull in the attention given the issue of euthanasia. How- ever, when the first heart transplant operation came into the public eye in 1967, death again became a popular subject for discussion and debate. There was an urgent need to establish criteria for the circumstances in which removal of vital organs for transplantation purposes would be proper. Accompanying discourse on the need for new definition of death was a renewed interest in "euthanasia." George Fletcher, Assistant Professor of Law at the University of Washington, directed his attention to the criminality of euthanasia. His article seems to be an attempt -to return to the question of the criminal liability involved in administering euthanasia. After enumerating the common law elements of murder,4' his analysis focuses on one of them, "an act resulting in death," and the criminality of an omission in the context of ,that element.4 2 He proposes that the desired test should be "whether on all the facts we should be inclined to speak of the activity as one that causes harm or one merely -that permits harm to occur." '4s He thus makes a distinction between acts and omissions. It turns upon the difference between "causation" and "permission." Professor Fletcher then turns to the physician-patient relationship to examine whether its scope includes the implied consent by a patient to the omission of some medical treatment by his physician. He finds that "what doctors customarily do" determines -the existence of that implied consent. He -thereby infers that if what doctors customarily do includes -the giving of implied consent by their patients, then an omission by a physician that permits harm to occur is not criminal conduct.

4. Luis Kutner

In a recent article, the Chairman of the World Habeas Corpus Committee of the World Peace Through Law Center proposes an approach to "euthanasia" that is one of the most creative suggestions thus far, the "living will." Without describing the first part of Mr. Kutner's article, which follows what appears to have become a standard format for legal writers,46 let us turn immediately to Mr. Kutner's proposal. It is summarized as follows:

(a) The document would be referred to as a "living will," "testament permitting death," "declaration for ending treatment," or the like.

(b) The purpose of the document would be to allow a person to "indicate to what extent he would consent to treatment" while "fully in control of his faculties and his ability to express himself."

(c) "The document would provide that if the individual's bodily state becomes completely vegetative and it is certain that he cannot regain his mental and physical capacities, medical treatment shall cease."

(d) The document would be acted upon only with the approval of a hospital committee or similar board which would "consider the circumstances under which the document was made in determining the patient's intent . . . and whether the condition of the patient has in- deed reached the point where he would no longer want any treatment." To these provisions Mr. Kutner attaches several qualifications.

One of them specifies that the wills could not be executed by incompetents incapable of consenting to medical treatment. Another pro vides that the document could not authorize the commission of euthanasia. Mr. Kutner's proposal has been adopted by several organizations and actively advocated by them. " Standard form "living wills" are now available to the public and are used by a growing number of per- sons. There are, however, several problems inherent in the use of "living wills" which must be solved before their use may become well- advised. The foremost of these are 51 (1) such documents are with- out any legal effect; (2) the limited consent to treatment expressed in them is not an expression of present intent or consent as such documents are only prospective in nature; and, (3) the suggested forms are necessarily broad but therefore fatally vague and there is no rational way to expect laymen or even lawyers to correct these defects and still achieve the desired result. In spite of these criticisms, the "living will" may still be one of -the best methods yet proposed to deal with human death and terminal illness humanely and efficaciously.52

5. Other Legal Scholars

The list of legal scholars devoting attention to the concept of death is continually growing. As this survey is not intended to present summaries of all the material available, brief reference has been made to a representative sample and the remainder will be left to the curiosity of the reader. A few more, however, are deserving of mention without extensive comment Joseph Sanders' position is that since the "present system of criminal law, as fictitious as it sometimes is, has not yet worked a great injustice on anyone committing euthanasia" and since "trial by jury permits justice to be done without causing any tear in the conceptual fabric of the law," a compelling case for changing the present situation is difficult to prove.54 On the other hand, Howard Brill notes that as the present law can be circumvented by a variety of techniques, it is definitely in need of legislative change to legalize "voluntary" eu-thanasia. In an article that may seem to present rather appealing arguments favoring "voluntary" euthanasia, but which -upon careful analysis fails to support those arguments with a substantial quantity of supportive facts or any quality of persuasive reasoning, Professor Arval Morris of the University of Washington law school adds yet another article to those already mentioned. A team of three law students recently compiled a most compre- hensive survey of the legal ramifications of euthanasia. It touches upon every conceiveable aspect of the subject within the reach of the inquisitive mind, sometimes with less than thorough analysis. The survey does, however, provide valuable background and the footnotes comprise an invaluable bibliography for the prospective investigator.

THEOLOGIANS

1. Joseph Fletcher

Recently, Dr. Fletcher left the modem-day euthanasia "controversy" he started in 1954,59 still debating the merits of "voluntary" euthanasia, and forged ahead into the area of "involuntary" euthanasia. Where once this noted Professor of Medical Ethics supported the idea of permitting patients to obtain a court order under conditions prescribed by statute for the administration of "voluntary" euthanasia to such patients, he now advocates the approval of "involuntary" euthanasia.

Starting with the premise that the issue of whether to permit "passive" or "negative" euthanasia (or "whether we may 'let the patient go') is as dead as Queen Anne," Dr. Fletcher reasons that "it is harder morally to justify letting somebody die a slow and ugly death, dehumanized, than it is to justify helping him to escape from such misery."61 His justification for this view is, that adjustments to traditional ethics, which are mandated by recent technological advances, enable euthanasia to be justified as a reasonable means to achieve the termination of life that is or has become useless. His "new ethics" is one which emphasizes the quality of life, and the essence of his argument is that the end of putting useless life to death, justifies -the means euthanasia, because the positive value of the end, that of terminating use- less life, outweighs the negative value of the means.Dr. Fletcher's new thesis necessarily raises several questions. Who will determine when a life has become valueless? How will the value of that life be determined? These questions cause him little difficulty. He readily admits that scientific change has enabled us to "play God," and argues that the "real question is: Which or whose God are we playing?" Thus, because we are playing God, we can morally justify evaluating -the quality of life exhibited by other human beings and, if we find it useless, we can therefore justify ending it.

The position espoused by Dr. Fletcher is an extension of his former position favoring "involuntary" euthanasia. Where once he believed that "consent is a common ethical consideration in all medicine . . . [and] while it should never be perfunctory it will always have to be substantial rather than perfect," 5 he would now de-emphasize the importance of consent in determining who should die. Whereas he once said that "we might choose death for ourselves more rightly than we can choose it for others," he would now have it chosen for all who are "useless" or "defective."

Fletcher closes his disclosure on "involuntary" euthanasia with the prediction that "...The day will come when people will . . . be able to carry a card, notarized and legally executed, which explains that they do not want to 'be kept alive beyond the humanum point, and authorizing the ending of their biological processes by any of the methods of euthanasia which seems appropriate..."

Thus he still recognizes the precept that consent is important in any euthanasia question. But this does not lessen the impact of his current position advocating "involuntary" euthanasia and the obvious moral questions raised by it.

2. Immanuel Jakobovits

In what is otherwise a dearth of written material available to the lay public dealing with "death," Rabbi Jakobovits' book, Jewish Medical Ethics,8 stands out as an indication of the relationship of Jewish moral and religious principles to that subject. Three conclusions regarding death and euthanasia are stated by the respected authority on Jewish history, culture and religion. First, "the doctor is obliged 'ex precepto charitatis' personally to inform the patient of the hopelessness of his condition. . . . Any failure to do so involves the doctor in grave sin, since he allows spiritual or material damage to occur which he could have prevented."Second, even when death is imminent and inevitable the patient must be treated as though he were living by af- fording his normal comfort and attention. Although death may not be hastened, impediments to it may be removed and its agony should not be lengthened. Third, even when it is certain that death is near, euthanasia is strictly prohibited. "In fact, it is condemned as plain murder . . . . At the same -time, Jewish law sanctions, and perhaps even demands, the withdrawal of any factor which may artificially delay [the patient's] demise in the final phase.

3. Paul Ramsey

As one of -the leading Christian ethicists of our time, Professor Ramsey has had occasion to consider "death" in great depth and in many contexts. In order to provide the reader with a succinct synopsis of his views, this survey is limited to Professor Ramsey's opinions that relate most closely to the arguments advanced in favor of the adoption of "voluntary" euthanasia legislation. In orienting most of his discussions to patients for whom death is both inevitable and imminent, Ramsey believes that "Fletcher's case for voluntary euthanasia is morally complete so far as -the patient alone is concerned.". Ramsey questions, however, whether the roles of other parties in relation to the one whose life is in balance raise moral issues not covered by Dr. Fletcher. He suggests that Dr. Fletcher's justification for "inducing death" by equating it with "permitting death to occur" may not be entirely justifiable on moral grounds.

Doing something and omitting something in order to do something else are different sorts of acts. To do or not to do something may, then, 'be subject to different moral evaluations. One may be wrong and the other may be right, even if these decisions and actions are followed by the same end result, namely, the death of a patient.

What Fletcher has gained by an improper characterization of actions that allow a patient to die while caring for him-by calling them indirect voluntary euthanasiais

that, without abandoning the case he and many other moralists have made for only caring for the dying, he can the more readily succeed in apparently reducing the warrants for omitting medical interventions to the moral equivalent of the alleged warrants for acts of direct euthanasia.

But to respond in this way would exhibit a considerable misunderstanding of the positive quality and proper purpose intended in only caring for the dying.These actions are fulfillments of the categorical imperative: Never abandon care! . . . [T] hey effectuate or hasten the coming of no end at all. Upon ceasing to try to rescue the perishing, one then is free to care for the dying.73

Professor Ramsey's thesis is as simple as this: care for the dying. He argues that it is necessary to establish the "moral limits properly surrounding efforts to save life" so that medical treatment will cease when appropriate, and caring for the dying will begin.7 4 He emphasizes a patient-oriented approach that centers on the life, not the death of the dying patient. He takes a middle ground, adopting neither the stand that there is never a reason to stop using life-sustaining medical procedures, nor one that advocates killing terminal patients. Rather, he prefers to leave the awesome decision regarding determination of when cure has become impossible and when the process of dying commences in a particular case to the physician and ,the patient together. "The patient has entered a covenant with the physician for his complete care, not for continuing useless efforts to cure.

4. Pope Pius XII

In an address to an international congress of anesthesiologists, Pope Pius XII stated the position of the Roman Catholic Church regarding the prolongation of life with eloquent simplicity. It is hoped that the following abstract does that address justice.

Does [the doctor] have the right, or is he bound, in all cases of deep unconsciousness, even in those that are considered to be completely hopeless. . , to use modem artificial respiration apparatus . . . ?

Normally one -is held to use only ordinary means-ac- cording to circumstances of persons, places, times, and culture- that is to say, means that do not involve any grave burden for oneself or another. On the other hand, one is not forbidden -to take more than the strictly necessary steps to preserve life and health, as long as -he does not -fail in some more serious duty

The rights and duties of the doctor are correlative to those of the patient. The doctor, in fact, has no separate or independent right where the patient is concerned. In general he can take action only if the patient explicitly or implicitly, directly or indirectly, gives him permission. The technique of resuscitation which concerns us here does not contain anything immoral in itself. Therefore the patient, if -he were capable of

making a personal decision, could lawfully use it and, consequently, give the doctor permission to use it. On the other hand, since these forms of treatment go beyond the ordinary means to which one is bound, it cannot be held that there is an obligation to use them or, consequently, that one is bound to give the doctor permission to use them. 76

5. Other Theological Views

Several churches have adopted positions regarding death and euthanasia.77 Summaries of the views of those churches that have issued formal statements follow.

The American Lutheran Church

While life is precious, there comes for every person that time when his earthly existence must end. The Lutheran hospital believes that he is entitled to die with dignity. The Lutheran hospital stands firm in its opposition to compulsory euthanasia. It does not lend its facilities to any active intervention 'that arbitrarily and ruthlessly brings about the death of any person who comes to it for care and treatment.

United Church of Christ

We believe it is ethically and theologically proper for a person to wish to avoid artificial and/or painful prolongation of a terminal illness and for him or her to execute a living will or similar document, at times, may work to the harm of the patients. We believe that there comes a time in the course of an irreversible terminal illness when, in the interest of love, mercy and compassion, those who are caring for the patient should say: 'Enough.' We do not believe simply the continuance of mere physical existence is either morally defensible or socially desirable or is God's will.

United Methodist Church

We assert the right of every person to die in dignity, with loving personal care and without efforts to prolong terminal illness merely 'because the technology is available to do so.

PHYSICIANS

1. Walter Sackett, Jr.

Probably the most outspoken, if not the most widely publicized physician to address the subject of death is Walter Sackett. This is because he is not only a physician who professes to have allowed countless of his patients to die,"' but is a Florida state representative as well. In his latter capacity he has on several occasions since 1969, introduced a bill into the Florida legislature to amend the state constitution's Declaration of Rights to include the right to be permitted to "die with dignity." In

support of his proposal, Dr. Sackett assumes his role as a physician and advances two arguments: a multitude of his patients want to be allowed to die with dignity, and the medical profession should be protected from legal vulnerability. Dr. Sackett places several conditions on the exercise of the right he would constitutionally enunciate. Among them are that the patient's condition must be irreversibly terminal, his condition must be incurable within the definition of the then current state of medical technology and the patient, his family or a medical review board must request or concur in any decision to permit the patient to die. 84

2. Sackett's Opponents

The physicians who oppose Dr. Sackett's proposal readily concede that "no doctor would advocate useless treatment when life is irretrievable." This opposition is grounded on the argument that the bill, if adopted, would not accomplish any useful or helpful purpose, much less change or introduce anything that cannot presently be done with- out such a measure. It is not properly within the purview of a medical practitioner to do anything except help his patient. This argument against Dr. Sackett's position is founded on the view that he would have the physician become an executioner, acting so as to accommodate death, whereas he should never act with respect to anything but life. Mistakes in diagnosis and treatment can be and are made. New cures can be and are developed. Heroic measures to save life can and do produce hope and comfort for the dying patient. Pain and suffering can be controlled. "Loneliness and de-personaliza- tion cause the terminally ill more suffering than the pain does."' Whereas Dr. Sackett views the problem as one of "death," his opponents view it as one of "life." In neither view is it denied that mistakes are possible, heroic measures can be of value, and pain and suffering should be minimized. It is perhaps fear of "judicious neg- lect" that compels Sackett opponents to speak out.

The other aspect of the argument against Sackett that his bill "is useless, meaningless and superfluous [and] is founded on 'the opinion that there is no legal or medical justification for it." In addition, there is no apparent indication of any rational and well-informed pub- lic demand for it. Such legislation would unnecessarily confine the judgment and conduct of the physician to its terms alone. Whereas he can now -handle death and communicate with his patient and the immediate family simply and quietly, the proposed bill would en- tangle the situation with legal requirements and could even promote malpractice litigation. "It would serve the people and their physicians best 'to desist from pushing legislation which has no useful or helpful purpose and which would accomplish nothing more than can be done without it."

3. Survey of Physicians In 1958

418 physicians at two Seattle hospitals were sent a questionnaire intended -to acquire their views of death and euthanasia, inter alia without commenting upon the adequacy of the statistical basis used, some of -the results of that survey are

included in this article for purposes of clarity and comprehension. Most of the physicians at both hospitals favored omitting procedures and medications which would probably extend life if such omission is at the request of -the patients or, where necessary, their immediate families. A greater majority of physicians who were in practice at community hospitals held 'this view than their colleagues at the university ("teaching") hospitals. The surveyors attempted to explain this difference by proposing four possible theories. First, doctors in community hospitals see more patients and hence more death than those at -teaching hospitals. Second, the house staff, i.e. interns and residents, at teaching hospitals has fewer occasions to counsel its patients. Third, "the teaching how to preserve life in the university setting is often so powerful that it may overwhelm any -thoughts of euthanasia." Lastly, the nature of the illnesses treated at university hospitals may be "biased toward -those (patients) who do not want to die."

Forty percent of the doctors polled approved of signed statements, "living wills", permitting the withdrawal of necessary life-sup- port equipment or medication. However, a clear majority indicated that they would practice "negative" euthanasia in the absence of signed authorization." Thirty-one percent of the respondents "favored change in social attitudes which would allow positive euthanasia to be carried out in selected patients." Nearly that percentage indicated they would practice "positive" euthanasia, social attitudes permitting. About half of the physicians favored establishment of panels or review boards for consultation in cases presenting difficult philosophical or moral questions. These were essentially the same doctors who favored utilizing authorization statements and who, therefore, would be less likely to encounter such problems.

4. Medical Organizations

In April of 1973, the House of Delegates (policy making body) of the Connecticut State Medical Society approved a statement regarding "a patient's right to die in dignity." The statement approved a standard form "living will" for use by persons wishing to express their wishes in the event they could no longer do so orally and to provide a means for permitting their deaths to occur.9" This is the only medical professional organization that has adopted or approved the use of a pro forma "living will". Several other organizations of physicians have expressed their policies regarding death in the context of the practice of medicine without resort to signed statements. Although this would appear to be contradictory to the attitudes apparent in the doctors responding to the survey discussed above, three state medical associations have done so and more are considering similar action.9 9 what they appear to enunciate are the views of their members without confining them and patients alike to fixed forms. The recent statement of the House of Delegates of the American Medical Association is exemplary. The intentional termination of the life of one human being -by another- mercy killing-is contrary to the policy of the American Medical Association. The cessation of the employment of extraordinary means to prolong the life of the body

when there is irrefutable evidence that 'biological death is imminent is the decision of the patient and/or his immediate family. The advice and judgment of the physician should 'be freely available to the patient and/or his immediate family.

With this statement the AMA seeks not only to encourage its members to practice good medicine, including both the technological and human aspects of it, but also to recognize that death and dying are exclusively within the province of the individual. It is not within the province of the physician to judge who should die. His task is to determine when, and in some instances, how, -that death occurs. His mercy and compassion should be directed toward the patient in the form of the medical care he provides, including full discussion of the medical circumstances involved in the patient's condition. Given this, the patient must then confront death and dying in the comfort and intimacy of his privacy.'

CONTROVERSIAL CONSENSUS

The foregoing section of this discussion was primarily intended to provide the reader with a general view of some opinions regarding euthanasia. Its principal purpose was to illustrate and thereby circumstantially underscore the notion that the controversy over euthanasia is due more to unsettled and confused semantics than to disagreement over basic substantive issues. With the exception of Joseph Fletcher and possibly Glanville Williams, who appear to use approval and rationalization to justification for "involuntary" or "active" type, euthanasia most authorities either condemn the taking of human life without the consent or against the will of the person whose life is in question, or -they avoid the subject altogether. They agree that pain and suffering should not be prolonged in instances where death is imminent and inevitable, and when the patient requests termination of life-supporting medical treatment.

The crux of the semantic problem arises in attempting to differentiate between "allowing death to occur" and what the writers persist in calling "voluntary" or "passive" euthanasia. Those who would prefer to some type of euthanasia even though they qualify their name for it and emphasize that it is undertaken with the consent or approval of the patient and with the most merciful and compassionate of motivations-are still nevertheless speaking of the taking of a human life. To make this taking more palatable, they further qualify their chosen terms so that it is limited to only terminally ill patients (not "persons") who are doomed to die in a matter of days anyway. By the time they are finished adding qualifiers to their definitions (of whatever terminology -they select), they are, in essence and in fact, talking about "permitting death to occur."

Sometimes terms such as "extraordinary treatments," "artificial means" -and "heroic measures" are used to describe medical efforts aimed at attempting to preserve the lives of dying patient. They can contribute to the confusion surrounding euthanasia. But here again, even though they may fail to recognize it, there is essential agreement

among the authorities. For example, suppose that a physician has obtained, either from the patient or his immediate family, an authorization in the nature of a "living will". Assume further that the patient in question is unconscious -and suffering from a terminal disease which involves great pain and discomfort, for which there is no presently known cure and which will, so far as medical technology is concerned, inevitably lead to his death within a short time. Upon these assumptions, precisely what conduct on the part of the physician constitutes "voluntary" or "indirect" euthanasia, and what constitutes "allowing death to occur"?

Suppose a new medication which might cure the patient's affliction has just been authorized for experimentation on human subjects. Is it an "extraordinary treatment"? If so and it is not administered, when the patient dies is this euthanasia, or simply death? If the new drug is used and the patient lives for two days, was it an "artificial means" that kept him alive? What if he lives for -two years? Suppose the patient is being treated with a respirator. Is -the device an "artificial means?" If so and it is unplugged, when the patient dies, is this euthanasia or death? In pursuing these questions perhaps the reader is inclined to de- sire more information to formulate his answers. Just what ailment does the patient have? Who gave the authorization? Why? How old is, the patient? How long has he suffered? The questions could become an imponderably involved inquisition. Perhaps a committee or board should be appointed or designated to look in-to this matter with all the care and discretion it deserves. It could construe the authorization, assess all of -the facts, interpret the possible medical alternatives and reach a decision upon which some type of conduct might then be appropriate. But, in the meanwhile, what of the patient? What should his doctor do now? Without implying that the definitions of terms such as "extraordinary -treatments" -are irrelevant in a given case, it is submitted that their uses and meanings are not proper reasons for maintaining any controversy. Their definitions -are a matter of circumstance, a function of too many necessary component variables for them to be used in a conceptual discussion. Thus we return to the subject at hand, euthanasia, to find that there really is no controversy. The "type" of euthanasia that the authorities support is really "permitting death to occur". The only visible purpose -that can be served by referring to a "type" of euthanasia is to trade upon the connotations that the word euthanasia carries with it. If those who refer -to "voluntary" euthanasia would not further qualify their definitions with provisions that their terminology is specifically aimed 'at patients for whom death is imminent and inevitable (using whatever language they chooses to attach to this additional qualification), then a controversy might indeed exist. If, for example, one would speak of denying or removing the insulin of a diabetic his request and out of compassion because he has contracted terminal cancer,then one might be speaking of "passive" or "voluntary" euthanasia, and there might be some controversy. Opinion is uniform regarding the propriety of euthanasia. It is condemned. It is criminal. It should not be permitted. Perhaps the penalties for it should be mitigated according to the motivation behind it, but nevertheless there should be a penalty for it.'

Opinion is also uniform regarding the propriety of allowing death to occur. It is condoned. It is not criminal. It is morally accept- able. The only real question that remains is whether it is either necessary or desirable to legislate any aspect of the natural termination of life.

MORALITY, ETHICS AND LAW

This portion of the discussion is devoted to whether legislation regarding "death" and "dying" is warranted. In considering this question a three part approach will be offered. This will define the three levels of value judgments the writer assigns to the processes of conduct appraisal utilized in our society, and to assist the reader in selecting one of them for his or her approach to the question.

Morality

Many of the authorities cited above refer to the concept of death as one which grips human interest. It concerns all of us. At one time or another, like it or not, we all ponder death, realizing it is in- evitable. We tend to think about death as an abstract occurrence in the lives of others rather than as something that will occur in our lives. However we may approach it, we all 'hold opinions about death. Even those who say they do not think about it at all are thereby expressing an opinion about it. Regardless of what our various opinions may be, we share the characteristic of assigning a value judgment to death. The most elementary mechanism for making our value judgments is what might be called morality the recognition of qualities and the application of values to those qualities -to achieve a frame of reference within which to conduct our lives. It is impossible to know how much of our morality is instinctive and how much is learned. From birth we are imparted with instinctive perceptions and bombarded with environmental influences. As we grow we begin thinking in terms of good and bad, correct and incorrect, right and wrong. We organ- ize things into groups and systems, and we characterize them as good and bad, correct and incorrect, right and wrong. We think about other people, and we also characterize them. Life becomes a way- a philosophy, if you will-of looking at things and others. It becomes a series of value judgments made according to that philosophy. Thus, we acquire a morality and govern our own lives by that morality. As a result of our morality we assign a value to life itself; we make a value judgment about life. This value judgment has nothing whatever to do with anything but our personal morality. Each of us assigns his own value to his own life and the lives of others about him. To the extent that we agree that 'human life has value, we share common morality; to the extent that we disagree about the measure of that value, we must adopt a common frame of reference to accommodate our respective moralities.111 Joseph Fletcher attempts to construct that frame of reference for us in his proposal favoring euthanasia. In so doing he gets entrapped in form, forsaking substance. His system would impose values rather than accommodate them; it would quantify qualities rather -than identify them. In Dr. Fletcher's system, philosophical perspectives and moral approaches must all be

categorized and named." Euthanasia must be dissected into four parts."' Life must be measured on a scale. Death must be statutorily defined. Subjected to all of this categorization, naming, dissection, measurement and definition his argument looses the quality of persuasiveness. Similarly, subjected to these things the quality of life also suffers a loss. By categorizing people they lose the ability to change. By naming ideas they become less conceptual. By dissecting life into childhood and adulthood the continuum of growth becomes obscured. By measuring success life looses capacity for happiness. By legislating conduct life looses the fullness of natural freedom. With a realization that it is sometimes necessary to perform these quantifications to preserve and protect our common morality, and that restricted life qualities can be better than none at all, perhaps Dr. Flethcer goes too far. The quantification he advocates for determining the quality of life and those persons qualified to retain it, in a very real sense, de- humanize us all. To say that any life is so utterly useless and without value that it should be extinguished is to deny that there is a nameless quality in all of us which is distinctly, uniquely and lovingly human. By acknowledging the value of life we recognize death. Regard- less of how we conceive of it, death is that inevitable mysterious quality in life that gives our values a sense of reality. It imparts to us and our morality an urgency that makes time important. It is no less a quality than love, and no less an integral part of our morality.

Ethics

One of the frames of reference for morality is ethics-the systemization of morality into standards of conduct for a defined group of people." Each such system depends upon voluntary adherence to it by the members of a specified group in specified circumstances. Each member accepts the morality of the system and follows the indicated standards of conduct. This does not mean that he betrays his personal morality as a member of society. Rather, it admits that in addition to being a member of society, he is also a member of a smaller, more specifically defined group. Thus, a church prescribes religious ethics for its membership; the practice of medicine includes standards of professional conduct known as medical ethics, and so forth. Because of its interdisciplinary nature, bio-ethics is more difficult to define and comprehend than other ethics because many members of many groups are concerned with bio-ethics; it surpasses the realm of the ethics of any one of these groups. Bio-ethics is in reality a systemization of the morality of our entire society. Its applicability to biological life necessarily includes all mankind, and its inclusion of the specific discipline of theology, medicine and law sets up various sub-systems within the major system. The bio-ethics involved in permitting human death to occur will illustrate this.

When a human being for whom death is imminent and inevitable is allowed to expire, the major system of bio-ethics as well as many of its sub-systems is involved. Basic human morality operates to make possible value judgments regarding pain and suffering. It also enables the laymen involved in the process to judge that the end of

a life is near. Religious ethics may apply similarly to the laymen, and they would of course be particularly appropriate in guiding the involvement of a clergyman in the counseling and comforting of -the other participants." Medical ethics is apposite to the attending physician in designating his professional responsibilities. In this situation, no single ethics predominates. Rather, each sub-system contributes, to the whole and in concert they operate as bio-ethics to enable the making of a value judgment upon the entire situation. Accordingly, a conclusion is achieved and conduct recommended. The most difficult problem of ethics is enforcement. This is a problem common to all systems of ethics, regardless of the group to which they apply. 18 In theory, at least, ethical principles are not the pontifical pronouncements of a small, elite superstructure imposed upon -the foundation group in order to arbitraily specifies unrealistically lofty standards of conduct. They are the common sense consensus of the group, intended to translate morality into useful guidelines for the conduct of the affairs which form the basis of the group. As such they are understandable and acceptable to the members of the group. The common welfare is promoted by adherence to them because they serve as realistic goals for the group members and enable presentation of a single image to persons outside the group. Thus, enforcement of ethical principles should not be difficult. Even if enforcement is not a major problem for a given group, the few cases of disobedience that do arise can be hard to handle because the group has little punitive power. Voluntary standards do not lend themselves well to involuntary punishment. Perhaps the most cohesive force in any ethics is one which is very subtle, and yet is also the one which enables enforcement to be effective. It is impossible to assign a name to that cohesive force. It is that intangible factor that explains why one likes -to go to a particular church, why doctors all seem to act like doctors, and why lawyers seem enjoined to act like lawyers. Perhaps it is something in their training and education; perhaps it is something they share in getting together at the end of a busy day or week. Whatever it might be called - fraternalism, brotherhood, professionalism-it is the core of the group, the rallying point, the reason why eligible persons desire membership and correspondingly why they voluntarily adhere to the group standards and accept group discipline." Given a group wherein its ethics are accepted and followed, and wherein its discipline is effective, there is no need for any other control or regulation of its group-related activities. So long as internal control works, any additional, external regulation is superfluous. It is only when the group looses the ability to govern itself that the force of law should come –to bear upon the group members.

LAW

The law is the ethics of government, the standards which the government imposes upon its constituency. In -this country the law should be those standards which the people impose upon -themselves. And, as the people each possess a morality, their law should be a reflection of their common morality. To say that law is without morality is to deny that it has any purpose whatever. In regulating our lives by defining our freedom and limiting our conduct, our law recognizes that indivual qualities and

values must be preserved by circumscribing the extent to which any among us can impose his values upon or interfere with those of others. Laws, like ethical systems, establish standards of conduct. But, unlike ethics, laws also set up the means of mandatory enforcement. They contain mechanisms for ensuring that they are carried out and for punishing those who disobey. Thus, law is the uppermost tier of morality. It is the standard that supersedes the others when those others become ineffectual, un- manageable or incapable of coexisting with each other. It should be resorted to only when there is evidence that moral values are threatened or violated. How much and what kind of evidence should re- quire the intercession of law is a matter for resolution by government. For the sake of this discussion, however, the arguments favoring adopt- ion of legislation regarding euthanasia are next examined to see if they appear to contain persuasive evidence in support of their positions.

Definitions of Death

The type of legislation most often promoted by the authorities cited in this discussion would regulate conditions for permitting death to occur. Those proposals will be discussed shortly. Before doing so, however, another type of legislation which has received some attention will be briefly examined. These are the statutes that would simply define "death". In the law, the determination of death is often a critical element in ascertaining the rights of the living. Ownership of property changes, control of business, wealth and political organizations are altered by death. In the law, then, it is often necessary to know that the life of one person has in fact ended in order -to know how the lives of others will continue.

The need to know when the law will declare that death has occurred is usually satisfied by a simple criterion: the cessation of life.' 23 For years, this simple, straight-forward standard has been applied in the law with little embellishment or statutory authority. It has been widely accepted without the necessity of legislative mandate.

Recently, however, some have concluded that this legal definition of death as the cessation of life must be made more precise and specific. They argue that death has become too complex to be de- fined so simply; and they urge that statutes must be enacted to provide the desired precision and specificity.

One of -the overriding concerns of those who advocate statutory definitions of death is the protection of potential donors in organ transplantation procedures. After the first heart transplant in 1967,124 the problem of protecting heart donors came into sharp focus. The questions were posed-and properly so: When is a potential donor dead? How should the proper time to remove a donor's heart be determined? Who should make the determination of death? Thus, we ask: Is legislation necessary to ensure that the answers to these questions are specified and enforced?

At once, after the first heart transplant, -these questions became the issues in a

worldwide debate. There was a fear that donors' hearts might be prematurely removed for transplantation, thereby removing all hope of recovery or survival for the donors.'

The intellectual community set to work at once to prevent this awful fate for those whose hearts might be removed for transplantation. Mighty discourse ensued. All were resolved -to prevent the possibility that someone might be killed to obtain his heart for use by someone else. Definitions of death were formulated, guidelines were issued for cardiac surgeons and the cry went up that "there ought to be a law!"

Although most of the reports that were issued were oriented to heart transplantation problems, they are also relevant to matters which concern us more directly. While few of us may ever be involved in organ transplantation, all of us will probably be involved with the deaths of other human beings. Some of the deaths we perceive may lead us to ask the same questions which the transplant committees asked-when, how, and who determines the moment of death?

First among the committees was the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death It published its report in the Journal of the American Medical Association in the summer of 1968. Specific medical criteria for the determination of a permanently nonfunctioning brain were advanced by the Committee. These were: 1. Unreceptively and unresponsively; 2. No movements or breathing; 3. No reflexes; and, 4. Flat electroencephalogram.'27 Other determinants of the absence of cerebral function would also be acceptable, the Committee said.

The report also contained comment upon the legal definition of death. The Harvard Committee recognized that the law treats -the question of death as one of fact to be determined in each particular case. It also said in this report, however, we suggest that responsible medical opinion is ready to adopt new criteria for pronouncing death -to have occurred in an individual sustaining irreversible coma as a result of permanent brain damage. If this position is adopted by the medical community, it can form the basis for change in the current legal concept of death. No statutory change in the 'law should be necessary since the law treats this question essentially as one of fact to be determined by physicians. The only circum- stance in which it would be necessary that legislation be offered in the various states to define "death" by law would be in the event that great controversy were engendered surrounding the subject and physicians were unable to agree on the new medical criteria. It is recommended as a part of these procedures that judgment of -the existence of these criteria is solely a medical criteria. Shortly after the Harvard Committee published its report, the American Medical Association adopted "Guidelines for Organ Trans- plantation". These Guidelines are intended 'to provide ethical standards to physicians connected with transplant procedures. Among the standards contained in the AMA Guidelines are the following. In all professional relationships between a physician and his

patient, -the physician's primary concern must be the health of his patient. He owes the patient his primary allegiance. This concern and -allegiance must be preserved in all medical proce- dures, including those which involve the -transplantation of an organ from one person -to another where both donor and recipient are patients. Care must, therefore, be taken to protect the rights of both the donor and the recipient, and no physician may assume a responsibility in organ transplantation unless the rights of both donor and recipient are equally protected.

A prospective organ transplant offers no justification for a relaxation of the usual standard of medical care. The physician should provide his patient, who may be a prospective organ donor, with that care usually given others being treated for a similar in- jury or disease. 3. When a vital, single organ is to be transplanted, the death of the donor shall have been determined by at least one physician other than the recipient's physician. Death shall be determined by the clinical judgment of the physician. In making this determination, the ethical physician will use all available, currently accepted scientific tests. The Harvard Committee Report and the AMA Guidelines were among the first authoritative statements issued regarding human organ transplantation and death. While both reports recognize the sensitive and urgent nature of their subject matter, neither of -them advocated the adoption of statutory definitions of death. The Harvard Committee Report specifically states that "no statutory change in the law should be necessary."'' The AMA Guidelines state that the determination of death should be made using scientific tests.'32 Nevertheless; others have argued that legal tests are necessary. In 1970, Kansas became the first state to adopt a statutory definition of death. The enactment of this legislation came in response to the social and political pressures which were generated by heart trans- plantation. The Kansas statute specifies alternative definitions of death; one is associated with absence of the classical vital signs and the other relates to absence of spontaneous brain functions. Either definition may be used by the attending physician in Kansas as the statute does not indicate a preference or order of application. The Kansas act defines death as follows:"' A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, attempts at resuscitations are considered hopeless; and, in this event, death will have occurred at the time these 'functions ceased; or A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the 'time when these conditions first coincide.

Death is to be pronounced 'before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation. These alternative definitions of death are to be utilized for all purposes in this state, including the trials of civil and criminal cases, and laws to the contrary notwithstanding. As the first enactment of its kind, the Kansas statute has been subjected to a great deal of analysis and criticism. Four of the most frequent criticisms are: 1. It is incorrect, medically, to say that death is two different conditions. Death is, after all, only one condition that may be characterized in more than one manner. The Kansas statute is too specific. It does not permit physicians to exercise medical judgment according to their scientific opinion of a particular case. It is so inflexible as to be repressive and it is obviously oriented to facilitating transplantation procedures, whereas it should have as its primary purpose the protection of all dying patients, whether they are potential organ donors or not. The Kansas law does not address itself to the attending physician or physicians. It does not require that more than one physician make a determination of death in difficult or questionable cases; it does not ensure that determination of death will be made by at least a physician other than one involved in caring for an organ recipient. In spite of these and other criticisms, the fact remains that the Kansas statute sought to quiet the voices that so loudly cried, "There oughta be a law!". (Parenthetically, only one other state legislature- Maryland-has been similarly motivated).Even now, -the cries for statutory definitions of death persist. Have they found ways to correct the faults of the Kansas statute? Let us first consider the arguments made in favor of the statutory definitions of death and then look at a recent proposal.

The movement for statutory definitions of death persists because its advocates feel that it is vital for the public to be involved in defining death. To be sure, death is a partly religious and philosophical phenomenon; it is inextricably associated with living and the quality of life. Death is certainly not only a medical or scientific phenomenon. As a matter of extra-medical concern, death is a matter of public concern and sometimes confusion. Thus, it is reasoned, as a matter of public concern, death is a proper matter for public expression. And, it is urged, the proper forum for public expression concerning death is a state legislature, and the proper manner in which to voice public expression is a statute. "

While it is clear that the subject of death is one in which 'the public has a valid interest, it does not seem so clear that legislative definitions of death are of much practical value or that they answer the particular public need. Certainly the definition of death is a mat- ter of public concern and ought to be discussed; but, will a statute lessen concern or expedite discussion? The mere passage of a statute does not, in and of itself, alleviate concern regarding the matter regulated by the law. The passage of a statute also might not promote free discussion of its subject matter. A statute might tend to inhibit expression by becoming the object of discussion rather than a vehicle for it.

Other reasons advanced in support of statutory definitions of death are that they would help achieve uniformity in the law and also might reduce malpractice litigation.' It is indeed doubtful that statutory definitions of death will help the law of the several states become more uniform unless every state legislature adopts precisely the same statute. No uniformity can be achieved by adoption of a slightly different statute in each state. It is true that courts have disagreed in particular cases regarding definitions of death. But it is difficult to imagine how legislative disagreement could be better than judicial disagreement. It is also difficult to accept that legislative uniformity might be achieved more easily than judicial uniformity. Perhaps the present legal system, wherein the question of death is decided according to all of the facts and circumstances of each case, is better than being bound by fixed legislative standards. Perhaps the best -thing about the present law is its flexibility to meet the exigencies of each case it confronts. The argument that statutory definitions of death would reduce malpractice litigation is the last one discussed here. The law of mal- practice is, to a large extent, involved with the concept of negligence. Medical malpractice is concerned with negligence by physicians' treating patients. Regardless of whether a statutory or medical standard is used to determine the arrival of death, the standard of care with which a physician must treat his patients does not change. It is impossible for any mere definition of death to either lessen or increase the responsibility of the physician to care for his patients. Suffice it to say that there are those who would disagree with -this appraisal of the need for statutory definitions of death. They believe it is necessary and urgent for every state to enact such legislation.

Two of the most vigorous proponents of definition of death legislation have developed a legislative proposal they feel meets the objections to the Kansas statute. ' They are Alexander M. Capron, a member of the law faculty of the University of Pennsylvania, and Leon R. Kass, a physician and doctor of philosophy and Executive Secretary of the Committee on the Life Sciences and Social Policy of the National Research Council of the National Academy of Sciences.' 43 Both of these 'gentlemen were members of the Task Force on Death and Dying of the Institute of Society, Ethics and the Life Sciences (Purely as an aside, one might note that the Task Force concluded that no statutory change in the law will be necessary if the medical profession itself adopts the Harvard brain death criteria. The Capron-Kass proposal reads as follows: A person will be considered dead if in 'the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physicians, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased. Although Capron and Kass obviously feel that this language meets the criticisms aimed at the Kansas, statute, it is possible that it is too vague to be a significant or substantial variance from current law. It may not be any improvement at all over what we have now. While such arguments as these

discussed may persuade some that statutory definitions of death are desirable, they do not include any evidence that such legislation is necessary. There is no evidence that physicians are unable to determine whether death has overcome a given patient, there is no evidence that physicians have killed any given patient-donor to remove his heart, and there is no evidence that ethical principles are being violated. How would a statute relieve a doctor's responsibility? He must still minister to 'his patient, he must still be the one who first perceives that it is appropriate to raise the question of whether death has occurred. When should the doctor ask the question? Would it be preferable to have the physician attending his patient ask, "What can and should I do next for my patient?" or "Are the statutory criteria now applicable to my patient?" What is the difference between a defendant-physician in a malpractice case showing that he adhered to the normal standards of medical practice in his community and his showing that he applied the statute? Wouldn't he still be liable for a negligent failure to do either? Lastly, where is the public outcry demanding a more active role in death decision-making? Even if there were such demands, would it then be plausible -to expect the public to then disregard medical determinations by physicians? Would dying patients really desire their plight to become a subject of public concern? Is there, then, sufficient evidence to indicate that a law defining death is required? Since the beginnings of medical practice doctors have been treating men's ailments to ward off death. They have been dealing with it and determining when it has occurred. They have investigated it and developed ever better methods of staying and perceiving it. They will continue -to do so. Is this or any other the proper moment in the state of -the medical, art to remove death from the sphere of medicine? Can or will we accept the responsibility of changing today's law to accommodate tomorrow's medical advance in sufficient time to achieve any useful result? There is no reason to suppose that an affirmative answer to this question is reasonable.

"Dying Patient" Statutes

We now return to the statutes establishing procedure for allowing of death to occur, and find yet another problem with definition of death legislation. Given the definition of death legislation and the request of a patient that he be permitted to die, hopeless confusion results. Certainly there is a way to resolve the obvious problems, but this would no doubt take the form of additional legislation attempting to include all of the variations possible. Perhaps the problems could be resolved, and if not the courts could intercede to decide. We re- turn to minutia, nothing has been resolved, morality prevails. As for the "dying patient" statutes, what would be accomplished? By persisting in referring to euthanasia, the necessary inference ac- companies the reference that because we speak of euthanasia it is something to be condemned unless it is controlled by law. Therefore, we need the proffered legislation. However we have such condemnatory legislation. It is the universally adopted law that penalizes murder. But, it is argued, there is a need to go beyond the criminal law and statutorily regulate the circumstances in which the dying patient should be permitted to expire. Perhaps if we do not adopt such legislation those poor, suffering people for whom

death is a certainty would not otherwise die. Simply because the proposed legislation speaks only to the situation in which death is imminent and inevitable it is patently ridiculous. What is sought to be controlled by law is nothing more than the natural termination of life. This is not only an incredibly unbelievable posture for a statute to assume, it is arrogant and unnecessary. Possibly the next item on the legislative agenda should be legal recognition of the right to wake up at the termination of sleep. The right to life includes -the right to experience its natural termination. This is a part of life that occurs around us every day. It is being handled and recognized by all of us, each in his own manner. Must we now invade that most private and mysterious fate that awaits us with a law -that would deny us the intimacy and urgency of life's last moments? Such law would change nothing but the dignity of meeting the end surrounded by the values it has taken us that lifetime to develop.

The Right to Refuse Life-Supporting Medical Treatment

It is said that from the moment of birth we begin -the process of dying. Throughout this discussion I have attempted to use the words "imminent and inevitable" in referring to the matter at hand. This terminology helped confine this discussion to one class of dying persons, a class which all too often has been called simply "dying patient". At any time during our lives when we become afflicted with an ailment that could cause death and when we receive the attention of a physician because of that ailment, we are "dying patients". Death might even be "imminent" for some of us, and it might be "inevitable" for others. And, when it becomes both imminent and inevitable we acquire the right to experience it. But what of the patient for whom it is only imminent? Does he have any corollary right to die? The law has addressed itself to this question and the commentators are urged that there is such a right. They also observe that it is a right which is subject to legal restriction. Since death is these cases is not inevitable, the necessary condition imposed on the right to die is that the patient should be compelled to live if his death would produce undesirable effects upon society. Thus, for example, where the dying patient would seek to refuse life-saving medications but whose death would work an unreasonable hardship upon his family, the government has a valid interest in denying the right to die. Let us not confuse such cases with the plight of the dying patient for whom death is both imminent and inevitable. Let us not use them as support for legislation regarding something else. Let us consider the question of statutory regulation of death according to the precise nature of the proper subject matter, and let the law intercede only where morality and ethics will not suffice.

The "euthanasia controversy" is more one of semantics than of substance. As it is now constituted, the controversy does not exist. But, there is a substantial problem looming on the horizon, one which must be addressed, considered and, if necessary, acted upon. In continuing to look at death as an entity unto itself, the question of who should die can arise. By asking this question we begin to consider the possibilities- the strong and healthy should live, -and the weak and timid should die; the intelligent

should live, and the un- intelligent should die. Thus we fall into the trap that those who would have us extinguish the "defective" would set for us. This cannot be permitted to happen. Rather than viewing death as a separate function, we must include it in our total concept of life. The issue must be whether we can do anything about improving life, not whether we can facilitate death. Our attention must be focused on life, and our efforts must be toward improving it. Our compassion and human understanding should guide our steps toward the goal of life with dignity not death with dignity for each individual. The morality of mankind would not have it otherwise.

THE ETHICAL AND LEGAL IMPLICATIONS BEHIND THE LEGALISATION OF EUTHANSIA IN UGANDA

Research into the topic outlined above was necessitated by the need to preserve the human dignity of the terminally ill in Uganda, in the spirit of the constitution of Uganda.

People ailing from serious illness that have stripped them off their health, livelihood, peace of mind and dignity have been consigned the footnotes of Uganda's social-economic advancement and constitutional change. The constitution is silent on the rights and needs of these people. While advancement in medical research and treatment has offered hope to countless people grappling with complicated illnesses throughout the world, a great number still continue to endure a demeaning, undignified and intolerable life as a result of their illness.

A constitution is the source, the jurisprudential fountain head from which other laws must flow, succinctly and harmoniously. A constitution is a living document; it goes beyond addressing the needs of the living, but the posterity as well In order for the people of Uganda to recognize, respect, and appreciate the constitution, we must enjoy and feel protected by this supreme law we must see its effects in our day to day life.

The constitution of Uganda 1995 thrust a robust and progressive bill of rights into the Ugandan system that provides for among other things the right to life and human dignity. As a consequence and within the letter and spirit of those provisions, it will be examined if legalizing euthanasia would offer relief to persons enduring endless and incurable suffering, as a result of illness for them to end their life voluntarily subject to the approval of qualified medical practioner and within the strict and explicit provisions of the law.

Our attitudes towards death have in recent years. In the past death was simply something that happened to us and had to be accepted. However with technology developments, it has become impossible to exercise greater control over our dying. Albeit the extent to which people should have control of their or another's death is

highly controversial.

Therefore owing to the controversial and maligned nature of the topic of euthanasia, and taking into account the pluralistic nature of the society we live in, I shall also look into and compare the implementation of the practice of euthanasia in countries that have legalized the same, and the lacunas that are likely to pop up if euthanasia is allowed in Uganda, and lastly the chances of success of such a practice within our borders.

Euthanasia and related issues has caused a great debate across the globe. Courts and legal scholars have faced a considerable challenge of determining whether euthanasia can truly fall within the scope of the fundamental human rights as recognized by a raft of international conventions, treaties and constitutions across the world. Euthanasia and related issues are topics that courts have struggled to deal with. In Britain, the House of Lords called upon parliament to legislate on the area. Politicians, lawyers and judges have exhibited hands off approach6, for many opponents of euthanasia.

At the heart of the issues surrounding euthanasia is the principle of sanctity of life, 7 they argue that the right to life is inviolable. For example, the House of Lords select committee on medical ethics concluded that the prohibition on intentional killing was "the cornerstone of law and of social relationships. From a religious perspective, this vies is also largely upheld and respected. Pope john Paul II said in one of his speeches that9 "euthanasia is a grave violation of the law of God. Man's life comes from God; it is his gift, his image and imprint, a sharing in his breath of life. God therefore is the sole hold of this life. Man cannot do with it as he wills.

More still God has given to human kind the gift of life. As such, it is to be revered and cherished. Those who become vulnerable through illness or disability deserve special care and protection. We do not accept that the right to personal autonomy requires any change in the law in order to allow euthanasia.

THE OREGON DEATH WITH DIGNITY ACT

The Oregon Death with Dignity Act (ODDA) is a citizens.' initiative that was first passed by the voters of Oregon in November 1994 by a margin of 51 percent in favor and 49 Percent opposed.20 The Act was delayed due to a legal injunction and multiple legal proceedings, including a petition that was denied by the United States Supreme Court. The Ninth Circuit Court of Appeals lifted the injunction in October 1997, and physician assisted Suicide (PAS) became a legal option for qualified terminally ill patients in Oregon.

In November 1997 the voters reaffirmed their support for the ODDA by Rejecting Measure 51, which asked them to repeal the Act on a general election ballot, by an increased margin of 60 percent in favor and 40 percent opposed. The Oregon Health

Services (OHS) notes that the term physician-assisted suicide is used in the ODDA despite the fact that the Act explicitly states that ending one's life in accordance with the law does not legally constitute. "suicide."; rather, the term is used because it is so widely used by the public and scholars alike to describe the very act that the ODDA allows.

According to the Oregon Death with Dignity Act, an adult who is capable, who is a resident of Oregon, who has been determined by the attending physician and a consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die may make the informed decision to initiate a request for medication for the purpose of ending his or her life in a humane and dignified manner. On the Moral and Social Implications of Legalized Euthanasia This concise iteration of the ODDA requires some clarification in accordance with the specifications of the Act.

The term adult designates an individual who is 18 years or older and the term resident of Oregon applies (but is not limited) to individuals who have a driver's license, are registered to vote, own or lease property, or filed their most recent tax return in Oregon.

The term terminal disease designates an incurable and irreversible disease that has been medically confirmed by the attending and consulting physicians and is expected to, within reasonable medical judgment, produce death within six months. The term capable means that in the opinion of the court, attending physician, consulting physician, psychiatrist, or psychologist the patient has the ability to make and communicate informed health care decisions to health care providers (or can do so with the assistance of a person of their choosing).

The term informed decision is used to designate a decision made by a qualified patient based on an appreciation of the relevant facts and after being fully informed by the attending physician of the following:

- The medical diagnosis and prognosis;
- The potential risks and probable results of taking the prescription; and
- The feasible alternatives to using the prescription including (but not limited to) comfort care, hospice care, and aggressive pain control.

The term attending physician designates the physician who has primary responsibility for the care of the patient, while the term consulting physician designates a physician who is qualified by specialty or experience for consultation to confirm the diagnosis and prognosis regarding the illness of the patient.

The attending physician may sign the patient's death certificate, notwithstanding

other legal restrictions. If either the attending or consulting physician suspects that the patient may be suffering from a psychiatric or psychological disorder or from depression that is causing impaired judgment, the patient must be referred for counseling. If the counselor determines that the patient is not suffering from impaired judgment, then (and only then) may the patient qualify for PAS. The Act specifies that the attending physician must:

• Make the initial determination of whether a patient has a terminal disease, is Capable, and has made the request voluntarily; On the Moral and Social Implications of Legalized Euthanasia

• Ensure that the patient is making an informed decision

• Refer the patient for counseling if appropriate

• Refer the patient to a consulting physician for medical confirmation of the diagnosis and for a determination as to whether or not the patient is capable of making an informed decision and is acting voluntarily;

• Recommend (but not require) that the patient notify next of kin;

• Counsel the patient about the importance of having another person present when taking the medication and of not taking the medication in a public place (the presence of physician at the time of ingestion is recommended, but not required);

• Inform the patient that he or she has an opportunity to rescind the request at any time and in any manner;

• Verify immediately prior to writing the prescription that the patient is making an informed and voluntary decision;

• Fulfill the medical record documentation requirements of the Act;

• Ensure that all appropriate steps are carried out in accordance with the Act prior to writing the prescription; and

• Dispense the prescription directly, provided he or she is qualified to do so; or, with the patient's written consent, contact and inform a pharmacist of the nature of the prescription and then deliver the written prescription personally or by mail to the pharmacist, who will dispense the medications to the patient, the attending physician, or an expressly identified agent of the patient.

(The Act was modified from its original form in this regard, and now specifically allows pharmacists to refuse to participate in the ODDA who morally object to PAS}. Once a qualified patient has made the first oral request to the attending physician, he or she must then make a written request followed by a second oral request in order to remain eligible to receive the prescription.

The second oral request must take place after the written request has been completed, and there is a mandatory 15 day waiting period between the two oral requests. The attending physician cannot write the prescription until 48 hours after the written request has been completed, and must remind patients of their right to rescind their request at any time upon receiving the second oral request.

The prescription generally consists of a lethal amount of barbiturates and other medications to help alleviate the nausea or vomiting that can sometimes occur when the barbiturates are ingested.

The primary medication used has changed from secobarbital to pentobarbital because the manufacturer of secobarbital (Eli Lilly} stopped producing the drug because of a lack of profitability and difficulty in producing the drug due to a shortage of supplies, not for ethical or publicity reasons.

On the Moral and Social Implications of Legalized Euthanasia the ODDA allows qualified individuals to obtain prescriptions for the purposes of ending their lives, but specifically prohibits physicians from directly administering medication for the purposes of ending the life of the patient (active euthanasia). No professional organization or association, or health care provider, or physician may be punished either for participating or for refusing to participate in the ODDA.

Furthermore, participation in the ODDA does not have an effect upon a life insurance, health Insurance, accident insurance, annuity policy, will, contract, or statute.

The Annual Report

The Oregon Health Services (OHS) is required to annually review a sample of records maintained with regard to the ODDA and to ensure that all health care providers file a copy of the dispensing record with the OHS upon writing a prescription in accordance with the ODDA. Reporting is not required if a patient begins the process but never receives a prescription, and the number of individuals who begin the process but never receive the prescription is unknown.

However, one physician who has participated in the ODDA reported that she has begun and not finished the legislative process nearly twice as often as she provided prescriptions, suggesting the possibility that at least twice the number of patients who have participated in the ODDA make an initial inquiry or verbal request for medication which is left undocumented and unreported.

The OHS is authorized to make rules to facilitate the collection of information regarding the ODDA and (except as otherwise required by law) the information collected Shall not be a public record and may not be made available for inspection

by the public. The OHS is then required to generate and make available to the public an annual Statistical report of information collected in a neutral manner in order that informed Ethical, legal, and medical decisions can be made based on interpretation of the data. The Statistics The Annual Reports provided by the OHS contain all of the statistical information regarding the ODDA that is made available to the public.

The Reports were obtained On the Moral and Social Implications of Legalized Euthanasia from physician and pharmacy reporting, physician interviews, and death certificates. The Fourth Annual Report was made available on February 6, 2002, and the other three Reports (plus a preliminary Report issued after the first 10 deaths under the ODDA were reported) can be found on the OHS website.30 According to the Reports, a total of 140 prescriptions have been written under the ODDA since physician-assisted suicide became legal in Oregon (24 in 1998, 33 in 1999, 39 in 2000, and 44 in 2001). Nineteen of the 33 patients who were prescribed medication under the Act in 2001 died after ingesting the medication; 14 died from their underlying disease; and 11 were alive as of December 31, 2001. Two patients chose not to use prescriptions received in 2000 until 2001, bringing the total number of patients who died after ingesting the medication to 21 in 2001, 27 in 2000, and 27 in 1999, and 16 in 1998.

Thus, the total number of patients who have died after ingesting lethal medication prescribed in accordance with the ODDA regulations comes to 91 out of the 140 who have received a lethal prescription.

The 21 patients who died as a result of ingesting lethal medications in 2001 were comparable in many ways to the other 6,265 Oregon residents who died from similar diseases during the year, although they were slightly more likely to be women, to have graduated from college, and to have been divorced. Trends such as these do not seem to have a particular pattern, but have varied from year to year.

The most commonly mentioned end of life concerns were losing autonomy, decreasing ability to participate in activities that make life enjoyable, losing control of bodily functions, becoming a burden on family and friends, and suffering from inadequate pain control. Typically, the median age of participants is around 70, they are likely to have a high school diploma, and they tend to be white. One of the most important findings over the four year period is that it has not been the case in any year that PAS was disproportionately chosen by terminally Iff patients who were poor, uneducated, uninsured, fearful of the financial consequences of their illnesses, or lacking end of life care.

The majority of patients who have chosen to participate in the ODDA suffer from some form of cancer {86 percent in 2001). It should be stressed that most of the patients utilized hospice care at some point during their illness {76 percent in 2001),

while all of the patients who did not utilize hospice care were offered it and declined. Approximately half of the attending physicians were present at the time of ingestion, while other health On the Moral and Social Implications of Legalized Euthanasia. Care providers were present in almost all of the remaining cases.

Approximately one-half of patients become unconscious within 3 minutes and die within 25 minutes, and complications are rare. A small number of patients have lived for longer than 24 hours after ingesting the medication and a small number have vomited shortly after ingestion.

Two physicians have been questioned in regard to submitting incomplete written consent forms, but formal charges have not been filed against them. Finally, Oregon physicians have consistently reported increased efforts to improve their knowledge of the use of pain medications, to improve their ability to recognize psychiatric disorders (such as depression), and have been referring more patients to hospice care since the passage of the ODDA. Political Controversy In November 2001, U.S. Attorney General John Ashcroft issued a directive specifying a new interpretation of the Controlled Substances Act (CSA) that was specifically aimed at prohibiting physicians from prescribing medication for use in PAS on a federal level, but not intended to increase scrutiny on physicians who prescribe pain controlling medications.

According to Ashcroft's interpretation of the federal law, the dispensing of controlled substances to assist in suicide does not constitute a legitimate medical purpose and, therefore, the ODDA violates federal regulations. This reverses the policy of former U.S. Attorney General Janet Reno, who deferred to state law in the determination of what constitutes a legitimate medical practice. In response to these actions, Oregon Attorney General Hardy Myers filed a federal lawsuit claiming that the directive is inconsistent with the intended use of the CSA as created by Congress, and that it is unconstitutional on both Commerce Clause and Tenth Amendment grounds.

U.S. District Judge Robert Jones issued a temporary restraining order against Ashcroft's directive in response to the suit, thereby allowing physicians to continue participating in the ODDA pending legal proceedings which were to be held within the year.35 Timothy Quill, a leading advocate for the ODDA, charged Ashcroft with unjustly attempting to usurp the rights of the state of Oregon and its voters by attempting to circumvent the democratic process.36 He maintains that the ODDA has On the Moral and Social Implications of Legalized Euthanasia been a success, and that the continuation of the Act will provide important information that is vital in making the decision as to whether or not PAS can be regulated without undermining the quality of end of life care.

The legality surrounding the ability of states to govern their practice of medicine

is somewhat unclear in this regard, but will likely be clarified to some extent as a result of these recent events. It has been suggested that the increase in support for the ODDA that occurred when the voters were (unsuccessfully) asked to repeal the Act in Measure 51 may have been due to the disapproval of voters who perceived Measure 51 as an attack on the democratic process.

It is not unlikely that a similar effect is occurring in Oregon now, caused by the feeling that Oregon's right to pass legislation regarding the practice of medicine within the state is being challenged. Some recent studies conducted by non advocacy organizations have demonstrated a strong support throughout the U.S. for legislation based on the ODDA to be passed in additional states (61 percent of those surveyed) and a public disapproval of Ashcroft's directive (58 percent).

In April 2002, U.S. District Judge Robert Jones ruled that Ashcroft lacks the authority to overturn the ODDA, noting that the legislation was passed after two votes in Its favor. According to the Washington Post, Jones."Scolded." Ashcroft by saying that he was attempting to ."Stifle an ongoing, earnest, and profound debate in the various states concerning physician-assisted suicide." and concluded that the Controlled Substance Act did not support Ashcroft's directive.

In closing, Jones remarked that his. "Task is not to criticize those who oppose the concept of assisted suicide for any reason. Many of our citizens, including the highest respected leaders of this country, oppose assisted suicide. But the fact that opposition to assisted suicide may be fully justified, morally, ethically, religiously or otherwise, does not permit a federal statute to be manipulated from its true meaning to satisfy even a worthy goal."40 Despite this ruling, an appeal is expected to be filed and the end result of Ashcroft's directive is unlikely to be known for some time. As I mentioned above, the Annual Reports issued by the OHS have suggested that many requests for assistance in dying are motivated by one or more of a limited number of Concerns.

The identification of these concerns offers a rare and valuable insight into some Ofthe more common hopes and fears expressed by persons engaged in the dying process.

On the Moral and Social Implications of Legalized Euthanasia 16 In the following section, I expand upon this issue and attempt to better explain the motivating factors which commonly prompt requests for assistance in dying.

The Leading Motivations for Requesting Physician-Assisted Suicide

The Fourth Annual Report on Oregon's Death with Dignity Act found that the most commonly mentioned end of life concerns for those who requested assistance in

dying in accordance with the ODDA were: losing autonomy, decreasing ability to participate in activities that make life enjoyable, losing control of bodily functions, becoming a burden on family and friends, and suffering from inadequate pain control.41 Discussing the typical factors which have motivated such patients to request assistance in dying is one way in which we can better understand what the notion of a ."Death with dignity."Might really mean to an individual patient nearing the end of life.

THE LEGAL CONCEPT OF EUTHANASIA

John Keown defines euthanasia as the intentional killing of a patient, by act or omission, as part of his or her medical care.59

Black law dictionary defines euthanasia as the act or practice of causing or hastening the death of a person who suffers from an incurable disease or terminal disease or condition especially a painful one, for reasons of mercy.

There are in addition various classifications of euthanasia such as voluntary euthanasia, non-voluntary euthanasia, passive euthanasia and active euthanasia.

Black law dictionary defines all the classifications as follows.

a) Voluntary euthanasia is euthanasia performed with the terminally ill persons consent.

b) Non voluntary euthanasia is euthanasia of a competent, non-consenting person.

c) Passive euthanasia is the act of allowing a terminally ill person to die, by either withholding or withdrawing life sustaining support respirator or feeding tube.

d) Active euthanasia is euthanasia performed by a facilitator, such as a healthcare practitioner who not only provides the means of death, but also carries out the final death causing act.

The position of the Uganda constitution

The Ugandan constitution does not support or guarantee the right to euthanasia.60 "no person shall be deprived of life intentionally except in the execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellant court".

This particular article however gives latitude to deprive life where a sentence has been passed by a competent court. Therefore there exist certain provisions under the constitution that could provide an argument for proponents of euthanasia.

The constitution further provides that "no person has the right to terminate the life of an unborn child except as may be authorised by law" 5 1 from this provision an argument may be put forth that it seems contradictory of the state to permit abortion under specific circumstances and refuse euthanasia. To this end one may ruminate on the following question;

If upon the opinion of a qualified medical professional, the condition of a terminally ill patient is deemed as so hopeless and death seems evident, why then should such a person not be allowed the freedom of choosing an earlier death to end his suffering?

In addition, the constitution provides that every person has a right to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

Thus, based on the understanding of this provision, those whose values and belief allow their conscience to support euthanasia should not be denied the right to undergo it, if they desire and freely consent. Equally those who do not support euthanasia should not be compelled to undergo the same.

THE PRINCIPLE OF DOUBLE EFFECT

Shawn D. pattisson writes in his book that the principle has its origin in the moral theology of t6he Roman Catholic Church. It holds that an act has two predicted consequences, one good and the other one bad, can morally be permissible where the intention is to achieve good, and the bad is unavoidable. 5 2

Shawn affirms that it is permissible to produce a bad consequence only if,

- The act engaged in is not itself bad.
- The bad consequence is not a means to the good consequence.
- The bad consequence is foreseen but not intended.
- There is a sufficiently serious reason for allowing the bad consequence to occur.

The principle can apply to end of life decisions in two ways

1) Applied to patient reasons for refusing life sustaining treatment. Here the intentions of the patient are paramount. Refusing treatment with the primary intention of committing suicide violates the sanity of life. On the other hand, refusing treatment with the primary the knowledge that death will result, but without the intention to die, does not violate the sanctity of life. 63 2) Apply to doctor's reasons for administering life shortening treatment or otherwise accelerating the patient's death.

Administering life shortening treatment with intention of killing the patient is viewed as morally unacceptable. On the other hand, administering life shorteni9ng treatment with the intention of relieving the patients pain and distress is considered morally permissible, the case of air dale NHS trust v bland sufficiently predicates this statement, where it was held that a doctor has a duty to act in the best interest of the patient, a duty that may require the doctor to shorten the patient's life by withdrawing treatment to relieve the patients treatment to relieve the patients suffering.

The principle of double effect has been applied in determining a number of cases revolving around the circumstances mentioned above. Fo4r instance in the case of R v Adams64

Where it alleged that Dr Adams injected an incurably but terminally ill patient with increasing doses of opiates. In summing up to the jury, Delvin j brought up the principle of double effect.

Delvin j stated " ..... If the first principle f medicine, the restoration of health, can no longer be achieved there is still much for a Doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measure he takes may incidentally shorten life."

Dr Adams was subsequently acquitted of murder on the grounds that ending of life was incidental to relieve pain. Michael Davies in his textbook on medical law states that according to the double effect principle, when doctors give pain relieving drugs in the knowledge that in addition to relieving pain, the same drugs will shorten life, then that is not seen as legal cause of death, since the "good effect" is desired while the "bad one" is not intended.66

The double effect principle lays a plausible legal and ethical justification for severely ill patients with no chance of recovery, to end their lives voluntarily. For such patients, the good intention is to alleviate their suffering at the hands of an incurable illness and the bad consequence, that is unavoidable, is inflicting death on them.

This was the scenario in the case of R v COX67

Where Mrs. Boyes was suffering friom8 an incurable and increasing distressing form of arthritis, which made her hypersensitive to touch and this could not be eased by painkillers in its latter stages.

As the hypersensitivity to pain increased at the end of her life, Mrs. Boyes and her sons repeatedly requested that doctors in attendance end her life. Dr Cox administered a lethal dose of potassium chloride and Mrs. Boyes died. Ognall J stated, "It was plainly Dr Cox's duty to do all that was medically possible to alleviate

her pain and suffering, even if the course adopted carried with it an obvious risk that as a side-effect. ..of that her death would be rendered likely or even certain." Here, the principle of double effect is manifested in the judgment set out. Death was an unavoidable and an unwanted consequence of the doctor carrying out his duty to alleviate his patient's pain and suffering. In addition, the court however held that " what can never be lawful is the use of drugs with the primary of hastening the moment of death. "

EMERGING JURISPRUDENCE ON EUTHANASIA

Carter v Canada

Facts: It was a crime in Canada to assist another person in ending their own life. The Canadian Criminal Code prohibited the provision of assistance in dying in Canada. The Canadian Criminal Code provided as follows, "No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.The Code further provided, "Everyone who counsels a person to commit suicide, or aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen yearl1 After T was diagnosed with a fatal neurodegenerative disease in 2009, she challenged the constitutionality of the Criminal Code provisions prohibiting assistance in dying. She was joined in her claim by C and J, who had assisted C's mother in achieving her goal of dying with dignity by taking her to Switzerland to use the services of an assisted suicide clinic; a physician who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association. The Attorney General of British Columbia participated in the constitutional litigation as of right.

Issue:

Whether the criminal prohibition that gave a terminally ill person the choice of violently ending their life or suffering until they died violated their Charter rights to life, liberty and security of the person and to equal treatment by and under the law

Held: The Criminal Code unjustifiably infringed on the Charter and was of no force or effect to the extent that they prohibited physician-assisted death for a competent adult person who;

a. Clearly consented to the termination of life

b. Had a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that was intolerable to the individual in the circumstances of his or her condition. The prohibition on assisted suicide was, in general, a valid exercise of the federal criminal law power and it did not impair

the protected core of the provincial jurisdiction over health. Health was an area of concurrent jurisdiction, which suggested that aspects of physician-assisted dying had to be the subject of valid legislation by both levels of government, depending on the circumstances and the focus of the legislation. Insofar as they prohibited physician-assisted dying for competent adults, who sought such assistance as a result of a grievous and irremediable medical condition that caused enduring and intolerable suffering, section 241 and 14 of the Criminal Code deprived these adults of their right to life, liberty and security of the person under section 7 of the Charter, that provided, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Here, the prohibition deprived some individuals of life, as it had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. The rights to liberty and security of the person, which dealt with concerns about autonomy and quality of life, were also engaged. An individual's response to a grievous and irremediable medical condition was a matter critical to their dignity and autonomy.

The prohibition denied people in this situation the right to make decisions concerning their bodily integrity and medical care and thus trenched on their liberty. And by leaving them to endure intolerable suffering, it impinged on their security of the person. The prohibition on physician-assisted dying infringed the right to life, liberty and security of the person in a manner that was not in accordance with the principles of fundamental justice. The object of the prohibition was not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helped achieve this object, individuals' rights were not deprived arbitrarily. However, the prohibition caught people outside the class of protected persons. It followed that the limitation on their rights was in at least some cases not connected to the objective and that the prohibition was thus over-broad.

The case had to involve matters of public interest that were truly exceptional. It was not enough that the issues raised had not been previously resolved or that they transcend individual interests of the successful litigant; they also had to have a significant and widespread societal impact.

The appropriate remedy was not to grant a free-standing constitutional exemption, but rather to issue a declaration of invalidity and to suspend it for 12 months.

Nothing in this declaration would compel physicians to provide assistance in dying. The Charter rights of patients and physicians would need to be reconciled in any legislative and regulatory response to this judgment.

Tony Nicklinson v Ministry of justice (2012) EWHC 2381

Facts: Mr. Nicklinson suffered a catastrophic stroke when he was aged 51. As a result, he was completely paralysed, save that he could move his head and his eyes. He was able to communicate, but only laboriously, by blinking to spell out words, letter by letter, initially via a Perspex board, and subsequently via an eye blink computer.

Despite loving and devoted attention from his family, his evidence was that he had for the past seven years consistently regarded his life as "dull, miserable, demeaning, undignified and intolerable", and had wished to end it. Because of his paralysed state, Mr. Nicklinson was unable to fulfill his wish of ending his life without assistance, other than by self-starvation. His preference was for someone to kill him.

Mr. Nicklinson applied to the High Court for:

A declaration that it would be lawful for a doctor to kill him or to assist him in terminating his life, or, if that was refused

(ii) A declaration that the current state of the law in that connection was incompatible with his rights. The High Court refused him both reliefs and he embarked on the very difficult and painful course of self-starvation, refusing all nutrition, fluids, and medical treatment, and he died of pneumonia.

Mr. Nicklinson's wife was then added, because she contended that she had a claim in her own right and substituted, in her capacity as administratrix of Mr. Nicklinson's estate, as a party to the proceedings, and pursued an appeal to the Court of Appeal.

The Court of Appeal gave Mrs. Nicklinson and another permission to appeal to the Supreme Court.

Held: The Supreme court found that Mercy killing is a term which means killing another person for motives which appear, at least to the perpetrator, to be well-intentioned, namely for the benefit of that person, very often at that person's request.

Nonetheless, mercy killing involves the perpetrator intentionally killing another person, and therefore, even where that person wished to die, or the killing was purely out of compassion and love, the current state of the law is that the killing will amount to murder or manslaughter.

The Court concluded that only parliament had the power to change the law relating to murder, which would allow someone to assist another person to die.

The court stated, ''To do as Tony wants, the courts would be making a major change in the law ... These are not things which the court should do It is not for the court

to decide whether the law about assisted dying should be changed and, if so, what safeguards should be put in place. "

Re Quinlan Supreme court of new jersey 70 N.J 10, 355 A.2d 647,(1976)

Facts: In 1975, 21-year-old Karen Ann Quinlan suffered cardiopulmonary arrest after ingesting a combination of alcohol and drugs.

She subsequently went into a persistent vegetative state.56 Dr. Fred Plum, a neurologist, described her as no longer having any cognitive function but retaining the capacity to maintain the vegetative parts of neurological function. She grimaced, made chewing movements, uttered sounds, and maintained a normal blood pressure, but was entirely unaware of anyone or anything.

The medical opinion was that Quinlan had some brain-stem function, but that in her case, it could not support breathing. She had been on a respirator since her admission to the hospital.

Quinlan's parents asked that her respirator be removed and that she be allowed to die. Quinlan's doctor refused, claiming that his patient did not meet the Harvard Criteria75for brain death.

Based on the existing medical standards and practices, a doctor could not terminate a patient's life support, if that patient did not meet the legal definitions for brain death.

Quinlan's father, Joseph Quinlan, went to court to seek appointment as his daughter's guardian, since she was of legal age, and to gain the power to authorize "the discontinuance of all extraordinary procedures for sustaining Quinlan's vital processes."

The court denied his petition to have Quinlan's respirator turned off and also refused to grant him guardianship over his daughter. Joseph Quinlan subsequently appealed to the Supreme Court of New Jersey.

He requested, as a parent, to have Quinlan's life support removed based on the U.S. Constitution's First Amendment.

Held:

The New Jersey Supreme Court stated that an individual's right to privacy was most relevant to the case.

Although the U.S. Constitution does not expressly indicate a right to privacy, U.S. Supreme Court rulings in past cases had not only recognized this right but had also

determined that some areas of the right to privacy are guaranteed by the Constitution.

The Court ruled that, "Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present"

It was further noted as follows:

Discussed earlier under the title the legal definition of death. 76 The right to religious freedom.

"We have no doubt ... that if Karen were herself miraculously lucid for an interval and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the fife-support apparatus, even if it meant the prospect of natural death."

Balanced against Quinlan's constitutional right to privacy was the state's interest in preserving life. The court, in light of this stated,

" ... we think that the State's interest ... weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State's interest."

The court also observed that life-prolonging advances had rendered the existing medical standards ambiguous, leaving doctors in a quandary. Moreover, modern devices used for prolonging life, such as respirators, had confused the issue of "ordinary" and "extraordinary" measures.

Therefore, the court suggested that respirators could be considered "ordinary" care for a curable patient, but "extraordinary" care for irreversibly unconscious patients. The court suggested that hospitals form ethics committees to assist physicians with difficult cases like Quinlan's. The committees would not only diffuse professional responsibility, but also eliminate any possibly unscrupulous motives of physicians or families.

The New Jersey Supreme Court also ruled that, if the hospital ethics committee agreed that Quinlan would not recover from irreversible coma, her respirator could be removed.77

The above cases show that euthanasia has acquired a widespread recognition and approval. But whilst some countries such as England are reluctant to legalize euthanasia, their courts do envision the law making bodies of those countries soon putting in place a legal framework to allow seriously ill patients to end their life.

CHAPTER FIFTEEN
HIPPOCRATIC OATH IN UGANDA: A NEED TO REFORM THE LAW

In this chapter, I expounded on the Hippocratic Oath and its history to the present in relation to the patients' rights as provided for under the Uganda patients charter of 2009. I went ahead and expounded on the legal consequences of the breach of the Hippocratic Oath, should not be taken that breach of the oath, creates liabilities liability (strict liability) offence.

It's God's duty to create humans but it's the doctor's duty to save lives as per the oath, hence doctors are mandated to save lives by the virtue of their work.

The oath devotes much greater attention to the quality of physicians' relationships with God.

The research also analyses prior informed consent as a right of the patients in relation to surgeries on any operations to be carried out on the patient.

The Hippocratic Oath is a seminal document on the ethics of medical practice as was historically taken by physicians[47]. It is one of the most widely known of Greek medical texts attributed by Hippocrates[48] where in its original form, it requires a new physician to swear, by a number of healing gods, to uphold specific ethical standards. The Oath is the earliest expression of medical ethics in the Western world, establishing several principles of medical ethics which remain of paramount significance today. These include the principles of medical confidentiality and non-maleficence. Although the ancient text is only of historic and symbolic value, swearing a modified form of the Oath remains a rite of passage for medical graduates in many countries.[49]

Thus this research seeks to provide a general background to the conceptualization on the critiques of the Hippocratic Oath in Uganda today and the need to reform the law as it is today.

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[47] *A physician is defined as "a person qualified to practice medicine, especially one who specializes in diagnosis and medical treatment as distinct from surgery….." The Concise Medical Dictionary; 9th Edition*

[48] *Hippocrates of Kos (Hippokrátēs ho K os; Born c. 460 – died c. 370 BC), also known as Hippocrates II, was a Greekphysician of the Age of Pericles (Classical Greece), and is considered one of the most outstanding figures in the history of medicine. He is sometimes referred to as the "Father of Medicine" in recognition of his lasting contributions to the field as the founder of the Hippocratic School of Medicine*
https://en.wikipedia.org/wiki/Hippocrates.[accessed10 February 2018, at 12:57.]

[49] *"What are some common criticisms of the classic Hippocratic Oath?";Discovery Health Administration,Posted on 13th July 2013*
https://www.sharecare.com/health/other-health-topics/what-common-criticisms-hippocratic-oath

HISTORICAL BACKGROUND

Ancient Greek schools of medicine were split into two, the Knidian and Koan on how to deal with disease. The Knidianschool of medicine focused on diagnosis [50] while the Hippocratic school or Koan school achieved greater success by applying general diagnoses and passive treatments. Its focus was on patient care and prognosis, not diagnosis. It could effectively treat diseases and allowed for a great development in clinical practice.[51]

Hippocrates believed that diseases were caused naturally, not because of superstition and gods. He was quoted 'On the Sacred Disease'to have said that,"…It is thus with regard to the disease called Sacred: it appears to me to be no wise more divine nor more sacred that other diseases, but has a natural cause from the originates like other affections. Men regard its nature and causes as divine from ignorance and wonder…"[52]

The Hippocratic Oath as was taken by all Doctors and Medical Professionals was as follows;

"I swear by Apollo, the healer, Asclepius, Hygieia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment, the following Oath and agreement:

To consider dear to me, as my parents, him who taught me this art; to live in common with him and, if necessary, to share my goods with him; To look upon his children as my own brothers, to teach them this art; and that by my teaching, I will impart a knowledge of this art to my own sons, and to my teacher's sons, and to disciples bound by an indenture and oath according to the medical laws, and no others.

I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone.

I will give no deadly medicine to any one if asked, nor suggest any such counsel; and similarly I will not give a woman a pessary to cause an abortion.

But I will preserve the purity of my life and my arts.

I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners, specialists in this art.

In every house where I come I will enter only for the good of my patients, keeping

[50] *Adams 1891, p. 15*

[51] *See Hippocrates From Wikipedia, the free encyclopedia posted and edited on 10th February 2018, at 12:57pm https://en.wikipedia.org/wiki/Hippocrates*

[52] *See Hippocrates From Wikipedia, the free encyclopedia posted and edited on 10th February 2018, at 12:57pm https://en.wikipedia.org/wiki/Hippocrates*

myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or men, be they free or slaves.

All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.

If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all humanity and in all times; but if I swerve from it or violate it, may the reverse be my life."[53]

Due to medical paternalism, the base of the Hippocratic Oath was replaced by the patient's rights, invoking the moral and legal autonomy of them forcing the physician to consider as prima facie duties, in addition to the autonomy duty, the beneficence and non-maleficenceones and due to the changes in modern medicine and law, there has thus been changes as the Oath in Uganda today is taken as follows.[54]

"I swear to fulfill, to the best of my ability and judgment, this covenant: I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.

I will apply, for the benefit of the sick, all measures which are required, avoiding those twin traps of overtreatment and therapeutic nihilism.

I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.

I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.

I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death . If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.

I will remember that I do not treat a fever chart, a cancerous growth, but a sick

[53] *Inside the Medical school at MakerereUniversity;This is the hippocratic oath version written by Hippocrates taken by all Ugandan medical students upon graduation dated 9th April 2015.http://campuseye.ug/this-is-the-hippocratic-oath-taken-by-all-ugandan-medical-students-upon-graduation*

[54] *Romankow J. Hippocrates and Schweitzer's text book "comparison of their concepts of medical ethics. "Arch HistFiloz Med 1999;62:245-50.*

human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm. If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter. May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help."[55]

In Uganda today, due to the constant growth and developments that are not only seen in the health sector, there is need to change the law as it is today with regards to the Hippocratic oath for example there is still lack of clarity on the abortion legislation as the law on abortion is still confusing and ambiguous. Abortion is not entertained and advocated for under the Oath nor in the Constitution of Uganda, for it states that," No person has the right to terminate the life of an unborn child except as may be authorized by law"[56] with out there in elaborating what the law is and despite extended legal abortion to cases such as incest or rape or if the mother suffers from HIV or cervical cancer it is unclear as to whether or not these policies overrule or coincide with the Constitution. On the other hand ,the abortion rates are high in the country were according to the Health, Human Rights and Development, a Kampala based research and advocacy organization, each day 840 girls and women have unsafe, unlawful abortions in Uganda, and on average five die as a result.

Under the principle of confidentiality, the oath did not cater for series of deadly diseases like Ebola, were outbreak of such a disease requires national alarm leading to a break in the oath as medical practioners swear that they will respect the privacy of their patients, for their problems not to be known to the world. There is need to change the law with regards to confidentiality in such cases because such serious deadly diseases create a state of emergency in the nation

Among other factors that are to be further discussed in my research, I contend that to a larger extent, there is need to reform the law today with regards to the Hippocratic oath.

The study will take a keen look at some of the laws enacted, expositions that have been written on the subject of by different authors, texts books and journals as seen;

[55] *Association of Physicians of Uganda (APU)dated 15th April 2015*

http://www.ugphysicians.org/content/hippocratic-oath

[56] *Article 22 of the Constitution of the Republic of Uganda(1995) As Amended.*

what has been written on the subject.

In 1998, the Medical and Dental Practitioners Act[57] was established in to monitor and exercise general supervision and control over and maintenance of professional medical and dental educational.

Section 47 provided for offences and penalties where it thus tastes that;

Any person who—

wilfully and falsely uses any name or title implying a qualification to practice medicine, surgery, dentistry;

not being registered or authorised under this Act practices whether openly or impliedly as a medical or dental practitioner;

wilfully procures or attempts to procure himself or herself to be registered under this Act by false or fraudulent representation either verbally or in writing;

having been summoned by the council fails—(i) to attend as a witness(ii) to produce any books or documents which he or she is required to produce without reasonable cause;

refuses, without lawful excuse, to answer any question put to him or her in the course of the proceedings of the council; or

(f) contravenes any other provision of this Act,

Commits an offence and is liable on conviction to a fine of not less than three hundred thousand shillings and not more than three million shillings or to imprisonment for not less than three months and not more than one year or to both.

In 2002, the medical and Dental Practitioners council published The Code of Medical ethics. The code is a legal document which is derived from S. 34 of the Medical and Dental Practitioners act[58], Laws of Uganda and its implementation has a full legal force.

This code of professional ethics is intended to be used as a guide to promote and maintain the highest standards of ethical behavior by practitioners in Uganda. In order to maintain public confidence in the professional standards of practitioners, it is essential that high ethical standards be exhibited in carrying out their duties all

[57] *CAP 274*

[58] *CAP 274*

principles embedded in the Hippocratic Oath.

Further, It should be observed that The Declaration of Geneva(Physician's Oath) as adopted by the General Assembly of the World Medical Association at Geneva in 1948, amended in 1968, 1983, 1994, editorially revised in 2005 and 2006 and amended in 2017[59]is seen revising the Hippocratic Oath to a formulation of the oath's moral truths to be comprehended and acknowledged in a modern way. It reads as follows:

I solemnly pledge to dedicate my life to the service of humanity;

The health and well-being of my patient will be my first consideration;

I will respect the autonomy and dignity of my patient;

I will maintain the utmost respect for human life;

I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient;

I will respect the secrets that are confided in me, even after the patient has died;

I will practice my profession with conscience and dignity and in accordance with good medical practice;

I will foster the honor and noble traditions of the medical profession;

I will give to my teachers, colleagues, and students the respect and gratitude that is their due;

I will share my medical knowledge for the benefit of the patient and the advancement of healthcare;

I will attend to my own health, well-being, and abilities in order to provide care of the highest standard;

I will not use my medical knowledge to violate human rights and civil liberties, even under threat;

I make these promises solemnly, freely and upon my honor.

Where the original oath read "My colleagues will be my brothers," later changed to "sisters and brothers." Age, disability, gender, and sexual orientation have been added as factors that must not interfere with a doctor's duty to a patient; some rephrasing of existing elements has occurred. Secrets are to remain confidential "even after the patient has died." The violation of "human rights and civil liberties" replaces "the laws of humanity" as a forbidden use of medical knowledge. "The health" in general of a patient is now the doctor's first consideration compared to the "health and life" as stated in the original declaration. This was apparently changed to free the medical

[59] *https://en.wikipedia.org/wiki/Declaration_of_Geneva*

profession from extending life at all cost.

The revisions[60] were approved including: respecting the autonomy of the patient; physicians to share medical knowledge for the benefit of their patients and the advancement of healthcare; a requirement for physicians to attend to their own health as well as their patients.

Drosimec.o from the department of surgery, university of Benin teaching hospital, Benin city, nigeria in his book understanding medical ethics in a contemporary society observed that certain principles are obviously manifest with respect to medical ethics, the Hippocratic oath and physicians ought to be familiar with most of these principles embedded therein. Principles included; patient's autonomy[61], Non-malfeasance[62], honesty[63] among others. He thus recommended that If a doctor has mismanaged a patient, it is preferable to opt for alternative dispute resolution rather than litigation. The doctor should be alert at all times and seek to do what isn't right always regarding patient care.

An article in the Daily Monitor Newspapers[64] on December 12th 2011, was published [65] referring to the Hippocratic Oath not a doctors suicide pact. Reading that."The Hippocratic Oath, in its various iterations, is not a commitment to economic or physical suicide by doctors. There is nothing in the Hippocratic Oath that mandates doctors to provide free services to patients, or to accept dangerously substandard facilities and resources with which to treat their patients. The Oath does not include a promise to work without rest and without a fair wage. The fundamental commitments in the Classic Hippocratic Oath are respect and support for one's teachers and colleagues; scrupulously ethical practice; and adherence to the principle of primum non nocere (first, do no harm.) Therefore advocating to view a doctor's expertise as a commodity despite the fact that they made an oath to uphold some of the core principles of health and humanity.

Research conducted by Zain Rahimi on whether the Hippocratic oath can be applied in today's medicine" [66] discussed the Hippocratic Oath as follows Hippocratic Oath is not a specialized approach, but rather an existing notion from the time of Ancient Greek which, I believe, should still be regarded as the foundation and basis of the medical occupation." The Hippocratic Oath gives medical professionals a

[60] *The 68th World Medical Association (WMA) General Assembly in October 2017 approved the revisions.*

[61] *He implied it as the right by the patient to decide what shall be done to his or her own body,.*

[62] *He described it as the principle of not causing harm to the patient.*

[63] *He described this t o be of vital importance as a doctor who is honest to with a patient creates a smooth relationship built with trust between the him(the doctor) and the patient.*

[64] *The Daily Monitor is one of the leading publishers of information through news papers daily in Uganda.*

[65] *Article written by Muniini K. Mulera*

[66] *http://www.ugphysicians.org/content/hippocratic-oath April 27, 2014 at 3:58 am*

framework of the moral code of Ancient Greek medicine to maintain a harmony among the physician, the patient, and the illness. When talking about Hippocratic Oath, we have to keep in mind that medicine in early Greece was greatly influenced by the philosophical thoughts at the time. Philosophers such as Socrates encourage people to pursue knowledge by thinking deeply and raising questions. Hippocrates himself encouraged those in the field of medicine to "insert wisdom in medicine." Today, medicine has evolved. Medicine is not only viewed as a means to help the sick, but it is a profitable business and has a purpose of scientific advancement as well. Medicine today is not just a triangle between a physician, patient, and an illness. Rather, medicine is a balance between patients' expectations, financial and political realities, society's demands, and also developing medical and scientific knowledge. Alone Hippocrates's oath cannot be applied in today's medicine. For instance, the original oath required patients to be cured regardless of circumstances. Today, patient's autonomy has taken over the paternalistic medicine that Hippocrates refers to. Hence, I believe that Hippocrates Oath should still be the moral guidance for those in the medical field, but as a reference curriculum because it reminds those in the medical profession their ultimate reasons to get into this profession. As Pellegrino says, medicine is a profession that demands of physicians' extraordinary moral sensitivity as they respond to patient susceptibility. However, the entire burden on physicians is not fair. The problems surrounding medical malpractice, high insurance, etc. in medical profession are, perhaps, the reasons why a need for a modern oath or an amendment to Hippocrates Oath is crucial.

BASIC PRINCIPLES

Four basic principles of biomedical ethics are seen embedded and still used to date in as far as the Hippocratic oaths is concerned. They thus include the following below; Respect for the autonomy of the patient, Beneficence, non-malfeasance and distributive justice. These principles exist and are recognized in the various laws in Uganda and they include the following below;

Respect for Human Dignity

The 1995 Constitution of Uganda as amended provides for Protection of right to life where it states that,"No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."No person has the right to terminate the life of an unborn child except as may be authorized by law."[67]

The Constitution further provides for respect for human dignity and protection from inhuman treatment.[68] Where it provides that, "No person shall be subjected to any

[67] *Article 22 of the Constitution of Uganda, (1995 As Amended)*

[68] *Article 24 Abid*

form of torture or cruel, inhuman or degrading treatment or punishment.

Informed consent

But there is an exception to the above stipulated provision as espoused in the case of KLOVISS NJAREKETA VS THE DIRECTOR OF MEDICAL SERVICES[69].

On February 8, 1949, a very sick young man named Klovis Njareketa 24, was admitted to Mulago hospital with a swelling on one of his leg. When an x-ray was taken, the doctors diagnosed that the swelling was a result of a cancer and was spreading. The patient's condition continued to deteriorate over a period of 20 days and the doctors were of the opinion that the cutting off (amputation) of that leg was essential to save the young man's life. On Monday February 28, a senior African Assistant Medical Officer, explained to the patient the gravity of the situation and what must be done to save his life. The patient consented to the operation, which the scheduled for Thursday March 3.

Change of Mind

However, the father of the patient visited him that morning and advised his son against undergoing the operation. By Wednesday the patient's condition had worsened and the surgeon, Dr. Mc Adam decided that an immediate operation was necessary. The patient declined. This decision was reported to the surgeon, who nevertheless, directed the operation to proceed on"humanitarian considerations". The Surgeon was of also of the opinion that the patient was not in a fit enough state to make up his mind. The operation went ahead and the patient's leg was cut off. The patient improved and was later discharged. He however, sued the surgeon and Director of Medical Services, the employer of the surgeon. The patient claimed damages in respect of the operation performed on him by the surgeon, an operation he did not Consent to, but done at the insistence of the surgeon.

The Ruling in Njareketa Vs the Director of Medical Services 1949

The trial judge, on evidence, found that the patient did give his consent to the amputation a day or two before the operation but that subsequently, he retracted his consent and consciously and expressly refused the operation, did in fact commit a trespass to the person of the patient and awarded damages and with to the patient.

Appealing The Ruiling in Njareketa Vs The Director of Medical Services 1949

An appeal was filed against the judge's decision. The appeal was on the grounds that the judge had withdrawn his consent to the operation and that the patient had suffered

[69] *2015*

any damages. The surgeon was also dissatisfied with the amount of damages. The surgeon was also dissatisfied with the amount of damages awarded to the patient. The court of Appeal was however satisfied that the trial judge was right in holding that the surgeon that the trial judge that the trial judge was right in holding that the surgeon had committed a technical trespass against the patient when on the morning of the operation and had no medical evidence to the effect that the patient was not in a fit enough state to make up his mind.

The surgeon at the initial trial had stated "the patient would most certainly have died, he was dying, and he would not have possibly survived for more than 14days (without the operation)".

No contrary or rebutting evidence was presented by the patient and there was no suggestion of negligence on the part of anyone at the hospital.

The patient told the court that before the amputation, he had a flourishing milk distribution business but because of the action of the surgeon of amputating his leg to render him a disable person, he was unable to earn enough to keep his wife and children.

Second Ruling in Njareketa Vs The Director of Medical Services 1949

The appeal court noted that the patient was very much alive and apart from his disability he was in excellent health. Court also noted with concern that it seemed to be beyond the mental comprehension of the parties to understand that had it not been for the decision of the surgeon to amputate his leg, the patient's children would be fatherless and his wife a widow.

Court was upset that instead of the patient expressing gratitude to the surgeon, the patient was now pressing for payment from the doctor for injury purportedly done to him. Court could hardly find similar cases as this and it seemed to be because there must be very few people like KLOVISS NJAREKETA (the patient) anywhere in the world, who would have the audacity to come to court for a claim against a doctor in such circumstances.

Court reasoned that had the operation not been performed, the patient would at most have lived seriously ill for a fortnight. However, because of the surgeon's courage and professional skill, the patient was alive and well and inconvenienced as he may have been, he was by no means suffering from anything approaching total disability.

Court concluded that the patient therefore suffered no damage by reason of the trespass and drastically reduced the damages earlier. This to court, was necessary to protect doctors from unscrupulous claims of this nature.

This provision of the law is Non-derogable[70], meaning it is absolute, any derogation however slight from it is totally unacceptable. While the right to life is derogable

The Constitution therefore does not however provide for the notion of euthanasia. Euthanasia is the painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma[71].It is classified in to three types; Voluntary, non-voluntary and involuntary.

Voluntary euthanasia as per the case of Cruzan Vs Director, Missouri Department of health[72] the involvement or when a patient brings about his or her death with the assistance of a physician.

Involuntary euthanasia is on the other hand conducted against the will of the patient and Non-Involuntary is conducted when the consent of the patient is unavailable.

Countries like Belgium legalized euthanasia for adults in Beligium, let alone amended the law, in December 2013 that extended the treatment to any child irrespective of the age.[73]However, certain conditions and procedures to administer the treatment go as follows;

Conditions include;

The patient must be at the most conscious moment of making his request.

The request must be voluntary, well considered, repeated and not a result of any external pressure.

The patient must be in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident.

Procedures for the treatment

The Patient makes a written request to the physician.

The physician may then inform the patient about his/her condition and life expectancy.

The physician must be certain of the patient's constant physical and mental suffering.

The Physician must then consult another physician about the serious incurable

[70] *Article 44(a)*

[71] *Oxford law dictionary*

[72] *497.U.S.261(1990)*

[73] *The Beligium Act on Euthanasia of May 28th, 2002*

character of the disorder and inform him/her about the reasons for the conclusion.

The attending physician must the consult another physician aout the serious incurable character of the disorder and inform him/ her about the reasons for the consultation.

The Consultant shall review the medical record, examine the patient, must be certain of the patients constant and unbearable physical, mental suffering that cannot be alleviated.

The consultant must then make his written reports and finding.

The attending physician then informs the patient of the results of consultation.

The attending physician must then allow at least one month between the date of the patients request and the act of euthanasia.

The attending physician shall then perform the act, fill in the registration form, deliver it to the federal control and evaluation commission.

Due to the standard, strict procedure and time one is given before the act of euthanasia is done. The fact that one decides where and whom to marry, where to work, and at the last hurdle of your life,i believe one should be allowed a right to die before death would otherwise occur. This notion is not only not recognized under the constitution[74] but deemed unconstitutional and an illegal practice in Uganda.

Medical and Dental Practitioners Act[75] which monitors and exercises general supervision and control over and maintenance of professional medical and dental educational standards.it provides for the following functions that are seen existent in the Hippocratic oath;

To disseminate to the medical and dental practioners and the public, ethics relating to doctor- patient rights and obligations.[76]

To protect society from the abuse of medical and dental care and research on human beings[77].

To exercise disciplinary control over medical and dental practioners.[78]

[74] *The Constitution of Uganda, 1995(As Amended)*

[75] *CAP 272 of 1998*

[76] *Section 79(h)*

[77] *Section 7, abid*

[78] *Section 2 ,abid*

Furthermore, there is a code of professional ethics established by the Uganda Medical and Dental Practitioners Council[79]is a body that registers and licenses medical and dental practioners in Uganda. It fosters good medical practices, high standards of medical education and advises government on issues pertaining to the medical profession.

It provides guidelines with respect to complains against medical and dental practitioners thereby outlining the procedures through which complaints are handled by the council; provide a list of the different categories of offences and types of penalties that are handled out to errant practitioners.

The code is intended to be used as a guide to promote and maintain the highest standards of ethical behavior by practitioners in Uganda. In order to maintain public confidence in the professional standards of practitioners, it is essential that high ethical standards be exhibited in carrying out their duties.[80]

It also recognizes principles found in the Hippocratic Oath where amongst them include;

Respect for persons[81]

Were it provides that a practitioner shall not;-Discriminate in the management of patients basing on gender, race, religion, disability, HIV status or any other indication of vulnerability.[82]Act violently or indecently towards a patient, a professional colleague or the general public.[83]

Protection of privacy[84]

A practitioner shall observe the patient's confidentially and privacy and shall not disclose any information regarding the patient except-

With the express consent of the patient; or in the case of a mirror with the consent of a patient or guardian; or in the case of a mentally disadvantaged or unconscious or deceased patient, with the consent of his or her authorized next of kin.[85]

To the extent that it is necessary to do so in order to protect the public or advance

[79] *(UMDPC) centenary 1913 – 2013 code of professional ethics*

[80] *Rule 1, Abid*

[81] *Rule 5*

[82] *Rule 5(a)*

[83] *Rule 5(b)*

[84] *Rule 6*

[85] *Rule 6(a)*

greater good of the community. [86]

Integrity[87]

A practitioner shall not- Aid in any form to inflict violence, torture, or degrading punishment or treatment to a person by the state or a private individual[88]; conduct any intervention or treatment without consent except where a bonafide emergency obtains.[89]

A practitioner shall; - (a) Not use his or her professional skills to participate I any actions that lead to violations of human rights (b) Report to the Council if there has been a violation of human rights; (c) Not carry out any specific actions that constitute a violation of bill of rights enshrined in the Constitution of Uganda and international human rights law.

However, not only do both statues not recognize the law on abortion in Uganda but since the enactment of the constitution[90], the Parliament has not fulfilled this obligation and has not created a law to prescribe instances in which a person can be permitted to terminate pregnancy. However, despite the Penal code of Uganda[91] providing for criminal sanctions to several aspects of abortion and, in the absence of any other law, it remains the authority on instances in which abortion is or is not permitted.

Section 212 of[92]provides that,"Any person who through any act or omission prevents child, who is about to be delivered from being born alive can be punished upon conviction with imprisonment for life." The act or omission mentioned in the offence under section 212 has to be of such nature that if the child has been born alive then died, the person would have been deemed to have killed the child.

Criminalization of abortion can lead to an increase and prevalence of unsafe abortions[93].Blocking women from safe abortion services means that women have resolved to terminate their pregnancies will access the same clandestinely and often using unsafe methods.

Teenage pregnancy is still widely shunned in Uganda and girls who get pregnant

[86] *Rule 6(b)*

[87] *Rule 7*

[88] *Rule 7(a)*

[89] *Rule 7(b)*

[90] *October 1995*

[91] *CAP 120*

[92] *The Penal code Act CAP 120*

[93] *MulumbaM.Hasunira ,R&Nabweteme.F (2014) , Criminalization of Abortion and Access to post Abortion care in Uganda.Community experiences and perceptions in Manafwa district, Kampala*

always find themselves having to deal with stigma from their peers at school and from their parents who at times marry them off to the person responsible for the pregnancy. In addition to dealing with the physical and health effects of their pregnancies, teenage girls have to deal with rejection from parents, their spouses, expulsion from home and school and rebuke from the community.[94]In many consequences, the fear of facing these socio-cultural consequences of teenage pregnancies compels girls to seek abortion services often involving unsafe health conditions and un qualified personnel.

COMPARING WITH OTHER JURISDICTION ASSESSING THE VARIOUS TERMS AND THE WAY THEY OPERATE.

All health professionals are expected to act in accordance with professional codes ethical principles.Codes with minimum standards and upper limits of behavior beyond which a practitioner must not go. Each healthcare encounter is formed by facts;-

Patient's history, Examination findings, investigation results and Evidence of effectiveness of treatment options.According to the [American Medical Association] it stipulates for medical ethics[95].

The Yale Journal of Health Policy, Law, and Ethics Volume 2 stipulates for the following;-

A physician shall be dedicated to providing competent Medicare, with compassion and respect for human dignity and rights.

Both stipulate that a physician shall respect the rights of parties, colleagues and other health professionals, and shall safeguard patient confidences and privacy with in the constants of law.

A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.

A physician shall while caring for a patient, regard responsibility to the patient as paramount.

A physician shall support access to medical care for all people.

Citation Numerous citations to the Hippocratic oath in contemporary judicial opinions indicate that it remains an extraordinarily important definition of medical

[94] *AtuyambeL.Mirembef;Tumwesigye,N.M,Annika J, Kirumira,E.K&faxelid.*

[95] *Article 4.*

practice. References to the oath arise in a wide range of cases, including those that involve employment[96] , physiciansdisciplinary proceedings[97]the first Amendment [98]and the disposition of frozen embryos[99].

This focuses on only those U.S cases whose opinions have devoted more than passing references to the Hippocratic oath[100].

POSITION OF THE LAW

The word {injustice} appears twice in the Hippocratic Oath. The Oath taker swears to keep the sick from harm and injustice and promise that they themselves will remain. Free of all international injustices[101]. This momentary allusion to patients' rights the Hippocratic oath in fact expresses much greater concern about the role of the physician indeed, it is telling that the oath is sometimes called The Physician oath[102].

The Oath places the physician in the foreground. The patient recedes into the distance, the unabated object of the physician's artistry. The oath devotes much greater attention to the quality of the physicians' relationships with his gods, his teacher and his students, then with his patients. The very order in which these parties are discussed underscores an implied hierarchy that places the gods at top and the ignorant, passive bearer of sickness and disease-a mere object to be examined and treated-rather than an automous, full participants in the healing process.

Next the Oath positions the physician in relation to his teacher and students. Here the physician becomes part of a new family, as he vows to treat his teacher like a part and his teacher's children like his brothers. At the same time, the physician promises to pass down his knowledge to his own sons, as well as to his teacher's sons and to all the other pupils who have signed the convenant and have taken an oath to the medical law but to no one else [103].

[96] *E.g., Aiken V Employer Health Serves., No. 95-3196,1996 U.S.App.LEXIS 6060[10th Cir. Mar. 26, 1996] [affirming judgement that physician was not wrongfully discharged from his employment , despite physician's reliance on the Hippocratic oath to establish he had served the interests of his patients].*

[97] *E.g ., U.S. V Rachels, 820 F.2d 325[9th Cir.1987].*

[98] *Malnak V Yogi, 440F. Supp.1284[D.N.J.1977][holding that the teaching of the scince of creative intelligence/ Transcendental Meditation in New jersey public schools violates the establishment clause of the first amendment, despite defendants' attempt to analogize the puja chant to the Hippocratic Oath].*

[99] *Davis V Davis, No. E-14496, 1989 WL 140495[Tenn.Cir.Ct1989].*

[100] *For a brief discussion of the use of the Oath in England and in Germany,seeNutton,supra note 17, at 61.*

[101] *EDELSTEIN, supra note 1, at 3.*

[102] *LEVINE, supra note 7, at 56. The first Generation of medical ethicists in 1960s and 1970s attacked the Hippocratic Oath because it left out the person whose rights above all should determine medical ethics- the patient. Nutton, supra note 17, at 51.*

[103] *EDELSTEIN, supra note 1, at 3. Ludwig Edelstein argues that the Hippocratic Oath was Inspired by the Pythagoreans, a religious sect from the fourth century whose doctrines included a belief that a student should honor his teacher like an adoptive father.see id. At 43, 47-48. Some classicists contend that the the practice of taking the Hippocratic oath was the equivalent of a de facto adoption , in that the pupil became like a son within a closed family guild of physicians.This arrangement served to ensure that knowledge remained within the family See BURKERT, supra note 9,at 44-45; EDELSTEIN, supra note 1, at vii,39,47. It also sparked the development of schools and apprenticeships of rationalist medicine.*

The very fact that judicial opinions refer to the oath so extensively indicates its status as a symbolic marker imbued with profound social meaning derived from generations upon generations of medical students swearing to follow its words. A kind of secondary performance effect of the Hippocratic Oath thus emerges beyond the linguistic performance effect of Hippocratic Oath thus emerges beyond the linguistic performativity it may possess in certain circumstances. This additional character that the oath assumes is, in Austin nomenclature, prelocutionary[104]. Prelocutionary acts may be refered to those acts that we bring about or achieve by saying something[105], acase in pointby convincing, persuading, deterring, suprising and misleading[106].

Another pivotal comparison not the forget is that the court's references to the Hippocratic oath subtly convince the reader that the oath remains a persuasive statement that continues to unite the medical profession. Interestingly even while citing the Hippocratic Oath, courts have rejected some of the oaths most important prohibitions most notably those barring from providing an abortive remedy or administering a deadly drug.

TRADITIONAL HIPPOCRATIC OATH

According to Dr. KIKOMEKO SHARIF the Hippocratic Oath and its relationship to the principles of ethics can be divided into 12 items

Covenant with deity; I swear by Apollo the physician…….

Covenant with teacher; Pledge of collegiality and financial support.

Commitment to students; Promise to teach those who swear the Oath.

Covenat with patients; Pledge to use ability and judgment

Appropriate means; Use of standard dietary care

Appropriate ends; the good of the patient not the physician.

Limits on ends; Originally proscribed abortion and euthanasia

Limits on means;Originally proscribed surgery for renal stones, by deferring to those more qualified.

Justice;Avoiding any voluntary act of impropriety or corruption

Chastity; Originally proscribed sexual contact with patients

Confidentiality;Not to repeat anything seen or heard.

Accountability;Not to repeat anything seen or heard.

Accountability; Prayer that the physician be favored by the gods if the Oath is kept,

[104] *Id at 121.*

[105] *Id at 109*

[106] *Id.*

and punished if it is not kept.

Recommendations and Possible Solutions

Revisiting and properly understanding of the Hippocratic Oath is very necessary in the light of present issues of ethical malpractices not only in Uganda but throughout the world.

Due to the drastic change of authority of decision making. Unlike the earlier years were the Hippocratic tradition and placed all authority in the hands of the physician, today, the modern version of the oath by the world medical Association[107] that has led to the utmost consideration of values, care and negligence.This is stipulated in the Hippocratic oath were it is provides that, "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death.. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God."

There is therefore need to create more awareness in Uganda thereby emphasizing to teach medical ethics in graduate courses for high standards of personal and professional values and that the knowledge of the ethical and legal aspects of medicine is important for comprehensive health-care.

LEGALIZING PRINCIPLES

Ugandan laws allow abortion under certain circumstances, but laws and policies on abortion are unclear and are often interpreted inconsistently, making it difficult for women and the medical community to understand what is legally permitted. The Uganda constitution states that "No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."

"No person has the right to terminate the life of an unborn child except as may be authorized by law."[108]This means that abortion is permitted if the procedure is authorized by law, but many of the medical workers cannot perform abortion because of failure to interpret the law.

Under the 2006 National policy guidelines and services standards for sexual and Reproductive Health and Rights, pregnancy termination is permitted in cases of fetal anomaly, rape and incest, or if the woman has HIV.

[107] *The world medical association is an independent and international confederation of free professional medical associations, therefore representing physicians worldwide .It was formally established on September 18,1974.*

[108] *Article 22 of the Constitution of Uganda, (1995 As Amended)*

According to the Penal code[109], a doctor who thinks that an abortion is justified to save the life of the mother, must write to the director general of medical services in the health ministry, seeking approval to terminate the pregnancy, who also convenes a medical team to scrutinize the case. The bureaucratization of this process alongside a life in danger may be dangerous, as a medical doctor waits for an approval.

I believe being aware that abortion results from unplanned pregnancy, it therefore follows that preventing unintended pregnancy is a major step is preventing unsafe abortions. We ought to think of legalizing safe abortion and thereby allowing qualified and certified medical practioners to operate abortion clinics through which women will be given a chance to have safe abortion.

The assumption of the power to tell another human being what they can or cannot do with their bodies is a violation of a woman's individual rights granted by our Constitution.It is only fair that women be allowed to have control over their bodies.Men and women need to be empowered to make the best choices, to access contraceptives and to be able and ready to use them. They should also have the freedom to raise babies they can love and take care of. Condom use and contraceptives is not just for women, men need to be empowered too and girls and boys below 18 should be allowed to access and use contraceptives once they start to be sexually active.

The government should let abortion be a choice and not a crime. It should let the young people be given a choice. Abortion is the best choice in cases where a woman (girl) is raped, conceive through incest, still in school, or pursuing a career that cannot allow her to carry a pregnancy, when she is medically unable to have a child, or financially incapable of taking care of a pregnancy and a baby.In such a situation, safe abortion is the only remedy.

Uganda being a member of many international human rights conventions that seek to uphold the standards of maternal health. Motivated by the Universal Declaration of Human Rights[110], Uganda has signed both regional and international human rights instruments such as the international covenant on civil and human rights, the African charter on Human and people's rights, convention on the elimination of all forms of discrimination against women, convention on the rights of the child, and convention on the rights of persons with disabilities, which addresses good health in all forms as an inalienable right that must be protected by law.

The country is also bound by domestic legal instruments, which affirm access to good health as a human rights and freedom of individuals, which are inherent and, therefore, not granted by the state.The right to good health is not treated in exemption.Article 21[111] disregards all forms of discrimination including on grounds

[109] *CAP 120*

[110] *UDHR was proclaimed by the United National General Assembly in paris on 10th December, 1948*

[111] *The constitution of Uganda*

of gender, while Article 22[112] emphasis the right to life to which women and girls are also entitled. Human dignity is brought into the equation by Article 24[113] which bars Ugandans, including women and girls from being subjected to inhuman, cruel, degrading treatment, and torture.

One of the principles embedded in the Hippocratic Oath states that, "I will prevent disease whenever I can, for prevention is preferable to cure."The government, institutions in Uganda can use the basis of the need to prevent diseases in society today by working hand in hand with the international bodies that advocate for the same there by in joint partnership, we can be able to carry out extended research that would not only be helpful in curing diseases but also saving lives of many Ugandans.

The World Health Organization focuses on the health of women during pregnancy, child birth and postpartum period, as an era averting hemorrhage, infection, high blood pressure, unsafe abortion and obstructed labor which may lead to morbidity and ultimately.

Therefore all that stated above chapter clearly stipulate for the recommendations and possible solutions.

The Hippocratic oath in its classic form, as the more modern, patient' centered oath gain more acceptance within the medical professional, court ought to pay him heed, that said, even if the courts were to take account of the modern oaths, the judicially ought none the less focus on more on making decisions that do not over lie privilege the views of the medical profession. A more independent perspective would ultimately better serve the best interest of the patient as all discussed in the above.

[112] *Ibid*

[113] *Ibid*

CHAPTER SIXTEEN
A REFORM ON THE RIGHT TO ABORT

There is some doubt as to whether abortion was an offence at common law in England. A statutory prohibition was introduced in 1803 and in 1861 it was amended to include a woman who induced an abortion on herself.17 This amended form of the law was effectively enacted in all Australian states and remains broadly the statutory law in New South Wales and Queensland.18 It was also the form of the criminal law until 2008 in Victoria. The Crimes Act 1958 (Vic) provided: Section 65.

"Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent shall be guilty of an indictable offence, and shall be liable to imprisonment for a term of not more than fifteen years."

Section 66. "Whosoever unlawfully supplies or procures any poison or other noxious thing or any instrument whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether with child or not, shall be guilty of an indictable offence, and shall be liable to imprisonment for a term of not more than three years."

Women have, despite the existence of such laws, always sought and obtained abortions. Brookes, describing the situation in England in the early part of the 20th century, suggests that, for many working-class women, abortion, at least before quickening, was not perceived as a crime and the practice of abortion was not intensively policed. Similarly, McCalman, writing about Victoria observes that abortion, usually via 'powerful emetics and drugs like ergot' was 'the one form of fertility control that was widely broadcast and within the reach of even the poorest'.20 Gideon Haigh documents some of the prosecutions for abortion, but also notes the difficulty of doing so. He quotes a 'distinguished medico Dr Herbert Moran', writing in 1910: It was only when a woman died that any real action was ever taken, and even then it was rare to establish a proof that an illegal operation had been performed. The dead cannot bear witness and the evidence of the dying is hobbled with legal difficulties. Furthermore, some of the jury feel sympathy for a woman who is trying to help another out of trouble.

At this time, midwives were largely responsible for medical terminations. However, after the Second World War, doctors became the predominant providers. High goes on to document the corrupt relationships between the police and abortion providers,

suggesting that by the 1960s 'the fortunes of Melbourne's abortion rackets and police were now inextricably linked'. But in the mid- 1960s, an activist Catholic, Francis Holland, took over as Police Commissioner, and determined to act against abortion. One of the prosecutions that arose out of this activity was that of Charles Davidson in 1969 for four counts of using an instrument to procure the miscarriage of a woman and one count of conspiring to unlawfully procure the miscarriage of a woman. Until the changes introduced in 2008, the direction given by Menhennitt J to the jury in the Davidson prosecution governed the lawfulness of abortion in Victoria. Justice Menhennitt focused on the principle of necessity and the inclusion of the word 'unlawful' in the statutory provisions and directed the jury that abortion was not unlawful in the following circumstances: For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.25

This direction thus allowed an abortion to be performed not only where a doctor formed a view, on reasonable grounds, that there was a danger to a woman's life, but also where the doctor considered that there was a danger to a woman's physical or mental health (and the action would be proportionate to the risk). Haigh reports that the case received no newspaper coverage: 'The Age's front page on 26 May thought that the most pressing question for contemporary women was "Are Ladies in Trousers Respectable?"'26 He goes on to describe the judgment in the following way: Precise in some places, vague in others, the Menhennitt Ruling [sic] offers almost nothing legally objectionable. It is not adventurous, stopping short of abortion on demand. It is not prescriptive, making no specific requirement regarding the number and nature of medical or psychiatric opinions. The lack of excitement it stirred is itself a kind of tribute. The jury found Davidson not guilty. Haigh speculates that this was not necessarily a result of Justice Menhennitt's direction, but rather he draws attention to Davidson's 'intriguing' evidence that the women concerned had imagined themselves pregnant, because this was their 'inborn desire'. Hence, they had merely imagined they had been aborted: 'The all-male jury was probably as influenced by masculine delusions about the female psyche as by the judge's fine-grained arguments'.However, he also quotes from Sir John Young, a former Supreme Court judge: 'We were all rather amazed there was no appeal … Cases on such issues can usually be relied on to be appealed.

In the end, Cliff [Menhennitt]'s decision satisfied everyone. Had it been against community standards, an appeal would have been certain. But he got it exactly right'.29 The decision of Menhennitt J was followed in New South Wales in R v Wald.30 The District Court judge there, Levine DCJ, made it clear that a doctor could also take account of economic and social grounds in assessing the danger

to a woman's physical or mental health. Given the (then) strong similarities in the statutory prohibition on abortion in the two jurisdictions, it was assumed that these factors could also be considered in Victoria.31 These two legal decisions were the foundations of abortion regulation in Victoria and remain the foundations in New South Wales. These are apparently flimsy foundations, as they are decisions of single judges and neither has been subject to direct appellate scrutiny. However, they have been effectively approved in a series of decisions.

WHY REFORM THE LAW OF ABORTION?

It could be argued that adequate reform of the law had occurred in Victoria with the Menhennitt ruling and the later clarifications. After all, at least in Australian cities, access to abortion is quite easy and nationally there are some 80 000 terminations performed each year that are paid for through the Medicare system. Indeed, were there not some risks if attempts were made to get explicit reform through Parliament?Might we end up with a more, rather than less, restrictive regime? Arguably, this is what occurred in South Australia, the first State to legislate for 'legal abortion', which it did in 1969. The South Australian reform legislation, in articulating the circumstances in which abortion is not unlawful, requires two doctors to form the opinion that continuing the pregnancy would involve a greater risk to the physical or mental health of the woman than if the pregnancy was terminated.36 Additionally, abortion can only be carried out in a prescribed hospital. To borrow a turn of phrase from Louis Waller, perhaps we would do best by 'letting sleeping legislators lie'.38 On the other hand, there are a number of reasons why reform of the law was required. First, the previous state of the law was, to say the least, anomalous.Prima facie, it is odd that the law of abortion appears typically in criminal law textbooks in the section on homicide; while they usually go on to describe the Menhennitt ruling, and the defence of necessity, it remains confusing.

Additionally, the continuing illegality of (unlawful) terminations did lead to substantial uncertainty in the law. This was of particular concern to doctors.41 Arguably, the Menhennitt ruling only applied to surgical abortion, and the increasing availability of medical abortion via drugs that induce a miscarriage, for example RU486, meant that medical termination might have remained especially vulnerable. Finally, and most importantly, the implicit or discursive message sent by a continued apparent criminalization of abortion is of concern: women are constructed as incapable of making their own thoughtful decisions, as either unworthy to do so, and/or at the mercy of the all-powerful doctor. The strong message is one of women's incapacity and inequality.

INSTITUTIONS OF CHANGE: HOW OR WHERE TO REFORM THE LAW ON ABORTION?

I have noted above the temptation to leave sleeping dogs, or legislators, lie, and yet as I have also outlined there are difficulties both practical and philosophical with keeping the offence of abortion on the statute books. If reform of the law on abortion is to occur, by what process should that happen? Clearly the courts have been one forum for legal change in Victoria, and indeed elsewhere in Australia. And yet the shape and form of that reform can be somewhat haphazard, seemingly dependent on apparently random prosecutions or civil litigation on civil liability of doctors, attempts by men to stop their partners having terminations, or minors seeking access to terminations. In countries with constitutionally entrenched Bills of Rights, there is the possibility of challenging the constitutionality of restrictions on the availability of abortion, as occurred famously in Roe v Wade in the United States and in Canada in Morgentaler v The Queen.50 However, Australia has no national Bill of Rights, and only two states or territories – the ACT and Victoria – have statutory Bills of Rights. (And, interestingly, laws concerning abortion are explicitly excluded from the purview of the Victorian Charter of Rights).51 In Australia, a more fruitful route for reform has been via legislative change. As noted, South Australia was the first jurisdiction to change its laws in 1969. In 1998, Western Australia removed abortion from its Criminal Code; the ACT moved similarly in 2002, and in the most recent wholesale reform, Victoria removed abortion (almost completely) from the Crimes Act in 2008. In the remainder of this section the institutional locus of these reforms is the focus, that is why Parliament might be a suitable (or unsuitable) forum for legal change. I then move on to the language of reform.

PARLIAMENTARY REFORM AND DEMOCRATIC PARTICIPATION

In 1938, John Barry, a barrister, developed a version of the legal argument that prevailed in Davidson, in an address to the Medico-Legal Society.52 What is of more interest in this context is his view of where legal reform should occur. Barry took the view that abortion law reform was not a suitable topic for a legislative body and should be left to the judges because 'on a subject such as this the reaction of the average person is not intellectual but emotional' and thus 'not a fit subject for debate in popular assemblies or the Parliaments we have'.Whatever the merits of his observations at the time – and Gideon Haigh suggests that despite the apparent 'legal elitism, he had some evidence for his conclusion' – I certainly think it underestimates the potential of modern parliaments. It contrasts sharply with the statement by then Attorney-General Robin Millhouse in South Australia in 1969, when he introduced Australia's first successful abortion law reform legislation:

I strongly believe that Parliament is the place in which issues of controversy and of significance in the community should be decided, and if Parliament for any reason

shirks its responsibility to debate and decide these things it is failing in one of its greatest functions; if it continues to do this, eventually it will be discredited in the eyes of the community. Therefore, I have no regrets whatever about the interest, lobbying, discussion and debate that have taken place in the community on this matter.

An editorial in The Age soon after the Menhennitt ruling berated the government for failing to clarify the law: After months of consideration, the Government of Victoria has finally decided to do nothing whatever about abortion law reform. It has chosen to ignore the wishes of the majority and the advice of the medical profession. Rather than abdicate its responsibilities openly, it has attempted to shelter behind a judge's wig and robes. … The State Government cannot be allowed to dodge its duty so easily. If it is happy about the common law as interpreted by Mr Justice Menhennitt, what possible reason (apart from political expediency) can it have for refusing to alter the statute law to bring it into line? Or, as put by Robin Scott (Labour) in the Victorian Parliament in 2008: As a general principle I regard parliaments in a democratic society as being the appropriate vehicles where possible to resolve complex issues of morality within society. While courts have an important role in protecting the rights of individuals they should not be the primary mechanism for resolving complex issues of morality and of how society functions. Parliament is the supreme body that has the pre-eminent role in this matter.Australian Parliaments has debated abortion law reform since at least 1966, when a private member's Bill to decriminalise abortion was introduced in the Western Australian Parliament. However the first successful legislative reform was in South Australia in 1969. While the development of abortion law via the common law was somewhat haphazard, that should not imply that the parliamentary process is necessarily replete with transparent logic and reason. For example, Jill Blewett notes that the South Australian reform originated in proposals from the Young Liberals early in 1968, notwithstanding that the then Labour Premier, Don Dunstan, had stated in 1967 that the Criminal Law Revision Committee might well examine the matter. And it was the Liberal Country League Party which introduced the reform Bill after the Dunstan government lost office in 1968. Blewett goes on to observe that Robin Millhouse, the then Attorney-General, had complex motivations for his move:

As a lawyer, but also as a deeply moral and religious man personally antipathetic to abortion, he was anxious to avoid by legalisation both the kind of graft and corruption obtaining in the eastern States, and the social problems engendered by restrictive laws. As a politician, he saw abortion law reform as a key element in the long overdue process of modernising his party, while on the personal level abortion was possibly the one issue which would allow him 'to leave a mark on law reform as distinctive as [that of] his rival and predecessor, Dunstan'.60 While human motivations, including those of parliamentarians, may be complex, parliamentarians do at least provide a target for lobbyists.

That is, there is a chance to affect, influence, persuade, convince or manipulate a politician, in a way that judges are not amenable to. Indeed, it is interesting here to reflect on the views of Scalia J, a conservative member of the United States Supreme Court. Justice Scalia enunciated this scathing critique of both lobbyists and his colleagues on their failure to overturn Roe: Alone sufficient to justify a broad holding is the fact that our retaining control, through Roe, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us – their unelected and life- tenured judges who have been awarded these extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will – to follow the popular will. Indeed, I expect we can look forward to even more of that than before, given our indecisive decision today.61 That sort of public 'engagement' with the court process is much less likely to happen in Australia; with the possible exception of the regular 'Fathers' Rights' demonstrators outside the Family Court,62 court protests are rare in Australia. In addition, as Scalia J points out, protest is arguably not a very useful tool as judges are not meant to be responsive to public opinion. In some limited circumstances, there is room for 'the public interest' to be presented in court proceedings, via an intervener or as an amicus curiae – friend of the court. However, Australian courts have comparatively restrictive rules on standing and these certainly do not ensure a right to represent the views of women's organisations, or the Abortion Law Reform Association in, say, the prosecution of a doctor. Interestingly, in one of the very few pieces of litigation about abortion to reach the High Court of Australia, CES v Superclinics, the Court granted leave to appear in the case as amici curiae to the Catholic Bishops Conference and the Catholic Health Care Providers' Federation. The granting of such leave was contested, and the court split 3:3, with the casting vote of Brennan CJ deciding the matter. The Abortion Providers Federation was also granted amicus curiae standing, and it remains unclear whether such standing would have been granted to the Women's Electoral Lobby ('WEL') as the case settled before that issue could be decided.So while it is possible for groups with a particular interest in an issue to intervene in a court case to argue those interests, participation is by no means assured. By contrast, the parliamentary forum is quintessentially one in which representations from constituents are expected and made, and can have a substantial influence, for both good and ill, on the way politicians vote.

THE LANGUAGE OF REFORM

The final aspect of the process of parliamentary reform I want to draw attention to is the language used in the parliamentary debates. That is, how do parliamentarians construct the issue of access to safe termination of pregnancy? El-Murr suggests that the dominant framing of the abortion issue in the Legislative Council was as a law reform problem.111 My focus is more on how women were configured in the debates. A close examination of the language used allows for a more qualitative

assessment of the claims I have made above for the benefits of a parliamentary process. It is one thing to identify the virtues of vigorous parliamentary debate, but if that debate positions women as lacking capacity or as mere incubators for a foetus, one might, like John Barry in the 1930s, continue to hesitate to entrust the question to politicians. In this context, it is worth briefly mentioning the language within which the 'right' to abortion is often articulated in courts.

In Roe, the United States Supreme Court articulated the abortion right as an aspect of the right to privacy. This is a narrow basis on which to articulate the right to abortion, and the reasoning of the Court has been widely criticised by those who support an expanded understanding of women's reproductive rights.The emphasis on privacy in Roe arguably fed into a discourse, which facilitated the Supreme Court's endorsement of restrictions on the public funding of abortion. Others have suggested that articulating access to abortion as an aspect of the right to privacy 'fosters debate in the pernicious terms of the rights of the foetus versus the rights of women'. The social and biological implications of pregnancy are fundamentally different for women and men, and thus access to safe publicly funded abortion raises issues of equality for women, and many feminists have argued that equality provides a much more fruitful language in which to articulate access to abortion.However, it is not a language frequently found in court decisions on abortion. Indeed, the only one of which I am aware is that of the Constitutional Court of Colombia, which recognised in 2006 that tight restrictions on abortion discriminated against women in their access to health care and were consequently a breach of women's equality rights.In this section, I explore the extent to which a rights discourse, especially one concerning the rights of women was used by parliamentarians. Do women's rights to equality appear in the parliamentary debates, or only the right to autonomy, the language in which medical decision-making is usually articulated? I then go on to consider whether women are configured as 'passive and in need of protection and particularly whether abortion is presented as hurting women. I also consider whether fetuses are treated as imbued with rights in the debates and then examine the very broad consensus that emerged to the effect that the number of terminations performed ought to be reduced. Finally, I touch on what proved to be the most controversial aspect of the legislation, the duty imposed on doctors who have a conscientious objection to refer on to a doctor who does not have such an objection.

WOMEN'S RIGHTS: AUTONOMY, EQUALITY AND DIGNITY

Michael Thomson, writing of the United Kingdom Parliament when it was debating the 1967 abortion reform legislation, observed that: 'The question of abortion and women's rights did not enter the discourse until after the enactment of the 1967 provisions.'119 This was certainly different by 1969 in South Australia where Don Dunstan, then Leader of the Opposition, stated: 'a woman should have a right to determine whether she proceeds with a pregnancy or not and, if required to vote on this, I would vote in favour of abortion on demand'.And rights remained very much

part of the 2008 Victorian debate. There is a tendency evident in that debate to tie access to abortion to more general claims about women's equality. So, for instance, Judy Maddigan (Labor) ties together the right to vote and the right to access to abortion: I must say I find it somewhat ironic that we are debating this bill this year, in which we celebrate 100 years since women got the vote – when women first got the right to have a say in the laws that affect them. ... I would find it ironic if, 100 years later, this still male-dominated house made the decision that this house has the right to tell women in this state what they should do.121 Or Richard Wynne (Labor) argued: 'In conclusion, in my view the passing of this bill will ensure that Victoria is a better and fairer place for women'. Or, in the words of Jude Perera (Labor): 'As legislators we need to consider historical developments, understand the realities of the present and take a pragmatic approach to deliver justice to society in general and women in particular'. Edward O'Donohue (Liberal), in the Legislative Council, was even more explicit: 'The equality of women in our society has been greatly aided by equal access to education and opportunities and the ability to manage fertility'. By contrast, Colleen Hartland, a Greens Member of the Legislative Council, referred to anti-choice literature, including quite personally directed leaflets she had received which, amongst other things, 'says that women of reproductive age should not be in the workforce'.

No such blatant assertion was made by those opposing the Bill in the parliamentary forums. The 'right to dignity' was a strong theme in the debates. Even those who voted against the Bill called on this language: 'I also understand in order that women are provided with the dignity of control over their own bodies and the preservation of their own wellbeing, and for a variety of other reasons, they should be entitled to make that choice'.Women do appear as competent decision-makers; so, in reference to arguments put by constituents about 'the instance of post-abortion trauma and depression in women who choose to have an abortion', Martin Pakula (Labor) stated that it was not so much the failure to mention that some women who have children also suffer from depression, 'but that the argument presumes that no woman is capable of assessing the risk for herself and that no woman is capable, having so assessed that risk, of making appropriate judgements for herself'. In opposition to a proposed amendment to the legislation as introduced that would have required a doctor to offer counselling, Lily D'Ambrosio (Labor) stated, explicitly connecting dignity and equality: When we talk about women and we talk about choice let us not forget about the issue of dignity. When we look to legislation to deal with programmatic service issues in the community we are saying that we are removing choice or we are raising the bar on choice for women. That is what we are doing – we are saying that women somehow have less understanding of or less ability to exercise their rights than others.

'ABORTION HURTS WOMEN'

A relatively new phenomenon in the Victorian debates was the introduction of arguments about abortion harming women, rather than, or in addition to, the focus on harming the fetus. Reva Siegel has identified a deliberate shift in arguments by those who oppose abortion in the US, from arguments that focus exclusively on the 'right-to-life' of the fetus, to those that emphasize the 'rights' of women, or claim that 'abortion hurts women'. Thus women undergoing terminations are 'misled or coerced and it is argued that abortion is 'dangerous to the psychological or physical health of the pregnant mother and ultimately that 'abortion violates women's nature as mothers'.This tendency is somewhat evident in the Victorian parliamentary debates, but is not an overwhelming theme. It is expressed very clearly by Christine Campbell (Labor): When my interest in human rights began it was focused on the unborn and pregnancy support for the mother and child. That interest remains, but decades later, after witnessing the effects of abortion on women I know and have counseled, it is clear that denying the unborn its human rights has many more profound detrimental effects on women that decades ago were unknown. And Tamara Lobato (Labor): 'Decisions made about abortion are not necessarily the signifying of women's independence but rather may be an indication of their reliance on men, and their responses, to determine the outcome of a pregnancy'. This so-called pro-woman anti-abortion argument was first evident in parliaments in Australia when in 1998 the ACT Legislative Assembly debated abortion legislation, eventually enacting some of the most draconian 'informed consent' provisions in Australia. This legislation provided that where an abortion was contemplated, a medical practitioner should give the woman information about, among other things, the medical risks of abortion and carrying a pregnancy to term, any risk peculiar to her, and 'the probable gestational age of the fetus at the time the abortion will be performed'. Additionally, appropriate counseling had to be offered. Furthermore, the Act provided that the information which could be provided to women could include 'materials which present pictures or drawings and descriptions of the anatomical and physiological characteristics of a fetus at regular intervals'.A termination could only be performed 72 hours after the information had been provided.One explanation of this ostensible pro-woman language appearing in the ACT debates might relate to the type of legislation being debated: where the proposed legislation constrains the giving of informed consent in the way described above, it seems more likely that it will be justified by being presented as a pro-woman stance. However, this sort of debate was also present in the ACT in the 2001–2 debate which culminated in the repeal of the informed consent legislation noted above, and the removal of unlawful termination from the Crimes Act 1900 (ACT).138 Hence Vicki Dunne stated: 'Even if you believe, hand on heart, that it is not really a child, can you imagine the effect it would have on a woman if she came to the conclusion that she had killed her child'.139

She continued: 'The patient is not even an individual – she is reduced to the status

of an inconveniently occupied womb. None of the rest of her matters – not her head and not her heart'.140 It is worth noting that this sort of rhetoric did not go without direct challenge. Thus Ted Quinlan argued: 'If you wish to say that abortion is a bad thing because it is against your fundamental beliefs, I respect that. But to interweave selective statistics and virtually say "And I am also doing it for a woman's own good" is heading towards the hypocritical'.141 The existence of this ostensibly pro-women rhetoric in both the later ACT debate and in 2008 in Victoria, suggests that there has been a subtle shift in the emphasis of anti- abortion advocates in Australia as well as the United States.

Uganda's law on abortion prohibits several acts and omissions relating to abortion and sets out to punish women and health workers who perform any of the prohibited acts. And yet it should also be noted that every woman has a right to make decisions relating to her reproductive health and this decision includes the right to terminate or keep a pregnancy. This right can be read into the obligation of the state to provide medical services to the population, to enable women in exercising their full reproductive and maternal functions and the exception to the right to life that prescribes the development of a law that provides for instances in which a pregnancy may be terminated.

Abortion affects girls, women, health workers, lawyers, police, and communities, with victims being particularly stigmatized. The stories and perspectives in this booklet demonstrate the need for access to safe abortion services in Uganda.

It is unfortunate that no effort has been made to take advantage of the opportunity that is presented by Article 22 (2) of the Constitution to create a law that provides specific instances in which an abortion is permitted. Despite the significant progress in the policies that relate to access to safe abortion services, the law has barely moved an inch since the Constitution of Uganda came into force.

It cannot be by coincidence that the prosecution of offences relating to the termination of pregnancy has resulted in injustice in Uganda. In some instances health workers have been arrested for providing post abortion care, in other instances girls have been manipulated into accepting conviction without legal representation and in other instances prosecutors have failed to find evidence that implicates the accused and the cases have been dismissed. Unfortunately by the time the cases are dismissed, the reputation and confidence of the health workers and women involved have been tarnished beyond repair.

The criminalization of abortion has had the effect of restraining health workers from providing safe abortion services for fear of prosecution which in turn has led to the inability of women to access the services. Women and girls who need to access safe abortions are therefore left with no option but clandestine and unsafe services

which often have fatal consequences contributing to Uganda's high level of maternal deaths.

We need all of the help that we can get to reduce the prevalence of maternal mortality in Uganda. With unsafe abortions contributing to over a quarter of all maternal mortality in Uganda, there is need to address the underlying factors that lead women into seeking unsafe abortions. Health workers need to operate in an environment without fear of being arrested and harassed. In turn, women should be able to seek safe abortion services knowing that they will not suffer stigma or be punished for services they need.

Clarifying Uganda's abortion law should be accompanied by the expansion of instances for which abortion can be accessed such as cases of incest, rape, defilement and other indications in which the health and life of the woman may be threatened. Beyond the law, there is need to improve socio-economic conditions and increase access to contraception and family planning services to minimize abortion and unwanted pregnancies.

I hope that this booklet will shed some light on the plight of pregnant women in Uganda, the factors that contribute to the unacceptably high number of unsafe abortions and maternal mortality in Uganda. I believe it will surely complement the efforts to realize a safe legal environment for women to access safe and lawful abortion services.

Maternal mortality continues to be a formidable factor in the realization of sexual and reproductive health and rights (SRHR) in Uganda. Indeed 343 women out of every 100,000 women die from preventable pregnancy-related complications each year and many more suffer serious and often permanent disabilities. Unsafe abortions contribute to 26% of maternal deaths, as a result of the legislation that criminalizes abortion. This 1950 law (the Penal Code Act) has had harmful effects on a diverse range of stakeholders particularly women and girls as well as health care providers who have been often threatened with arrests or have actually been arrested. Some have been tried and sentenced to prison, some have served their sentences to the end, while others have spent days in detention and, in some instances, been released with no charge filed against them.

The purpose of this chapter is to evoke for the reader the reality of the situation in Uganda. It specifically speaks about the impact of the criminalization of abortion in Uganda. It offers an array of voices: a girl who was defiled and denied access to abortion services, a woman imprisoned for procuring an abortion, a health service provider detained for providing post-abortion care, a law enforcement officer, a gynaecology/obstetrician/midwife involved in providing abortion and post- abortion care, a legal practitioner who specializes in abortion law, and the voices of girls

that have procured unsafe abortions—among others. We hope that these voices have the power to create space for the rights holders and duty bearers to speak out on these key issues and bring about change. We believe that sharing these stories will strengthen the case for legislative reform and lead to a decrease in the high rates of maternal mortality and morbidity in the country as well as realization of the rights of women.

STATE OF THE LAW ON ABORTION IN UGANDA TODAY

To understand the scope of the law on abortion in Uganda, it is important to appreciate the whole scope of the legal and policy framework under which it is provided. Abortion law in Uganda has been spread across a number of legal and policy instruments, which all have to be traversed to get a comprehensive understanding of the position of the law. The Constitution of the Republic of Uganda is the supreme law from which all others laws in Uganda naturally flow. Article 2 (2) of the Constitution as such nullifies any law or custom that is not consistent with its provisions. Article 22 (2) of the Constitution prohibits the deprivation of the life of any person including an unborn child. It also provides that in some instances the termination of a pregnancy is lawful; by commanding that no person has the right to terminate the life of an unborn child except as may be authorized by law. It is therefore without doubt that the constitution anticipated that there should be instances in which the termination of a pregnancy should be permitted and prescribed that such instances should be laid out by the law. The Parliament of Uganda has been vested with the mandate to make laws in Uganda. Article 22 (2) not only anticipated but also placed an obligation on the Parliament to make a law which would provide for instances under which the termination of a pregnancy would be permitted. Unfortunately since the enactment of the Constitution in October 1995, the Parliament has not fulfilled this obligation and has not created a law to prescribe instances in which a person can be permitted to terminate a pregnancy.

However, the Penal Code Act of Uganda, which commenced on 15 June, 1950, provides for criminal sanctions to several aspects of abortion and, in the absence of any other law, it remains the authority on instances in which abortion is or is not permitted.

The Penal Code Act is a criminal code and it provides for offences relating to abortion and an exception in the form of a defence against prosecution for an offence relating to abortion. Section 141, 142, 143 and 212 of the Penal Code Act provide for the offences relating to abortion while Section 224 provides for a defence against prosecution for an offence relating to abortion. Under Section 141, any person who unlawfully administers to any woman any poison, noxious substance or uses any force or any means on her with intent to cause a termination of a pregnancy can be punished upon conviction with imprisonment of 14 years. This offence punishes any person, including health service providers, who through any unlawful way helps

and causes a woman to terminate a pregnancy. Under Section 142, any woman who unlawfully administers to herself any poison or noxious thing or uses any force or any means on herself or even permits such a thing to be used on her can be punished upon conviction with imprisonment of 7 years. This offence punishes the woman who uses any means or even permits any means to be used upon her for the purposes of terminating a pregnancy. Under Section 143, any person who supplies anything knowing that it will be used unlawfully to terminate a pregnancy can be punished upon conviction with imprisonment for 3 years. This offence punishes any person, including a pharmacist, who provides anything to a woman or to any person knowing that it will be used to terminate a pregnancy. The key feature cutting across these three provisions is intent. Under each of the provisions, it has to be established that there was an intention to terminate the pregnancy.

Unintended termination of a pregnancy is also criminally punishable in Uganda. Under Section 212 of the Penal Code Act, any person who through any act or omission prevents a child, who is about to be delivered, from being born alive can be punished upon conviction with imprisonment for life. The act or omission mentioned in the offence under Section 212 has to be of such nature that if the child had been born alive then died, the person would have been deemed to have killed the child. This offence removes the element of intent but also adds the element of a child who is about to be delivered. The section does not specifically define who amounts to a child about to be delivered but it may be argued that a child about to be delivered could include a foetus which is capable of living on its own outside the uterus. In such instances, the accused will not be deemed to have terminated a pregnancy but will be deemed to have killed an unborn child. While the Penal Code does not comprehensively provide for instances in which abortion may be permitted, it provides for a defence to a person accused of any of the offences defined by Section 141, 142 , 143 and 212 of the Penal Code Act. Under Section 224, any person who in good faith and with reasonable care and skill performs a surgical operation upon an unborn child for the preservation of the mother's life is not criminally responsible. The performance of the operation must however be reasonable having regard to the patient's state at the time and all the circumstances of the case. This section recognises that while the deprivation of the life of any person including an unborn child is not permitted, a person shall not be criminally liable where the termination of a pregnancy was conducted through a surgical operation with reasonable care and skill for the purposes of saving the life of the mother. This defence is available to both the person providing the surgical operation and the person on whom a surgical operation is being performed.

THE PENAL CODE ACT, CAP. 120 LAWS OF UGANDA

Section 141. Attempts to procure abortion.

Any person who, with intent to procure the miscarriage of a woman whether she is

or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable to imprisonment for fourteen years.

Section 142 procuring miscarriage.

Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means, or permits any such things or means to be administered to or used on her, commits a felony and is liable to imprisonment for seven years.

Section 143. Supplying drugs, etc. to procure abortion.

Any person who unlawfully supplies to or procures for any person anything, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits a felony and is liable to imprisonment for three years.

Section 224.Surgical operation.

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case."

Only the Penal Code Act has provisions with the force of law relating to abortion. However, the Ministry of Health has taken cognisance of the limitation of the law and has advanced its policy provisions for access to safe abortion services. The 2006 — and its replacement — the 2012 National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights provide guidance for the management and prevention of unsafe abortion and highlight several medical indications on which a person can access comprehensive abortion care.3 The indications highlighted include severe maternal illnesses threatening the health of a pregnant woman e.g. severe cardiac disease, renal disease, severe pre- eclampsia and eclampsia, severe foetal abnormalities which are not compatible with extra-uterine life e.g. molar pregnancy, anencephaly, cervical cancer and HIV-positive women requesting for termination. These indications – it can be argued – fall within the "threat to life" exemption provided by Section 224 of the Penal Code Act.

ACCESSING LAWFUL AND SAFE ABORTION SERVICES

The provisions in the policy documents relating to access to comprehensive abortion services in Uganda do not prescribe law but provide useful guidance for the interpretation of the laws that provide for abortion. They set a standard in medical practice that should guide the provision of access to safe abortion services in Uganda. The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights (2012) provide direction and focus in provision of reproductive health services and clarify the roles of the different actors involved in planning, implementation, service provision, monitoring and evaluation.7 These Policy Guidelines and Service Standards also spell out the general rules and regulations governing reproductive health services, components of reproductive health services, target and priority groups for services and basic information education and communication (IEC) for the target and priority groups.Ministry of Health has followed up these Policy Guidelines and Service Standards by developing the Standards and Guidelines on Reducing Maternal Morbidity and Mortality from Abortion in Uganda to guide health providers on the provision of comprehensive abortion care. The Standards and Guidelines are currently under consideration by the Ministry of Health. From the above discussion it is deducible that the law on abortion in Uganda is quite complex and confusing. While the policies providing for comprehensive abortion care have been rather progressive, their lack of binding force on the courts of law still presents a barrier to clarifying the law on abortion in Uganda. It is therefore imperative that a holistic approach be taken when appreciating the law on abortion so as to bring all the relevant pieces of law and policy together.

THE POLICY ENVIRONMENT

National policy guidelines for sexual and reproductive health services 2012

Comprehensive Abortion Care Services (CAC) This is health care provided to a woman or a couple seeking advice and services either for terminating a pregnancy or managing complications arising from an abortion. People who can get services for termination of pregnancy: Severe maternal illnesses threatening the health of a pregnant woman e.g. severe cardiac disease, renal disease, severe pre-eclampsia and eclampsia; Severe foetal abnormalities which are not compatible with extra-uterine life e.g. molar pregnancy, anencephaly; Cancer cervix HIV-positive women requesting for termination; In accordance with bullet one above Rape, incest and defilement.

ACCESSING LAWFUL AND SAFE ABORTION SERVICES

When a woman or girl qualifies for a lawful abortion, it is essential that she be able to access one when she needs it. But due to a number of barriers like a restrictive legal environment, lack of information on how to access safe abortion services and stigma against those who seek abortion services, accessing safe and lawful abortion

services is quite difficult. The Ministry of Health through the 2006 National Policy Guidelines and Service Standards recommended that in some instances the woman or girl should be assisted to terminate the pregnancy. These instances include severe maternal illnesses threatening the health of a pregnant woman e.g. severe cardiac disease, renal disease, severe pre-eclampsia and eclampsia; severe foetal abnormalities which are not compatible with extra-uterine life e.g. molar pregnancy, anencephaly; cancer cervix; HIV-positive women requesting for termination; rape, incest and defilement9. The 2012 National Policy Guidelines and Service Standards which replaced the 2006 version retained these provisions and the Standards and Guidelines for the reduction of Maternal Mortality and Morbidity from Abortion which are still being developed similarly retain the same permissions for termination of pregnancy. Accordingly, a pregnant girl or woman who presents herself to a health service provider with an unwanted and risky pregnancy as a consequence of any of the mentioned medical indications or is a victim of rape, incest or defilement has the right to be provided with the required form of abortion care.

In March 2014, Nabukeera Sarah (pseudonym) was drugged and defiled by a health worker when she went to a health facility for treatment. Because of the stigma surrounding abortion, she could not walk to a health facility and request for a termination of her unwanted pregnancy and yet being a victim of sexual violence, she was clearly entitled to the services. She was forced to obtain a clandestine abortion. For many girls, the decision whether to abort or not is influenced by whether they can continue with their education or not. In addition to the stigma that comes with being pregnant while in primary school, it is common for parents in rural areas who are struggling to get by to marry off their pregnant daughters to avoid the burden of taking care of another child. This effectively means that the girl will never have an opportunity to go to school again having since become a wife. The 2012 National Guidelines and Policy Service standards prescribe that victims of incest, rape and defilement can access comprehensive abortion care and prescribe that termination of pregnancy through medical induction and surgical induction can be conducted at a health facility from the Health Center IV level all through to the referral hospital level.Unfortunately, this information has not been made available to both the health workers who provide the services and to girls who need it like Nabukeera Sarah. Regardless of the policy space that has been opened, access to information regarding the availability of the services becomes a barrier to access to the comprehensive abortion services because the health workers do not know whether they are permitted to provide comprehensive abortion services. In turn, this leaves girls and women unsure as to whether they can access the services and if so, from where they can access them.

ABORTION TESTIMONY (NABUKEERA SARAH, 15 YEARS)

Around March 2014, I felt stomach pains and sought my mother's permission to go to hospital. I went to Walukuba Health Center IV. While there, I met Dr. Alex who treated me and gave me medicine that I took. A week later my stomach pains had not reduced and I went back to the same doctor, who checked me again and gave me more medicine. While I was leaving the hospital, I met another doctor who asked me what the problem was. I told him that the medicine that Dr. Alex had prescribed to me the previous week had not worked so I had come back. He looked at my medical notes and told me that the medicine was not good enough and I needed an injection. He took me to a separate room for it and told me to come back after two days.

This injection made me vomit and after three days when I came back he gave me yet another injection which he said will stop the vomiting. This medicine made me uncomfortable and I felt a lot of pain and I cried. Soon, I became disoriented, then unconscious. I was recovering my consciousness when I realised that the doctor was naked and forcing himself onto me. I made an alarm but my voice was not lound enough. Someone eventually heard and came and found the doctor naked and the doctor ran away. My mother was called and she came immediately.

I was taken to a police station where I made a statement and was taken for a medical check-up. The check-up found sperm in me but determined that I was not pregnant at that moment. I waited for my menstrual periods in vain and I started worrying. My mother took me for another check-up and this time found that I was pregnant. We reported this to police and despite their investigations they said that the doctor had absconded.

I got pregnant because I had been raped and I decided that I did not want the pregnancy and I wanted to abort. I did not want anyone to know about my decision so I told only my mother and no one else. I only worried about the price it would take to carry out the abortion. We had been told that abortion would lead to death, but I was not worried about this once I had made my decision.

When I went for the abortion the doctor asked me how pregnant I was and I told him. He asked me what I wanted him to do, and I told him. He then took me to another room where there was a female nurse. They told me not to scream because we were near a police station.

After the abortion, the doctor told me that I would feel pain for the next two and a half weeks but then my periods would come. By the time I got home, I was bleeding and feeling a lot of pain but the pain eventually went away.

COMPLICATIONS ARISING FROM UNSAFE ABORTIONS

Criminalisation of abortion can lead to an increase in the incidence and prevalence of unsafe abortions. Blocking women from safe abortion services means that women who have resolved to terminate their pregnancies will access the same clandestinely and often using unsafe methods. The Ministry of Health has found that unsafe abortions contribute to 26% of all maternal deaths in Uganda and even more women suffer from severe injuries12. It has also been shown that in a particular year 15 out of every 1000 women of reproductive age were treated for complications arising from unsafe abortions13. The number of women experiencing complications from abortion is likely much higher since many may not seek care because they either do not know where to access the treatment or because they fear being harassed by health care providers. In 2008, Esther Nagudi (pseudonym), then only 13 years old, was impregnated by her boyfriend who later denied responsibility for the pregnancy. Frustrated and afraid to face her parents, she resolved to terminate her pregnancy by whatever means. She sought an unsafe abortion from a quack health provider and this led to severe bleeding which she has been living with for eight years now. She had no idea where to go for post- abortion care as she lived in fear of being found out. She therefore went from one herbalist to another in an unsuccessful bid to treat her bleeding. It was only after she met the interviewer that she was able to obtain professional help to treat the complication.

Teenage pregnancy is still widely shunned in Uganda and girls who get pregnant always find themselves having to deal with stigma from their peers at school and from their parents who at times marry them off to the person who is responsible for the pregnancy. In addition to dealing with the physical and health effects of their pregnancies, teenage girls have to deal with rejection from their parents, their spouses, expulsion from home and school and rebuke from the community. In many instances, the fear of facing these socio-cultural consequences of teenage pregnancies compels girls to seek abortion services often involving unsafe health conditions and unqualified personnel. There is also a lack of information regarding access to contraceptive services and commodities which is important for the prevention of unwanted pregnancies. While people are generally knowledgeable on various methods of contraception, the lack of information on how to physically access the services and the several misconceptions are key barriers to accessing family planning services. In the case of Mirembe Sylvia, she was afraid to use condoms because she was afraid of the side effects of using them due to widespread misconceptions and misinformation on contraception.

Other barriers in accessing contraceptive services in Uganda include: limited range of contraceptive methods available, limited provider skills/ competence to provide some contraceptive methods, requiring young people to receive parental consent prior to accessing family planning services, lack of youth-friendly spaces for accessing family planning services and poor management of side effects of

contraception.Limited information on access to contraceptive services contributes to unwanted pregnancies. In the absence of comprehensive abortion care services; unwanted pregnancies lead to an increase in the rate of unsafe abortions, which are a major contributor to maternal mortality in Uganda.

MEDICAL OPTIONS FOR ACCESSING SAFE ABORTIONS IN UGANDA

In spite of the restrictive legal environment in Uganda, the health system has the capacity to provide safe abortion services to women who need them. However, these services are not readily available to the girls and women who need them. The legal defence in the Penal Code Act only excuses a termination of a pregnancy from criminal liability where it is performed with reasonable care and skill by a surgical operation (Section 224, Penal Code Act). It can be argued that the Penal Code's limitation to surgical operation was conceived in a health setting in which termination of pregnancy was only possible by way of surgical operation. Advancements in science and technology render this language unnecessarily limiting to the use of contemporary methods which do not require surgery and are safe. World Health Organisation (WHO) recommends medical abortion through use of mifeprostone and misoprostol to terminate pregnancies up to 12 weeks.19 The 2012 National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights similarly recognize advancement in medicine and technology for termination of pregnancy; they provide for the facilities at which termination of pregnancy can be carried out and the cadres of health workers who can perform them. Termination of pregnancy by medical induction can be carried out at health units at referral level (Health Centre IVs and above).20 Health workers at the cadre of nurse/midwife, clinical officer, medical officer and obstetrician/gynaecologist can terminate pregnancies by way of medical induction and evacuate incomplete abortions while only health workers at the cadre of the obstetrician/gynaecologist can terminate pregnancies by way of surgical induction21.

There is therefore a contradiction between the policy space that prescribes for the ability of nurses, midwives, clinical officers and medical officers to terminate pregnancies through medical induction and the legal environment which only permits termination through surgical induction which in this case can only be conducted by Obstetrician/Gynaecologists. In a setting like Uganda, where human resources are constrained, it is only reasonable that skilled and trained mid-level health workers be permitted to provide lawful and safe medical abortions.. A skilled health professional in this case would be any person who has appropriate skill in termination of pregnancy and is competent in providing this service, including a medical doctor, clinical officer, or midwife. The challenge of providing safe abortion services, however, goes beyond the legal and policy provisions. It is also affected by factors including ignorance of the law and policy, cultural and religious influences leading to conscientious objections, and fear of stigmatisation at the hands of health workers.

ENFORCING THE LAW ON ABORTION IN UGANDA

The law on abortion in Uganda remains too complicated for the authorities to enforce. While the High Court of Uganda has unlimited jurisdiction in all offences, there are offences that have been left to the jurisdiction of the Magistrates' Court and will therefore only be heard by the High Court when exercising its appellate jurisdiction. Under the Magistrates Courts, the Chief Magistrates can try all of the offences relating to abortion since they are empowered to try all offences, save for offences whose punishment is death The Magistrates Grade 1 can try cases of attempt to procure a miscarriage under Section 141, procuring a miscarriage under Section 142 and supplying drugs to procure a miscarriage under Section 143.23 In the Magistrates Courts, offences are prosecuted by the Director of Public Prosecutions (DPP), who has authority to institute criminal proceedings against any person on behalf of the State. In addition to instructing the police to investigate any matter, the DPP usually acts on the arrests and investigations of the police who are mandated to preserve law and order and prevent and detect crime. One of the strongest limitations of the law on abortion in Uganda is that it remains stuck in the criminalisation perspective and has not developed to appreciate the rights of women, yet the country is signatory to international human rights treaties and instruments that recognize the reproductive rights of women including access to comprehensive abortion care. Article 12 of the International Covenant on Economic Social and Cultural Rights recognizes the "right of everyone to the enjoyment of the highest standard of physical and mental health". This right includes "the right to control one's health and body, including sexual and reproductive freedom," which "requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health" The Convention on Elimination of all forms of Discrimination against Women under Article 12 requires Uganda to eliminate discrimination against women in their access to health-care services throughout their life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period. This obligation requires the state to among others "prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates" and when possible, amend legislation criminalizing abortion "to withdraw punitive measures imposed on women who undergo abortion". The African Charter on Human and Peoples' Rights under Article 16 also provides for the "right to enjoy the best attainable state of physical and mental health". Towards the fulfillment of this right, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) under Article 14 (c) requires the state to authorize abortion in cases of sexual assault, rape, incest, and when continued pregnancy endangers the mental and physical health or life of the women or the foetus. Uganda has however reserved on the application of Article 14 (c) of the Maputo Protocol.

Despite this, it has received recommendations from human rights mechanisms to ensure access to legal abortion including recent recommendations from the United

Nations Committee on Economic, Social and Cultural Rights urging it to decriminalize abortion and expand the circumstances under which services are made legal and available. These provisions have been incorporated into the Constitution, which requires the state to "provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement" and to "protect women and their rights, taking into account their unique status and natural maternal functions in society". Despite these well documented human rights of women in Uganda, the enforcement of the law on abortion has been limited to the criminal perspective ignoring the obligation the state has in enforcing the reproductive health rights of women.

Roles of the local communities in enforcement of the law on abortion

The communities in which girls and women live play a significant role in the prosecution of cases relating to abortion. When a girl gets pregnant, her first point of call is either a close and trusted family member or a neighbour in the local community. Given the very limited knowledge of the law and policy on abortion across most communities in Uganda, girls who should be able to access legal abortion are not provided that option. This leaves them at the mercy of clandestine and unsafe abortions. The local council leaders play both an administrative and policing role in the communities. They are usually closer to the community members than the local police since they are more approachable and have been democratically elected by the community. When there is any complaint relating to an abortion that has been performed in the area, the complaint is usually made to the local council leaders and not necessarily the police. With the limited knowledge on the law and policy on abortion in Uganda, such complaints can be used as examples to warn girls who may be contemplating termination of pregnancies. Unfortunately this can only increase the social stigma for girls or women, which can drive them to access unsafe abortions. When local leaders are faced with decisions regarding how to handle cases of abortion in their communities, they are often driven by values and beliefs of the socio-cultural setting in which they operate. In the case of Milly Nassuna below, it did not matter that she had a mental disability and had been defiled. When her case was presented to the local leaders, they ignored the circumstances of her case and sided with the community mob so as to make an example of Milly's situation.

When local leaders do not have access to information regarding reproductive health services and rights guarantees, and the law on abortion, girls who become pregnant within those communities have very little opportunity for access to justice even when they meet the legal indications for abortion such as when they have been sexually violated. Just like in the case of Milly, women can be unfairly subjected to criminal trial resulting in conviction and injustice. Ms. Namatovu Gorreti and Mr. Wasswa Alex are two local leaders who have addressed local complaints relating to abortion.

DEFENDING PEOPLE ACCUSED OF OFFENCES RELATING TO ABORTION

Every person accused of an offence in Uganda has rights to ensure that they get a fair trial. These rights include the right to a presumption of innocence, the right to be given adequate time and facilities to prepare one's defence, and the right to be afforded facilities to examine witnesses and obtain attendance of other witnesses before Court. These rights, however, can be very difficult in a society where suspects and the accused themselves are not sure of the law, and the state agencies narrowly interpret the law. This is exacerbated by a society that stigmatises any girl or woman who needs to access safe abortion services. When people are arrested or accused of offences relating to abortion, very little regard, if any, is paid to the protection of their rights, and very few people are similarly willing to stand up in defence of their rights. The Constitution of the Republic of Uganda entitles a person charged with a criminal offence to be permitted adequate time and facilities for the preparation of his or her defence and in cases where he or she is charged with an offence punishable by death or life imprisonment, he or she is entitled to legal representation at the expense of the State (Article 28 (3). Abortion related offences neither attract punishments of death or life imprisonment and this means that women or girls charged with such offences have to bear the cost of legal representation on their own which in most cases they are unable to do. The unfortunate yet preventable outcome is that in many instances, these women are forced to represent themselves in court without the requisite legal skills needed to make their case regarding whether they had an induced or spontaneous abortion, and, if induced, whether the grounds provided under the penal code or the 2012 Standards and Guidelines were applicable.

Nassuna Milly, who suffers from a mental disability, was impregnated by a man who denied responsibility for the child. She was forced into an unsafe abortion. Unfortunately, her abortion was discovered by the community members, and she was arrested. Without legal guidance of any sort, she was harassed by police until she conceded to the charges, and was later convicted. She served a sentence of five months. No regard was paid to her mental state or her right to receive legal guidance.

RECOMMENDATIONS

Enact the law envisaged under Article 22 (2) of the Constitution to clearly provide for the circumstances under which women and girls should have access to safe and legal abortion. Expand the legal indications for abortion in recognition of women's and girls' experiences and in compliance with human rights provisions guaranteed in the Constitution and in regional and international human rights instruments.

To the executive/cabinet

Develop and implement nation-wide sensitisation and awareness-raising campaigns on the legal framework of abortion in Uganda to address lack of information and

misperceptions by women and girls, communities, healthcare providers, and law enforcement among others, regarding access to and provision of safe abortion services and to ensure the rights of women who receive abortion services and the healthcare workers who provide them, are protected.

To The Judiciary

Provide clear interpretations of the abortion law which recognize the rights guarantees under the Constitution and comply with regional and international human rights norms and standards with respect to women's and girls' access to safe abortion.

To law enforcement agencies

Ensure police and other relevant law enforcement officials receive sufficient training on the abortion law and Uganda's human rights obligations, as well as appropriate investigative and interrogatory practices, to eliminate unwarranted arrests, detention, and prosecution of women, girls, and healthcare providers for abortion- related services.

CHAPTER SEVENTEEN
DEATH PENALTY (A NEED FOR REFORM)

The philosophy of death penalty also known as capital punishment in Uganda can be traced from the development of criminal law in England. Just like other laws, criminal law in Uganda was put in place during the colonial period with the reception clause of 1902. In regard to criminal law and death penalty, a fundamental departure was made in 1902 after the adoption of the Indian penal code of 1862 and chapter 106 of the consolidated amendments. We see that in 1980 despite the opposition by the Uganda laws, a long argument with the British commissioners who later considered that the punishment was fine to be applied in East Africa, death penalty was put in place in 1960's together with the abrogation of the 1962 constitution.

Then in 1966 the decree later replaced it during the reign of the dictator and field marshal Iddi Dada Amin. During this period, it was the foundation of the British colonial rule in Uganda, as seen in the book by Ibingira, the forging of an African nation and the political and constitutional evolution of Uganda from the colonial rule to independence that there was a lot of violation of right to life in that, many political opponents disappeared without discovering their whereabouts and others were executed through firing squad. Then in 1973 and 1976, many people were killed by still firing squad with no reasons as to why they were executed thus violating human rights and also ignoring the natural justice principle that states that an accused person has a right to be heard.

During the government of Amin.the death penalty as a form of capital punishment was given for offences like over charging, hoarding, smuggling, corruption, fraud and illegal currency sales. This led to many people executed and these killings also left many psychologically traumatized, abandoned, lonely, and insecure and others having a permanent sense of fear. Between the periods of 1980-85 of Milton Obote due to differences and a clash of parties mainly UPC and DP led the arbitral killings of the time resulting to many people loosing their lives.

Under the National resistance movement (NRM) government, death penalty as a capital punishment was killed. During this period there were a lot of extra judicial execution by the military. Men who kill innocent people and the state at that time didn't exert enough to protect these people that were innocently executed. On 20th April 1999 28 prisoners on death row, in 2009 they were 637 on death row, in 2006 566 in mates on death row as per the Uganda Prisons spokesman at the Luzira prisons. This shows that there was violation2 of rights as per Article 22 (1) of the constitution which provides that "no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court" In Uganda the

1995 constitution of Uganda and the penal code still provide for the death penalty as a punishment.

This calls for the total abolition of death penalty because of its violation of the fundamental right to life meaning that even the state has no right to take the life of a person.

IMPACT OF THE DEATH PENALTY, RELEVANT NATIONAL AND INTERNATIONAL LEGAL FRAMEWORKS

International legal framework:

Uganda is a signatory to the International Covenant on Civil and Political Rights (ICCPR) which restricts the application of the death penalty to the most serious crimes under Article 6(2). The main international treaty seeking to abolish the death penalty is the Second Optional Protocol to the International Covenant on Civil and Political Rights (Protocol). The Protocol urges state parties to take all necessary measures to abolish the death penalty within their jurisdictions. Uganda is not party to this Protocol. The UN Moratorium on the Death Penalty calls upon states that retain the death penalty to establisha moratorium on the use of the death penalty with a view to abolition, and in the meantime, restrict the number of offences it attracts and to respect the rights of those on death row. It also calls on States that have abolished the death penalty not to reintroduce it. This resolution, like all General Assembly resolutions is not binding on any state. The UN General Assembly has voted four times on this resolution (2007, 2008, 2010 & 2012) and Uganda has always voted against it. The UN voted on the fifth resolution on 21st November 2014 with Uganda abstaining.

Regional Legal Framework: Uganda is a party to the African Commission on Human and People's Rights (ACHPR). Article 4 of the ACHPR protects individuals from arbitrary loss of life but is silent on the death penalty. The African Commission on Human and People's Rights (ACHPR) has however, taken positive steps towards abolition of the death penalty. The ACHPR adopted two resolutions calling state parties to observe a moratorium on the death penalty. In 2011, the Chairperson of the ACHPRand its working group on the death penalty stated that the death penalty violated the African Charter on Human and People's Rights (ACHPR) and called for an Additional Protocol to the African Charter on Abolition of the Death Penalty in Africa (the Protocol). Towards this end, the ACHPR, during its 56th session in April 2015, adopted a draft of the Protocol. It is currently before the African Union.

Status of the Death Penalty in Africa: Out of the 54 African Union member states, 21 countries have a moratorium, 17 retain the deapenalty and 16 have abolished the death penalty.2 Amnesty International reported that there was a reduction in the number of executions in Sub-Saharan Africa in 2014 i.e. 46 judicial executions in

2014 compared to 64 in 2013.3 The countries that carried out executions in Sub-Saharan Africa in 2014 were: Equatorial Guinea, Somalia and Sudan. On the other hand, there was a sharp rise in the number of death sentences imposed; 907 death sentences in 2014 compared to 423 in 2013.4

1 These moratoriums were adopted in 1999 and 2008 respectively.

2 The countries that have abolished the death penalty are: Angola, Burundi, Cape Verde, Cote d'ivore, Gabon, Guinea-Bissau, Mauritius, Mozambique, Namibia, Rwanda, Senegal, Seychelles, South Africa, Togo, Djibouti, and Sao Tome and Principe.

3 Amnesties International, 'Death Sentences and Executions in 2014', p. 54.

In Northern Africa, Egypt executed over 15 people and imposed over 500 death sentences.5 Other countries, imposed death sentences in Northern Africa are: Algeria, Libya, Morocco, Western Sahara and Tunisia..Nevertheless, there have been positive developments towards abolition on the continent. Sierra Leone might soon abolish the death penalty. In May 2014, the Attorney General and Minister of Justice, Hon Franklyn Bai Kargbo, told the United Nations Committee against Torture that Sierra Leone would soon abolish the death penalty. These remarks were made to the committee in Geneva on May 2nd 2014. Mr Kargbo stated that his office had received instructions from the President, Ernest Bai Koroma to abolish the death penalty. Gabon became a party of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Additionally, the National Assembly in Madagascar adopted a bill that abolishes the death penalty in December 2014. The bill is awaiting signature from the President to become law. How states have abolished the death penalty: States have adopted various ways of abolishing the death penalty. One of the methods is through constitutional reform. In South Africa, the Constitutional Court through State v Makawanyane unanimously struck down the death sentence for murder for violating the right to life and human dignity and the right to be free from cruel, inhuman or degrading treatment and punishment. Abolition of the death penalty through the constitutional amendment is a secure and powerful safeguard against death penalty. Other methods include: referendum and decree by head of state.

The Death Penalty in Uganda

National Legal Framework: The Constitution of the Republic of Uganda, 1995 provides for the death penalty in Article 22 (1). Other laws that provide for the death penalty are: the Penal Code Act Cap 120, Anti-Terrorism Act, 2002 (as amended by the Anti-Terrorism Amendment Act, 2015) and the Uganda Peoples Defence Forces Act, 2005. The three statutes provided for the mandatory death penalty until the Susan Kigula ruling.

Offences that attract the death penalty

Penal Code Act, Cap 120 (8 offences)

Anti-Terrorism Act, 2002 (3 offences)

UPDF Act,2005 (17 offences)

Murder (section 189)

Aggravated Robbery (section 286 (2))

Rape under (section 123)

Aggravated defilement (section 129 (1) of the Penal Code Amendment Act 2007)

Treason and offences against the state (section 23)

Kidnap with intent to murder (section 243)

Smuggling while armed (section 319(2))

Detention with sexual intent (section 134)

Engaging in or carrying out acts of terrorism under Section 7(1)

Aiding and abetting terrorism under section 8

Establishment of terrorist institutions under section 9

Treachery (section 16)

Mutiny (section 18)

Failing to execute one's duties where such failure results in failure of an operation or loss of life (section 20) Offences related to prisoners of war where a prisoner of war fail to re-join the army when able to do so, or serves with or aids the enemy (section 21)

•Cowardice in action where it results in failure of operation or loss of life (section 29)

•Failure by person in command tobring officers under his command into action, or failure to encourage officers under his command to fight courageously or gives premature orders to attack, resulting into failure of operation or loss of life (section 30)

•Breaching concealment (section 31)

•Failure to protect war materials (section 32)

•Failure to brief or give instructions for an operation leading to failure or operation or loss of life (section 35)

•Disclosure of confidential information to the enemy or unauthorised persons or

discussion of confidential information in unauthorised places, and anything deemed to be prejudicial to the security of the army (section 37)

•Spreading harmful propaganda where there is failure of operation or loss of life (section 38)

•Desertion if the desertion endangers life, or leads to loss of life, or if the person deserts withammunition or war materials or joins the enemy (section 39)

•Failure to defend a ship or vessel when attacked or cowardly abandons it (section 50) Inaccurate certification of an air craft or air material (section 54)

•Dangerous acts in relation to an aircraft which may result in loss of life or bodily injury (section 55)

•Attempt to hijack an aircraft or vessel used by the army or belonging to the army (section 58)

•causing fire where fire results in death (section 61)

Susan Kigula Ruling

In 2003, FHRI filed a petition on behalf of all prisoners on death row challenging the constitutonality of the death penalty Susan Kigula & 417 Others vs. Attorney General (Constitutional Petition No. 6 of 2003). The petition argued, in the first instance, that the death penalty was a cruel, inhumanand/or degrading treatment and punishment and was therefore inherently unconstitutional. It also argued, in the alternative, that the mandatory death sentence was unconstitutional,and thatexecution by hanging is an unconstitutional method of execution. The petitioners further arguedthat the long delay between a sentence and execution thereof made an otherwise constitutionaldeath penalty unconstitutional. The Constitutional Court held that a mandatory death sentence violated the right to a fair trial by denying a proper sentence hearing and precluding the appellate review of criminal sentences and violated the principle of separation of powers; and that any inordinate delay lasting longer than three years would be unconstitutional. The Court, however, held that the death penalty in itself is constitutional. The court also ordered that: "For the petitioners whose appeal process was completed and their sentence of death had been confirmed by the Supreme Court, their redress would be put on halt for two years to enable the Executive exercise its discretion under article 121 of the Constitution. They could return to court after expiration of this period; Appellants still before an appellate court would be offered a hearing on mitigation of sentence; the court would exercise its discretion whether or not to confirm the sentence and a respect of those whose sentence of death would be confirmed the discretion under articles 121 should be exercised within 3 years." The Attorney General appealed the decision to the Supreme Court. The Supreme Court dismissedthe appeal and upheld the decision of the Constitutional Court and added some modifications to theabove judgement that: "For those respondents whose sentences were already confirmed

by the highest court, their petition for mercy under section 121 of the Constitution must be processed and determined within three years if no decision is made by the executive, the deathsentences shall be deemed commuted to imprisonment for life without remission;

For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and High Court may pass such sentence as it deems fit under the law."

2. Impact of the Judgement:

Restored judges' discretion: judges are no longer bound by law to hand down the death penalty for capital offences. They can now exercise discretion on

the suitable punishment for each case. There has been a reduction in the number of death sentences handed down by the judiciary i.e. the number of death sentences handed down pre-Kigula are significantly less than those post Kigula.

Reduction of death row inmates: As a result of the Supreme Court's ruling, inmates whose petitions of mercy have not been decided within three years have had their death sentences commuted to imprisonment for life without remission. Additionally, over 100 inmates have had their sentences mitigated.

This judgement has been used as jurisprudence within the region. In Tanzania, the Legal and Human Rights Centre instituted a case with similar grounds challenging mandatory death sentencing.

Since the ruling scrapped mandatory death sentencing, the second gravest punishment in Uganda is life imprisonment. Life imprisonment however, is defined under Section 86 (3) of the Prisons Act, 2006, as imprisonment for 20 years for purposes of calculating remission. According to the judiciary, this meaning of life imprisonment was too lenient; more so because some judges were handing down sentences above 20 years as an alternative for offences that attracted the death penalty. In 2011, the Supreme Court in Stephen Tigo v Uganda, defined life imprisonment, "as the natural life term of a convict. The actual period of imprisonment may stand reduced on account of remissions earned." This definition has not been fully understood by the judiciary. In this regard, FHRI has petitioned court toprovide a clear definition of imprisonment for life.

FHRI has developed a private members bill titled, 'The Law Revision (Penalties in Criminal Matters) Miscellaneous Amendment Bill, 2015'. The bill's objective is to enforce the Susan Kigula ruling by amending all laws that provide for the

mandatory death sentence. It proposes a reduction in the number of offences that attract the death penalty and seeks to amend the Trial on Indictment Act Cap 23 to the extent that it denies persons facing the death penalty the right to mitigation. The bill is supported by Hon. Alice Alaso, Hon. Fox Odoi, Hon. Paul Mwiru and Hon. Medard Ssegona.

Challenges faced by the Campaign The Death Penalty Campaign has faced a number of challenges. These include: Public support for the death penalty: In 2013, FHRI carried out a nationwide perception survey on the views of the public on the death penalty. The survey which enlisted 2000 participants revealed that 53% of the participants agreed that the death penalty should be retained. Social environment: There has been an increase in the number of crime rates and the gruesome nature of crimes. Some of these include: murder of muslim clerics and Assistant Director of Public Prosecution, Joan Kagezi, kidnap, ransom and murder of university students and terrorist attacks in neighbouring Kenya. Support of the death penalty by the President. In February 2015, at the 17th Annual Judge's Conference, the President urged theJudiciary to hand down more death sentences especially for murderers.

Statistics collected from an FHRI visit to the Uganda Government Prison (Upper) Luzira and Uganda Government Luzira Women's Prison, 24th February 2015. The male prisoners serving imprisonment for life have committed the following offences: aggravateddefilement, murder, kidnap and aggravated robbery. All the female prisoners serving imprisonment for life committed murder.

Passing laws that introduce new offences that attract the death . Some of these laws include: the Anti Terrorism Amendment Act, 2015, which added fourteen acts that amount to terrorism which is punishable by death.

Why should Uganda abolish the death penalty?

Deterrence: Proponents of the death penalty have often argued that the death penalty deters crime.here has however, been no empirical evidence to support this argument. On the contrary, studies have been conducted that show that the death penalty does not deter crime. In 2009, a study revealed that 88% of criminologists believed that long term sentencing had a stronger deterrent effect than the death penalty. In addition, a study was done on police chiefs in the United States which revealed that only 1% believed that the death penalty was the best mechanism to reduce violence. Lastly, the Death Penalty Information Centre in the United States revealed that states that still retain the death penalty have higher crimes rates than states that do not retain the death penalty.

Rehabilitation: Punishment is supposed to serve the following purposes: retribution, deterrence, rehabilitation, reconciliation and restorative justice. The death penalty if

carried out does not serve all the purposes of punishment as it only serves retribution. Rehabilitation is aimed at reforming the offender to prevent recidivism. Interactions with the Uganda Prisons Service have revealed that the rate of recidivism is very low especially for capital offenders. Article 126 (2) (d) of the Constitution of the Republic of Uganda promotes reconciliation between parties in both civil and criminal cases which would be curtailed by the death penalty. The aim of reconciliation and restorative justice is to bring the offender and victim together to foster healing. Punishment in Uganda has traditionally focused on retribution and deterrence. The criminal justice system needs to put more emphasis on rehabilitation, reconciliation and restorative justice. Public Opinion: One of the greatest challenges of the death penalty campaign has seen the public's continued support of the death penalty. This has prevented law makers from removing the punishment from the statute books because they want to appease the wishes of their voters. Nevertheless, laws should not be enacted due to the support or wishesof the majority but because they respect human rights. We have also carried out some studies that reveal that some victim's families do not support the death penalty. A woman we interviewed once stated, "No punishment ca bring my son back". In the United States and Taiwan, there are charities that have been started by victim's families in an endeavour to abolish the death penalty. Therefore efforts should go towards healing the family rather than revenge.Innocent people: Policing and judicial systems around the world are not infallible. In Uganda, Patric Lwanga Zizinga was sentenced to death for the murder of his alleged wife on 17th December 2004. Yet in fact, his wife at the time, Annet Nakibuuka, was still alive and he had no connection toAnnet Nakiwala, the deceased. During Zizinga's mitigation hearing in 2013, the court held that there was no evidence that he participated in the murder and it remained questionable as to who committed the murder. Zizinga spent 11 years and 3 months in prison with 8 and a half on death row. If Uganda actively executed people like China or Iraq, an innocent man would have been killed.

1. Recommendations:

• To Parliament: a. Pass the Law Revision Miscellaneous Amendment Bill, 2015.

b. Stop passing laws that prescribe the death penalty.

• To Judiciary: a. Provide a clear definition of imprisonment for life. The definition should take into consideration the rehabilitative purpose of punishment.

CHAPTER EIGTEEN
PRENUPTIAL AGREEMENTS: THE ENGLISH POSITION

English law has never developed a special regime for dealing with family assets and consequently has no notion of community of property. Whenever ownership of family assets are strictly in issue whether it be in the context of marriage or cohabitation regard is had to the ordinary rules governing property law which in our case rests upon the doctrine of separation of property. Grafted onto this basic position are the court's wide distributive powers under the court can make property adjustment orders?

Notwithstanding even more recent comments that prenuptial agreements are not enforceable it would be a mistake to think that English courts simply dismiss their relevance. Indeed, even before there had been indications that such agreements were a material consideration in deciding how property may be distributed after the divorce.

General Background to the English Position

To put the English position on prenuptial agreements into perspective some explanation of the general system for dealing with matrimonial property is required. In contrast to many (if not most) continental European legal systems, English law has never developed a special regime for dealing with family assets and consequently has no notion of community of property. Indeed in general (though see below in the context of Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618) it recognises no special concept of "family property" at all. Consequently whenever ownership of family assets are strictly in issue whether it be in the context of marriage or cohabitation regard is had to the ordinary rules governing property law which in our case rests upon the doctrine of separation of property which of course is the very opposite of the doctrine of community of property. Grafted onto this basic position are the court's wide distributive powers conferred by Parliament through the Matrimonial Causes Act 1973 (as amended) (hereafter "MCA 1973") which can be exercised upon the ending of the marriage through divorce or even nullity and now, through the Civil Partnership Act 2004, upon the dissolution of the civil partnership. Under these powers the court can make property adjustment orders (including the out and out transfer of ownership from one spouse to the other or even to any child of the family); it can order the property to be sold and direct to whom the proceeds should be paid; it can order the one-off payment of lump sums; it can order the sharing of pension rights and it can order continuing maintenance payments (known under English law as "periodical payments") both in favour of the former spouse and of any child of the family.

Not only are these powers wide ranging, effectively covering all aspects of family assets, but their exercise is subject to minimal statutory control. Indeed all the 1973 Act (through s 25) directs the court to do is

in deciding whether and how to exercise its powers "to have regard to all the circumstances of the case first [note, not paramount] consideration being given to the welfare while a minor or any child of the family who has not attained the age of eighteen";

when exercising its powers "to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards each other will be terminated as soon after the grant of the decree as the court considers just and reasonable" [the "clean breach" principle]; and

when exercising its powers: to have regard to each party's current and potential income, earning capacity, property and other financial resources, their (and their children's) financial needs, the family's standard of living before the marital breakdown, the spouses' age and any disability, the duration of the marriage, each party's contribution (past, present and future) to the welfare of the family (including looking after the home or caring for the family) and each party's conduct insofar as it would be inequitable to disregard it.

What is notably absent from the statutory guidance is any statement of what the overall object of the courts powers is. It was with this in mind that the House of Lords in White v White [2001] AC 596 held that the underlying object was to achieve a fair outcome between the parties as judged against the yardstick of equality and without being biased in favour of the money-earner as against the home-make and the child-carer. This approach (which, at a stroke, removed the socalled "glass ceiling" of any awards) has since been further refined by the House of Lords in Miller v Miller; McFarlane v McFarlane, above. That case recognised three principles upon which the redistribution of resources from one party to another following a divorce was justified, namely

theneeds (primarily housing and financial) generated by the relationship between the parties. This is often where the search for fairness begins and ends since in most cases the available assets are insufficient to provide adequately for the needs of two homes;

compensation for relationship-generated disadvantage - women in particular may still suffer a disproportionate financial loss upon marital breakdown having sacrificed their careers looking after the home and family; and

Sharing of the fruits of the matrimonial partnership of equals (sometimes referred to as "entitlement").

In this latter context their Lordships made a distinction between so-called "matrimonial property" – where the principle of equal sharing applies regardless of the duration of the marriage – and "non matrimonial property" which is not automatically shared since, in the words of Baroness Hale, "in a matrimonial property regime which started, as the English system did, with the premise of separate property, there remains some scope for one party to acquire and retain separate property". This distinction can be critical in short marriages but as Lord Nicholls pointed out in longer marriages non matrimonial property represents a contribution made to the marriage by one of the parties which in any event in many cases diminishes over time.

Precisely what amounts to non matrimonial property for these purposes generated a measure of disagreement though in general it refers to property brought into the marriage (other than that used as or to provide for the matrimonial home) and property acquired by gift or inheritance during the marriage. But whether it also does not include business or investment assets that have been generated mainly or solely by the effect of one party admitted of different views nor were assets acquired after separation specifically considered.

The above mentioned debate, however, should not mask the basic fact that more or less all the spouses' assets, however and whenever acquired, are subject to the court's extraordinarily wide powers and are therefore at risk of being redistributed. This risk, one might have thought, makes the need to recognise prenuptial agreements all the more pressing. Yet, as will be seen, English law almost alone not only in Europe but also among other common law jurisdictions, has hitherto refused to recognise such agreements as binding.

Clarification of Terms

In considering the English position on prenuptial agreements it will be useful to clarify terms. By "prenuptial agreement" (also referred to as "antenuptial agreements") is meant an agreement made before marriage concerning what is to happen to all the parties' assets in the event of a divorce or separation. Although there must now be the equivalent "pre-civil partnership agreements" there has yet to be an established phrase for such agreements. One (perhaps frivolous) suggestion (Barton C, 2005, 994) is that they can be referred to as "pre-reggies" (as opposed to "pre-nups"); others (Harris-Short S and Miles J, 2007, 551) refer to them as "pre-cips". Prenuptial agreements must be contrasted with "antenuptial settlements" (which are variable under MCA 1973, s 24) which seek to regulate the spouses' financial affairs upon and during their marriage but which do not contemplate the dissolution of the marriage (per Wall J in N v N (Jurisdiction: Pre-Nuptial Agreement) [1999] 2 FLR 745 at 751-2). In turn these agreements are to be contrasted with "post separation agreements", which are commonly negotiated during the divorce process, and which, though not binding, are positively encouraged. Finally, all the above, are to be contrasted with "cohabitation contracts" which, as their name implies, governs the parties' position

during and after cohabitation and in which neither marriage nor civil partnership is contemplated at all.

RÉSUMÉ OF ENGLISH CASE-LAW

There is no formal statutory prohibition against the making nor indeed the enforcement of prenuptial agreements. Section 34(1) of the MCA does, however, provide that insofar as a "maintenance agreement" purports to "restrict any right to apply for an order containing financial provisions" it is void, though it also states that "any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable". [There is now a similar provision concerning maintenance agreements between civil partners]. Strictly, prenuptial agreements fall outside the scope of since they are made before the marriage and are not therefore made between spouses. However, it is no doubt implicit that the prohibition extends to all agreements whenever made that purport to oust the court's jurisdiction. In any event, s 34(1)(a), a re-enactment of a series of provisions going back to s 1(2) of the Maintenance Agreements Act 1957, reflects the House of Lords' decision in Hyman v Hyman [1929] AC 601 that no spousal maintenance agreement can preclude a spouse from applying for financial relief in divorce proceedings. Based upon the premise that the court's power to order the husband to maintain his former wife after divorce was intended to protect not only her but also any third party dealing with her and indirectly the state since it may have had to support her, it was held to be contrary to public policy to permit to oust the court's jurisdiction. Put another way, as Lord Atkin said, the "wife's right to future maintenance is a matter of public concern which she cannot barter away". So stated, it is evident that the wide ratio of Hyman is that no matter when it is made an agreement it cannot oust the court's jurisdiction. At any rate, it is generally taken as read that pre-nuptial agreements are not binding. As Wall J said in N v N (Jurisdiction: Pre-Nuptial Agreement) (above):

> "The attitude of the English courts to antenuptial agreements… has always been that they are not enforceable.

In fact the decision in N v N was especially strict since Wall J considered that the public policy argument applied to individual clauses even if they could be severed from the rest of the agreement.

Illustrative of this standpoint is F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45, which seems to be the first reported English decision on pre-nuptial agreements (though in that case they were called "antenuptial contracts"). In that case under an agreement drawn up in Germany the wife of a millionaire would have been restricted to receiving the equivalent of a pension of a German judge, a result which Thorpe J (as he then was) dismissed as being "ridiculous". Although he acknowledged that "contracts of this sort are commonplace in the society from which the parties come", Thorpe J considered that in "this jurisdiction they must be

of very limited significance".

Despite these two decisions and notwithstanding even more recent comments that prenuptial agreements are not enforceable (see, for example, C v C (Variation of Post-Nuptial Settlement) [2003]

EWHC 742 (Fam), [2004] 2 FLR 1 in which Wilson J commented "Even nowadays, notwithstanding the law's growing respect for properly negotiated prenuptial agreements, it is impossible to argue that they can succeed in ousting the jurisdiction of the court") it would be a mistake to think that English courts simply dismiss their relevance. (Indeed, simply to ignore a prenuptial agreement could be thought to violate Article 8 of the European Convention on Human Rights as being an interference with the right to respect for private and family life). Indeed, even before N v N, referred to above, there had been indications that such agreements were a material consideration in deciding how property may be distributed after the divorce. In N v N (Foreign Divorce: Financial Relief) [1997] 1 FLR 900, for example, in a case involving Swedish nationals, it was held that while their prenuptial agreement was not conclusive in England (as it was in Sweden) it was nonetheless a material consideration to which the court should have regard in applying the criteria set out in the MCA 1973. More strikingly still, in S v S (Divorce: Staying Proceedings) [1997] 2 FLR 100 Wilson J said that there was a danger that the words of Thorpe J in F v F (referred to above) might be taken out of context. Looking to the future his Lordship added

"There will come a case… where the circumstances surrounding the prenuptial agreement and the provisions therein contained might, when viewed in the context of other circumstances of the case prove influential or even crucial. I can find nothing in s 25 to compel a conclusion at odds with personal freedoms to make agreements for ourselves… carefully struck by informed adults. It all depends".

Although Wilson J's comments were obiter (as subsequently pointed out by Thorpe LJ in Ella v Ella [2007] EWCA Civ 99, [2007] 2 FLR 35) the clear thrust of the post-2000 case-law has been to confirm the basic proposition that prenuptial agreements are a material consideration in the postdivorce redistribution of property exercise either as part of "all the circumstances" or as "conduct" (according to Connell J in M v M (Prenuptial Agreement [2002] 1 FLR 654 at 661) it does not matter which) which the court is directed to take into account under s 25 of the MCA 1973. Three cases illustrate the current position. In the first, K v K (Ancillary Relief: Prenuptial Agreement [2003] 1 FLR 120), the wife became pregnant and her mother pressured the husband to marry. Both parties came from wealthy backgrounds, the husband having wealth of around £25 million and the wife being a beneficiary of trusts valued at some £1 million. According to the prenuptial agreement, signed after each took legal advice, but without the husband making full disclosure, if the marriage ended

within five years, the wife was to receive £100,000 from the husband (to be increased by 10% p.a. compound) and the husband was to make reasonable financial provision for any children. The agreement made no provision for periodical payments for the wife. The marriage ended after 14 months and the wife sought a lump sum of £1.6 million and periodical payments of £57,000p.a for herself in addition to the £15,000 p.a. for their child. The husband offered a £120,000 lump sum (plus £600,000 to provide a home in which she could bring up the child). Given that the husband had agreed to marry the wife under pressure and upon the understanding that no capital claim in the event of an early termination of the marriage would be governed by their agreement, it was held that entry into the agreement constituted "conduct which it would be inequitable to disregard" under s 25(2)(g). Accordingly, it was decided that the capital element of the agreement should be upheld. However, it was thought wrong to confine provision to the wife to the husband's offer, since it failed to recognise her role as the child's mother. The court awarded the wife periodical payments of £15,000 p.a. It also ordered a lump sum of £1.2 million to be paid so as to provide the wife and child with a house that bore some relationship to the husband's standard of living.

The second and most recent of the illustrative decisions is Ella v Ella (above). In that case the spouses had dual British/Israeli nationality. They married in Israel in 1996 having made a prenuptial contract that provided for Israeli law to apply to any questions concerning their property and provided for separation of property with future assets belonging exclusively to the spouse creating them. The spouses made their marital home in London but in 2006 the marriage ran into difficulties and the wife petitioned for divorce in London. The husband countered by petitioning in Israel and in due course the Rabbinical court issued a consent order under which it would first determine the question of jurisdiction. Subsequently, on the husband's without notice application, the Israeli court ruled that it had exclusive jurisdiction. The husband then sought a stay of the English proceedings. At first instance the husband succeeded, Macur J holding that in reaching the decision the prenuptial agreement was a "major factor". This decision was upheld by the Court of Appeal. As Charles J (with whom Kay LJ agreed) said

"I agree with the submission made on behalf of the wife that absent the prenuptial agreement, this would be an English case and the husband would not be able to show that Israel was clearly the appropriate forum. The judge clearly recognises the connecting factors connecting the family to Israel. In my judgment the judge was right to conclude that, taken together with those factors, the prenuptial agreement is a major factor in this case, and in my view it is one that results in Israel being clearly the more appropriate forum".

Ella is interesting on a number of counts: it is the first Court of Appeal decision in which a prenuptial agreement has been held to be relevant (though none of the judges

made anything of that); it provides a rare example of a really influential role played by such an agreement, and it was held to be a major factor notwithstanding that the wife did not take independent legal advice before making the agreement (though in this respect it was acknowledged that the wife might not be deprived of a remedy in the English courts under Part III of the Matrimonial and Family Proceedings Act 1984).

A third illustrative case, in fact the first to be decided out of the trilogy is M v M (Prenuptial Agreement) (above). Here the parties were Canadian. The woman became pregnant and the man was opposed to her having an abortion. She refused to have the child unless they married. But having undergone an acrimonious and expensive divorce from his first wife, the man refused to marry her unless she signed a prenuptial agreement he had had drawn up by his lawyers, under which the wife would receive £275,000 in the event of a divorce. Despite being advised by an independent experienced matrimonial lawyer not to do so the woman signed the agreement since that was the only way she was able to ensure that marriage went ahead as planned. The marriage lasted five years by which time the husband's net worth was about £7.5 million. The wife sought £1.3 million. Connell J commented:

"The circumstances of this case illustrate vividly that the existence of a prenuptial agreement can do more to obscure rather than clarify the underlying justice of the case. On the one hand this husband would not have married the wife unless she signed the agreement. On the other hand this wife signed the agreement because she was pregnant and did not relish single parenthood either for herself or for her child and because she wanted to marry the husband. In my view it would be as unjust to the husband to ignore the existence of the agreement and its terms as it would be to the wife to hold her strictly to those terms. I do bear the agreement in mind as one of the more relevant circumstances of this case, but the court's overriding duty remains to attempt to arrive at a solution which is fair in all the circumstances, applying S 25 of the Matrimonial Causes Act 1973".

In the event Connell J ordered the husband to pay the wife £875,000 which because of the prenuptial agreement was "a more modest award than might have been made without it".

Should The English Position Be Reformed?

The current law on prenuptial agreements has attracted considerable comment from academics, judges and policy makers and serious consideration has been given to reforming the law.

A key criticism of the current law is that it is paternalistic and anachronistic (see Clarke B, 2004; Harris-Short S and Miles J, 2007 at 7.9.2 and Lowe N and Douglas G, 2007, 1013-1014). It has been pointed out that when Hyman was decided wives

did not then have full legal capacity and it made sense to protect them. Now, however, since they do have full competence and particularly because marriage is regarded as a partnership of equals together with the doctrine of separation of property there should be full freedom for both parties to make their economic arrangements. It has in any event been further argued that the decision in Hyman is illustrative of the former law's ambivalence about private agreements when as one commentary (Cretney C and Masson J, 1999, 359a) has put it "the fact that the parties had come to an agreement between themselves was… regarded not as a matter of satisfaction but rather as something which should arouse the court's vigilance", i.e. to be satisfied that the divorce was not collusive. But again all this has changed: the parties are encouraged to settle their financial affairs amicably. Indeed, post separation financial agreements either made independently or as a result of financial dispute resolution appointment, whilst not strictly binding, are normally followed provided the court is satisfied that each party was properly and independently advised (as established by Edgar v Edgar [1980] 3 All ER 887 and see Xydhias v Xydhias [1999] 1 FLR 683). Accordingly it can be argued that the law is wrong to treat prenuptial agreements differently. Furthermore, given that some of the sensitivities regarding prenuptial agreements are peculiar to marriage it is not absolutely certain that so-called "precips" will be treated the same way. Yet it surely cannot be right to treat prenuptial and pre-cips agreements differently. That would only compound another awkward comparison, namely, the apparently developing recognition of cohabitation contracts at any rate with regard to financial arrangements contained therein (see Sutton v Mischon de Reya and Gawor and Co [2003] EWHC 3166 (ch), [2004] 1 FLR 837) (though in this last respect it has been pointed out (Herring J, 2007, 243) that since there are no redistributive powers following the breakdown of cohabitation between unmarried couples cohabitation contracts cannot be said to be "robbing" the court of such power).

In defence of the current position there are a number of so-called public policy arguments but, say advocates for reform, they are either unpersuasive or point to other alternatives for dealing with the problem. In the former category is the argument that prenuptial agreements diminish the importance/sanctity of marriage. But as Connell J said in M v M this is hardly a strong argument given the high number of divorces. Ironically it is now being said that the inability both of wealthy people and those already divorced to protect their already accrued property acts as a deterrent to marriage or remarriage. Indeed, some say that an ability to make binding prenuptial agreements could add stability to marriage second time round. In any event such binding agreements could lead to greater certainty and hence to reduced costs in the event of divorce.

One concern commonly expressed about making prenuptial agreements binding is that they could inappropriately transfer the burden of maintaining an ex-spouse away

from the individual onto the State. But so the argument goes, that problem could and should be dealt with by appropriate social security laws. Other issues include the adequate protection of children, the appropriateness of agreements made long ago or where circumstances have entirely changed, and protection of the weaker party. These problems could be solved respectively by dealing separately with children, having so called "sunset clauses" or by simply relying on standard contractual principles such as duress, frustration and so on. Of course, as many have observed, the danger of making agreements binding is that the uncertainties and arguments are simply shifted onto the validity and meaning of the agreement as opposed to the current settlement issues on divorce thus negating the argument that prenups lead to greater certainty and thus reduced divorce costs.

One further argument is that English law is simply out of line internationally, not just with the civil systems of continental Europe but also many common law systems as well. Australia, New Zealand has changed their laws relatively recently and Ireland are currently considering doing so (see e.g. Fehlberg B and Smyth B, 2002, 127 and the Report of the Study Group on Pre-nuptial agreements, 2007). In the European context there is, against the background of freedom of movement so dear to the EU, an arguable need for harmonisation. Is it fair that a couple having made a binding prenuptial agreement in one Member State should on divorcing in England find that the agreement can be totally undone? In his postscript to his judgment in Charman v Charman [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [124] Potter P commented

"The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of civilian member states is exacerbated by the fact that our law has so far given little status to prenuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principle of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at least the opportunity to order their own affairs otherwise by a nuptial contract?"

How then have the English policy makers reacted to these type of arguments?

In its Consultation Paper Supporting Families published in 1998 the government itself suggested that prenuptial agreements could usefully be made binding but subject to safeguards, namely, that the parties received independent legal advice before entering the agreement; that there be full disclosure of each parties' assets and property before the agreement was made and that the agreement is made no fewer than 21 days before the marriage. Furthermore, the agreement would not have been binding if there was a child of the family whether or not that child was born at the time the agreement was made or where under the general law of contract the agreement would be unenforceable or, finally, where the agreement would cause significant injustice to one or both parties or a child of the marriage. These safeguards

are so wide-ranging that most agreements would have difficulty negotiating the hurdle. Indeed the point has been made that Ella apart, all the Englishcases referred to would fail to do so. In other words, had the proposed reform been enacted it would have made little or no difference to the current law. In the event the proposal did not find favour apparently mainly because of concern that parties' circumstances could change as time passed following the agreement so that it would be unfair to keep them to its terms and was abandoned. At one stage the majority of judges of the Family Division proposed that the terms of any prenuptial agreement should be made an additional factor for the court to take into account under s 25 of the MCA 1973. A minority would have gone further and provided that both pre and post nuptial agreements should be presumptively binding (see Wilson N, 1999 at 162-3). Building on that opinion, Resolution (the Solicitors' Family Law Association, 2004) proposed that Section 25 be amended so as to provide that agreements should be considered binding "unless to do so will cause significant injustice to either party or to any child of the family".[114]

While this latter proposal might be useful inasmuch as it would at least potentially harmonise the approach to prenuptial agreements it seems doubtful that any of the decisions cited in this paper would have been decided differently had it been enacted which raises the question of whether any such reform is worth the candle.

In any event does not English law have the best of all worlds, namely, to accept prenuptials as being a material consideration in deciding how to redistribute the family assets but not to being bound by them so as to prevent the court being able to do justice or more importantly able to avoid injustice between the parties? In this sense those continental systems which simply view prenuptial agreements as binding are surely too rigid and inflexible – a position, it is submitted, that is exposed by the trilogy of cases, F v F, K v K, M v M (discussed above) which I would argue were rightly decided. Whether there is a material difference between agreements which aim to set out or limit what assets each are to have and those such as Ella v Ella determining which law is to apply can possibly be debated. In principle, however, it is submitted that there is no real difference but then the author comes from a jurisdiction that espouses the lex fori approach

[114] *Note: a Private Member's Bill – the Pre-Nuptial Agreements Bill – promoted by Quentin Davies MP which aimed to make such agreements binding – did have a First Reading in July 2007 but lapsed in October 2007.*

CHAPTER NINETEEN
A POWER DIFFERENTIAL EQUALS COERCION IN RAPE CASES

The 1995 Constitution of Uganda provides that women shall be accorded full and equal dignity of the person with men and further places an obligation on the state to provide the facilities and opportunities necessary to enhance the welfare of the women to enable them to realise their full potential and advancement[115]. In addition, all laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by the constitution[116]. This is why offences such as rape that degrade and take away women's dignity are considered acts against morality and criminalised by the state.

Procedures for litigation in Rape Cases

Prosecutions of a criminal nature including for torture or sexual offences such as rape are under the remit of the Director of Public Prosecution (DPP). The complainant is required to file a complaint with the police, following which the police undertake investigations and gather evidence which will then be submitted to the DPP for prosecution. In Uganda, the trial court responsible for dealing with sexual offences is the High Court[117]. One may opt for a private prosecution and this entails preparation of a charge sheet and requesting the court to issue a summons. The DPP however reserves the right to take over the private prosecution when deemed necessary.

Civil claims of Rape are also an option and these are likely filed for compensation with the Human Rights Commission. Under the Human Rights Commission, the practice for justice in cases of Rape has been mainly to lodge civil claims against the Attorney General with the intention of recovering monetary compensation for the suffering inflicted on the victim. In these cases the alleged perpetrator may never be known let alone punished individually. Moreover, since the Commission primarily addresses human rights violations by State agents, it only has jurisdiction when rape is by an officer of the State or when it is defined as discrimination.

Defining Rape

The World Report on violence has defined rape as physically forced or otherwise coerced penetration, even if slight, of the vulva or anus, using a penis, other body parts or an object[118].It involves sexual assault involving unwanted touching of intimate body part for sexual arousal and must includes penetration even slightly and it is not

[115] *Article 33(1) of the 1995 Constitution of the Republic of Uganda.*

[116] *Ibid., Article 33(6).*

[117] *Ntambala v Uganda 2018 UGSC 1 (18January 2018) para 2.*

[118] *Chapter 6 of World Report on Violence and Health, vol.2 pg 149 by World Health Organization (2002) .*

necessary that ejaculation be present. However, Penetration under rape is limited to penetration by a sexual organ. This implies that excludes the penetration of the mouth or anus by other parts of the body, or by any object used by the rapist to penetrate victim's vagina. In law the term rape refers to a situation where a man has carnal knowledge of a woman by force, against her will and against her consent where such carnal knowledge is proved by establishing penetration of the complainant's sexual organ[119] where penetration implied in a sexual act involves penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ and the unlawful use of any object or organ by a person on another person's sexual organ. Where there is no penetration of the penis into the vagina, such an offence is construed as attempted rape[120]. In Bassita Hussein vs. Uganda[121], the Supreme Court of Uganda held that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by Medical evidence or other evidence and that whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.

The penal code Act of Uganda also defines rape as unlawful carnal knowledge of a woman or a girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in case of a married woman, by personating her husband[122]. To sustain a conviction of rape there should be proof of non-consensual sex under the common law and case law. Upon conviction, the penal Code provides a maximum sentence of death[123].

Rape is a crime categorised under offences against morality[124] and crime has been defined by Smith and Hogan as a public wrong[125]. In a nut shell, it is an act of forcing an adult female especially a woman, in sexual intercourse which is evidently immoral. Fortunately, the Constitution of Uganda prohibits torture[126] and gives the right to file for compensation upon violation of any right or freedom guaranteed by the Constitution[127]. The case of Uganda V Sheikh Abdul Said Nyanzi Masumbuko & others[128] breaks down and elaborates all the ingredients of the offence of Rape which include;proof of penetration by a male sexual organ Absence of the victim's consent and Consent obtained by fraud force intimidation and deceit.

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[119] *Section 129 (7) of the Penal Code Act Cap 120 defines sexual organ to mean a vagina or a penis.*

[120] *Ibid., section 125.*

[121] *Criminal Appeal No. 35 of 1995.*

[122] *Ibid., section 123.*

[123] *Ibid., section 124.*

[124] *Chapter XIV of the Penal Code Amendment Act Cap. 120.*

[125] *Ormerod, D. ,& Laird, K. (2015). Smith and Hogan's Criminal Law (14thed.) Oxford University Express.*

[126] *Article 24 of the 1995 Constitution of the Republic of iUganda.*

[127] *Ibid., Article 50.*

[128] *(2006) [2008] UG HC 22.*

Consent verses Coercion in Rape Cases

Consent in has been defined as the voluntary, specific, informed and unambiguous indication of a person's wish by which he or she, signifies agreement to performance of a sexual act129. In the case of Olugboja130 it was stated that consent is a state of mind and the assessors needs to be directed to make up their own mind regarding the effect if the consent was present, keeping in mind the state of mind of the victim at the time of the rape. The absence of consent is an essential ingredient in securing a conviction for rape will be entered once it is proved beyond reasonable doubt that male accused had unlawful carnal knowledge of the complainant, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm or by means of false representation as to the nature of the act, or in case of a married woman, by impersonating her husband131.

In addition, a person consents if she agrees by choice and has the freedom and capacity to make that choice. The Age of Consent in Uganda is 18 years old. In Nakholi V Republic132 the defendant raised a defence that a girl of 16 was able to consent and court rejected the same. This is the minimum age at which an individual is considered legally old enough to consent to participation in sexual activity. It is also important to note that giving consent to sexual activity does not make the decision and therefore,a person who has consented to performing a sexual act with another, he or she may withdraw such consent at any time befor or during the performance of the sexual act133. Therefore, where the complainant behaved in a way that suggested consent then it may not amount to rape.

On a contrary, Coercion is traditionally understood as the involvement of physical force such as in the case of Uganda v Abel Ochan134 where it was alleged that the accused had unlawful carnal knowledge of the complainant. On that day, the victim ran out of the accused's house, took away the accused trousers and there was evidence that the accused admitted that the trousers belonged to him. The accused was also found lying completely naked inside the house, the complainant's necklace was broken and the beads were found scattered on the floor inside the house and the injuries sustained by the accused showed that force had been used against her.

There is a common misperception that rape can only be committed if a man uses physical violence or force to subdue a non-consenting woman and that victim sustained injuries in the process of resisting the aggression. However, the threat or use of this type of physical compulsion represents but is one end of a 'continuum of

129 *Part I of the Sexual Offenses Bill 2019.*

130 *[1981]3 All ER 443.*

131 *Section 123 of the Penal code Act cap 120.*

132 *(1967) EA pg 337.*

133 *Clause 36 of the Sexual Offences Bill 2019.*

134 *(1972) ULR 13.*

coercion'135. Apart from physical force, it may involve psychological intimidation, blackmail or other threats such as the threat of physical harm, of being dismissed from a job or of not obtaining a job that is sought. Other circumstances where coercion may be depicted is when the person aggressed is unable to give consent for reasons such as being drugged, asleep, drunk, or mentally incapable of understanding the situation136. It is for this reason that court has pulled away from the requirement proof of ruptured hymen. In the case of Mukasa Evaristo vs. Uganda137, in determining whether there was penetration, court held that the rupture of the hymen of a victim of defilement was not essential for arriving at a verdict and that what would be of essence is whether on the evidence available, the prosecution has proved beyond reasonable doubt, that the accused before court had had sexual intercourse with the child. The fact that a child's hymen is already ruptured does not mean that the victim cannot be defiled after the rapture of the hymen." Although this is a case of defilement there is a shared ingredient of penetration with rape as well. Sexual coercion does not necessarily need to involve overt threats. A threat may be implied or the nature of the relationship may be inherently coercive so that an individual's capacity to freely agree to sexual activity is negated138.

According to Scott Anderson139, Rape can be conceptualized in two folds that is; Asnon-consensual sex and coercive (forced) sex. The two sounds intertwined but are different concepts as one can exist without the other. He argues that a definition of rape as non-consensual sex (where there is no consent) is simply too broad and thinks that it should not be made criminal because of the various circumstances such sex obtained by fraud, might be both immoral and non-consensual in some important sense, but probably shouldn't be a crime. For instance, if a woman gave into sex after a man deceived her about his background, or, a wife who unhappily gives into sex to her husband with the aim of saving her marriage should not be categorised as rape. He prefers the second concept, rape being conceptualized as coercive sex and insists that coercion is the missing element in our understanding of rape: it is coercion, he argues, not either force or non-consent per se, that renders the sex that is obtained through various credible threats, so harmful. It is also coercion, as Anderson understands it, which ties the act of rape to the broader subordination of women. I agree with Anderson's perspective because consent is very broad to the extent that a yes can mean a no when obtained under duress and that there are instances where consent is not given freely but for personal reasons yet it does not amount to rape. The benefit of conceptualizing rape as mainly coercive sex is that helps to clearly bring out the aspects of mens rea and actus reus and also is releveant in grading of the offence in terms of distinguishing the levels of coerciveness.

135 *McGregor J, (2005) Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously (Ashgate: Adershot, pg 164.)*

136*Ibid., Chapter 6 of World Report on Violence and Health, pg 149*

137*9 SCCA No. 53 of 1999.*

138*Leahy, S. (2014). 'No Means No', But Where's the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence.The Journal of Criminal Law, 78(4), pg. 312*

139*Anderson, S. A. (2015). Conceptualizing Rape as Coerced Sex.SSRN Electronic Journal.delivery.php (ssrn.com)*

Power Differentials as a form of coercion in Rape Cases

There are a whole range of situations where a male with power, influence or authority over a female can abuse that power, influence or authority in order to have sexual relations with the female. Such cases should be charged as rape as the female has been coerced into having sexual relations when she does not wish to do so. Because of gender inequalities and gender discrimination, it is predominately males who are in a position to abuse their authority to sexually exploit female and sometimes even their male subordinates. Rape victims can be seriously harmed by rapes which are not facilitated by either violence or the threat of it. The wrongness of rape and the harms of rape do seemingly stem, at least in substantial part, from the fact that the sex is coerced from the victim through a use or manipulation of power differentials between men and women that convey a credible threat whether or not such a threat is uttered, and thus facilitates the rape even in the absence of force140.

The requirements of force and resistance have long since been replaced by the consent standard with common law jurisdictions now typically conceptualizing rape as sexual intercourse without consent. Munro points out, despite the formal abolition of the force requirement, in practice evidence of physical injury or at least the threat thereof (for example, use of a weapon, words of violence) makes a conviction for rape more likely when these features are present141.

On a contrary, according to Anderson's account, as I have already elaborated under the definition of Rape heading of this work, the victim's consent or non-consent is not an essential part of the definition of the crime even though it may be a good fit for raising a defence. Rather, his definition is concentrated on coerciveness; the accused person's acts and mental states, rather than those of the complainant to the question of whether or not did the accused created or took advantage of pre-existing differentials in the ability and willingness to use force, threat or violence to obtain sex. Force on this account need not be direct force but rather, the "differentials" in power that facilitate the rape may pre-exist the act itself, and may be as much a function of the similarity between the agent and others similarly situated, as anything the agent himself does in the particular encounter142.

The reason why I concur with Anderson's coercion based conceptualization of rape is that it helps to mitigate the under-inclusiveness or gaps in the definitions of rape that focus on literal or direct force leaving out the concepts of duress or power differential intricacies. In addition, the concept helps to guard against the

[140] *Robin West (2016) On Rape, Coercion and Consent, (reviewing Scott Allen Anderson, Conceptualizing Rape as Coerced Sex, Univ. of British Colombia (2015), available at On Rape, Coercion and Consent - Jurisprudence (jotwell.com).*

[141] *Leahy S.(2014. 'No Means No', But Where's the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence'.Journal of Criminal Law pg. 309.*

[142] *Robin West (2016) On Rape, Coercion and Consent, (reviewing Scott Allen Anderson, Conceptualizing Rape as Coerced Sex, Univ. of British Colombia (2015), available at On Rape, Coercion and Consent - Jurisprudence (jotwell.com). accessed on 19/07/2021*

over inclusiveness consent in conceptualizing rape especially when yes means no. Rubenfeld alleges that a coercion standard for rape boils down to essentially the same thing as the nonconsent standard. "Coercion is objectionable because a coerced 'yes' does not reflect a valid or genuine consent," and argues that coercion conceived like duress is of legal interest only because it undermines free agency, and hence legal responsibility143.

How power differentials render the pressure "coercive" are depicted through direct force, violence, or threats of violence, but might also include taking physical advantage of another who is mentally or physically incapacitated because of intoxicants or cognitive or mental impairment. Most important, though, the power differentials at the core of the "coerciveness" that renders sex to be termed as rape might be facilitated not by direct threats, but by drawing upon "the link between the person Coercing and others of a similar kind who have used similar powers in the past.[144]" When sex is "coerced" in any of these ways, such that the victim is not able to "usefully or reasonably ignore, deflect, evade, or work-around the enforcement of the threat[145]," then the sex that results should be understood as rape.

Examples of power differential scenarios showing coercion in Rape include differential power relations between;

Employers and employees. As we know a lot of rape cases start with a form of sexual harassment which can include any form of unwanted sexual behaviour that excludes penetration. Starting with the constitution which places a legal obligation on employers and individuals to treat women with equal dignity of person to women as to men[146], the Employment Act[147] also places an obligation on the employer to put in place measures to prevent sexual harassment. As McGregor[148] notes, at least in some such cases, the employee who is threatened may have no viable alternative but to acquiesce because the loss of her job would constitute a serious, undeserved evil.

In Schools and Universities, students especially females who are above eighteen are more likely to face threats of failing exams or a semester to as far as getting a dead year by those in power such as teachers and head teachers in case they fail to give in into sexual favours. In addition rejection of the same may lead to hostility both at a physical and psychological level[149]. This amounts to clear coercion and even if consent is given in such cases it is defective and does not fit the definition of

[143] *Rubenfeld J. (2013). "The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,"Yale Law Journal 122 pg 1412.*

[144] *Anderson, S. A. (2015). Conceptualizing Rape as Coerced Sex.SSRN Electronic Journal pg.30.*

[145] *Ibid.*

[146] *Article 33 of the 1995 Constitution of the Republic of Uganda.*

[147] *Section 7 of the Employment Act 2006.*

[148] *McGregor J, (2005) Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously (Ashgate: Adershot 165).*

[149] *Muhanguzi, F. K. (2011). Gender and sexual vulnerability of young women in Africa: experiences of young girls in secondary schools in Uganda. Culture, Health & Sexuality, 13(6), 713–725. https://doi.org/10.1080/13691058.2011.571290 accessed on 18/07/2021*

consent[150].

In health care settings, Admittedly, conduct like this is prohibited by the codes of conduct of the majority of professionals and those who make such direct or indirect threats to clients could be liable for professional censure if a formal complaint is made to their professional body. Indeed, there is considerable evidence of censure of doctors for engaging in sexual relationships with their patients .While professional censure is an important consequence of such abuse of authority, where professionals obtain sexual intercourse by coercive means this should also be recognised as a criminal offence.

Armed conflicts and refugee settings. Refugees in Uganda suffer cases of rape,also owing to the scarcity of means for adults to earn a livelihood, refugees send their children to work for local people. In the course of the work they are often sexually abused trading sex for money and services is also prevalent as a means of survival. Vulnerability of these refuges impeded access to justice and ignorance of the law. Article 50(1) of the 1995 Constitution of the Republic of Uganda[151] ensures the right to seek redress in a competent court for the threat to or actual violation of the rights of a citizen, and empowers anyone who desires to seek redress in courts for the violation of his or her constitutional rights to do so. The right to engage in a case action in court is provided for in Article 50(2). Concerning access to the courts for refugees in the territory, the Refugee Act[152] declares that refugees are to have free access to the courts, including legal assistance under the applicable laws. According to a recent comparative analysis of rape committed against refugees in South Africa Tanzania Uganda had a high number of refugee rape victims and yet zero brought to court for prosecution[153].

Abusive Relationships including marital rape. Rv R[154] was a case on appeal where the issue was whether a husband could not rape his wife as marriage amounted to irrevocable consent.Court upheld the conviction and stated that there was a common law fiction that marital rape was an exception under rape. The concept of irrevocable consent by a wife to her husband was said to be an unacceptable in modern times where both the husband and wife are seen as equal partners and therefore, rape is rape irrespective of the relationship between the parties. In Miller v R[155] it was held that husband cannot rape his wife, consent was obtained at marriage and the defendant could only be charged with indecent assault and bodily harm. The decision has been criticised to the extent that deprives a wife from having options to choose to not have

[150] *Part I of the Sexual Offenses Bill 2019.*

[151] *Supra.*

[152] *Section 29(h) of the Refugee Act 2006.*

[153] *Eberechi, D. R. O. (2020). A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda.Potchefstroom Electronic Law Journal, pg. 18 para 1https://doi.org/10.17159/1727-3781/2020/ accessed on 19/07/2021*

[154] *[1992] 1 AC 599.*

[155] *[1977]2 SCR 680.*

sex at a given time.

All of the scenarios listed here are 'non-violent'. There is no violence extrinsic to the sexual act itself and no threats of physical harm such as beating or assaulting with a weapon. In some examples the threat is implicit and hails from the coercive nature of the relationship or the circumstances in which the complainant finds herself. The power differentials gives the greater power bearer has the ability and willingness to broadly interdict the actions of another and is unchecked by fear of retaliation, then that agent is able to require that the target of such force meet any arbitrary conditions the powerful agent may set as a condition of doing anything at all.[156]

Need for Amendment and Revision of the Law on Rape

A Power differential as a form of coercion in rape impedes women from a genuine sexual choice; there is no option for the complainant that consists of their non-compliance with the demand and avoidance of the threatened feared consequences. Those with the greater power in a given instance interfere with the complainant's options and this is why it should be recognised as a serious form of coercion in sexual offences. Undoubtedly, such behaviour should attract the attention of the criminal law and the following should be considered;

"Coercion" should be defined in detail, spelling out circumstances of not only non-physical force but psychological force as well to contain circumstances which, respectively, give rise to evidential and conclusive presumptions that consent is absent. These are to include types of coercion which are incompatible with a free agreement to engage in sexual activity. This will help to improve the chances of obtaining a conviction for sexual coercion without extrinsic physical violence.

"Consent" should be defined in detail as opposed to stating what it is not; force, threats, intimidation, fear of bodily harm and false representation as to the nature of the act. Consent should be distinguished from agreement. The definition can be somewhere close to voluntary or freely given, knowledgeable and informed[157] .

Use of threats of violence mentioned under section 123 of the Penal Code Act cap 120 should not be limited to only immediate ones but accommodate future threats. The immediacy of this requirement has faced criticism since it seems to imply a fairly strict temporal limitation on the validity of a threat. Unfortunately, a threat of future violence undermines sexual autonomy compared to a more immediate risk yet a threat of future violence may be distant in time but such that one can do nothing between now and then to avoid it. As stated by Suzanne Leahy, "Immediacy is no essential for a threat to infringe an individual's ability to freely choose to engage in

[156] *Anderson, S. A. (2015). Conceptualizing Rape as Coerced Sex.SSRN Electronic Journal pg.31.*

[157] *ConsentAwareness.net | Defining "consent" is the critical key to conquering sexual assault!. accessed on 19/07/2021*

sexual activity.[158]"

Conclusion

Coercion in any form provided it negates the complainant's capacity to freely choose to engage in sexual activity is serious enough to ground a conviction for rape. In practice, sexual coercion is a far more complex issue than it is in principle. Non physical forms of coercion such as power differentials are impeded by the societal traditional expectation that a Rape involves some degree of force and resultant physical injury and as result there is a lot of sexually coercive practices that go unrecognised and unpunished. It is evident that there is a very clear gap between the law in writing and what this law is capable of achieving in practice. Therefore there is need for the introduction of an offence of obtaining sexual intercourse by use of a power differential in order to offer a practicable means of acknowledging that non-violent sexual coercion is worthy of the attention of the criminal law and exploration of the same is likely to pave a way of justice for victims of non violence sexual coercion.

[158] *Lealy S.(2014. 'No Means No', But Where's the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence'.Journal of Criminal Law pg. pg. 315).*

CHAPTER TWENTY
SURROGACY AND ITS LEGAL CONSTRAINTS

SURROGACY IN RELATION TO THE CHILDREN'S ACT CAP 59 AND RELEVANT LEGISLATION

This chapter gives a detailed analysis on the concept of surrogacy; giving a broad explanation on the what, why, where and how is surrogacy practiced in the Ugandan context. I labor to give an accurate definition of surrogacy agreements while referring to how the same has been and is being practiced in Uganda as well as other jurisdictions but more so, under what legal and policy regulations. I bring the argument back home with a detailed study of surrogacy practice within the precincts of Children's Act cap 59, wherein it shall be inevitably stated that the latter does not stipulate specifically how surrogacy should be conducted.

I have make mention of the challenges that have arisen in the practice of surrogacy which leave a lot to be desired in ensuring a healthy and fertile environment for surrogates mothers, children and commissioning parents but profoundly still, the inadequacies of the law itself shall be ranked as the first challenge. Herein still, you will find included a number of decided cases which elaborate more on the rights and legal standing of the parties to a surrogacy agreement. In my chapter four, I have analyzed and compared the practice in other jurisdictions which have settled regulations and precedents. I have submitted a proposed legislative framework governing surrogacy practice in Uganda while borrowing from external jurisdictions. I have therefore made recommendations on the same as you will find expressed in this book.

It is regrettable to state that a research can never be all knowing and conclusive of all matters; i.e. new trends, challenges, alternatives and solutions are already in place and more so developing which are not fully encompassed but some I have had annexed to this book in what I termed the "Tomorrow's Dilemma."

In order to fully understand the ethical, moral, and legal arguments surrounding surrogacy, it is important to understand what surrogacy is. According to the Black's Law Dictionary, surrogacy is "the practice of serving as a surrogate mother" (Surrogacy) and to surrogate means "to put in the place of another" (Surrogate). These two definitions put together allow surrogacy to be better defined as a process whereby a woman bears and gives birth to a child that she will not raise but will give to the intended infertile couple. That is to say, surrogacy is an arrangement in which a woman ("the carrying mother") agrees to bear a child and to hand over that child,

on birth, to another person or persons ("the commissioning parents").

The origin of families is as old as the creation stories and this is reflected in all laws even the laws that were given to Moses (Exodus 20: 1-14) direct from God. Under the laws of Uganda as provided in Article 44 of the Constitution of the Republic of Uganda 1995, provides for the importance of a family, and it states that; "The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition economic and social rights." This, therefore, means that a man and a woman on mutual agreement are sufficient to constitute a family and it is therefore necessary to note that in today's society, we cannot ignore the fact that worldwide, a family unit comprises of many different forms.

The forms, not with-standing a few, are acceptable since almost all societies cannot ignore the fact that children are a very important constitute of the family unit. It is also accepted that children are not necessarily born in close neat families, in some cases they are raised by single mothers and single fathers. It is also on this basis that we see the aspect of surrogacy coming in and surrogacy arrangements becoming an increasingly popular alternative for childless couples seeking to fulfill their dream of becoming parents.

Surrogacy has, for many years, been rejected by society, where by many look at it as an immoral act and ethically wrong and thus should not be legally recognized. However, taking an example from the Bible, one could say that the surrogate mother of all surrogate mothers was Hagar, servant to Sarai in the Old Testament. Sarai, later known as Sarah, had fertility woes. So she pleaded with her husband Abram, before he became Abraham to lay with Hagar and have a child by her. "It may be that I may obtain children by her," she said. Her plan worked splendidly. Hagar conceived a son and called him Ishmael since the original intention was that Sarah would automatically become a mother to Ishmael. This way, Sarah becomes a mother though, Hagar did not picture it that way and refused to hand over the child, and God too had a different plan.

There are two types of surrogacy, traditional surrogacy and gestational surrogacy that are outlined. For traditional surrogacy, the surrogate mother is the biological mother to the child (whereby she provides the ovum) she intends to carry for the intending parents whereas for gestational surrogacy, the surrogate mother had no genetic relationship to the child she will carry for the intended parents. Such involves the process of In Vitro Fertilization (IVF) and the successful results are planted into the womb of the intended surrogate mother.

Surrogacy obtained more popularity in the mid-1980s through the Baby M case in the United Kingdom. The facts to this case are that; In March 1984 William Stern entered into a surrogacy agreement with Mary Beth Whitehead, whom he and his

wife Elizabeth Stern discovered through a newspaper advertisement and went ahead to contact her in regards the same idea. According to the agreement, Mary Beth Whitehead would be inseminated with William Stern's sperm (making her a traditional surrogate as opposed to gestational, surrogate), bring the pregnancy to term, and relinquish her parental rights in favor of William's wife, Elizabeth. After the birth, however, Mary Beth decided to keep the child. Mary Beth initially relinquished the child to the Sterns, but days later, she and her husband kidnapped the infant. William and Elizabeth Stern then sued to be recognized as the child's legal parents. Upon seeking the court's guidance, the court of New Jersey made void the surrogacy agreement as being contrary to public policy but Mr. Stern and Mrs. Whitehead were awarded equal claim and custody to the child. However, as time went by and several cases of the same sort coming up, courts over turned the ruling of court in the above cases and stated that surrogacy agreements are valid and it is from this that countries have come up to legalize surrogacy and have enacted domestic and international laws regulating surrogacy. The treatment of surrogacy, however, differs from one state jurisdiction to the other. Seeing how the courts responded to the Baby M case in the United Kingdom basing it on claims related to the biological parenthood, a Californian court in the United States of America in the case of Johnson v Calvert, based its judgment on intentional parenthood. In this case, Mrs. Johnson had the Calvert's embryo implanted in her who after gestation bore the child. The courts established that when determining parenthood and legal motherhood to be specific, the process of birth as well as genetic consanguinity where factors to be considered. Custody was therefore awarded to the commissioning parents (the Calvert's). And with such, we also see that there was a modification in the law to meet the new aspect of life that the current generations cold not run from.

In Uganda, surrogacy started in the year 2005 when a 29-year-old mother and first Ugandan woman to participate in the arrangement of surrogacy was paid about Uganda Shillings 4,500,000/- to carry a pregnancy for another woman. She delivered healthy twins and immediately handed them over, as agreed, to the woman who had hired her to carry the babies. She was not allowed to see the babies even for a minute. This woman (names withheld) became the first surrogate mother in Uganda. This opened way for many other women that could commit themselves to help the childless couples.

Surrogacy is a new but yet a complex process in Uganda. This is due to the fact that it involves many different moral, ethical, and legal issues that are challenging the acceptance of this assisted reproductive treatment by society. However, surrogacy should only be viewed by society as a great option to infertility based on sound moral, ethical, and legal arguments. In effect, this view will help eliminate adverse criticism against the ones resorting to this reproductive alternative to create a family and also against the child later in life. Thus, legislators should pass laws to help and protect the rights of surrogate mothers, intended parents and children.

The definitions provided for by the Children Act are out dated and insufficient as they do not clarify whether a surrogate is accommodated in the definition of a parent and more so, the laws do not state whether contracts made in surrogate arrangements are valid contracts. This makes it difficult to determine who the rightful parents should be in case of misunderstandings between the genetic parents and the surrogate mother.

According to Jane Stoll in Surrogacy Arrangements and Legal Parenthood; Swedish Law in a Comparative Context a surrogate born child has the right to have responsible parents at birth. She argues that the purpose of enacting legislation for the practice of surrogacy is to secure an efficient way of carrying out surrogacy arrangements within the state and provide for guidelines on how courts will handle disputes in this area in case any dispute arises between parties in such an arrangement.

Surrogacy and infertility are two neighboring blocks; in fact, surrogacy is a stand-in for infertility the same infertility has hit Uganda over the years. (In appendix (i) is an illustration of the current trends in rate of fertility/infertility in Uganda from 1950-2021)

(Find in appendix (ii) a table emphasizing a steady fall per annum / trend in the actual fertility rate of Uganda, over the last 4 years.)

As visible in appendix (ii), fertility rates in women continue to fall steadily per year meaning that as projected by the UN above, time will come when couples will desire children but they cannot obtain them owing to their bareness (yet it is their constitutional right to found a family) and at that time, a solution will be found in relying on the few fertile ones so as to carry the babies on behalf of their counterparts, followed by adoption. In such an environment of dependency, clear laws will need to be established to govern such arrangements for the stability of contracting parties as well as the welfare of the surrogate born child. In a fast growing nation like Uganda, should we wait until then yet the signs of the time have pronounced the danger already?

For the past 10-15 years, the idea of surrogacy has grown from a niche practice catering for a particular class for people to a convenient response to infertility and such a development in the world of medicine has not left Uganda behind.

In the wake of reality, infertility rate in Uganda keeps shooting up against the fertility rate which for years now, is steadily falling, isn't it prudent enough to cover the rights of women who are unable to bear children on their own? With the existing fact of child neglect, I find that it would be reasonably suffice to pronounce the rights of a surrogate born child to prevent tendencies of child neglect, denial of a child's rights but cater for their proper adoption, the legal and parental responsibility over surrogate born children. Be it known that since 2005, there are so many Ugandans

that have participated in surrogacy arrangements and so many fertility centers have been put in place to facilitate those practicing surrogacy in Uganda yet ¬a lacuna in law remains as a stumbling block against enforcement of surrogacy rights. Where does one a child and its parent seek refuge?

In the absence of a law regarding surrogacy, the rights of participants in surrogacy remain handicapped and terrified of questions as to who may be legally permitted to obtain custody of the child. Despite the increasing cases of surrogacy as well as arguments for and against the practice, there is a gap in Ugandan laws. The Constitution of the Republic of Uganda 1995, the Children Act, the Contracts Act and International Conventions only "impliedly" protect the rights of the parties involved in Surrogacy arrangements. However, at a point in time where there arises a dispute in this area, the courts may be faced with a challenge due to the absence of laws or policies governing this area yet it is so important in this technical generation.

To sum it up, the issue of surrogacy and surrogate mothers is something that has been ongoing (even in Uganda), but it has been between individuals. However, considering where the country is heading, surrounded by the various challenges of high rates of infertility and mothers who do not have the time for pregnancy, the area of surrogacy needs to be regulated since the laws may not protect it ably yet we cannot, as a growing state, run away from the issues of surrogacy. Similarly Uganda, though has not been faced with such questions or even cases, it needs to come within its legal framework, laws that will regulate this area to avoid future misunderstandings such as forced surrogacy, refusal by surrogate mothers to deliver the child to the intended parents, issues of determining who the actual parents are among others, among others.

The main objective of this chapter is to assess the concept of surrogacy arrangements and its relation to the Children's Act, other relevant regulations and the institutional framework in Uganda.

In light of the fact that surrogacy arrangements are increasingly being practiced, there is urgent need for the Government to enact comprehensive legal and policy framework addressing all aspects of the surrogacy arrangements. Whereas the Children Act Cap 59 only addresses matters in the best interest of the children and parental responsibility, it does not address the issue of surrogacy. The Act does not even recognize the existence of surrogacy practice in Uganda. The Act too, does not address the question of ownership; i.e. to which the surrogate born child belongs to. The underwhelming legislation and inadequacy of the existent law underpins the motivation and basis for this research.

This chapter has been inspired and is enriched by a number of writings and publications on the subject of parentage and surrogacy arrangements. It makes

numerous references to international publications.

In an article by J. Hunt titled A Brief Guide to Surrogacy, it is submitted therein that; any agreement between a surrogate mother and commissioning parents is not legally enforceable and it is important to have a written surrogacy agreement, to make intentions clear and to provide evidence of intentions to the court in case a dispute arises. The article clearly sets out the legal issues, the financial issues, and the procedure for birth registration of the surrogate-child and parental orders arising out of a surrogacy arrangement. The article further talks about international surrogacy arrangements. The entire article is important for this paper for the reason that the Government of Uganda can borrow what the UK law on surrogacy provides and be able to enact its own laws that govern this area.

However, it is important to note that while the article exclusively talks about the laws of UK, this paper compares examples from other jurisdictions as well so as to come up with the best policy, legal and institutional frameworks for surrogacy arrangements and legal parentage in Uganda.

Browne C. Lewis in his article, Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child addresses the situations where the surrogate goes against her promise and attempts to keep the child. In particular, the article deals with the adjudication of maternity after the surrogate has breached the agreement by failing to turn the child over to the intended parent or parents. The article contends that contractual surrogacy agreement obligations should be treated like any other contractual obligations. Consequently, courts should take actions to ensure that the intended mother receives the benefit of her bargains by being recognized as the child's legal mother. The appropriate way to accomplish that is to establish a rebuttable presumption that surrogacy contracts should be specifically enforced.

This article is relevant to this study since it concentrates on the enforcement of the rights and interests of the parties in a surrogacy arrangement. That is to say, addresses ways through which the interests of the child, surrogate mother and the intended parents are protected and more so on how the surrogacy arrangements are to be handled. However the article does not focus on Uganda and this paper basically addresses surrogacy arrangements in Uganda.

A handout by Bianca Jackson titled My Bun, Your Oven: An Introduction to Surrogacy Law in the United Kingdomenumerates that the legal/intended mother of a surrogate child is the woman who carries the child, regardless of whether she is genetically related to that child. This is an irrefutable presumption. The handout highlights a number of court cases showing that commercial surrogacy arrangements are not permitted in the UK. While the UK does not permit commercial surrogacy arrangements, as it seeks to commoditize the surrogate mothers and the resultant

child this paper seeks to convince the legislators of the Ugandan laws that in some instances, commercial surrogacy arrangements should be allowed and more so legalized. This is due to the fact that in Uganda commercial surrogacy is the most common practice. Thus, if they are governed by the law, it will help to avoid exploitation of the surrogate mothers and safeguard the best interests of the surrogate child. The handout is of much significance to this study as it gives copies of the laws governing surrogacy in other jurisdictions, for example, Acts of Parliaments of UK that govern surrogacy arrangements.

An article by the International Surrogacy Forum (ISF) gives an overview of how surrogacy arrangements are governed in South Africa. The article clearly gives the provisions of Chapter 19 of the Children Act of South Africa which touches on surrogacy agreements. An interesting mentioning under the article is that a child born in terms of a valid surrogacy agreement is deemed the child of the commissioning parent(s) and the surrogate mother has no right of parenthood or care of the child unless otherwise provided for. Thus, no claim for maintenance or of succession can arise against the surrogate or her family. The article further provides that one (or both) of the commissioning parents is required to be a gamete donor and that surrogacy agreements must be confirmed before the High Court. While the ISF article majors on surrogacy in South Africa, this paper is concerned about Uganda formulating policies as well as legal framework to govern surrogacy arrangements in Uganda.

A handout by Bianca Jackson titled My Bun, Your Oven: An Introduction to Surrogacy Law in the United Kingdomenumerates that the legal mother of a surrogate child is the woman who carries the child, regardless of whether she is genetically related to that child. This is an irrefutable presumption. The handout highlights a number of court cases showing that commercial surrogacy arrangements are not permitted in the UK. While the UK does not permit commercial surrogacy arrangements, as it seeks to commoditize the surrogate mothers and the resultant child this thesis seeks to convince the law makers that in some instances, commercial surrogacy arrangements should be allowed so long as they are governed by the law to avoid exploitation of the surrogate mothers and safeguard the best interests of the surrogate child. The handout is of much significance to this study as it gives copies of the Acts of Parliaments of UK that govern surrogacy arrangements. The framers of the law in Uganda, being a Common Wealth Country, could make reference to such laws and cases in framing its own laws to help governing the new concept of surrogacy in the state. This book is important to this paper as it will help to define who the legal mother and a surrogate mother of the child basically is in the Ugandan context.

In the article "SURROGATE GESTATOR- A NEW AND HONORABLE PROFFESION" John Ingram Dwight expounds on how gestational surrogacy should be a profession. He is of the opinion that opposition to commercial surrogacy is derived from our historical failure to value the domestic work of mothers and

housewives as a form of productive labor. This is because the surrogate should be paid for her time, energy, physical discomfort and risk.He asks why is using a body to produce a baby for someone else any different from using a body to produce blood, sperms, ova, or any other regenerative substance for someone else's use? He argues that if a child is deemed to be from conception, the child of his genetic parents, there is no sale of the child. This refutes the argument that gestational surrogacy is like baby selling.

The author states that statutory regulations on surrogacy should be employed only to:

Provide back up for situations when the parties directly involved have not made their own contractual arrangement.

Expressly authorize arrangements that may have been considered illegal in the past.

Relieve involved parties from parental or other responsibilities when appropriate.

Provide for problems of inheritance, custody and financial support.

These statutes/regulations should allow parties to enter into a complete and binding agreement covering every foreseeable issue and provided it is not contrary to public policy (for example if it is for the benefit of a Ugandan Gay couple which is against the laws of the country). This article is relevant to this study since it provides for the rights of parties in a surrogacy arrangement.

In the article "ADVANCING A SURROGATE FOCUSED MODEL OF GESTATIONAL SURROGACY CONTRACTS," Catherine London sets out the ethical and societal consequences of the practice of gestational surrogacy. She states that the practice undermines public policy and exerts pernicious effects on the society by exploiting poor women and children. She is of the view that, although most countries prohibit commercial surrogacy, the arrangement to compensate the surrogate for her services is pretense for surrendering the custody of the infant. This compensation becomes an avenue for baby selling and thus establishes a market for children. This equates women to the status of commodities. This classification of women as commodities brings about the question of respecting the body integrity of women visa a vise the right for couples to have a child.

The author of this article perceives the practice of surrogacy as a form of reproductive slavery. However, she notes that arrangements that are motivated by altruism are considered less objectionable by the society because they avoid placing women's reproductive capacities into the economic market place.

From the article, there is a critic that surrogacy arrangement revolves around the notion that prospective surrogates are unable to freely consent to assume the psychological and physical risk associated with pregnancy. She contends that the relationship established during pregnancy vitiates the surrogates consent. This is

based on the inability of foreseeing the future emotional responses. This becomes a sufficient justification of invalidating surrogacy contracts. The contract before delivery of the infant is unable to put into consideration future emotions of the surrogate or the psychological effect of the pregnancy. The contract also does not put into consideration the bonding between the child and the surrogate during pregnancy. The author advices that providing the surrogates with comprehensive information prior to conception and affording them an opportunity to grant informed consent reaffirms their decisional capacity and reproductive autonomy. Generally, this author rubbishes surrogacy agreements on grounds of being enormously uncertain, equivocal and capricious thus disabling a meeting of minds during contract formation.

In the absence of adequate legislation to regulate surrogacy, the author states that most protection should be given to the party most vulnerable to exploitation i.e. the surrogate. She states that the surrogate should be given authority to dictate contractual terms and thus preserve individual autonomy and protect women from exploitation. The author views contract, as the best avenue to govern surrogacy agreements and not family law. This is based on the argument that enforcing of this contract with relevant contract principles/doctrines avoids perpetuating the perception that women are incapable of rationally committing themselves to agreements for their own services. This contacts principles and doctrines serve as tools of solutions to these legal issues. She advises that a surrogacy-focused contract model would shift the balance of power during negations. This would ensure that the contract reflects the proactive aims of all parties. However a critic to this surrogates focused approach to surrogacy contracts is that the surrogates would exploit the intended parents because of their inability to have children. The article is important to the thesis /as most Ugandans have fallen victim of several critics the author mentions and if surrogacy is not legislated, the cries of the public will be left un-attended to.

In the article of BURROWS, CHANTELL, LOUISE (2011),Deconstructing Motherhood; there is an expression about legal status of surrogacy contracts and it is states that; "Rethinking surrogacy regulation within the ambit of contract law raises several questions. The most important issue for consideration is the legal status of surrogacy contracts. At present, all surrogacy arrangements are unenforceable in law. The introduction of surrogacy contracts would reverse this position. It is proposed here that surrogacy contracts should be used to guide and monitor all surrogacy arrangements through the legal process of transferring legal status from the surrogate to the intending party. Applying basic principles of contract law to surrogacy, all agreements must be enforceable otherwise the purpose of the contract is diluted. The doctrine of consideration, and an intention to create a legal relationship would apply. In other words, there must be a legal consequence to the contractual process between parties if both parties intend to enter into a legal relationship that will result in the birth of a child. Without enforceability, it is clear that the best interests test often favors the surrogate and her wishes when the arrangement fails."

This draws a picture showing that enforceable surrogacy contracts will enable the courts to explicitly take into account the conception method of the child when determining who is most able to care for the child. This is particularly important for the commissioning party as without their initial arrangement the surrogate, the child would not have been born. It therefore follows that there must be a legal consequence to the surrogacy context and this consequence should be the transferal of legal parenthood through parental order. This article will be relevant to this thesis as it concentrates more on the rights of the parties in a surrogacy arrangement. However, this paper focuses on how Uganda should come up with a legal frame work on surrogacy. Consequently, the paper is relevant in this perspective since it expresses how the law should be structured and what factors should be considered when formulating a law on surrogacy.

In the article of Raghav Sharma: The Call for Legalization of surrogacy in India; the author notes therein that; surrogacy allows individuals to have children of a genetic link and eventfully start a family. The law allows for heterosexual couples to contract in a surrogacy agreement with a surrogate mother, but in order to undergo the procedure, the contract must be approved by a statutory committee. The article reviews and analyses the legal and social developments regarding parenting and surrogacy in India. It will be relevant to this research as it will help to specify what kind of marriages are allowed to engage in a surrogacy arrangement and more so lay out the proper procedure a couple should follow in case it wishes to carry out a surrogacy arrangement in Uganda.

Fiona MacCallum in the Article; 'The experience of commissioning couples,' is of the view that; 'The relationship between the commissioning couple and the surrogate mother is crucial to the success of the arrangement." The surrogate mother may be either a relative or friend of the commissioning couple, or may have been unknown to them prior to the surrogacy arrangement. Some argue that surrogacy with a previously unknown surrogate mother is potentially problematic since to some extent all of those involved are depending on trust between strangers. In other forms of assisted reproduction involving an unknown third party such as donor insemination or egg donation, the donor generally remains anonymous. However, in surrogacy cases, a bond must be established between the previously unknown surrogate mother and the commissioning couple, a relationship described by the founder of one UK surrogacy agency as a `forced friendship." The Rationale of this is to enable both parties to easily effect the terms of the contract. In Uganda, similar arrangements are being carried out even when there is no law governing the arrangements. However, this article basically covers the process of surrogacy arrangements in UK and not those of Uganda. This research therefore seeks to answer the concerns in the Ugandan context by giving a proposed legislation to govern the practice of surrogacy and legal parentage in surrogacy arrangements.

JOSEPH. G. W; in his article SURROGACY ARRANGEMENTS/AGREEMENTS AND ITS ENFORCEABILITY, notes that; 'Jeremy Bentham looked upon 'law' as an instrument for securing the "greatest good of the greatest number" and correctly so. Law, at a particular time, showcases the societal mindset and undergoes radical metamorphosis to align itself with social change. The question of 'when to' employ this instrument for addressing social issues is beset with many conceptual uncertainties. This article seeks to address one such question with regard to the issue of surrogacy in and, in the process, analyzes its various dimensions in order to ascertain the basis which makes it imperative for the legislature to pass a law to explicitly address the issue.' The article will be relevant to this research paper since in its quest, the paper will endorse the need for legalization of surrogacy from the perspective of positive fundamental right of procreation as guaranteed under Article 31 of the Constitution of the Republic of Uganda, 1995 and the compelling state interest in maintaining the 'rule of law'.

In the article 'Resolving Disputes Arising out of Surrogacy,' the author, Pankaj Sattawan, notes that; "Marriage and procreation are fundamental to the very existence and survival of the race. In other words rights to marry establish a home, and raise children are fundamental. Still it might look odd to go for surrogacy, but prohibiting or limiting the surrogacy also seems to be in contravention to the Constitution, made for people of fundamentally different views…….they must also recognize that the demand for surrogacy in present times is so high that banning it entirely would not solve the legal and moral problems. Instead, steps should be taken to regulate and minimize the negative effects of surrogacy. This will protect those who are affected by the use of such technologies."

This article lays out the importance of surrogacy and shows that despite that fact that the idea may be immoral to some societies, it is necessary for some groups of people to get families and live happily like any other family. Thus the state should enact laws that legalize it and state how such arrangements should be performed other than letting the parties involved to run it on their own and at some point carry out illegal activities so has to help them reach their goal. In Uganda, there is no law governing surrogacy and even those that may be referred to at the moment, they are not exhaustive. Some people refer to surrogacy as an un Godly act while other do it to help or even earn a living. Therefore some hide or even involve themselves in illegal acts so as to achieve their goals yet at some point some surrogate mothers are cheated and have no way through which they can claim the damages they may incur. Thus, this article will be of great relevance to this research paper as it lays out the advantages of surrogacy and why a state should put up a legal frame work to regulate this area of family law.

In the article, Reconceiving Surrogacy: by Alison Bailey, it is noted therein that; "There are no laws regulating surrogacy in India, although the Ministry of Health and Family Welfare has established a set of guidelines for this practice. Policies and

contracts vary from clinic to clinic and range from corporate five-star hospitals such as the Rotunda Medical Center in Mumbai to well-known smaller practices like Dr. Patel's Clinic. Some clinics present themselves as progressive and woman-centered. Dr. Patel boasts that she provides surrogate workers with room and board, English lessons, computer classes, and savings accounts to ensure that earnings go to each woman's intended project. And all these require to be regulated." In Uganda, there is a similar situation, where by the people carry out surrogacy privately and in case of misunderstandings, they have nowhere to run to. Thus if a law is enacted, the gap that exists today, in that area, will be filled. The article lays out the importance of having surrogacy guidelines, it is for this reason that the article will be referred to in this paper.

Mahesh Nath in the article A critique on Surrogacy Contracts: at page 3 notes that; "Surrogacy as a method of reproduction under ARTs has far-reaching ramifications on the societal interest. It raises a multitude of ethical and legal questions. The legislation and courts across the globe vary in their approach to surrogacy arrangements… The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation facilitating for proper use of ARTs." The author goes on to note that; There would be many legal questions encasing surrogacy contract as to;

1) Whether surrogacy agreements are against public policy?

2) Whether payment of fee in lieu of surrogacy contract violates child trafficking law? Is it payment for services rendered or for the child?

3) Would prohibition of surrogate contract violate constitutional rights to privacy or rights to procreate?

4) Who would be the legal mother? Who should participate in decisions affecting the welfare of the fetus and the newborn?

5) What would be the status of surrogate child in the absence of grant of citizenship?

This article will be of great relevance to this paper as it gives answers to the many questions surrounding surrogacy and more so encompasses several judicial precedents of other jurisdictions. This is so due to the fact that the judicial precedents from other jurisdictions and legal scholar's opinion on the eventual legal concerns surrounding surrogacy would possibly enlighten Ugandan legislators to frame a comprehensive ARTs legislation.

Maureen Kakah in a Kenyan Article titled "As Rent-a-Womb Trend Gains Local Currency, Legal Loopholes Emerge" explains that surrogacy is not a hypothetical issue anymore, that it is real and many Kenyans are resorting to it for medical reasons and the State ought to protect such arrangements. The article gives the meaning of a surrogacy arrangement and the different types that exist. The author further argues

that there have been growing concerns that surrogacy, designed to make couples who cannot have children become parents, is also being adopted by Nairobi's nouveau riche, the type that has been pejoratively described as "too posh to push". The article explains that medical experts warn that surrogacy is not a procedure of convenience, and that it should be adopted as a last recourse. This will assist in protecting children from being commoditized and women from being exploited, the article also quotes advocate John Swaka who says that surrogacy in Kenya is unregulated, owing to the fact that it is shrouded in secrecy. But as the practice evolves and gains currency, Mr. Swaka says that the laws of the land should adopt to capture the legal need, as Justice Majanja implored in his ruling. While Ms. Kakah insists on the lack of legal regulation of surrogacy practice in Kenya.

However, this article basically covers the concerns in Kenya (Uganda's neighbor) and not those of Uganda. This research therefore seeks to answer the concerns in the Ugandan context by giving a proposed legislation to govern the practice of surrogacy and legal parentage in surrogacy arrangements.

Bianca Jackson in a book titled Surrogacy: A Guide to the Current Law highlights the shortcomings faced by the laws governing surrogacy in the UK. Bianca explains that the law governing surrogacy arrangements in the UK has hardly changed since the introduction of the Surrogacy Arrangements Act 1985. As a result, surrogacy law is piecemeal, outdated and full of contradictions. For example, commercial surrogacy is prohibited but the courts have the power to authorize payments to the surrogate mother. Notably, third parties profit from legal parenthood and surrogacy arrangements and receive remuneration for their services. This paper is relevant to the study because it critiques the UK laws on surrogacy thus making it easy for the determination of which provisions Uganda should borrow and which ones need to be ignored. Whereas the paper critiques the UK laws, this research proposes a regulated pricing" in surrogacy arrangements.

Muthomi Thiankolu, Towards a Legal Framework on Assisted Human Reproduction Technologies in Kenya, submits that notwithstanding the modern trend of globalization, any legislative framework on assisted reproduction and related matters in Kenya must be informed by peculiar needs of Kenya. He states that the Kenyan drafters should be wary of the copy-and-paste mentality that seems to invariably inform the legislation drafting of Kenya.

Whereas Muthomi grapples with the effect of importing laws that are not applicable to the peculiar Kenyan society and submits for the vetting of the various clauses, this article is looking at formulating laws for Uganda (which to some extent also faces some problems as those faced in Kenya). This article, therefore, shall be pegged on the strong belief that if Uganda is to enact better laws, it needs to copy from the best practices. Importantly, focus should not be placed on the need to check on copy and

pasted legislation at the behest of ignoring better provisions enacted by jurisdiction with best practices. This study uses the guidelines to come up with a comprehensive legislative framework for surrogacy arrangements and matters related thereto.

A Discussion of how surrogacy arrangements are being practiced under the Children's Act and the related Legal Framework on Surrogacy in Uganda.

This chapter discusses what surrogacy is; the nature of surrogacy agreements and factors considered when entering into surrogacy agreements. It analyses the extent in which the legal framework in Uganda discusses surrogacy arrangements. These mainly include the Children Act, and 1995 Constitution of the Republic of Uganda and International Conventions;

It also draws a comparative analysis on the best practices in other jurisdictions such as the United Kingdom, South Africa, India and Kenya. The study for UK in this chapter has been motivated by the fact that the UK is one of the first jurisdictions in the world which formally and legally endorsed the practice of surrogacy arrangements as a means of reproductive health practices. South Africa on the other hand has been preferred for the reason that it is the first African country to enact legislation regulating surrogacy arrangement. India is looked at reason being that it has legally endorsed the practice of surrogacy for commercial arrangements; Kenya has been preferred for the reason that, just like Uganda, it has just been faced with a new regime of surrogacy, which several citizens have embraced but privately since there is no law that governs surrogacy. However it has been faced with a few cases and due to lack of laws governing surrogacy, the courts of law have been faced with a challenge and thus, the legislature has come up with bills suggesting the laws to govern this sector which Uganda is also trying to do. The chapter also proposes the way forward regarding the necessary provisions that should be included in the law and why such a law should be enacted in Uganda.

Reproduction has revolved over and over in the past years. This has, eventually, resulted into the use of assisted reproductive technology and today, this has become more prominent than ever. Often, way after the society has embraced, rejected or become inured to the techno logical advancements or innovations the law usually does not have set principles and regulations for analyzing and accommodating the new scientific and social practices. This is because new technology creates a lacuna in social thought which the legal world is less adept to accessing its pitfall.

In Uganda, as elsewhere, fertility forms the basis of and is itself a product of social and economic organization. There is an expectation from the Ugandan society, like any other African society that, every married couple ought to have a child of their own. This makes the society or the infertile couples devise methods of dealing with the problem of infertility. One of the methods that have been devised to deal with this

problem of infertility is surrogacy.

This chapter gives highlights on the concept of surrogacy and how Ugandans have perceived, the main challenges compounding the legalization of surrogacy arrangements in Uganda. It discusses provisions that must be present to make a contract valid; attempts to the arguments for and against the pre-requisite surrogacy arrangements of the practice. These considerations basically outline the ideal requirements that ought to be followed and addressed when making the Agreements.

Justiciability of surrogacy in Uganda

First and foremost, I write this thesis with full knowledge about the absence of a specific law guaranteeing a right to health and more so, that the National Objectives which would have sufficed to give rise to such a right, may also not be justiciable but nevertheless, I also believe in judicial activism as an important gateway to achieving the desired effect under the above national objectives.

Objective xx states that "The State shall take all practical measures to ensure the provision of basic medical services to the population." This shows a deliberate attempt by government to preserve and recognize the right to health but of which such a right is not expressly guaranteed under the provisions of the 1995 constitution. The challenge arises that in Zachary Olum & Another v Attorney General, it was accepted the same way did Justice Egoola Ntende that though such objectives are part of the constitution and are aids to constrain the same, yet they are not justiciable. This noted therefore, the justiciability of the National Objectives remains in question even after the Article 8A (1) in the 2005 constitutional amendment since clause 2 which would operationalize clause 1, is not yet implemented by parliament.

Regardless, I move to say that in the absence of a specific law recognizing the right to health, the courts have gone ahead to rely on civil and political rights to advance the broader right to health in numerous cases, an example of such a case is CEHURD and 2 Ors v The Executive Directive Director Mulago Referral Hospital and the Attorney, where Justice Lydia Mugambe held that denying the parents of the child the opportunity to bury their baby, was a violation of their right to health in contravention of objectives XX and XIV (b) of the Constitution, in addition to Article 12 and Article 16 of the ISECR and the African Charter respectively which guarantee the right to health. This judgement is important because it demonstrates judicial activism where judges have relied on civil and political rights which are well defined in the Constitution to protect the right to health.

In the same vein, I can authoritatively state that the lacuna created by absence of a specific law permitting surrogacy agreements in Uganda is sufficiently covered the operation of judicial activism in the manner envisaged by Justice Lydia Mugambe in the E.D of Mulago case.

The Concept of Surrogacy

Surrogacy is defined as; "the practice whereby one woman carries a pregnancy for another person(s) as the result of an arrangement/agreement prior to conception that the child should be handed over to that person after birth." That is to say, surrogacy refers to an arrangement whereby a woman agrees to become pregnant, carry the pregnancy to term and give birth to a child or children on behalf of another person or persons (couple) who become parents of the new born child.

The word 'surrogate', on the other hand, means; 'substitute' or replacement'. A surrogate mother is therefore a substitute mother. She is a woman who, for financial and or compassionate reasons agrees to bear a child for another woman who is incapable or, less often, unwilling to do so herself. In the New Vision Article by Simon Masaba, a surrogate mother was defined as; a woman who agrees, usually by contract and for, to bear a child for a couple who are infertile or physically incapable of carrying a developing fetus. In other words, she is a substitute or 'tentative' mother in that she conceives, gestates and delivers a baby of another woman who is subsequently to be seen as the real (social and legal) mother of the child or a woman who simply carries a baby for another woman under an agreement to handover the child at the time of birth.

There are several forms of surrogacy. The most common mode of surrogacy where a woman's ovary (egg) is, either by artificial insemination or, less often, by natural sexual intercourse is fertilized by the sperm of the male partner who also is referred to as the commissioning/intended father. In such an arrangement, the surrogate is the genetic mother of the child and that she consents to giving up the child while the role of the social and legal mother is taken over by the other woman also referred to as the 'commissioning mother'.

To donate the garment link between the surrogate and the child she bears, we shall call this type of surrogacy 'genetic surrogacy', although it often referred to as 'partial surrogacy'. This kind of surrogacy is also possible if the commissioning father is infertile or wishes not to pass on a defective gene to fertilize the surrogate egg with the sperm of a donor or that of her husband, which is referred to as 'total surrogacy'.

Another form of surrogacy utilizes the process of In Vitro Fertilization (IVF). Here the ovary and semen are obtained from the commissioning parents/couple (or, less often, from anonymous donors) and the two are fertilized and finally the resultant embryo is implanted into the surrogate or carrying mother. This is referred to as gestational surrogacy since the surrogate only performs the role of gestation/carrying the baby for the commissioning couple and such a carrier has no genetic link with the child. This type of surrogacy is sometimes referred to as 'full surrogacy'.

Factors considered when making a legal surrogacy arrangement

Legal surrogacy agreements vary from one to another depending on the concerned parties (that is to say, genetic parent; gestating mother; non genetic parent; commissioning parents and the child born of the surrogacy arrangement). Some agreements contain very peculiar terms. The Agreements are usually meticulously thorough detailing the basic agreement between the parties. There are a number of standard legal, social and ethical issues inherent in surrogate arrangements which should be considered when entering into surrogacy arrangements in order to curtail potential disputes. With that in mind, it is therefore proper that every agreement must have the Consent of the parties; it can either be commercial or altruistic; parties must have the capacity of entering into agreement; parties should be domiciled in Uganda.

Surrogacy arrangements just like any other contract; there are some necessary elements that are essential for such a contract to be legally binding onto the parties. Such elements include consent, consideration among others. The major element that we look at is that of consent and it is discussed in detail in the following paragraphs.

Consent of the Parties

According to the Oxford law Dictionary, consent is defined as an agreement that may be expressed or implied either verbally or in writing by the contracting parties and if the parties to such a contract don't consent, then there is no valid contract (emphasis mine).

Principally, before the culmination of the Agreement, consent must be sought from the surrogate mother. The surrogate mother; legal father; commissioning couples or resultant child of the surrogacy agreement cannot accurately predict the intervening factors which may occur over the next nine months or after nine months that could undermine their "original consent". For the best interest of the child and for a better contractual relationship between the parties, it is important for the law to provide for consent as one of the most important elements of a surrogacy contract to be legally valid and that such consent should be between a married couple as provided for the Supreme Law of the land (between man and woman.)

a) Consent of the Surrogate Mother.

This consent must be a free and informed consent. The rationale for free and fair consent is to protect the dignity of women as provided for by the Constitution. Informed consent means that the surrogate mother is educated as to all pertinent facts concerning the medical procedure prior to giving consent. This is hardly the case as in most instances the surrogate mother's motivations are to remove her from her miserable economic situation and is not concerned with the medical; emotional or physical repercussions that may arise after the enforceable consent. Thus, the

Assisted Reproductive Health Clinics if not regulated may use gametes that may endanger the surrogate mother and the resultant child.

The Agreements define the rights and duties of the intended parents and the surrogate mother. These contracts typically provide that the surrogate mother will be artificially inseminated, carry the fetus to term, and then relinquish her parental rights to the adopting parents immediately after birth. Many contracts also require the surrogate to undergo physical and psychological test before artificial insemination can be done. This is done so as to avoid future effects that may come along as a result of taking on the function of carrying the child that has been artificially implanted into the surrogate's body.

In Uganda, there is no law regulating how many times a woman may consent to be a surrogate or how many times procedure of artificial insemination may be carried out in her body for any single commissioning parent(s). The impact of the deterioration of a woman's health is irreversible; she could even loose her life at birth. Thus, the scenarios put the surrogate mother in an inequitable bargaining position in relation to the contracting single or couple as in most cases she clearly demonstrates her inability to appreciate the present and future impact of her decision.

The inequitable position of the surrogate is further intensified by the fact that most surrogates come into contract through the intercession of the middlemen who are deployed to ensure that a proper match is found and tied down to the Agreement. Their primary desire to ensure that the contract has been successfully completed which puts the middleman against the surrogate mother by ensuring that they work towards the relinquishment of the child rather than the best interest of the surrogate.

The surrogate mother may give birth to the child and due to emotional attachment refuse to relinquish the child as it was a matter of disagreement in the Re Baby M case. The child may have physical disabilities resulting in rejection by both the commissioning parent and the surrogate. The State and the tax payer is left with the burden of taking care of the survival and development of the child in a children's home which in the long run is a disservice to the state and thus consent of the surrogate mother, in my view, should be obtained freely without forcefully convincing the intended surrogate in that if she willingly agrees to the terms of the agreement, she is answerable to any outcomes thereto. Similarly, if this field is regulated and the courts are given the opportunity to determine such matters, the chances of rejection of the baby incase of disability will be reduced since such a child too is human and deserves parental care from the commissioning parents and not the state to incur the cost.

Suffice to say is that the law on surrogacy should be formulated in a way that it provides for all the conditions that yield as outcomes after the child is born. This

helps to avoid disagreements after the child is born under circumstances where the child may have disabilities, where the surrogate doesn't want to hand over the child or even in circumstances where the commissioning parents may have separated. The law should provide for the steps to be taken in case such instances arise. For example, who will take care of the child in cases where the commissioning parents separate or where one of the parents dies.

b) Consent of the Father

At the time of birth, in normal circumstances, a mother is expected to fill a birth certificate. However, prior to a mother indicating the father's name on the birth certificate of the child she requires consent of the father to do so. This consent requires legal identification of the father to be supplied before issuance of the birth certificate. In Uganda, the law is silent about this, but taking a reference to the Kenyan laws, a father's consent is really vital at the time of filling in the birth certificate. This imposes an unfair burden on the mother to prove something she may not have control over because of mere refusal by the father to provide the particulars. This refusal also affects the child as in the meantime the child is rendered stateless and fatherless yet he/she is entitled to care and protection by both parents.

With the help of this paper, I therefore opine that the laws of Uganda should expressly provide that sperm donors, who donate the sperms to a bank, are not the legal father of the resultant child. There is also no regulatory body controlling the number of times a sperm may be used in a certain area or in addition that the use of the sperms will not result to paternity suits by women who have clear intentions of defrauding men and where there is no law in that regard, a law should be enacted to provide for such loophole in the legal system. In the case of A v B & anor sperm donor was not considered a legal father.

c) Consent of the Commissioning Parents

The term 'commissioning parent(s) is defined as the person or persons who enter into the surrogacy arrangement with the intent that another woman, who they agree with, carry for them the child in her womb in a way that is favorable. The Commissioning parent(s), like any other party in the surrogacy arrangement, are also required to give consents to their spouses prior to entering into surrogacy arrangements. In some instances the spouse may refuse and the delay will affect the welfare of the child. In any event the couples' consent may be harmful to all parties including the resultant child.

There is a proposition that a longed-for child may not transform an infertile couple or person into the "happy people" they expected. The child may in fact be a constant reminder of the couple's inability to become parents, as their infertility is not cured. The couple may instead be "sitting on a time bomb that is guaranteed to go off at

some point during their child's Life."

The relationship between the commissioning couple and the surrogate mother is crucial to the success of the arrangement. The parties to the consent must sign the agreement and the same must be entered into prior to any assisted reproductive technology procedures being carried out this will assist the surrogate mother claim for any expenses or damages resulting from the procedure. In Blew v Verta the court held that with the advent of science and technology, the Government should be ready to accept and validate the existence of unusual complex arrangements for child birth. In practice there are various ways of child birth and family formation. Surrogacy cannot subvert a concept that already has a wide expression. Therefore singling out surrogacy for prohibition could be considered discriminatory and in that regard, the framers of the law in Uganda should formulate a law that fills up the gap of surrogacy and embrace it since the citizens have adopted it, but such a law should not be against the norms and customs of the people for instance allowing same sex marriages to be carried on which is against the provisions of the Constitution.

An analysis of the legal framework on surrogacy practice and surrogacy arrangements in Uganda

This Children (Amendment) Act Cap 59 regulates parental responsibility, adoption, custody, maintenance, guidance, care and protection of children. It also gives effects to the principles of the Convention on the Right of the Child and the African Charter on the Rights and Welfare of the Child.

The government of Uganda ratified the United Nations Convention on the Rights of the child (UNCRC) in 1990. Since then, significant progress has been made on the observance of children's rights to survival, development and protection. The challenge however remains the fulfillment of the basic rights of children, which facilitates the realization of other rights.

It is the duty of the Government of Uganda to ensure that all children's rights are respected, protected and promoted. Art. 12 of the UNCRC obliges "States parties to ensure a child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child." As part of its mandate, the Ministry of Gender, Labour and social Development (MGLSD) provides guidance to stakeholders on promotion and protection of children's rights. With the above in place, the law on surrogacy will help to set a straight path for the parties to surrogacy arrangements and more importantly will help to cub illegalities that may arise therein.

i) Children Act

A child is everyone below the age of 18 years. This is mandated and verified by the United Nations Convention on the Rights of Child (Article 1), African Charter on the

Rights and Welfare of the

African Child (Article 2), the Constitution of the Republic of Uganda, 1995 (Article 257(c) and the Children Act, Cap 59 (Section 2).The Uniform Parentage Act;86 the Human fertilization and Embryology Act the India ART Reproduction Bill regulations and the Child Status Act , unlike the domestic laws of Uganda, boldly define a child to include one born of surrogacy arrangement.

The rights of a Child which begin at conception are governed by this act and supported by Article

34 of the Constitution of the Republic of Uganda. The Act stipulates that every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child. The Act further stipulates that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.89

The Children Act defines a parent to mean the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody. The legal parents in surrogacy arrangements (surrogate parents; commissioning couples(parent); genetic parent(s); non genetic parent(s);therefore can be addressed as parents under the Act pursuant to legal parentage in surrogacy Agreement as they are indeed liable to maintain a child. The dispute would arise as to whether to legal parentage and thus custody of the child which right is attached to parental responsibility.

Parental responsibility, as per Section 6, means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child91. Parental responsibility may never be abdicated until the child is 18 years old. An application for extension of parental responsibility may be made when the child is over 18 by the child. Section 6(2) provides for Transmission of parental responsibility may take place if the people in whom the parental responsibility was vested are deceased. However legal parentage under surrogacy arrangements can only be transferred by adoption orders like observed in the AMN and JLN case. Although parental responsibility does not extend until the age 18 years, legal parentage lasts forever unless relinquished through parental order.

Children have a right to know and be cared for by their parents (both). It is not the child's concern which relationship their parents have; children have a right to welfare; clothing shelter; adequate diet, medical care including immunization and educational and guidance.

Although Section 6 is titled as parental responsibility, the terms therein outline or describe how parties acquire legal parentage. Where the mother and father were married at the time the child was born or after the child was born then the parties, because of their legal parentage, have shared equal parental responsibility. However, where the parties do not subsequently marry then the mother has superior responsibility over the child and the father acquires responsibility under Section 71 of the Act. Parties may also enter into a parental responsibility agreement and the court may proceed to endorse the said agreement and the same court may proceed to terminate the said agreement on application by either party or by a child. We can therefore assume that the Children Act recognizes the legal mother as the genetic mother. Similarly in the UK Section 33 of the HFEA particularly stipulates that the surrogate mother is the legal mother when the child is born. However the Children's Act be cognizant of the fact that you may be a surrogate but not a genetic mother hence view on parentage should be reconsidered and updated.

The Children Act ignores the different scenarios of legal parentage, Ugandan laws must provide for such legal parentage laws or non-genetic mother, non- genetic father and non-genetic singles. As was seen in the AMN case and JLN case above the definition of the term legal mother in the context of a surrogate child is a highly contentious term when dispute arises. There is need to specifically clarify who the mother of the surrogate child is immediately after birth.

The Children Act discusses a marriage or non-marriage situation, disregarding any situations where parties may enter into surrogacy arrangements and have parentage or parental responsibility attached to them. In order to expedite the parentage process, surrogacy arrangements should therefore be reconsidered and provided for in their own account so as to be performed in such a way that doesn't contravene the provision on marriage within the Constitution of the Republic of Uganda 1995.

A Discussion of the Constitution of the Republic of Uganda and the best practices of other International Covenants in protecting Surrogacy Arrangements in Uganda.

i)Right to family

Article 31 of the Constitution is to the effect that; a man and woman who are of age have a right to found a family. Borrowing a leave from Article 16(3) of the UHDR, which gives a better understanding of the right to family, it stipulates that the family is the natural and fundamental unit of the society and the necessary basis for social order and shall enjoy the recognition and protection of the State. Today with the help of assisted reproduction and assisted reproductive technology children may or may not be a product of a marriage union.

Notwithstanding the fact that Article 34 of the Constitution of the Republic of Uganda does not expressly mention the words Surrogacy. The rights of children, including

those born out of surrogacy arrangement are protected under all fundamental rights and fundamental freedoms enshrined in the Constitution and specifically the right to a name and nationality from birth; to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment; and to parental care and protection.

From the above, one may easily observe that, enacting of a legal frame work that regulates surrogacy will help fill up the loopholes in line with the questions that the already existing loopholes in the existing laws, being relied upon while carrying out surrogacy arrangements.

ii) Right to Life

The Constitution of Uganda, under Chapter IV, further stipulates that every person has the right to life. Pursuant to section 4 of the Children's Act, Life begins at conception and for avoidance of doubt the Constitution stipulates that a person shall not be deprived of life intentionally, except to the extent authorized by the Constitution. Abortion is also not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment or else the life or health of the mother is in danger. This under consideration, it means that a surrogate mother or commissioning couples cannot therefore opt to abort a child on grounds of sex of a child. The Indian Assisted Reproductive Technology Regulation Bill 2010 proposes that Assisted Reproductive Technology (ART) clinics shall not assist couples to get a child of pre-determined sex. The Bill proposes that it shall be an offence for anyone to determine the sex of the child to be borne through ART.

Similarly, Uganda should build a legal frame work on surrogacy and such should be molded in such a way that it, prima facie, protects the most Inherent Human Right of Life and such a Law should for the best interest of the child.

iii) Best Interest of the child

In line with the Children's Act, when the courts were faced with a dilemma between administrative action and the best interest of the child, a child's best interests are of paramount importance in every matter concerning the child. In the case of Re Onen Cliff Mills and Laker Joy Onen Minors court observed that In the determination of matters of a child, Court is guided by Sections 3 and 4 of The Children Actthat require it to be guided by the welfare principle and best interest of the child. In applying that principle, the court will consider the relationship between the child and potential legal guardian, whether the applicant is the child's preference, whether the applicant is in position to provide the best stability and continuous care for the child, he or she can best fulfill the child's needs, the moral character, fitness, and conduct of the potential guardian. The court will look at what is in the best interest of the

child to make sure the child is raised in a safe, stable, and loving environment. A guardianship order ought to be motivated by the overriding requirements pertaining to the child's best interests.

Relating this to the issue of surrogacy, the law has to be in line with protecting the best interest of the Child pursuant to the provisions of the Children's Act and other related laws which take best interest of the child as paramount.

iv) Right to highest attainable standard of health

Further, the Constitution under Article 39 provides that every person has the right to the highest attainable standard of health which in my opinion as provided for by other subsisting laws, includes the right to health care services, including reproductive health care. Similarly The African Charter on the Human and Peoples Rights (the "ACHPR") or the Banjul Charter, as it is also called and Article 12(1) ICESCR provides that every individual, which includes children, has the right to enjoy the best attainable standard of physical health. Assisted reproduction may require different types of medical procedure for purposes of ensuring legal parentage rights. The parties are thus recognized by the Constitution that they, including the resultant child, should attain the highest standard of health. In that regard, just like other countries that have embraced surrogacy and enacted laws to govern it, Uganda also requires a regulation and a regulatory body to govern, standardize and accredit clinics engaged in these reproductive activities.

v) Special measure of protection

The Constitution recognizes that the International Covenant on Economic, Social and Cultural

Rights (the "ICESCR") state that special measures of protection and assistance should be taken on behalf of all children without any discrimination for reasons of parentage or other conditions. Thus, a legislation that specifically addresses the surrogate children to be free from discrimination will assist in addressing the stigma that surrounds those radicals who are against surrogacy as being a means of rejection of the resultant child by the birth mother.

Main Challenges of Surrogacy Arrangements and the Contemporary Legal Issues surrounding Surrogacy Practice

Challenges due to Inability of the Resultant Child born of Surrogacy Agreement to Consent

The Child, a product of the surrogacy arrangement, had no say in entering the consent but stands to suffer great effects infringements against its' rights and interests if his or

her legal parents do not take up their parental responsibility.

Acquisition of infancy diseases. The Child has a right to health, children are entitled to medical treatment, protection and care and the unavailability of a regulatory body to accredit and standardize ART clinic can endanger the heath of a child if the gametes of the parties are not screened and tested against sexually transmitted diseases or other communicable diseases. The child must not live with the disease unintentionally transmitted by the commissioning parent(s) or surrogate mother.

The "single parent effect." The Child has a right to be raised by both parents under the Children Act with equal parental responsibilities the choice of parties being single can affect the child's psychology in the long term.

Moral and religious challenges. It is regrettable to mention that many countries in Western Europe consistently prohibit surrogacy because of moral and religious concerns. People in those countries sometimes engage in surrogacy outside of their home country, and the home nations sometimes refuse to recognize the parental standing of intended parents which leaves the operation at risk.

The surrogate child may suffer from identity crisis and statelessness. The identity crisis that may happen to the child on realization that he/she is the result of a surrogate arrangement may lead to a possible self-esteem loss. The child may feel a sense of neglect by biological parent(s) deceit and self-denial.

Jurisdictional challenges.Parties to a surrogate arrangement face a problem when their respective states do not allow surrogacy. The challenge comes when at the country rejects such a practice and yet a party insists on having a baby through the same method.New York is one of the states in the country that rejected both compensated and uncompensated surrogacy arrangements and went ahead to impose fines and criminal sanctions upon people involved in compensated surrogacy arrangements. Consequently, New York couples try as much to beat the odds by coordinating surrogacy arrangements abroad at after birth, the child is adopted within their mother country. It is imperative to note that such an act can lead to uncertainty over the law that applies to the arrangement and subsequently the parentage of children.

Secondly, it is averred thatmost people experience a strong physiological need to know theirorigin.This could be problematic where the parents of the child are reluctant to disclose to the child his or her genetic parents where the gametes used during IVF were obtained from a sperm bank or a willing donor. Full surrogacy poses infringement of the rights guaranteed under the Convention on the Rights of Children as in many circumstances the child is not made aware of the existence of the genetic parent.

To avoid the above Uganda should directly stipulate within the new law on surrogacy on how a child born out of surrogacy can obtain citizenship and how they should be handled as they grow-up.

Challenges at Enforceability of the consent

Conflict of interest and responsibility. In several circumstances, there exists misunderstandings and conflicts between the surrogate mother and the commissioning parents yet surrogacy arrangements by definition involve more than two people, all of whom can legitimately claim that he/she is the parent of the child, a conflict can in principle always arise about who should assume parental rights and responsibilities towards the child. It seems that this is a problem inherent to surrogacy arrangements since one can never be certain that such a conflict will not arise. It's easy to praise a successful arrangement in retrospect, but the danger always exists that an arrangement one is planning, would cause moral harm to the surrogate and/or the commissioning parents.

Refusal to relinquish the child. The consequence for breach of surrogacy contract could well be illustrated by Baby M case where the surrogate mother eventually refused to hand over the baby saying that she was its biological mother and her right to raise the child pre-empted the commissioning parents. The Supreme Court of New Jersey allowed the custody to commissioning parents in the 'best interest of the child'; however the larger issue as to who would be a legal mother to the surrogate child was left unresolved.

Advancing the legal dilemmas further, the case of Jaycee B. v. Superior Court presented a still complex situation where a child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo using the in vitro fertilization techniques. Thus the surrogate child had five people who could lay claim to parenthood, that is to say, a genetic mother, a commissioning mother, a surrogate mother, a genetic father and a commissioning father. The commissioning couple got separated prior to the birth the surrogate child and commissioning father rescinded his obligation under the surrogacy contract in order to avoid maintenance costs to the child. Commissioning mother sought both custody and support from her ex-husband. The court granted temporary custody of the baby and order the commissioning father to pay for child support. The court battle continued for three years wherein the surrogate child did not have a legal parent for this period. The conclusions arrived at the judicial determination of surrogacy contract clearly indicate that these contracts are against public policy. The ideal would be for the surrogate to be a close friend or relative of the commissioning parents who is also deemed psychologically and medically fit to undertake such and a venture but again there is no guarantee that problems would not arise. Therefore, in most circumstances, a couple usually prefer a surrogate who is (and will remain) a complete stranger to them, for the very reason.

However, it is important to note that most of such misunderstandings come about as a result of not having a law that governs such governs of contracts and leaving such modes of arrangements to be handled by persons privately and to apply the general laws of Contract law which are really not exhaustive when it comes to laws governing surrogacy.

Difficulty in constraining a surrogate's behavior. The Agreements may also require the surrogate to refrain from alcohol and drugs or to maintain a certain diet or engage or refrain from certain activities during pregnancy. Enforcing this consent can be difficult; legitimate concerns arise as to the extent of the surrogate's autonomy during the period of the pregnancy. It is not clear whether a court order should be obtained against the surrogate mother whether this order could be enforced through total restraint through a hospital confinement or compulsory intake of certain foods. The challenge arises naturally from the fact that a surrogate mother will never have the true concern and attachment to the fetus as much as a real genetic mother would be hence the former may not take adequate caution or sacrifice for the sake of the child's well-being. The problem arises where such control over a surrogate may go to the extremes such that her personal freedoms and rights are infringed, a thing which is potentially exploitative and underlining the bodily autonomy due to intense regulation and intrusive supervision during pregnancy. This therefore means that a balance should be obtained between the interests of the surrogate and those of the fetus that depends on the surrogate for its wellbeing.

Lability of a surrogate remains unsettled. If the child is born with genetic impairment or defect which is determined to be as a direct consequence of the actions of the surrogate, it is not clear in the current legislation at what stage the surrogate can be sued for negligence? Regrettably, the physical and mental damage is done to the child regardless of disputes on parental responsibility. In such a situation, the infant would likely become an award to the state, and therefore a responsibility of the taxpayer if and until adoption could be arranged.

Locusstandi of the child against a legal parent in negligence is unsettled. In addition, there is no provision that allows a child born of a surrogacy arrangement to sue his legal parent for any neglect or desertion or aversion of parental responsibility. In Uganda there is also no registry created to ensure that the child can access birth register to confirm their birth mother and the parental order register to confirm the commissioning parent(s). Commissioning parent(s) who enter into surrogacy arrangements, it is suggested, want perfect babies in their own images and would be more likely to reject an imperfect child. Surrogacy arrangements therefore appear to stack the deck against an imperfect child. The gestational mother is prevented from thinking of the baby as her own while the contracting parents have a certain image of how the child should appear.

Conflict between surrogate mother and commissioning mother. In some other circumstances, surrogate mothers (gestational, especially in circumstances where they obtained the child through sex with the commissioning father) obtained feelings for the father and want to be referred to as wives to the man thus becoming a threat to the already existing marriage's continuity.

Right to access of information. In cases of adoption, questions had been raised whether an adopted child is entitled to his/her basic rights to know her historical identities and also to find out whether hereditary diseases or other health problems were a part of her genetic inheritance. A comparable argument can obviously be made by the progeny of AID. The argument for disclosure would gain even more persuasiveness in light of a finding made by New England Journal of Medicine, whose statistics from a study showed that a sperm from one donor had in fact been used to produce fifty children and thus raised the potential of accidental incest among offspring who had the same father.

Conclusion

Suffice to note that, Medical science has evolved to the extent that it has resulted in assistance to the procreation process. These have yielded, with them, ARTs (Artificial Reproduction Technologies) which in its various forms assist the infertile and weak mothers to bear a child genetically related to them. Such technology might face resistance from the society, due to the customary Laws governing such societies. However, the state's approach should be in conformity to the demand and an attempt to regulate controversies arising out of such arrangements. In an attempt to harmonize the sexual and technological conception, the laws of Uganda need to have a consistent and updated approach in order to regulate and solve various disputes arising out of such arrangements. Thus an approach should be towards assisting in procreation process and building up a strong family policy.

A Comparative analysis of the CHILDREN'S ACT Cap 59 and the best practices of other jurisdictions

The proposed best practices from the UK; US; India and South Africa

(i) The SAA, HFEA and UPA

The Children Act, like UK under the HFEA Act, should stipulate that the intended parents must be registered as donors for medical screening purposes. This definition outlines a clear watershed between the transition period when the legal mother of the child transmits its parental duties and obligations to the intended parents. It will save on time and best interest of the child as it limits the time wasted for paternity test during a trial for child maintenance.

There is also need for a structure to protect the best interest of the child in the event disputes arise as to the parentage in surrogacy laws. The UPA Act comprehensively provides a paternity establishing scheme through voluntary acknowledgement; rules and standards of genetic testing; and through the adjudication process. For persons who fail to volunteer paternity acknowledgments. The practice in Uganda is that DNA hearings of maintenance suit which suit may be prolonged thus prejudicing the legal mother and child. In the unlikely event that the donors gametes are not prescreened then attaching the father of a father who refuses to volunteer to a paternity test is favorable to the parties. The father must however be conscious of the fact that parental responsibility attaches to a father whether or not he is genetically related to the child.

(ii) The Surrogacy Arrangement Act (SAA) in UK.

Whereas in the UK the SAA Prohibits Advertisement of Commercial Surrogacy in India. The Surrogacy Arrangement Act (SAA) illegalizes advertisements to search for a surrogate. The Act prohibits women from making advertisements as potential surrogate mothers. The penalty for this offence upon conviction is imprisonment for a period of three months. The SAA further stipulates that it is illegal for anyone to receive payment for their involvement in a surrogacy arrangement. This provision prohibits individuals and surrogacy agencies from commercializing the surrogacy practice in the UK. The SAA only permits for the payment of reasonable expenses to the surrogate mother to cater for her medical expenses; loss of income and other pregnancy related costs that may be incurred over thepregnancy period. The UK courts have had opportunity to pronounce decisions in circumstances where allegations of the clause for nonpayment have occurred.

In the case of Re W, a UK couple entered into a surrogacy contract with a surrogate mother in United States (the "US"). The arrangement was organized by a surrogacy agency in the US. The intended parents paid both the surrogate mother and the Agency commission for their task. Upon return to the UK the commissioning couple applied for a grant of parental order. The Court held that parental order cannot be granted under the SAA if there is proof that the Arrangement was not done purely for altruistic reasons. The Court in declining to grant the parental order noted that this stipulation applies even where the surrogacy arrangement took place in a country or state where commercial surrogacy is legal. On the contrary India is the herb of commercial tourism. The ART Bill prescribes that registered ART Banks are authorized to advertise, procure or provide semen, oocyte donor or surrogate mother.

From the above, the question that arises In a Ugandan context is, should the law disallow advertisements of surrogacy practices?, if so, the practice will be commercial and shrouded in secrecy; very few parties are willing to discuss the issue and despite the fact that surrogacy is an old practice and has been ongoing within the country, there are no cases that have been reported yet even though parties involved in the

arrangements have had issues. Thus, the idea of advertisement should be left out however a law that is stringent in-terms of not giving the citizens an option to carry out illegal acts should be enacted in the regard.

(iii) Transferring Legal parentage

Uganda may seek to use the UK approach in issuance of Parental Orders in surrogacy arrangement, however, in my view; the South African Approach is best as it is more predictable and faster as it is endorsed by a High Court by an order prior to the artificial insemination; in vitro fertilization or other medical procedures. The commissioning parents are granted a parental order from the onset unlike in the UK the intended parents can only become the legal parents of the surrogate child upon applying for a grant of parental order and obtaining approval of consent from the court. The application forms for parental orders are made to the Family Proceedings Court/Magistrate's Court or County Court in the intended parents" local area. If the intended parents comply with the conditions of the HFEA, the Court then appoints a Parental Order Reporter.

Parental orders can be granted to married or unmarried intended parents or parties in a civil partnership. However, the SAA is to the effect that the child must have been carried by a woman other than the intended mother and must also be genetically related to at least one of the intended parents. The SAA further requires the partner to the surrogate mother to freely and unconditionally consent to the making of the Order. It is worth noting that consent must be given within six weeks after the child has been born. After obtaining consent the SAA makes it a requirement that couples must apply for the Parental Order before the child reaches six months of age. Six months is a long time to allow the surrogate or commissioning couples to change their minds to the detriment of the child. Although the law may seek to compensate aggrieved parties by damages; there is no significant difference between the adoption 6 week consent procedure and the parental orders under surrogacy arrangements.

Additionally, at the time of the application and at the time of the making of the Order, the intended parents must have been domiciled in the UK and the child must be living with the intended parents. These scenarios of being domicile in the jurisdiction of the surrogate mother costs the commissioning mother her job due to unpredictable delay as observed in the AMN case. The law international practices on legal parentage in surrogacy arrangements will go a long way in that it should provide uniformity in parentage issues for foreigners. In the meantime the Indian approach is most suitable in ensuring the best interest of the child born of surrogacy arrangements. The Bill stipulates that for non-resident foreign couples seeking to undertake surrogacy in India shall appoint a local guardian who shall be legally responsible for taking care of the child during and after pregnancy. Further, the foreigners must also provide a letter from embassy of the country in India or from foreign ministry of the Country, clearly and unambiguously stating that:

a. the country permits surrogacy; and

b. that the child born through surrogacy in India will be permitted entry in the Country as a biological child of the commissioning couple, including where the embryo was a consequence of donation, an oocyte or sperm outside of India.

If the foreigner fails to take delivery of the child, the local guardian shall be legally obliged to take delivery of the child. The local guardian will be free to hand over the child to an adoption agency within one month after delivery. During the interim period the local guardian shall be responsible for the well-being of the child and the child will be give Indian citizenship.

The Bill also stipulates that at any given time the commissioning parents shall use only one surrogate and the surrogate must be an Indian citizen. Notably, the Bill states that during the pregnancy the surrogate shall be prohibited from engaging in any act that may harm the child until the designated hand over of the child. The commissioning parents on the other hand are expected to insure the surrogate mother and the child till the surrogate mother is free of all health complications arising out surrogacy.

Finally, in the UK the Court then appoints a Parental Order Reporter, who visits all the parties and provides the Court with a report describing the circumstances of the surrogacy, commenting on the welfare of the child, (as set out in the Adoption Act 2002 and modified by the Parental Orders Regulations), and any arrangements for direct or indirect future contact. After the Parental Order has been granted, the Registrar General makes an entry in a separate Parental Order Register to reregister the child. This is cross-referenced with the original entry in the Register of Births. It is not possible for the public to make a link between entries in the Register of Births and the Parental Order Register. This register can only be accessed by the child once he attains the majority age of eighteen years. The effect of the Parental Order is that the intended parents receive a new birth certificate stating they are the legal mother and father of the child.

A Parental Order takes effect from the day it is made. Up until the granting of the Parental Order by the Court, the surrogate can apply for a residence order to stop the Parental Order from being made or seek the return of child. The intended parents can make a counter application.

Thus, including a provision of registries is important in Uganda as this will assist in protecting the best interest of the child. The child can access the register whenever required and the commissioning parents having received the parental orders can have their names in the child's birth certificate to avoid embarrassing situations when making applications to institutions as there relations with the resultant child.

Legal parentage in surrogacy arrangements entered by same sex couples as commissioning couples

The UK SAA and The Child Status Act embrace same sex marriages or same sex parenting.

Article 31(1) of the Constitution expressly allows marriage between a man and a woman and Article 31(2a) expressly disallows same sex marriages. In the pretext, legal parentage or legal responsibility arising out of surrogacy arrangements in same sex marriages cannot arise since it's between the husband and the wife or either of the two.

The place of the same sex commissioning couples in South Africa legal regime In the Ex Parte Matter between WH and 3 others the South African Court held that same sex couples can use surrogacy arrangements to obtain children of their own. In this matter the Court noted that where the commissioning couples meet all the qualifications in the CSA it matters not whether they are same sex couples or not. The Court noted that the commissioning parents as well as the surrogate mother were suitable persons to accept parenthood as well as to act as surrogate mother respectively.

The Court was also satisfied that arrangements for the care and welfare of the child to be born, including the stability of the home environment and the provisions for the child's needs in the event of death of the commissioning parents or divorce or separation had been more than adequately provided for. The Court finally concluded that the parties" agreement was altruistic. The Court held that the surrogate motherhood agreement in question is valid and was confirmed and that the provisions of Section 297(1) of the CSA should apply to the Agreement for all purposes. Similarly in the USA In the case of Albridge & Keaton a woman who moved in with a woman who was pregnant and later left when the child was still an infant was said not to have equal parental responsibility.

However, it is important to note that same sex marriages have been banned and fought against by all communities in Uganda and allowing such arrangements to be part of the Surrogacy arrangements will be raping the grand norm which derives its powers from the people. It is thus my opinion that; in formulating a legal artillery on surrogacy, it should only cater for the marriages between a man and a woman as recognized by the norms and customs and more so the laws of Uganda.

International law on legal parentage in surrogacy arrangements

In discussing the legal status of children born out of surrogacy arrangement The Hague conference on private International law discussed the legal parentage and parental responsibility for the resultant child as being crucial rights in matters of nationality inheritance, maintenance and identity. The effect of legal parentage would arise

from different scenarios birth registration; judicial proceeding; acknowledgement of legal parentage. There is a gap in cross border relations and there is need for uniform laws governing legal parentage of surrogacy arrangements however Uganda will have to look into practices acceptable to our culture and do away with unacceptable practices such as recognition of same sex legal parentage agreements; There is also need for amendments of the registration of Birth' & Death Act; the Children Act and Family laws and finally the enactment of Legislative framework addressing surrogacy arrangements.

Equal or Shared parentage

Equal and or shared parental responsibility cannot only vest in the natural parents and in some cases must be determined in a case by case basis. The most important factor is the best interest of the child.

Psychologist studies reveal that children are better off being reared and cared for by both parents rather than single parent arrangements. The Convention on the Rights of the Child (UNCRC) are clear that the best interest of the child is paramount and separation of the child from his or her parents should happened in extraneous circumstances.

However the best interest of the child standard has its challenges to the parent and to the child. The parent's welfare is not considered and their rights may be infringed as the authorities are busy guarding the child's best interest. Secondly some situations are unpredictable, for example parties do not anticipate death, divorce, separation when they have intentions of legal parentage. The situation is also information intensive as a shared parentage can be an issue for the court to determine both pro-actively and in a supervisory manner hence there should be guidelines; age and sex of the child; a proper definition of shared custody, physical or otherwise; when should share-custody be withheld; court should safeguard rights of the parties from exploitation of the other because of using the children and bargaining power on maintenance.

In the US and Canada, United Kingdom, SA, Netherlands, Thailand and India joint legal custody has been accepted however there are two determining factors, the welfare principle; the no delay principle and the best interest of the child principles. It also makes the court's decision easier when parties consent, are mature, consent or come up with a parental plan, the parents must be free from family violence and abuse.

In Uganda, Section 3 of the Children Act provides that the best interest of the child is a primary consideration and the overriding factor however several factors are considered in determining this best interest of the child.

The Kenyan and Indian approach are admirable as they embrace both the welfare and best interest of the child. Whereas in India the Guardian and Wards Act the provisions are more detailed in guardianship of the child, Part VIA of the Children's Act outlines the legal responsibility of the guardians. The Indian courts are more inclined to give custody of the child to the mother.

However there are exceptions to this rule when the court granted custody to a father after observations that the mother is turning the child against the father and disallowing him visitation rights as was seen in the case of Ashish Ranjan v Anupama Tandon. The courts have also awarded joint custody for half the year each to both parents with weekend visitation rights, telephone and video conferencing rights when the child is with the other parent for the sustainable growth of the child. It is debatable whether or not the weekly as opposed to the half year approach may be better. Such an approach would also best apply in Uganda if complied in a way that protects the best interest of the Child.

Regulatory legal parentage in surrogacy arrangements

The National Council for Children Act Cap 60 establishes the National Council for Children's, which operates under the Ministry of Youth and Children to provide a structure and mechanism which will ensure proper coordination, monitoring and evaluation of all policies and programs relating to the survival, protection and development of the child and for other connected matters. However, there is an urgent need to amend The roles and functions of NCC to include them as representatives to in a Surrogacy Regulatory Board wherein they will ensure that the child's best interest are addressed as the overriding objective of issues arising in legal parentage surrogacy arrangements. Orders granting Legal Parentage in surrogacy arrangements may be expedited best through the proposed High Court endorsement procedure in the South African court; this will significantly reduce the amount of conflict arising from such arrangements including the definition of who is the parent; which is pre-determined as the commissioning parent in surrogacy. The Indian ART bill is similarly elaborate in laying out the guiding principles for Regulation of the operations of ART clinics; The commissioning couple may however be furnished with particular information regarding height, weight, ethnicity, skin color, educational qualification, medical history of the donor provided that the identity, name and address of the donor is not disclosed; semen, oocyte donor or surrogate mother; requirement for written consent; Obligations of the ART clinics when using gametes or embryos; sourcing of gametes and the pre-requisite to the arrangements is that the details of the donors shall be kept highly confidential. Donor gametes shall not however be stored for more than five years. The Regulatory body must clearly spell out the rights and duties of the parties to the legal parentage in Surrogacy Arrangements and the Determination of the status of the child and the rights of the child.

Analysis of landmark case laws

Uganda has not reported any cases in regard to surrogacy, however we shall borrow a leaf from the reported cases from it immediate Neighbor Kenya.

A.M.N& 2 others v Attorney General & 5 others

A commissioning couple entered into a surrogacy agreement after the commissioning woman was diagnosed with secondary infertility and was also not genetically related to the twins born of the surrogacy arrangements as she could not donate her egg because she lacked an end cervical canal. This case was mainly concerned with how surrogacy agreements should be lawfully operationalized. It also raised questions as to the registration of a child born out of a surrogacy arrangement. The court held that the legal mother was the genetic and gestational mother regardless of the surrogacy contract in place. The contract was unenforceable because surrogacy arrangements are not governed by any Kenyan laws. The effect of the surrogacy contract was adoption.

The courts were thus able to confirm recognized the options of inter-country adoption under Article 23 of the 1993 Hague Convention on Protection of the children and Co-operation in Respect of the inter-country Adoption. The commissioning couples in this case were able to obtain a certificate as prescribed in Article 23 which enable them obtain a passport services. This was a tedious process and was limiting and costly to commissioning couples who wish to have the children recognized as their own from the onset in order to avoid to wriggles of court proceeding and time expanded in back and forth adoption procedure and reporting.

JLN & 2 others v Director of Children Services& 4 others

This case highlights the duty of the State to protect children born out of surrogate arrangements by providing a legal framework to govern surrogacy. In particular whether the constitutional right to privacy of the surrogates was breached and whether the legal mother was properly registered under the Kenya legal frameworks regulating legal parentage in surrogacy arrangements. Following the delivery of the children, conflict arose as to whether the commissioning mother should be registered as the mother of the children and not the birth mother. MP Shah Hospital informed the 1st respondent (the Director for Children Services) of the circumstances concerning the birth of the twins. The 1st respondent was of the view that the children were in need of care and protection. He directed his officers to place the children under the care of a Children's Home. The children were later released to JLN and the hospital issued the Acknowledgement of Birth Notifications in the name of JLN. Both cases called out for the formation of a legislative framework towards surrogacy arrangements which includes legal parentage. The cases also restricted the definition of surrogacy to the birth mother ignoring the commissioning couples for want of a legislative framework.

Plausible action plan for serogacy

a. To conduct a civic education on legal rights attached to Assisted Reproduction and Assisted Reproductive Technology (ART) with specific emphasis on surrogacy arrangements. This is because many members of the society do not know the meaning of surrogacy arrangements, let alone the rights they should demand under the arrangements. Thus conducting such will increase public awareness and enable the citizens to participate when they are fully aware of their rights.

b. To propose that Uganda participates in the ongoing discussions of International surrogacy and matters arising thereto.

c. To propose that surrogacy arrangements should be entered into only during specified conditions and that the commissioning parents must be man and woman and are legally able to form a family. This will help enacting a law that is consistent with the Constitution of land and all the other laws and norms of the people of Uganda.

d. Proposing formation of an independent regulatory body in line with India's Assisted Reproductive Technology Bill as a mode, to the extent that Uganda does not promote commercial surrogacy. This will increase public awareness and the level of informed decisions parties will make when entering into a legal surrogacy agreement.

e. To ensure all stakeholders having representation in the Regulatory body are members of the NCCS and their major goal is to ensure that the best interest of the child is paramount to all decisions made during the surrogacy arrangement, as it is the overriding objective of the Children Act.

i) To further propose that the Regulatory body do come up with guidelines, this will govern the conduct and capacity of the professionals who supervise the practice of surrogacy. This will help to reduce a number of risks and illegal practices

ii) That the regulatory body addresses the fundamental requirements and conditions of all surrogacy agreements. For example, the date of the commencement of the agreement should be tied to the date of fertilization of the surrogate mother;

f. The Surrogacy Arrangements should have the following minimum requirements:

There are certain considerations which must be taken into account when designing the Agreement. These are:

I. an acknowledgement that the intended parents shall compensate the surrogate for her gesture;

II. A statement that a licensed physician will perform artificial insemination on the surrogate

(This is to be done under circumstances of gestational surrogacy);

III. That the intended parents shall acknowledge the child in question once born; and finally

IV. A statement by the surrogate that she will consent to the adoption of the infant by the real father and his wife at the time of birth.

Recommendation geared to protect the surrogate mother and the Commissioning parents

The new law should be aimed at promoting the following in relation to protecting the surrogate mother;

The surrogate mother and the commissioning parents should enter into the Agreement freely devoid of any coercion, duress or undue influence. The Consent given should also be a voluntary and an informed consent.

A surrogate mother should not enter into a surrogacy arrangement for commercial gains. However, a reasonable compensation should be availed to the fifty percent prior to the procedure being carried out and fifty percent prior to delivery of the child and fifty percent after delivery of the child whether healthy or otherwise. The commissioning parents should also shoulder the burden of all pregnancy related costs.

To ensure screening of all gametes prior to procedure to protect surrogate mother against sexually transmitted diseases or other communicable diseases. To ensure that the gametes that will be used on the surrogate mother are not stored for a long period of time. This will reduce any damages that may arise into a legal suit.

To ensure that the surrogate mother does not undergo more than three medical procedures for the same couple or person in order to protect her health.

The pre-requisite conditions to be met by the surrogate mother should be set out by the regulatory body and reviewed annually to confirm that their health is protected. The surrogate mother must be in a specified age bracket, say between the age of twenty one years and forty five years, and must have given birth to at least two children of her own through normal birth(without having any history of miscarriages) and must further be mentally sound to enter into the surrogacy arrangement.

Surrogate arrangements are of great importance to the intended parents but put the

life of the surrogate mother on a frontline of danger. Thus the intended parents must take the obligation to take life insurance cover for the surrogate mother, or the other alternative is to consent by way of endorsement, before an authorized person, that they will foot the medical bills and this is intended to shield the surrogate mother(s) from any medical or physical complications that may necessitate the need for an urgent medical care.

Surrogate contracts should include a term stating that the surrogate can utilize the services of a healthcare practitioner of her choosing, after consultation with the intended parent/s, to provide the surrogate's care during the pregnancy.

The surrogate mothers and the commissioning parents must be given joint and separate counseling services one month prior to the parties signing an agreement (this could include information on medical, physical emotional and legal risks which should assist her in making an informed decision as far as is practical) The counseling should take place before the court order approving the surrogacy arrangement being signed and two months after relinquishing her child to the commissioning parent or parents and also in instances where the child born has succumbed to a still birth;

To be allowed to terminate the pregnancy on the advice of a medical practitioner in the event that the pregnancy will be harmful to her or the resultant child.

The legal parentage agreements should be approved by the court order to avoid any change of mind from the surrogate mother due to emotional attachments to the child after birth. A commission parent should, as far as is practicable, know anticipated costs to avoid black mail and exploitation by surrogate mother or stakeholders towards the completion period (9 months).

The birth certificate of a child born through surrogate arrangements should contain the names of the commissioning parents in order to protect the legal interest of the child and the commission parents should there be any intervening factor;

Infertile person(s) should be allowed to use donors to have children of their own; and, the law should expressly prohibit the surrogate mothers from engaging in activities that may result in miscarriage of the child like taking drugs, alcohol and engaging in demanding physical activities amongst others.

The conform that the medical practitioner will conduct himself professionally in not allowing the surrogate mother to terminate her pregnancy any account other that the fact that the pregnancy will be harmful to her or the resultant child. To be entitled to compensation in the event that there is no medical approval of termination of pregnancy by the surrogate mother.

Recommendations to Protect the Surrogate Child

a) Surrogate arrangements must stipulate for the provision of financial support for the surrogate child to cushion the child and the surrogate mother in the unfortunate of demise of the Commissioning Parents before the delivery of the child, or divorce of the Commissioning Parents and subsequent willingness of none to take the child or the occurrence of any other intervening factor which may render the intended parents unavailable or unwilling to take the surrogate child. This however does not protect parties (including the surrogate child from an agreement gone badly due to unpredictability. Even the courts have no control of enforceability of surrogacy arrangements in some occasions as discussed in this thesis.

b) If he child is rejected by both the commissioning couple and the surrogate mother, the surrogate child should be surrendered to the Children Services Department for adoption either by the surrogate mother or any other willing person.

c) The laws regarding birth certificates and any other laws promoting the best interest of the child, as stipulated in the Children Act, should be applied.

This chapter has summarized the scope and proposes recommendations of how the key players should be treated under surrogacy arrangements. The current legislation addressing matters arising with regard to surrogacy is inadequate and insufficient to respond to dispute arising from infringements of rights of parties. Surrogacy involves conflict of various interests and would have inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will be a regressive step at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. Prohibition or non-intervention on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. On the other hand, active legislative intervention is required to facilitate correct uses of the new technology. Therefore, it is at this point that I suggest that Uganda should come up with commendable effort towards formulating legislative framework that will particularly cover up the gap that has been drawn by this new concept of surrogacy.

TOMORROW'S DILEMA

Patentability of Genes

In instances where for instance, body organs have been held out for commercial realization benefits, it is inevitable to meet logger heads with issues of "who owns what and why?" this is imminent because at a certain point under a surrogacy practicing environment where we see sperm banks being depots for surrogacy purposes, a vigilant activist would wish to exercise their claim by for instance seeking a benefit or compensation from commissioning parents for his/her genetic contribution. Take an example; a commissioning spouse could be known for giving birth to albinos and

owing to the gene contribution of a surrogate, this fact is escaped.Can this surrogate later claim an award for their fortune occasioned upon the commissioning parents?

Arguments for this are not only built in surrogacy but also owing to prevalent issue of blood sale and donation, sale of body organs, among others which could form grounds for future litigation. A question will arise on; whether a surrogate mother or a sperm donor can attain copyright over their DNA and thus seek an award therefrom?

First of all, a gene patent is the exclusive rights to a specific sequence of DNA (a gene) given by government to the patent holder. The later can be an individual, an organization or corporation who claims to have first identified the gene.

Prior to 2013, about 4,300 human genes had been patented in the US. This meant that the holder of patent would dictate how the gene could be used, in both commercial settings such as clinical genetic testing and in noncommercial settings including research, from 20 years from the date of the patent. The position changed in the case of Association for Molecular Pathology v. Myriad Genetics, Inc where the supreme court of the US rejected the notion that human genes should be patented. The court rejected such patent with a view that DNA is not patentable since it is a product of nature. It is important to note that among the considerations for granting any patent is that the applicant must have created something new or added something new to the already existing. This therefore means that patent cannot be granted over a human gene since nothing new is created apart when discovering the gene. However, the court found that complementary DNA's can be patented since there is a modification of the existing. The standpoint therefore remains that things which are products of nature cannot be patented. Patenting such would lead to monopolization of genes which would hinder research and also slow down medical results.

The "baby selling"impasse

There has been a continuous belief by some members in surrogacy practicing nations that the monetary compensation to a surrogate mother cannot survive being termed "baby selling" and which practice would be both immoral and unlawful. The second issue lies in computing the amount of compensation to a surrogate mother.

Should there be a standard compensatory amount? and If standardized, would surrogacy not be viewed as a commercially viable business for women and male donors? and if all answered in this positive, where does this leave the morals of Uganda? in an instance where surrogacy institutions form the revenue base bearing in mind Uganda's traditional centeredness.

Am drawn to allude to the words that "you cannot uproot a tree in London and plant it in African soil, expecting it to grow normally".In my opinion, if not rotted by the soil, (the law) it would be suffocated by the surrounding weeds (the customs).

Compensated Surrogacy is the practice in which the surrogate receives compensation for the reproductive care she provides beyond reimbursement for reasonable direct expenses(also known as commercial surrogacy). The standard price for surrogacy compensation in Uganda remains unsettled but a 2005 precedent has it that it goes for about 4.5 million (16 years ago) and considering economical changes, the price currently must be doubling. Standardizing the compensation amount has a moral effect of permitting what is viewed as "baby selling" and also an effect of failing the parties' freedom of contract.

What constitutes the surrogacy cost? The compensated amount may include the cost of paying agents or brokers for their service, the cost of advertising by the agency, matching, carrier screening services, background checks, creating an intended parent's profile, counselling, education and support to both parties, coordinating and overseeing the surrogacy process health wise, legal services, medical expenses i.e. paying for IVF treatments, surrogate compensation and reimbursement, matching services do well to establish a relationship between the surrogate and intended parents. The cumulative cost of such surrogacy compensation in for instance America goes for about $75,000m- $125,000 which in Uganda shillings, the former amounts to approximately 270m but of course not all these facilities are given or affordable in Uganda hence the price will be so much lower. The moral question of "baby selling" has finally been answered thus;

In any case, as the cost of surrogacy goes high, practitioners need to take into account the growing competition from the ongoing sale of body organs. Where does the ongoing sale of body organs leave the practice of surrogacy?

Organ trafficking poses a potentially strong alternative to surrogacy practice which I believe will be cheaper; child friendly and less burdensome to courts of law in regards questions of parentage, adoption and the best interests of a child. In 2011, a uterus transplant was witnessed of a one Turk Derya Sert, which now provides an option for those born without a uterus as cases have been reported in Uganda. The natural attachment of a mother to their fetus will groom a better concern, care and obligation to raise a child genuinely than what is possible for an adopting parent. Recently, Ugandan medical officers have been probed over sale if human organs to the global black market not forgetting that dozens of illegal transplants have been carried out within. Often times, transplants have been done on people with end-stage kidney failure but as the situation seemingly turns commercial, other body organs like too are reportedly on sale, which could facilitate an alternative to surrogacy. In my finding, I have encountered a kidney sale at Ushs. 130 million in 2019, which is somewhat fair price? The challenge is how they are done illegally and as a 2021 UN report reads that young girls are given about Ushs. 300,000- Shs. 500,000 for selling their organs to Ugandan middlemen who resell them at 10 million. The sluggishness of law makers to appreciate this practice and enact a law thereto would in turn cause

health risks and genetic inflammations owing to absence of standardized facilities to operate such transplants.

The future of national law

Criminal law and national health policies would ordinarily operate to prohibit all parties in the illegal organ trafficking and surrogacy transaction but there remains confusion where some participate knowingly while others do so unknowingly. The profile of culprits in the process is also a confusion that would encompass the real people living on criminal trafficking, doctors, ambulance drivers, legitimate medical professionals who may not intend to participate in the offence. In response, the UN has formulated the Trafficking in Persons Protocol supplementing the Transnational Organized Crime Convention which is concerned with trafficking of persons for organ removal. This means that in an instance that surrogacy and organ trafficking remain operating in the backstage, national criminal law too will encounter a need to adjust accordingly and formulate deterrent rules or else, gliding rules shall need to be made to direct the operations. Various national laws including but not limited to the contracts Act 2010, the Sale of Goods and Supply of Services Act 2017 (for instance section 2 which defines a "good") will need to be amended to encompass body organs such as uterus, liver, kidney among others as within the meaning of the term "goods."

More to this, reports show that in 10 years to come, human kind will be capable of manufacturing a synthetic human from building a synthetic genome out of human nucleotides and if this is so, commercial surrogacy will experience a boost given "my imagination" that a person can own an artificial person as property which will where possible be used in surrogacy to do the "hectic work" of carrying the embryo and giving birth to a child which shall automatically belong to the owner of the artificial person (only thinking out loud.

The moral dilemma

Others go deeper in the religious precincts and say that the practice of traditional surrogacy where a woman's spouse would have intercourse with another woman outside their marriage is detrimental to the sanctity of marriage and whether permitted by the spouse or not, is an adultery which is potentially harmful to the marriage's survival. Therefore the future of surrogacy in Uganda stands at a verge of condemnation from the Christian fraternity. In justifying this conclusion, it is alleged that surrogacy "places children at risk and is not in their best interests or those of society at large," "has the potential to undermine the dignity of women, children, and human reproduction by commercializing childbearing." Considering this analogy, it is most probable that surrogacy will face this as a thorn in the neck of its durability.

The DNA dominance factor, intended parents might abandon disabled children. The

intended parents may have a tendency to claim dominion over certain genetic benefits stemming from their family DNA and may in so doing reject a child for failure to possess a specified appearance common from their family DNA a couple may claim that their DNA only produces tall children and so they have no responsibility over the short or short-nosed. Take for instance, the US Task Force were met with a challenge where a disabled child was abandoned by its intended parents in one case, when a fetus was diagnosed with Down syndrome and the intended parents told the surrogate to abort the fetus. When the surrogate refused to abort, the intended parents relinquished any claim to the child. This poses a bad position in Uganda where abortion is illegal. The question of patenting human DNA has been settled in the negative but nevertheless, the challenge would lie in such DNA related matters that affect a resultant child's appearance. The surrogate nonetheless gave birth to the child, and she and her partner took custody of and assumed responsibility for the child. While any parent, regardless of how the child was conceived, could choose to relinquish their child due to the child's disability, surrogacy laws must proactively address this risk. Under the CPSA, the intended parents are legally obligated to accept custody of the children immediately upon birth regardless of number, gender, or mental or physical condition and agree to assume sole responsibility for the resulting children.

In a nutshell, any researcher can only discuss what they find but could never encompass all scenarios nor imagine all the future developments. Nevertheless, here's an attempt to look through the shorter lenses to the future and so many developments lie ahead in the fate of surrogacy practice in Uganda and globally which are incapable of conclusive summary. The few I can imagine are deemed to form my submission; "Tommorrow's Dilema."w

APPENDICES ON SEROGACY

Appendix (i)

An illustration of the current trends in rate of fertility/infertility in Uganda from 1950-2021

A table emphasizing a steady fall per annum / trend in the actual fertility rate of Uganda, over the last 4 years.)

Appendix (ii)

Year	Births Per Woman	Decline Rate
2021	4.665	2.41
2020	4.780	2.35
2019	4.895	2.3
2018	5.010	2.98

Infertility Rate in Uganda since 2018 © UN 2021w

Surrogacy is a new assisted reproductive technology requiring to be perceived based on the real experiences of surrogacy patients regarding its legal issues so that legislators are able to enact appropriate laws for such patients' safety. This book pursues the goal to examine the experiences of commissioning mothers and surrogates confronting legal issues.

Infertility affects much of the world's childbearing population. Across the world, an estimated 40.2–120.6 million women aged 20–44 years and living in committed relationships fail to conceive after 12 months of trying. Of these, 12–90.4 million are likely to seek medical help. The remarkable advances in the science of medicine lead to the development of new human, ethical, legal and social issues every day; sometimes, the emergence of these problems limits or puts an end to using these medical advances. The functional development of these technologies depends on the responses given to the questions and issues raised (2, 3). Surrogacy is one of the scientific developments of the past few decades for treating infertility that has recently become the most controversial issue of assisted reproductive technologies due to its unique characteristics and aspects, and has so far had profound implications for religion, law, ethics and the society. Surrogacy is an agreement with a woman who indicates a readiness to become impregnated or an infertile couple and to give up the baby to them after delivery. The woman carrying the baby is the surrogate mother and the commissioning couple is considered the child's genetic (biological) parents. Surrogacy helps couples have their own biological children. Surrogacy is classified into two general categories namely gestational (full, host) surrogacy in which the

surrogate mother is not genetically related to the child, and partial (traditional, straight) surrogacy in which the surrogate mother becomes the child's genetic mother through donating her egg. Both procedures might be performed with commercial incentives, that is, the surrogate mother receives monetary compensation for carrying and delivering the baby, though sometimes surrogacy is performed with non-commercial (altruistic) incentives. Surrogacy has attracted the interest of many infertile couples in Iran as well and many Shia jurisprudents and legal scholars have permitted its use. In Iran, surrogacy was first introduced in 2001 in a number of fertility clinics Commercial surrogacy is currently the more common type of surrogacy in Iran however, there is no precise statistics on the actual number of surrogacies performed in the country. Although surrogacy is conducted in many countries, few laws have been ratified regarding this procedure. For instance, in certain countries such as India and Australia, only the first draft of surrogacy laws has been developed. The Iranian legal system lacks particular laws and the rule of precedent or legal precedent pertaining to surrogacy and the law of embryo donation to infertile couples enacted in 2003 as the only statutory law regarding new methods of pregnancy in our country, which is not helpful as it does not address issues related to surrogacy. The current rules and regulations enforced in Iran therefore put the medical team involved in these treatments in a predicament where finding a resolution seems very hard -if not quite impossible. According to Iranian laws, physicians are required to issue birth certificates under the name of the woman who has delivered the child. Issuing false birth certificates is a criminal liability for physicians and entails subsequent punishment. As laws have kept silent on the subject of applying surrogacy, including to issue birth certificates, physicians are unsure about their duties in such conditions. If the birth certificate is issued under the surrogate's name, however, the genetic parents face difficulties for having birth certificates issued and having their child's names inserted into their own birth certificates. As we know, no studies have been conducted inside or outside the country focusing on a dedicated purpose to describe the experiences of individuals involved in surrogacy in their confrontations with legal issues. In general, there are few empirical data available on surrogacy in Iran; therefore, its effects on the recipients and donors are ill-defined. Investigating the various aspects of using alternative assisted reproductive technologies in Iran, particularly in terms of religion and law, is a pre-requisite for introducing this technology. The prevalence of surrogacy has been growing and it is getting more likely for health care providers to be exposed to it in clinical settings Collecting data is therefore a necessary step to informing the institutors of this technology and legislators about the existing issues and also to the development of appropriate rules ensuring the safety of the infertile couple, the surrogate mother and the child. Given the current lack of information about the confrontation of commissioning mothers with legal issues, the present study has been conducted to understand and describe the experiences of commissioning mothers and surrogates about the legal issues of surrogacy and to also examine their manner of dealing with the situation.

Surrogacy agreements help to provide children for persons who cannot achieve conception or carry a child to term themselves. This practice has improved several lives over the years but can also be exploitative for some parties involved, if not adequately regulated. Surrogacy gives hope to couples who have been unsuccessful in their efforts to have children, whether through miscarriages, inability to conceive or health issues. The practice was recorded in the Holy Bible when Abraham and Sarah had difficulties bearing children and used their Egyptian slave girl, Hagar, to bear a child for them. Nevertheless, while Abram had sexual contact with Hagar, the modern reproduction technique of surrogacy can be done without the need for sexual contact. Surrogacy has been defined as "an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party". The surrogacy agreement will state that after the birth the surrogate mother breaks her parental link with the child and hands him or her over to the commissioning parents who legally become his or her parents. The woman delivering the child is known as the surrogate mother while the couple to whom she is handing over the child is known as the commissioning or intending parents. Surrogacy has become a more viable option than it was a few decades ago. This is largely due to the increasing awareness of Assisted Reproductive Techniques (ART), an increase in ART knowledge, and demand in several countries as well as the complex requirements and processes involved in adoption processes. Abortion of children has also reduced the availability of babies who could be adopted by interested persons. While surrogacy agreements assist people to have the children they desire, children are at risk of being subjected to human rights violations owing to their vulnerability.8 Children have rights that have been recognised in several international human rights documents, including the United Nations Convention on the Rights of the Child9 (UNCRC) and the African Charter on the Rights and Welfare of the Child10 (ACRWC).11 According to Gerber and O'Byrne,12 "whatever their parentage or the means of their conception and birth, children are not properties, but human beings and rights-holders in law." However, these rights are usually in conflict with the rights of other parties involved in surrogacy agreements.

This book aims to discuss the rights of children in surrogacy agreements, with the aim of ensuring that they are not abused through people's desire to have children. Furthermore, the types of surrogacy agreement as well as the legal frameworks in Nigeria and South Africa respectively are discussed to determine how these countries regulate the practice of surrogacy to protect the rights of children. South Africa is compared with Nigeria because they are both developing African countries and South Africa's comprehensive legislation on surrogacy agreements may be of benefit to Nigeria. A child, according to the UNCRC, is defined as a person below the age of 18 years. However, references to "children" in this article are to those who were born through surrogacy as well as to the unborn foetus.

TYPES OF SURRROGACY AGREEMENT

The practice of surrogacy comprises two types namely, partial or traditional surrogacy, and full or gestational surrogacy; each works in its distinct way.

Traditional or partial surrogacy

In traditional or partial surrogacy, the surrogate donates her eggs for fertilization with the commissioning man's sperm either through artificial insemination or sexual relations. Partial surrogacy is less expensive and might not need medical assistance. The disadvantage, however, is that the surrogate mother is genetically linked to the child and she might be able to lay claim to the child upon his or her delivery. In South Africa, for example, a surrogate who is genetically connected with a child has the right to terminate an agreement within a period of 60 days after the birth of the child.

Gestational or full surrogacy

Zaidi describes gestational or full surrogacy as the procedure carried out when a commissioning couple donates their gametes to be carried to term by a third party, and the child is handed over as soon as he or she is born. The child is related to the commissioning couple genetically; while the womb of the surrogate mother is used, she will have no genetic relationship with the child. Full surrogacy has been called a form of womb leasing and it necessarily involves the technique known as in-vitro fertilisation (IVF). In gestational surrogacy, the surrogate could be implanted with donor eggs, donor sperm or donor embryo, in cases where both commissioning parents do not have viable gametes.

RIGHTS OF CHILDREN BORN VIA SURROGACY AGREEMENTS

Surrogacy has various implications for the rights of children. Without adequate regulation and monitoring, abuse and exploitation can occur, which affects the well-being of children born of surrogacy. In a survey conducted by the World Health Organisation (WHO) in 2015, it was reported that only 46 per cent of the participating countries had ART legislation that included children in its provisions. The rights of children, which must be protected in surrogacy agreements are discussed below.

The rights to non-discrimination

Children may be deprived of certain rights based on their gender, race, colour, disability, language, sexual orientation, religion and/or the circumstances of their birth. Discrimination against children is usually due to their dependence on adults for basic needs, their immaturity and their inadequate access to justice. Article 2 of the UNCRC provides that the rights of children should be respected without any form of discrimination based on their birth or parents' status. The United Nations (UN) Committee on the Rights of the Child, which monitors the enforcement of the

UNCRC, affirmed this position by stating in General Comment 7 that States Parties must monitor and combat discrimination against children based on circumstances of their birth that deviate from the traditional process. Therefore, children born through surrogate mothers must enjoy the same rights as children born through natural methods. Their status, role and position in the home and society should not be different from those of children born through natural methods. In schools and communities, children born through surrogacy agreements should not be stigmatized. All privileges obtained by other children should be available to them.

The right to know one's biological origins

Article 7 of the UNCRC provides that "a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents". The right to know one's parents in article 7 has been interpreted to mean providing children with information concerning their biological origins and the circumstances surrounding their birth. In the case of Rose v Secretary of the State for Health, the European Convention on Human Rights (ECHR) held that the applicant had a right to be given details about her father. Failure to avail children of this information affects their ability to develop a sense of identity. Identity is a person's unique profile of which genetic origin is a key feature. Article 8(1) of the UNCRC recognises a child's right to preserve his or her identity, including nationality, name and family relations. Article 8(2) further states, "where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity". Therefore, States Parties are to assist children in achieving their right to identity and this right cannot be achieved if children are not aware of their biological origins, as this is one of the determining factors that make them understand who they are. Donor gametes, particularly sperm, have been used to conceive children since ancient times, and this practice has "traditionally been shrouded in secrecy" so as to protect men who have challenges with fertility. Sperm donors were also granted anonymity out of concern that a lack of anonymity would reduce the willingness to donate and cause a shortage in the availability of gametes to cure infertility. However, the secrecy involved in this practice is declining as medical science advances.In surrogacy agreements, donor gametes are sometimes used when either of the intending parents cannot use their own. However, lack of information about biological origin deprives children born through surrogacy agreements of the freedom to define their genetic relationships and connect with their heritage. It can also pose medical risks as uninformed decisions can be made in the absence of a person's family medical history. This is contrary to article 24 of the UNCRC, which protects the rights of the child to the highest attainable standard of health. Jancic is of the opinion that sharing information concerning the biological parents of children does not mean that a relationship will be established between them, but it can fulfil a usual human desire (on the part of the child) to discover from whom they originated.

Many countries have ruled against the child's right to know his or her parents owing to privacy protection established by law for donors in these countries. Parents also prefer the non-disclosure rule because of the connection they have with the child and the fear that the attitude of the child might change when he or she learns of his or her biological origin. They also do not want to destabilise the child and disclose the fertility status of the parent(s). However, some countries have placed the rights of children to know their origins ahead of the rights of donors to privacy, with Sweden leading the way in 1984, followed by other jurisdictions. Factors that have increased the support for children learning about their biological origins include the realisation that keeping such secrets could be harmful to families, as well as the support received from government-appointed committees including the UK's Warnock Committee, and laws like the Human Fertilisation and Embryology Act, 1990 in the UK, which absolves a donor from the responsibility of caring for a child resulting from a donated gamete. The UN Committee on the Rights of the Child also states that article 7 of the UNCRC should take preference where there is a conflict between a child's right to information about his or her biological parents and the rights of others to privacy. The issue remains a contentious one and has not been regulated in several countries, including the Solomon Islands, Iran, Japan and Uzbekistan, which means parents can choose either to notify the child or conceal the circumstances behind a child's birth. In other countries like the Netherlands, a child conceived by sperm or egg donation has the right to non-identifying information about the donor upon reaching 12 years, and at the age of 16 years, may apply to have access to identifying information. In Denmark, in cases of gestational surrogacy with donor sperm, a child's right to such information is dependent on the agreement between the legal parents and the sperm bank. Disclosing information about the biological origin of a child is the duty of the intended parents, although this duty might be carried out indirectly by the State through the issuing of a birth certificate. However, there have been reports of low levels of disclosure of this information, even in countries where parents are mandated to make such disclosure. It is nevertheless difficult to enforce such complicated family matters. The rights of a child to a name and nationality are essential to preserving his or her identity and the registration of a child's birth enables enjoyment of such rights. For children born through surrogacy agreements, birth registration is an essential right, as it is the first step to the process of determining their legal parentage and nationality.

Protection from harm

Children conceived through surrogacy agreements can experience various forms of harm and exploitation if their rights are not considered. In the event of parents losing a legal claim, a child could experience psychological trauma if taken from the parents who had cared for him or her and given to the surrogate. The child's right to be protected from harm would mean parties not making decisions that negatively affect his or her well-being and health. Medical screening for genetic diseases and counselling before implantation in the surrogate will protect the child from harm.

There should also be a limit to the number of agreements in which surrogates can participate, as the higher the number of pregnancies and births achieved, the higher the risk to the children produced. Another form of preventable harm is the risk of sexual, physical or emotional abuse by the partner of a single parent who has a child through a surrogate mother when that partner is not the biological parent of the child.

Best interests of the child

The consideration of the best interests of the child is a fundamental legal principle borne out of the realisation that most decisions concerning children are made by adults. These decisions must not be detrimental to children, since they are too immature to make their own choices. Article 3(1) of the UNCRC provides that the best interests of children shall be a primary consideration in all issues concerning them. According to the UN Committee on the Rights of the Child, the above provision means that the effects of laws and policies on children must be considered in all issues concerning them before they are enacted or adopted. Identifying the best interests of the child is especially difficult in surrogacy agreements because it involves several ethical and moral issues and deals with choices in respect of unborn children. Cohen has, for example, argued that the best interests principle cannot be extended to unborn children since they do not yet have an identity. Mutcherson, however, contends that children who have been born cannot be the sole focus, as those unborn are equally important. Mutcherson's opinion is agreeable, as protecting unborn children helps to prevent further harm when they are eventually born. It also brings a certain consciousness to all parties who, at an early stage, come to understand the implications of the best interests' principle. In this context, all decisions that have consequences for children must be well considered to ensure that decisions made do not adversely affect the child's health and well-being. Parents play a great role in ensuring that the best interests of their children born through surrogacy are protected. It is thus important that intending parents are appropriately examined so that their willingness and commitment to safeguarding their children's rights are confirmed. Failure to make investigations concerning the background of intending parents, as is done in adoption processes, undermines the best interests principle. It is against the best interests of a child to be separated from his or her parents after birth. Article 9 of the UNCRC prohibits separation without the consent of the parents except when abuse or maltreatment has been judicially determined. This principle also applies to commissioning parents who have no genetic link with the child as it has been reported that "strong and positive ties" also exist between them and their children born through surrogacy. Thus, when children are taken away from intending parents owing to restrictions on surrogacy, this might deprive children of the benefits of living with a caring family and violate their rights. For example, owing to the ban on commercial surrogacy in Cambodia, some surrogate mothers were mandated to bring up the children they gave birth to until they were 18 years old or risk being imprisoned for 20 years. This is contrary to the best interests of the child as the surrogates might not be mentally and financially capable of caring for those children,

which could lead to neglect and abuse.The National Board of Health and Welfare (NBHW) in Sweden, in collaboration with the Swedish Society for Obstetrics and Gynaecology and the Swedish Paediatric Society, claimed in their reports that the transfer of multiple embryos is contrary to the best interests of the child, because they tend to increase the risk of pre-term births, low birth weight and disabilities like cerebral palsy. They thus recommended instead that single embryos be transferred to prevent multiple pregnancies. However, they added that the above conditions stated to be common in multiple embryo transfers also happen to single embryos. The single embryo transfer recommendation has been criticised on the basis that the transfer of single embryos reduces the chances of conception in ART. To protect the best interests of the child, more attention should be placed on avoiding lengthy custody battles and reducing the rate at which children move from one family to another. The risk of disputes increases when more than two persons can claim to be parents of a child, when the surrogacy agreement involves people residing in more than one jurisdiction and when laws governing surrogacy agreements are not clear and comprehensive. Determining the best interests of the child requires careful scrutiny of each case and rules must be subject to review and changes as new developments arise.

Citizenship and nationality of the child in cross- border surrogacy agreements

In accordance with article 7 of the UNCRC, it is important that States Parties assign a nationality to children when they are born, thus providing the jurisdiction where their rights can be enforced and protected. When a child is born in a country different to that of the commissioning parents, he or she could sometimes be denied their nationality upon birth.68 The country whence the intending parents come from could have banned surrogacy while some countries require a genetic link with the intending parents before a child could be accepted as a citizen of their country. Denial of citizenship results in a child being rendered stateless, which affects his or her ability to obtain passports for travelling, receive medical care, get quality education and other public service benefits. Storrow suggests that the best solution is the doctrine of comity, which is the recognition given by a state to the legislative, executive or judicial acts of another jurisdiction, bearing in mind its own public policies.71 Under this principle, agreements concluded in other jurisdictions where surrogacy is legal will be declared valid by the court. Shalev et al on the other hand opine that those children should be offered nationality in the country in which they were born as well as the country where the intended parents are citizens.

COMMERCIAL SURROGACY COMPERATIVE ANALYSIS

Commercial surrogacy refers to a situation where a woman is compensated for giving birth to a child whom she hands over to the commissioning parents in return for payment. When no payment is made, the situation is referred to as altruistic surrogacy.

Over the years, there have been ethical, legal and policy considerations to determine whether commercial surrogacy presents children as commodities and violates their rights. Countries that prohibit commercial surrogacy give ethical reasons to defend their position. Some regard the payment of surrogate mothers as renting or buying the human body or human life. They claim that mothers should always want to give birth, not for financial gain, but out of their obligation to such children, who cannot be sold. Furthermore, in consideration of the well-being of the child, it is believed that a child's knowledge that his or her mother was paid to give birth might affect the child psychologically, which could also ruin the relationship with his or her parents. In contrast, those in favour of commercialisation cite the free choice individuals should have to enter into contracts and the right to autonomy that is, to do whatever they like with their own bodies.Commercial surrogacy, especially one involving parties who live in different countries, thereby effecting a transfer of the resulting child from one country to another, has been likened to human trafficking. Through deceit and promises for a better life, some women are introduced into prostitution and slavery, for the purpose of selling their babies. Article 35 of the UNCRC prohibits the "abduction of, the sale of or traffic in children for any purpose or in any form". In some countries, when surrogates deliver more babies than the planned or desired number, the "extra ones" are not accepted by the intending parents and are then sold. Some intending parents also do not accept the children they initially wanted because of a birth defect, among other reasons. In 2012, an attorney specialising in reproductive law in the United States was convicted for her involvement in a baby-selling scheme where childless couples were deceived into believing that children sold to them were the results of legal surrogacy agreements from which the original intended parents had withdrawn. To eliminate the possibility of child trafficking in surrogacy agreements, the Supreme Court in Israel ruled that there must be a genetic connection between one of the intending parents and the child. It has also been recommended that children are better protected when surrogate mothers are relatives or friends of intending parents, with the caveat of ensuring that they have not been coerced into participating and have been informed of all risks. The UN Special Rapporteur (SR) on the Sale and Sexual Exploitation of Children also recommends that payment to a surrogate mother that is only for gestational services rendered, and not for the transfer of the child, would not amount to the sale of a child.

In South Africa, the rights of children are regulated in the Children's Act and by the Constitution of the Republic of South Africa. The relevant subsections of the South African Constitution are section 28(1), which spells out the rights of children, and section 28(2), which provides that "the best interests of the child are of paramount importance in all matters concerning such a child".The first known case of surrogacy in South Africa took place in 1987, when a 48-year-old mother, Karen Ferreira-Jorge, agreed to carry her daughter's baby and gave birth to triplets.88 Subsequently, the publicity generated by the birth of the Ferreira-Jorge triplets, and the consciousness of the existence of surrogacy in the country, led the South African Law Commission (SALC) to advocate for legislation that would specify the rights and duties of all

parties to a surrogacy agreement.Surrogacy agreements are regulated by Chapter 19 of the Children's Act. Before enactment of the Children's Act, surrogacy agreements were regulated by the law of contract as well as by rules pertaining to artificial insemination, such as the Human Tissue Act 65 of 1983. Section 292 of the Children's Act provides for the criteria that must be complied with before surrogacy agreements can be declared valid. They must be in writing, signed by all parties and entered into in South Africa. One of the commissioning parents, as well as the surrogate mother and her husband or partner, must be domiciled in South Africa at the time the agreement is entered into. However, the court will be willing to overlook this requirement for a good reason for example, in the event that a foreign relative of the commissioning parents who is not living in South Africa is willing to act as an altruistic surrogate mother. Furthermore, a high court judge who has jurisdiction in the area where the commissioning parents are domiciled must confirm a surrogacy agreement before the surrogate mother is artificially inseminated. According to section 293(1) and (2), where a commissioning parent as well as a surrogate mother are married or involved in a permanent relationship, the spouses or partners must give their consent in writing to the agreement and therefore become parties to the agreement. However, in the event of the unreasonable refusal of consent by the husband or partner of a surrogate who is not genetically related to the child, the court may confirm the agreement. A surrogacy agreement will not be sanctioned by a court unless it is certain that the commissioning parents are permanently unable to have a child. Furthermore, the surrogate mother must be fit and capable of performing all her relevant roles as a surrogate, must not be paid for her services, and must comprehend the legal implications of the agreement. She must have been pregnant before and given birth to her own child, who must still be alive. Although the condition and situation of all parties will be considered, the court will not approve the surrogacy agreement if its terms are against the interests of the children and has the potential of harming them. In the case of Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements, it was emphasised that the confirmation of agreements by courts is not automatic, as courts are under an obligation to ensure that the interests of children are prioritised, and cases are considered on their merits, in accordance with their duty.

Adequate arrangements must be made to ensure that children are born in a secure environment and they must be cared for and well brought up. The agreement must consider the child's status on the occasion that one or both of the commissioning parents dies, divorces or separates before the birth of the child. In full surrogacy agreements, the child belongs to the commissioning parents upon birth. Therefore, the surrogate mother or her husband lacks the right to get in touch with the child, except where provision is made to this effect in the agreement. However, in partial surrogacy agreements, the rights of the commissioning parents to the child are suspended until the surrogate mother makes a decision either to renege or abide by the terms of the agreement. Thus, she has the right to terminate the agreement within the period of 60 days after the child's birth through notice to the court, on condition

that she pays back the money spent on her care by the commissioning parents. It has been argued that the distinction between full and partial surrogacy is made because the surrogate mother's rights to dignity, privacy and autonomy are violated by being compelled to give up the baby contrary to her wishes. Commercial surrogacy is prohibited and the only financial payment allowed is with respect to expenses in fertilising the surrogate, birthing the child, confirming the agreement in the court, loss of earnings owing to absence of the surrogate from work and insurance for the surrogate in the event of death or disability. Legal and medical professionals who helped to further the objectives of the surrogate agreement are also to be compensated. The identity of a person born through a surrogacy agreement, as well as other parties involved, must not be revealed through any publication. According to section 294 of the Children's Act, the gamete of at least one of the commissioning parents must be used for a valid surrogate agreement. In other words, at least one of the parents must be biologically related to the child. This is based on the SALC's rationale that where both parents cannot have children, adoption will be an adequate substitute. The committee reasoned that being related genetically to at least one parent would protect children emotionally as their connection to the commissioning parents will be stronger than when they use donor gametes. It will also restrict the undesirable practice of searching for gametes to create children with specific characteristics. The genetic link prerequisite has, however, been criticised by several authors. For example, Metz argues that the rationale given for the provision is not sufficient and should be repealed so as to respect the privacy of commissioning couples and allow them to "create loving and intimate relationships" Furthermore, in the case of AB v Minister of Social Development, the respondents contended that not being related to at least one parent would mean the child might not know his or her parents, which would violate the child's right to dignity. There is also the risk of the child being abandoned in the event he or she is born disabled. The court disagreed and declared section 294 of the Children's Act to be discriminatory and a violation of the constitutional rights to non- discrimination, dignity, privacy, healthcare, and bodily and psychological integrity of people who are incapable of using their own gametes. Unfortunately, the invalidity of section 294 of the Children's Act posited by the High Court was not confirmed by the Constitutional Court on the basis that the High Court placed more emphasis on the interests of the commissioning parent(s) than on the best interests of children. Section 41(1) of the Children's Act makes it mandatory for a child to have access to information, including medical information, concerning his genetic parents, as soon as he or she is 18 years old. However, according to section 41(2), such revealed information must not extend to the identity of the donor and surrogate mother. This is contrary to section 7 of the UNCRC, which gives a child the right to know his or her origins. The SALC has condemned countries that prohibit the availability of such information to the child as well as those who allow anonymous birth and have suggested the reformation of their laws. This is so that children will enjoy their right to identity as stipulated in the UNCRC. Authors have suggested that information concerning the biological origin of a child can be divulged before a child is 10 years of age because, at that age, children can process

vital information in a simpler manner before they start forming their identity. They are also old enough to distinguish between biological and non-biological parents.

SURROGACY AGREEMENTS IN SOME COUNTRIES

NIGERIA

Nigeria has yet to provide specific comprehensive legislation to regulate surrogacy; there are also no judicial decisions made in that respect. The implication is that the rights of children in surrogacy agreements are not protected and parties could choose to make any decision concerning them, whether harmful or not. There are, however, certain provisions in Rule 23 of the Code of Medical Ethics, 2004118 that regulate assisted conception and related practices. Rule 23 recognises gestational surrogacy and permits the donation of gametes for that purpose. It states that necessary statutes to govern assisted reproduction have not yet been established; nevertheless, medical practitioners must resolve all ethical issues that may arise with respect to the counselling and consent of the donor. The Code states that gamete and embryo donation should not be commercialised. With respect to children, the Code notes that in the absence of a legal framework protecting them in these agreements, the basic principles applied in child adoption cases should be considered as best practice. However, in 2016, a Bill was introduced in the Nigerian National Assembly to amend the National Health Act and includes the regulation of ART. The Bill mandates the Federal Ministry of Health to regulate the practice of ART and establish a National Registry of Assisted Reproductive Technology Clinics and Banks, which will have the function of creating and maintaining a central database of ART data in Nigeria. Medical tests and screening are required for surrogates and donors to ensure that children are not harmed in any way. Clinics are also to counsel the commissioning parents on the options available to them and the consequences and risks involved. Before surrogacy will be supported, a medical report must confirm the inability of the commissioning mother to carry a child to term. Written consents must also be obtained by all parties to the agreement for every stage of the assisted reproduction process. They may however, withdraw such consent any time before the surrogate is implanted with the required gametes. Children are protected through the prohibition of implantation of gametes from more than one man and woman, sex pre-determination or selection and freezing of embryos without consent from all parties. Clinics must also inform the commissioning couple of the rights of children born through ART. The Bill allows ARTs, except surrogacy, for married infertile couples. This provision is not drafted clearly as that would mean surrogacy is declared illegal by the Act, when it has already been deemed lawful in previous provisions in the same Act. In 2017, a Bill for the regulation of reproductive technology was also introduced in the National Assembly. This Bill has yet to been passed but has scaled the second reading. The ART Bill spells out more clearly the rights and duties of all parties in assisted reproduction. The status and welfare of children born through ARTs are included. For example, it is a crime for commissioning parents to refuse

to accept a child, regardless of any disability that he or she may have. The child must be registered at birth in the name of the commissioning parents. Only one surrogate may be employed at a particular point in time and a woman cannot be a surrogate more than three times in her lifetime, in order to prevent harm to the resulting children. As in the case of the South African Children's Act, a child has the right to apply for information concerning his or her biological parents, with the exception of information concerning their identity. However, a child could apply to know the biological parents' identity if there were a medical emergency that required the physical testing of the biological parents. The consent of the biological parents is, however, required before the release of such information. The Bill also allows the payment of compensation to surrogate mothers, unlike the South African Children's Act and the Nigerian National Health Act (Amendment) Bill, which prohibit the practice.

SOUTH AFRICA

In South Africa, there are still some criticisms inherent in the regulation of surrogacy. For example, surrogacy agreements can only be undertaken by persons domiciled in South Africa, and it has been argued that this regulation is restrictive to citizens from other countries. Also, the prohibition of commercial surrogacy, the genetic link requirement and knowledge of biological origin by the child are also issues that have been subject to debates. However, despite these criticisms, the fact that the practice of surrogacy has been regulated in the Children's Act has helped to protect the rights of children born through surrogacy agreements in South Africa. Chapter 19 of the Children's Act aims to promote the best interests of children through the confirmation of surrogacy agreements in South African courts. This ensures that clauses harmful to children are not included in these agreements. Thus, the capacity of surrogate mothers to carry the child and the ability of the commissioning parents to care for him or her will be considered by the courts so that the child's welfare will not be put at risk. It is a laudable requirement that spouses of the surrogate and commissioning parent give their written consent as it prevents subsequent conflicts and neglect of the child after his or her birth. The best interests principle is also to be made a priority in surrogacy agreements. Parties are also screened to ensure they are capable of handling their duties without causing harm to the child. The fact that surrogates are required to have at least one child who is alive reduces the risk of a refusal to hand over the babies, thus leading to legal disputes that affect such children psychologically. The court is also interested in what would happen to the child upon divorce or separation of the commissioning parents. The Children's Act aims for surrogacy to be the last option for commissioning couples, which is why it is preferred that they have a medical condition that has affected their ability to conceive naturally. Thus, a surrogacy agreement can only be termed as valid when other ARTs have been unsuccessful and this ensures that the practice is not taken lightly and abused. On the other hand, in Nigeria, the rights of children have not been sufficiently protected in surrogacy agreements. The lack of specific comprehensive

legislation to regulate the practice has the implication of increasing the risk of abuse of children. It has, for example, led to the illegal sale of gametes without screening or counseling.

A WAY FORWARD FOR UGANDA

A step in the right direction in Uganda is the tabling of the National Health Act (Amendment) Bill and the ART Regulation Bill. These Bills, with some adjustments, are adequate to serve as a foundation for regulating ART, including surrogacy agreements in Uganda. The Bills include important provisions similar to the South African Children's Act, such as requiring consent of parties as well as spouses and partners, medical screening, proof of inability of the commissioning parents to give birth to a baby, legal status of children, among others. The two Bills, which to a large extent have similar provisions, should, however, be merged together into a single piece of comprehensive legislation so as to prevent inconsistencies and to provide a simple process for all parties. The Bills, for example, have different standards concerning commercial surrogacy. Also, the laudable provisions in the South African Children's Act, which are absent in the Bills, should be considered in Uganda. For example, the confirmation of surrogacy agreements by courts will help in protecting children. The requirement that a surrogate mother must have given birth to her own child who is alive should also be incorporated into Uganda's legislation as it reduces the risk of surrogates refusing to give up the child. To avoid children having several parents as a result of different donors and to establish a good child-parent relationship, the genetic link requirement should also be incorporated in Uganda. However, there should be an exception, whereby those who have been unsuccessful with adoption for a specific period of years, could be given an opportunity to use a surrogate. Concerning disclosure of biological origins to a child, the South African Children's Act and the ART Bill both prohibit the identity of the genetic parents being divulged to the child. The right of children to know their biological origin may compete with the right of the donor to be anonymous and the right of parents to have a private life and keep their reproductive choices private. The best interests of the child should, however, be primarily considered as stated by the UNCRC. It is thus recommended that this provision be modified and the right to identity of children be protected. Specific conditions like the age of the child, persons who should disclose such information, and other conditions that would make the information easier for the child to process, should be included. The identity of the parties should however not be made public knowledge.Clause 75(1) of the National Health (Amendment Bill), which prohibits surrogacy for married couples who cannot have children, should be amended and spelt out more clearly.

CONCLUSION

The practice of surrogacy is becoming more common in Uganda. Adequate regulation is therefore important so as to create standards for the practice and to prevent the abuse of parties, especially children who are the most vulnerable and are brought innocently into the world. It is important for Uganda to join the rank of countries, such as South Africa, that have established and legally enforceable ART laws. All parties must consider the best interests of children when drafting agreements and clauses. Medical practitioners must conduct medical and psychological evaluations to access the fitness of surrogate mothers and such reports must be attached with the surrogacy agreements for confirmation. All medical processes should be performed in registered hospitals and by qualified doctors to prevent harm to the child. Commissioning parents must also be seen to have the capacity to care for the child in a safe environment and should be informed about their rights. Children should be registered at birth so that their right to identity and nationality is ensured. It is also important for parents to inform their children of their biological heritage when they are old enough to understand.

CHAPTER TWENTY ONE
PROSTITUTION AND THE TEST OF CONSCIENCE

The Constitution of the Republic Uganda, 1995 incorporates guarantees of fundamental human rights and freedoms on which the modern Ugandan state is based. Among these, the ones most relevant to sex workers are: equality before and under the law that is freedom from discrimination, freedom from torture, inhuman and degrading treatment, the right to dignity and the right to work. Uganda is also a signatory to numerous international and regional human rights instruments which proclaim fundamental rights for all including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social, Cultural and Economic Rights (ICSCER) and the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). However, translating these lofty constitutional pronouncements and international human rights obligations into reality presents numerous challenges. Among these challenges is the incompatibility of the texts and implementation of domestic laws with principles of human rights embedded in both the Constitution and international instruments. This mismatch has, among others, given rise to the predicament of sex workers. Numerous legislations remain in place and in fact others are being enacted which directly or indirectly prohibit sex work and negatively impact upon the rights of sex workers including the Penal Code Act, the Anti-Pornography Act 2014, the HIV/AIDS Prevention and Control Act 2014 and the Employment Act 2006.

Currently, sex work and related practices are deemed to be such harmful conduct deserving of criminal sanctions and social stigma. The Penal Code Act Cap 120 under a general heading 'offences against morality' outlaws various activities related to sex work including prostitution, living on the earnings of prostitution16, aiding and abetting prostitution17 and operating brothels. It is clear from these provisions that they target not only those engaged in sex work but also their dependants, family members and business managers and associates. These provisions are used by the Police, other law enforcement agencies and vigilantes to arrest, harass, abuse, rape and extort bribes and sexual favours from vulnerable sex workers.

Beyond criminalisation, sex work is also not recognised under Uganda's employment and labour laws yet it is a means of livelihood for many women and men without formal education and training. This is in spite of the fact that article 40 of the Constitution provides for economic rights including the right to work and obliges parliament to make laws regulating conditions of work, equal pay and discrimination at work. Consequently, sex workers face numerous socio-economic difficulties including arrests, imprisonment and prosecution, stigmatisation, exploitation, prosecution, lack of protection, limited access to public services and vulnerability to

sexually transmitted diseases. The prohibition of sex work infringes upon the human dignity of sex workers. Since sex work is prohibited, sex workers battle to find legal remedies, support and services to aid them if their rights have been violated.

Thus the national laws and their implementation are oblivious of the fact that sex work is work from which many women, and to some extent men, derive their livelihood. Indeed, there is no evidence that the criminalisation of sex work has reduced its prevalence in Uganda or elsewhere around the world. With or without these legislations, sex work is work and it is here to stay. And so are sex workers, who in spite of having protection of their rights guaranteed by human rights standards enshrined in both international instruments and the Ugandan Constitution, continue to face numerous violations of these rights.

The intersection between sex work and fundamental human rights and freedoms in Uganda is an intriguing phenomenon, which has attracted a number of studies by scholars and human rights advocates alike. This section reviews the available literature and explores the gaps that this study seeks to bridge.

A 2006 study by Kyokunzire sought to interrogate the criminal laws affecting commercial sex workers in Kampala in light of human rights. The study also tackled ways of addressing health and safety issues of commercial sex workers. Kyokunzire's conclusion that criminalisation of sex work is a violation of human rights as it takes away one's freedom to use and employ their bodies as they wish is a familiar tale. The study also highlighted the prevalent violations, abuses and exploitative practices that sex workers face and attributed them to factors that include their illegal status. Scorgie et al (2013) did a related study at the regional level covering Uganda, Kenya, Zimbabwe and South Africa. They investigated and reported wide-ranging human rights violations inflicted on sex workers by not only the police and state actors but also other stakeholders such as family members, clients and brothel managers. The study found that, while a significant number of these violations could be attributed to the criminalisation of sex work and hence the absence of legal protection in the countries investigated, other social and economic factors such as illiteracy among sex workers, conservative cultural practices, religion and the general marginalisation of women cannot be discounted. In its approach and scope, the study goes beyond criminalisation per se but does not delve into the impact of other laws.

Tamale conducted research in Kampala and Jinja in order to explore the link between sex work, gender and the law in Uganda. She found that the Penal Code provisions criminalising prostitution are redundant since they are near impossible to enforce through the courts. Instead, the Ugandan police uses the law to harass and abuse sex workers, reducing it to 'a scarecrow by the patriarchal state to control women's sexuality'. The study found that other Penal Code offences, such as the 'Idle and disorderly' laws under section 167 and 168 as well as the trespass of 'disturbing

peace' under Rule 27(c) and 72 of the Urban Authorities Rules, Statutory Instrument 27-19 are used to arbitrarily arrest sex workers. Tamale also identifies a number of complexities and paradoxes in respect of sex work in Uganda. One such paradox is the fact that while women would be forced into sex work for economic reasons, which renders the trade oppressive, it is simultaneously a liberating force that frees them from abject poverty. Another paradox lies in the fact that while the criminalisation of sex work and the way in which this criminal status has been abused reinforces gender inequality, women nevertheless are able to exercise a measure of agency over their own sexuality which is not the reality for the majority of Ugandan working class women who are not engaged in the trade. Tamale's study was published in 2011 and therefore it does not take into account the numerous legislative developments which are deemed to impact upon sex workers that came to the fore from 2014 onwards. The study also looks at sex work in Uganda through the lenses of gender and power relations and does not specifically interrogate human rights abuses suffered by sex workers due to the legal regime. The study is furthermore focused on female sex workers only and does not consider the impact of the social and legal framework on male sex workers.

Twinomugisha conducted a study on the sexual and reproductive health rights of young, female sex workers in the context of HIV/AIDS in Uganda. The study found that the criminalisation of sex work increases sex workers' vulnerability to sexual violence, which in turn increases their risk of contracting sexually transmitted diseases and becoming infected with HIV. The lack of participation of young, female sex workers in policy design and implementation as far as their sexual and reproductive health rights are concerned is also criticised. While the study does make a strong case for the decriminalisation of sex work in Uganda, its scope was limited to young female sex workers and also had a narrow focus on sexual and reproductive rights only. The impact of the criminalisation of sex work on male sex workers as well as human rights beyond sexual and reproductive health rights were not carefully considered. Laws beyond the laws used to criminalise sex work were not considered either.

A study conducted under the auspices of the Open Society Initiative in 2008 explored the intersection of HIV/AIDS, human rights and legal services in Uganda. The findings of this study exposed violations of human rights attributable to one's HIV/AIDS status and identified sex workers as a vulnerable group among People Living With HIV/AIDS, due to the hostile legal environment. Thus this study underscored the contribution of laws and their implementation to the violation of human rights of sex workers. However, commercial sex workers were not the principal concern of this study and neither was the legal framework that affects their rights.

In recent years, influential international health and human rights organizations have called for the decriminalization of sex work. In 2015, Amnesty International announced that they have decided to "advocate for the decriminalization of all aspects

of consensual adult sex – sex work that does not involve coercion, exploitation or abuse." The United Nations Programme on HIV/AIDS (UNAIDS) has also pushed for the decriminalization of sex work, stating in a 2014 briefing note that "criminalization of sex workers or their clients negates the right to individual self-determination, autonomy and agency." In 2013, Human Rights Watch stated, "ending the criminalization of sex work is critical to achieving public health and human rights goals." In 2012 and 2014, the World Health Organization (WHO) also released guidelines urging countries to move toward decriminalizing sex work. Furthermore, United Nations Special Rapporteurs on extreme poverty, the right to health, and the right to be free from torture have all determined that human rights violations against sex workers are a result of criminalization, stigma, and discrimination.

During the first Universal Periodic Review of Uganda in October 2011, 182 recommendations were formulated, but not one addressed rights violations against sex workers. Thus, the report of the UPR Working Group did not mention the rampant human rights abuses against sex workers. Uganda will not be in compliance with its international human rights obligations as long as the widespread state-sanctioned violations of sex workers' rights continue.

LEGAL FRAMEWORK ON PROSTITUITON

Ugandan law criminalizes and stigmatizes sex work, leading to grave human rights violations against sex workers. Sections 138 and 139 of Uganda's Penal Code Act of 1950 criminalize prostitution. Under Section 138, a "prostitute" is defined as a person "who in public or elsewhere regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain." Under Section 139, any individual engaged in selling sex can be imprisoned for up to seven years. Third parties, like brothel owners, also face up to seven years imprisonment for "living wholly or in part on the earnings of prostitution." Prostitution charges are difficult to prove for law enforcement. Thus, the police often use Section 168 of the penal code, which creates the offense of rogue and vagabond, to intimidate and exploit sex workers for monetary and sexual bribes. The Ugandan Directorate of Ethics and Integrity has also indicated that it is working to amend Uganda's Penal Code to make the purchasing of sex illegal as well, further criminalizing the sex industry.

In 2014, Uganda enacted the Anti-Pornography Act (APA), which defines pornography as "any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means, of a person engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement." The Anti-Pornography Act has led to the further criminalization of sex work because police arbitrarily deem sex workers' appearance or attire "sexually exciting."

Ugandan law also criminalizes homosexuality, subjecting sex workers who are LGBT to double prosecution and stigmatization. While a Ugandan constitutional court declared the Anti- Homosexuality Act of 2014 unconstitutional because it was passed without the requisite quorum, the Ugandan Penal Code of 1950 still criminalizes the LGBT community. Under Section 145, consensual sex between individuals of the same sex is prohibited and punishable by life imprisonment. Section 146 makes any person who attempts to commit the "unnatural offences" enumerated in Section 145 liable for seven years imprisonment under felony charges.

In 2014, Uganda passed the HIV and AIDS Prevention and Control Act, which requires mandatory HIV testing for those charged with sexual offences. The Act also criminalizes the transmission of HIV with up to five years in prison. This law is both discriminatory and counter-productive, since it further marginalizes and alienates the at-risk groups who already face stigma and discrimination. These types of measures exacerbate the pre-existing stigma and institutional exclusion that prevent sex workers from accessing treatment and health services, thereby augmenting the spread of HIV and Sexually Transmitted Infections (STIs) in Uganda.

Freedom from torture and other cruel, inhuman, and degrading treatment & Right to security of the person and freedom from arbitrary arrest and detention Acase for prostitution

The criminalization of sex work in Uganda makes sex workers an easy target for police abuse and brutality. Police abuse of sex workers includes physical assault,sexual assault, including rape , gang rape,arbitrary arrest and detention, bribery ,extortion, and public humiliation. This section illustrates how the criminalization of sex work encourages police corruption and allows law enforcement to perpetrate abuses against sex workers with impunity. Police officers, who are charged with protecting the public, create an atmosphere of impunity for crimes against sex workers when they act as major perpetrators of violent abuse against sex workers.

Police authorities routinely perpetrate violence against sex workers that amounts to torture and to cruel, inhuman, and degrading treatment. Because of sex work's criminality, these abuses are viewed as legitimate, and occur with widespread impunity. Police-perpetrated beatings and assaults are common occurrences. A 2013 study by University of Witwatersrand researchers in South Africa found that virtually all of the sex workers interviewed, including 25 from Uganda, reported being beaten and assaulted by police at some point in their lives. One female sex worker in Uganda described police officers beating her and a group of other sex workers while forcing them to lay on their backs; following the beating, the police officers took their money. In a different case, a transgender female sex worker described how police officers beat her, stripped her, and detained her on her way home from work. In yet another example of police brutality, police officers beat and kicked a pregnant

sex worker, and made her sit in sewage for two hours.

Both male and female sex workers in Uganda report that local and military police routinely orchestrate acts of sexual violence, including rape and gang rape. In 2011, the African Sex Workers Alliance (ASWA) interviewed dozens of Ugandan sex workers about human rights violations perpetrated by law enforcement. The respondents' experiences reflect a common theme of rape, exploitation, and physical and emotional abuse. Similarly, all of the respondents to a 2010 study of 68 sex workers in Kampala said that police beat and raped them if they resisted arrest. In one documented case, sex workers reported that military police in Kisenyi had raped various sex workers. The sex workers felt that it was futile to report the rapes to police because superior officers were responsible. In another case, officers beat a sex worker with a metal baton while she was working as a bartender. Following the beating, they took her into custody, where a police officer poked at her vagina with a baton, hit her head, and threatened to have her do physical labor in a neighboring town if she did not pay them 200,000 Ugandan shillings by the next morning. Police officers raped another female sex worker when she went to report abuse by criminals posing as clients.

Police in Uganda use prostitution's illegality as justification to harass, detain, and arbitrarily arrest sex workers. The Ugandan Penal Code prohibits living off the earnings of prostitution, but police know that this allegation is difficult to prove in court. So they subject sex workers to a constant cycle of detention and release without prosecution. A lawyer who represents Ugandan sex workers suggests that this cycle of law enforcement arresting and detaining sex workers without prosecution demonstrates that "the police are using arrest as a way to extort money from the sex workers." Police officers in Uganda use the threat of arrest of sex workers, whether for prostitution or violation of other laws, as a means for bribery and extortion. They force sex workers to bribe them in order to avoid arrest for offenses like rogue and vagabond. Police officers often force sex workers to pay them as much as the equivalent of $100 USD, which can amount to over half a month's earnings for a sex worker. One WONETHA member has paid police bribes as high as 50,000 Ugandan shillings to avoid arrest. One male sex worker reported an experience where he was beaten and went to the police to report the assault. Police officers refused to take his report unless he paid them a bribe. Because he did not have sufficient funds to pay the amount the police were demanding, he was unable to file the report.

Police not only engage in extortion of sex workers for money, but also for sex acts. One sex worker described seven separate instances in which police officers blackmailed her into having sex in exchange for not arresting her – an action equivalent to rape. Police similarly blackmailed another female sex worker into having sex with them five times over the course of three years. On two occasions, she attempted to confront the officers by demanding that they take her to the police station, hoping that they would be held accountable for their misconduct. Instead,

the officers physically restrained and raped her.

In addition to perpetrating acts of violence, harassment, and extortion of sex workers in Uganda, police officers commonly degrade sex workers by publicly humiliating them. In one example, police officers arrested a group of female sex workers and forced them to carry used condoms on their heads. The officers then took the women to the police station and demanded a bribe for their release. Sex workers have also reported cases of police forcing them to march in public with inflated condoms around their necks. One infamous police officer in Kampala is known for arresting sex workers, stripping them, parading them through town, and threatening to shoot them if they report him. This officer made a habit of entering the homes of sex workers, including those who are pregnant or caring for their infants, and dragging them by their hair to the police station.

Police officers use other discriminatory policies that are not directly related to prostitution to justify harassing and detaining sex workers. One of these policies is the 2014 Anti- Pornography Act (APA), formerly called the "Miniskirt Bill," which criminalizes anything qualifying as "pornography." Although the word "miniskirt" is absent from the law, police have the discretion to interpret the Act's vague language and do so in a discriminatory fashion against sex workers. Under the guise of the APA, police officers have arrested sex workers for appearing "sexually exciting." Barely two weeks after the passing of the APA, police officers undressed several women in public who were wearing miniskirts.

Right to equality before the law

Because sex work is criminalized in Uganda, there is little recourse for sex workers who are victims of crimes. Sex workers commonly describe being targets of violence because people know that sex work is criminalized and sex workers will be unable to report acts of violence committed against them to the police out of a deep fear of arrest. Even the most brutal crimes against sex workers often go unreported and unpunished: one sex worker, whose friend died from injuries inflicted by a criminal posing as a client who had brutally raped her with a stick, wanted to report the man to the police. Other sex workers discouraged her from doing so because they warned her that if she went to the police, nothing would happen to the murderer but she would be "arrested for nothing." Police have told sex workers who do report rapes that they "are selling sex and so are asking for it" or that "a prostitute can't be raped." Not only is the likelihood of receiving aid from the police quite low, but sex workers have a legitimate reason to fear that what the police will do to them may be worse than the crimes they are reporting.

There is widespread impunity for those who commit acts of violence, including murder, against sex workers. One sex worker summed up the problem of impunity after she rattled off a list of names of sex workers who she knew had been murdered,

saying, "Their murders haven't been solved and there's been no police investigation. Nothing at all." Many sex workers have resigned themselves to the fact that they do not have avenues for redress when crimes are committed against them. As one sex worker put it, there is "nothing to do about it but to just endure the hardships." Sex workers commonly describe the futility of seeking help from the police. One explained, "When a man rapes you, beats you, or uses you, you cannot go and report him because you are a sex worker. I just keep quiet and die with my pain….When you go to report you will be asked, 'What were you doing?' and you will be charged for prostitution so the laws do not favor us and we cannot report cases."

Sex workers fall into not just one category but multiple categories of marginalized populations, and accordingly are disproportionately victimized. Transphobia, xenophobia, homophobia, HIV discrimination, and associated discriminatory laws render Ugandan LGBT, migrant, and HIV positive sex workers particularly vulnerable to multiple, overlapping stigmas and forms of discrimination Police target LBGT sex workers both because they are sex workers and because homosexuality is illegal and the LGBT community is highly stigmatized in Uganda. A transgender female sex worker in Uganda, recalled incidents where police officers publicly stripped her, clients refused to pay her, and the public assaulted her because of her status as a transgender sex worker. She cited numerous murders of transgender sex workers in Uganda, none of which have been investigated by law enforcement. A female migrant sex worker from Kenya described how the Ugandan police committed many abuses against her while she was detained for one month in Kampala: "I was a prostitute in a foreign country so you can imagine the treatment and discrimination" she said.

Right to the highest attainable standard of health and freedom from discrimination

As a direct consequence of their criminal status, sex workers in Uganda face denial of treatment, discriminatory treatment, and violations of their right to privacy when attempting to access health services, which often discourages them from seeking treatment altogether. This discrimination and stigma negatively impacts their right to health.

Sex workers often experience denial of health care and discriminatory treatment from healthcare workers. A sex worker from Kampala recalled: "when I fell sick and went to a health center and they realized that I was a sex worker, they did not treat me like a human being. When the health worker came to attend to me she said that I should go to the other health worker and when I reached the other health worker, I was told that he had no time for me so I left without getting treatment." Another sex worker described the futility of trying to access health care: "We are despised in the hospitals. They [health providers] say, 'We don't have time for prostitutes' and they also say that if one prostitute dies then the number reduces." Two female sex workers in Kampala reported that health workers ignored them when they visited a

hospital for the treatment of STIs. When one male sex worker sought treatment at a public health clinic, he was made to wait an entire day without treatment and he was not attended to when he returned the next day either. He eventually had to seek treatment at a private hospital. One sex worker vowed never to return to a health clinic after being told that the clinic's resources were limited and providing drugs to a sex worker "who is a vector of HIV and STIs would be like washing a cloth spotless white and spreading on filthy ground to dry."

Healthcare workers also often violate sex workers' right to privacy by disclosing sex workers' private health information to other patients, family members, and co-workers. When a female sex worker in Uganda visited a hospital to seek treatment for STIs, a health worker revealed her status as a sex worker to her father and told her to stop visiting the hospital for free treatment because she had enough money from engaging in sex work. A male sex worker in Kampala recounted that a doctor he visited breached confidentiality by revealing his health and sexual orientation to workers at the clinic.

As a result of healthcare discrimination, sex workers often do not go to healthcare clinics to get tested, which increases their risk of infection with STIs or HIV, and delays their treatment. For example, when one sex worker tried to access STI testing at a government-run health clinic the nurses humiliated her in front of other patients. As a result, she left the clinic without treatment and, traumatized, she has not tried to go back to a clinic.84 According to Daisy Nakato, a Uganda sex worker activist and founder of WONETHA, "Stigma has caused the death of WONETHA members too afraid to seek treatment for fear of being attacked or rejected by the very health care workers supposed to assist them."

Uganda passed mandatory HIV testing laws for all people arrested on prostitution charges, which is both discriminatory and counter-productive to HIV reduction. This practice fosters the stigmatization of sex workers and HIV positive individuals, rather than encouraging testing and the utilization of health services.

Sex-workerand LGBT-friendly clinics face harassment from the government. In April 2014, the police raided a gay- and sex worker-friendly healthcare clinic, the Makerere University Walter Reed Project, on the grounds that it was "recruiting homosexuals." Walter Reed provided HIV treatment in a safe space to "most at risk" populations, including LGBT people and sex workers.

In addition to healthcare discrimination, sex workers also experience housing and employment discrimination because of their status as sex workers. Landlords often refuse to rent to sex workers or evict them upon discovering they are sex workers. One male sex worker gave an account of his landlords evicting him because they believed that he would negatively influence their children. Additionally, it is difficult

and sometimes impossible for sex workers to find work in other fields because of employment discrimination they face when potential employers learn of their criminal records for prostitution.

Right to work

Criminalization of sex work is a labor issue because it prevents sex workers from exercising their right to freely choose their work. The violation of sex workers' free choice of work makes sex workers vulnerable to other abuses, including unsafe working conditions, denial of and inadequate remuneration, exploitation by brothel managers, and even difficulty in securing jobs in other sectors because of their history of sex work. Because sex work in Uganda is not recognized as legitimate work, sex workers are unable to seek legal redress when their labor rights are violated.

As a result of the lack of labor protections for sex workers in Uganda, sex workers also lack control over their labor and are unable to negotiate effectively with clients regarding critical items such as wages and usage of work tools. In a 2012 survey of Ugandan sex workers, 72% of respondents reported being paid less than what they had negotiated with clients. Lack of labor protections allows brothel managers to underpay, overwork, and exploit sex workers by creating unsafe and hostile work conditions where employers freely harass sex workers. For example, many brothels are kept in squalid conditions, with dark corridors, tin roofs and rooms as small as closets. A sex worker in Kampala recounted paying half of her earnings to a brothel manager for every client she brought to the brothel, even if the client refused to pay for her services. Similarly, another sex worker stated that landlords often demand money from sex workers on a daily basis and that sex workers are required to make such payments even when they take short vacations away from the brothel.

Right to association and right to privacy

The Ugandan government commonly violates sex workers' right to freedom of association by banning and disrupting sex worker meetings, trainings, and other gatherings. The government has prohibited human rights trainings for sex workers, stopped sex worker conferences from taking place, and denied permits to sex workers' groups seeking to hold public meetings about legislation that disproportionately affects them. Under section 5 of the Public Order Management Act, organizers must notify authorities before any public meetings are held. If notification is not made, it is an offense to continue with the meeting. According to Daisy Nakato, this makes organizing difficult: "So with this law in place, you can imagine how many times we have to notify the authorities when going for outreaches to promote condoms, to conduct HIV testing, or to talk about our health."

Sex workers' right to privacy is violated when the media accompanies the police on raids. Newspapers and tabloids photograph these raids and publish pictures of sex workers without their permission to publicly shame them. By publicly identifying sex workers, the police and media violate sex workers' right to privacy. After the 2012 raid on a WONETHA center in Gulu, local newspapers published photos of the staff who were accused and arrested. In one instance, the police raided a sex worker's room, ordered her to take off her clothes, and took pictures of her, which were published three days later in a local tabloid with a caption stating she was having sex in a lodge. Activists have stated that this type of "outing" by the media can lead to further violence against sex workers and deepens the stigma against sex work in Uganda.

The Penal Code Act criminalises various activities related to sex work including: prostitution; living on the earnings of prostitution; aiding and abetting prostitution; and operating brothels. In recent years, a number of laws, beyond criminal provisions, have been enacted which impact upon the rights of sex workers. These Acts include the Anti-Pornography Act 2014, the NGO Act 2016 and the HIV/AIDS Prevention and Control Act 2014. A new Sexual Offences Bill with the prostitution offences largely as they are in the Penal Code has also been introduced in Parliament. These developments have created the need to critically assess the legal framework in which sex workers operate, and how this environment affects their rights. Sex work is not recognised under Uganda's employment and labour laws yet it is a means of livelihood for many women and men. Consequently, sex workers face numerous socio-economic difficulties including arrests, imprisonment and prosecution, stigmatisation, exploitation, prosecution, lack of protection, limited access to public services and vulnerability to sexually transmitted diseases. Since sex work is prohibited, sex workers battle to find legal remedies, support and services to aid them when their rights are violated. These violations are suffered despite the fact that the rights of sex workers are guaranteed in both international instruments and the Ugandan Constitution. While the criminalisation of sex work is globally recognised and studied as an infringement of the rights of sex workers, Uganda's unique social context and moralistic legal framework warrants a deeper assessment of the impact of the legal regime on the rights of sex workers.

Makindye Division is one of the hubs of sex work activity in Uganda. It also has police presence, its own court, its own Resident State Attorney and is the location of WONETHA, the leading sex worker organisation in Uganda. Primary data was collected using face to face key informant interviews and Focus Group Discussions (FGDs). The study population, drawn from Makindye Division, The other provisions in the Penal Code which do not directly deal with sex work but are nevertheless used are: 'being a rogue and vagabond' or 'being idle and disorderly.' For male sex workers and transgender sex workers, offences on having carnal knowledge against the order of nature (section 145) and attempts to commit unnatural offences (section 146) are also used as charges. Section 253 and 254 of the Penal Code Act, which

criminalises theft are also sometimes used to charge sex workers. The other laws which do not directly concern sex work but which nevertheless affect sex workers are:

The Anti-Pornography Act 2014: This has such a wide definition of pornography that it restricts the way women dress. The HIV Prevention and Control Act 2014: The criminalisation of willful transmission of HIV affects sex workers as they are usually suspected of having HIV and thus very likely to be accused of willful transmission. The Equal Opportunities Commission Act, 2007: Section 15(6)(d) of this Act prevents sex workers from seeking redress from the Equal Opportunities Commission as it stops the Equal Opportunities Commission from investigating matters regarded as immoral or social unacceptable by the majority of the cultural groupings in Uganda. The Employment Act 2006: This does not cover sex workers and therefore they do not enjoy the benefits of employees under the Employment Act including the right to form or join a labour unions, protection from sexual harassment at the workplace and the right to remuneration. 2016 Human Rights Awareness and Promotion Forum (HRAPF) Legal Regulation of Sex Work in Uganda: Exploring the Current Trends and their Impact on the Human Rights of Sex Workers.

Trends in enforcement of the Penal Code provisions In terms of trends in enforcing the Penal Code Act, the study found the following: Trends regarding arrests As regards arrests, female sex workers are often arrested in large groups simply for the purpose of extorting money from them. They are rounded up and those who have money on them and can pay are released while those who cannot pay are taken to the police cells. Sometimes they are released after offering sex to the police officers in return for their release. However, such mass arrests have become less common since 2008. This was attributed to closer cooperation between the Police and sex workers and increased sensitisation. In some cases, police officers even offer security to sex workers in collaboration with brothel managers. Police operations which used to take place as early as 7pm are now only taking place after midnight. Male sex workers and transgender sex workers, on the other hand, do not suffer mass arrests but rather targeted arrests after being watched and followed by neighbours, landlords and police officers for long periods of time. Transgender sex workers are particularly targeted as they are seen as 'the public image of homosexuality'. Sex workers are often kept in custody beyond 48 hours when arrested. The sex workers who are arrested are usually paraded before the media. In Makindye Division, the media has replaced the law and the police as the most fearsome weapon against sex workers. Trends regarding charges and the provisions that strictly criminalise sex work are not enforced. The police station in the study district had never investigated any of the prostitution offences and not a single charge relating to any of the prostitution offences could be found at the Chief Magistrate's Court serving the area. The explanation for this infrequency in enforcement is that prostitution and related offences are difficult to prove beyond reasonable doubt during a criminal trial. The only potential witnesses are clients and fellow sex workers, who are usually unwilling to testify.

The most common charges against sex workers are 'being a rogue and vagabond' or 'being idle and disorderly' rather than the provisions which actually criminalise sex work. For male sex workers and transgender sex workers, offences on having carnal knowledge against the order of nature (section 145 of the Penal Code Act) and attempts to commit unnatural offences (section 146) are also used as charges.

Section 253 and 254 of the Penal Code Act, which criminalises theft are also used to charge sex workers and these charges are often unfounded. Sex workers are also charged under the National Drug Policy and Authority Act, 2006 for smoking opium; frequenting a place used for smoking opium or for the xi Human Rights Awareness and Promotion Forum (HRAPF) 2016 Legal Regulation of Sex Work in Uganda: Exploring the Current Trends and their Impact on the Human Rights of Sex Workers possession of narcotic drugs. Alhough the prostitution laws are not being enforced, the arrest of sex workers under other provisions of law is largely fuelled by the fact that sex work is illegal in Uganda. Trends in prosecution, convictions and sentences where many of the charges instituted against sex workers make it to the courts and are prosecuted. This is despite the fact that many of them are vague. Sex workers usually plead guilty to the offences with which they are charged due to pressure from managers and their handlers, fear of imprisonment and lack of legal representation. Pleading guilty usually has the outcome of serving a lesser punishment such as fines, cautions and community service and avoiding the uncertainty of a full criminal trial. Where convicted, sex workers are usually sentenced to pay a fine ranging between UGX 200,000 and UGX 500,000, to perform community service under the Community Service Act or, in rare cases, to a short period of imprisonment. Although these sentences appear to be minor, they do have a profound effect on sex workers who do not earn large incomes and could easily be imprisoned because they are unable to pay the fines imposed. Remand periods sometimes extend to up to six months, even though the final sentences imposed are not heavy. Sex workers largely lack legal representation because they cannot afford legal fees. Even though there are organisations which provide legal services to sex workers, these organisations are limited in their resources and capacity and find it challenging to secure competent sureties and bail money.

Trends in enforcing other laws other than the Penal Code the enforcement of the other laws is rather lukewarm

Only the Anti_Pornography Act has been enforced against a performer who does not necessarily qualify as a sex worker, however its mere existence has made sex workers more cautious on how they dress in public. The HIV Prevention and Control Act has not been enforced against sex workers but has discouraged sex workers from undertaking HIV tests since the offence requires knowledge of one's status. Concern was also expressed about the mandatory testing and disclosure of status requirements. A few female sex workers noted that the HIV Prevention and Control Act provides them with leverage to ensure that their male clients use condoms,

which is a positive aspect of the impact of this law. None of the respondents have attempted to access the Equal Opportunities Commission despite the wide range of violations regularly suffered, which speaks to the real and perceived accessibility of the Commission to this group. Their exclusion from the Employment Act makes them to suffer as an invisible work group that do not enjoy the regular rights that accrue to workers 2016 Human Rights Awareness and Promotion Forum (HRAPF) Legal Regulation of Sex Work in Uganda, Exploring the Current Trends and their Impact on the Human Rights of Sex Workers and the enforcement trends of laws affecting sex workers show mixed signals with strict and overzealous enforcement of selected criminal provisions and a general apathy towards others. The study finds that, whether enforced or not, the presence of laws which affect sex work feeds into the stigma, oppression and violations of sex workers.

Violation of human rights occasioned by the criminalisation of sex work

The criminalisation of sex work makes sex workers to suffer widespread violations of their rights. The violated rights are: The right to liberty of sex workers is violated in that they are arrested without the intention of successfully prosecuting their cases. The main purpose of arrest of sex workers has been shown to be the collection of bribes. This right is also violated in that sex workers are not informed of the reason for their arrest and that they are often detained beyond the prescribed 48 hours. The right to equality of female sex workers is violated because they bear the worst brunt of the enforcement of these laws. The right to equality is also violated since sex workers are targeted for arrest due to their social and economic status as sex workers. Sex workers suffer the violation of their right to be free from cruel, inhuman and degrading treatment and punishment when they are beaten, assaulted, verbally abused and fondled by police during arrest. Sex workers also suffer the violation of their right to property in that they are deprived of their money in police custody, and also their property is usually vandalized after they have been arrested The right to privacy of sex workers is also infringed in that the media often takes their pictures during and after their arrests and publish these images exposing them as sex workers. Sex workers also suffer the violation of their right to work and practice their profession of choice because sex work is not recognised by Uganda's labour laws, even though they engage in it as a means of generating a livelihood. The study also highlighted a number of violations which do not fall neatly under the expressly recognized rights in the Constitution. These are the disruption of family life; the exposure of a dual identity and increased vulnerability to Sexually Transmitted Infections.

Exploring the Current Trends and their Impact on the Human Rights of Sex Workers

Empowerment of sex workers The criminalization of sex work has had an unexpected benefit from sex workers as a number of organizations have come out to defend, empower and protect them. There is a discernible trend of empowerment of sex

workers through human rights education which has lead to a notable decrease of the number of arrests of sex workers in the Makindye Division. Sex workers are learning how to engage and interact with police and increasingly have the services of paralegals at their disposal. Instances have also been found where sex workers have instituted cases of police abuse at the Uganda Human Rights Commission and the Police Professional Standards Unit.

RECOMMENDATIONS

To the President and Cabinet

• Issue a directive staying the enforcement of the criminalisation of sex work, either by use of section 136, 137, 138 and 139 or any other provision of the Penal Code Act.
To the Uganda Law Reform Commission

• Review section 136, 137, 138 and 139 of the Penal Code Act in light of Constitutional and international human rights standards.

To Parliament

• Repeal section 136, 137, 138, 139, 145, 148 and 149 of the Penal Code Act.

• Do not include repetitions of section 136, 137, 138 and 139 of the Penal Code Act in the new Sexual Offences Bill.

• Repeal section 167 and 168 of the Penal Code Act.

• Amend the Employment Act to recognise sex work as work.

• Amend section 30 of the Non-Governmental Organisations Act and section 36 of the Companies Act to avoid leaving room for government authorities to exclude sex workers from forming organisations.

• Amend or repeal section 41 of the HIV Prevention and Control Act, which criminalise attempted transmission of HIV; section 43 which criminalises willful transmission and section 12 which provides for mandatory HIV testing.

• Amend section 2 and 13 of the Anti-Pornography Act to limit the overbroad definition of 'pornography'.

To the Judiciary

• Dismiss cases brought under section 167 and 168 of the Penal Code Act or section 47 and 48 of the National Drug Policy and Authority Act 2006 which are clear attempts to use these provisions to harass, expose or extort money from sex workers, especially where the accused is unrepresented.

• In cases where sex workers are accused under Penal Code offences, consider carefully whether all the elements if the crime had been proven, prior to making a conviction.

• Where sex workers are convicted under criminal provisions, opt for noncustodial

sentences and small fines, taking into account that sex workers are often the breadwinners of their homes and that their prolonged absence from home has a profound impact on their families.

To the DPP

• Refuse to sanction vague charges which are clearly aimed at using overbroad offences to expose, intimidate or extort sex workers.

To the Uganda Police Force

• Refrain from arresting persons in the absence of the availability of evidence to prove that the alleged offence had been committed.

• Refrain from parading sex workers before the media during and after arrests.

• Put strong sanctions in place against police officers who torture and solicit for bribes from sex workers upon arrest.

• Provide strong remedies to sex workers who have suffered the violation of their rights at the hands of the police through the Police Professional Standards Unit.

• Continue to work with sex workers to weed out wrong elements amongst themselves and vice versa.

• Train its officers on the way in which the laws criminalising sex work ought to be enforced.

• Organise trainings of police officers which would sensitise them in respect of the rights and reality of sex workers.

To Civil Society

• Engage the police on the rights of sex workers.

• Institute cases in the Constitutional Court to challenge legislative provisions which discriminate against sex workers. To the sex workers

• Continue to proactively engage and cooperate with Police.

• Make use of mechanisms to enforce rights such as the Uganda Human Rights Commission and the Police Professional Standards Unit.

CHAPTER TWENTY TWO
CONDOMS AND HUMAN RIGHTS (FREEDOM OF CONSCIENCE)

Uganda faces a possible explosion of human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS), yet its government actively impedes measures that would prevent this incurable and deadly disease. It does so chiefly by impeding access to condoms-the single most effective technology against sexual transmission of HIV, and the cornerstone of HIV prevention efforts since the beginning of the AIDS epidemic. Latex condoms provide an essentially impermeable barrier to HIV pathogens. When used correctly and consistently, they reduce HIV risk to almost zero and have the potential to slow the epidemic spread of AIDS.Programs that include condoms as part of a comprehensive HIV/AIDS response, as opposed to those that promote only sexual abstinence or fidelity, have proven most successful at reducing sexual transmission of HIV and other viruses.In violation of the internationally recognized human right to health, however, Uganda both interferes with the delivery of effective HIV prevention programs and invests in public health strategies that discourage condom use.

Uganda shares many of the same HIV/AIDS risk factors of its African neighbors, such as high rates of sexually transmitted diseases (STDs), widespread high-risk behaviors, and low knowledge of HIV/AIDS and condom use. What is distinct about the Uganda is that up to 62 percent of the population subscribes to Roman Catholicism, a religion whose leadership objects to the use of condoms for any purpose. In the past, the Uganda government has boldly confronted these objections and pursued an exemplary strategy of condom promotion. But the current administration has stood in the way of aggressive HIV prevention strategies by, among other things, failing to support comprehensive reproductive health legislation that would expand access to condoms.

Condoms are readily available in the Uganda through the commercial sector and through campaigns that provide them at discounted prices. But for poor and marginalized populations, who are arguably at highest risk of HIV, the government restricts programs that would guarantee access to condoms and complete HIV/AIDS information. Government officials have refused to purchase condom supplies with national funds; awarded public contracts to organizations that make misleading statements about condom effectiveness; failed to release local funds earmarked for condom promotion, leading HIV prevention programs to cut services and lay off staff; and even enacted local ordinances prohibiting condoms from public health facilities. The immediate effect of these policies has been to deprive the poorest, most vulnerable members of society of a lifesaving HIV-prevention technology, while leaving relatively unaffected those who can afford private health care. Women

and girls, who have been shown to be biologically more vulnerable to heterosexually transmitted HIV than men, have been hit hardest.

The impact of these anti-condom policies on the work of HIV/AIDS service providers in Uganda is crippling. In interviews with Human Rights Watch, providers said they experienced condom shortages due to the refusal of the Department of Health (DOH) to compensate for a lack of free or subsidized condoms from donor countries. In Kampala health outreach workers felt compelled to conceal their condom promotion efforts for fear of retribution from city authorities."If the mayor found out, he'd probably have me called into his office and ask me to explain why I do this," one said. Attempts by AIDS educators to teach comprehensive HIV prevention in schools were met with stiff resistance from teachers and principals opposed to birth control.

The government also fails to counter false scientific claims about condoms, particularly those made by religious authorities. Powerful bishops in the Uganda have always opposed condoms for moral reasons, but more recently some have begun to buttress their moral arguments with false claims about the ineffectiveness of condoms. These include the claim that condoms contain microscopic pores that are permeable by HIV pathogens, a view that is shared by such influential bishops as former archbishop of Manila, Jaime Cardinal Sin, and the head of the Vatican's Pontifical Council for the Family. Although claims of condom porosity have been deemed "totally wrong" by the World Health Organization (WHO)-and, in any case, lack credibility coming from those who oppose condoms for moral reasons-the Uganda government has squandered opportunities to clarify the facts.

To its credit, the government has taken many positive steps to prevent HIV transmission, chiefly through the passage of a 1998 law on the prevention and control of AIDS, and the establishment of HIV surveillance and education activities in several localities. Implementation of the 1998 AIDS law, however, is marred by a flawed legal framework, poor oversight, and a bias against condoms from the highest levels of government. Human Rights Watch interviews with vulnerable persons revealed low levels of knowledge of HIV, inconsistent to no condom use, and poor treatment in public health facilities."I don't use condoms-I never have. I think condoms are not very effective," said one male sex worker in AngelesCity, representing a commonly held view.Institutions mandated by law to provide complete HIV/AIDS information-from public schools to health clinics for sex workers to pre-departure orientation seminars for migrant workers-proved sadly lacking.

Besides repressing condoms and HIV/AIDS information, Uganda also acts in ways that radically increase the likelihood of a rapid outbreak and spread of HIV/AIDS among populations at high risk, particularly sex workers. Sex workers interviewed by Human Rights Watch said they had been given HIV tests in government clinics without their informed consent-a practice that has been shown to drive people from

health and prevention services and increase their risk of infection. Sex workers also said that police routinely used possession of condoms as evidence to arrest and prosecute prostitution."I like to have plenty of condoms in my bag," said one nineteen-year-old street-based sex worker in Kampala City."But if I see the police, I throw my bag away."

The United States, traditionally the largest supporter of HIV/AIDS programs in Uganda , has proved an unreliable supporter of comprehensive HIV prevention programs. While the U.S. Agency for International Development (USAID) deserves credit for having promoted condoms in the country for many years, in 2002 the agency announced that it would no longer be donating any condoms or other contraceptive supplies to the country. This announcement coincided with a radical policy shift within USAID away from condom promotion and toward programs that gave primary emphasis to abstinence and marital fidelity. While the relationship between these two developments was not evident, it was clear that by early 2004, Uganda was facing a potentially catastrophic shortage in condom supplies. Non-U.S. donors, such as the United Nations Populations Fund (UNFPA) and the Commission of the European Union, had not implemented a strategy for addressing this shortage, despite their historic commitment to addressing global condom shortages.

International law guarantees access to condoms and related HIV prevention services as part of the human right to the highest attainable standard of health. The International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by the Philippines, obliges states parties to take steps "necessary for the prevention, treatment and control of epidemic .diseases," including HIV/AIDS.United Nations bodies responsible for monitoring implementation of the ICESCR have interpreted this provision to include access to condoms and complete HIV/AIDS information. The right to information, including information about preventing epidemic diseases, is further recognized by the International Covenant on Civil and Political Rights (ICCPR), also ratified by the Uganda. All major human rights conventions recognize the right to life, which is implicated by policies that interfere with access to life-saving technologies such as latex condoms and the failure to provide life-saving

In its 2002 technical report on HIV/AIDS, the Ministry of Health recommends that local governments "have ample supply of condoms" to prevent further HIV infection. Yet the national government allocates precious resources to anti-condom service providers, takes no discernible steps to counter widespread misinformation about condoms, and permits local authorities to intimidate AIDS service providers who promote condom use. In this environment, it should come as no surprise that many Ugandans avoid or are unaware of condoms as an HIV prevention strategy, risking premature and preventable death.

Condoms are the single most effective technology to protect against sexual

transmission of HIV/AIDS, a disease that killed up to 3.5 million people in 2003 alone and infected up to 5.8 million others. Unsafe sexual practices remain the dominant mode of HIV transmission in most regions of the world. In Africa, where an estimated 7.2 million adults and children are living with HIV, low condom use among sex workers and their clients accounts for a substantial proportion of new HIV infections. Widespread and consistent condom use has been shown to reduce the number of people infected with HIV enough to slow the spread of AIDS. Multilateral organizations such as the World Health Organization and the Joint United Nations Programme on HIV/AIDS (UNAIDS) recommend condoms as an essential intervention against HIV.

Relative to their effectiveness at preventing HIV, however, condoms are a scarce and restricted commodity. The World Health Organization estimated in August 2003 that billions of condoms were needed to prevent the escalation of the AIDS epidemic in Asia, including more than 1 billion condoms in China alone. Globally, the gap between the number of condoms needed for HIV prevention and the number available was estimated in 2000 at anywhere from 15 to 18 billion condoms. In developing countries, many of which rely principally on international donors for condom supplies, only 950 million of the estimated 8 billion condoms needed to achieve a "significant reduction" in HIV infection-less than one eighth of those needed were donated in 2000. The average international price of a male latex condom is U.S.$0.03 (three cents), including the costs of sampling, testing and shipping.

In 2002, United Nations Population Fund Executive Director Thoraya Obaid warned that "[i]n all of the [HIV/AIDS]-affected countries, the supply of condoms is far short of what is needed." Such supply gaps are accompanied by an equally dire scarcity of information. In its 2002 global AIDS report, UNAIDS stated that "[a] lmost everywhere, sexually active young people (especially young women) are denied information about condoms."

Condom shortages stem not only from resource constraints, but also from deliberate government policies that restrict condom manufacture, procurement, distribution, and information on their use. Such policies may limit distribution of condoms in public places, censor information about condoms in schools, regulate import of condoms manufactured abroad, or invest public funds in programs that make false or misleading claims about condoms. Many governments fail to streamline administrative requirements regarding condom storage, logistics and purchasing, creating the potential for wastage and inflated prices. Few have a national strategy or working group on reproductive health supplies that would ensure equal access to condoms, particularly among high-risk groups and people living in rural areas. Too often, governments fail to promote condoms and impart necessary skills and knowledge for fear that doing so will promote sexual activity or birth control.

Incomplete information about HIV/AIDS can both elevate HIV risk and fuel negative stereotypes about people living with the disease.In July 2002, a joint report of UNAIDS, WHO and the United Nations Children's Fund (UNICEF) stated that "the vast majority" of people aged fifteen to twenty-four-an age group that accounts for 50 percent of new HIV infections worldwide had "no idea how HIV/AIDS is transmitted or how to protect themselves from the disease." UNICEF surveys of young women in eighteen countries found that significant percentages had at least one negative attitude towards people living with AIDS-including over 80 percent of respondents in the Philippines. Many people continue to think of HIV/AIDS as a disease of sex workers and gay men, a view too often associated with a low perception of broader HIV risk and a deep stigma against people living with AIDS. HIV prevention campaigns that censor information about condoms can heighten this risk.

Condoms and the Vatican

In its opposition to condoms, the Catholic Bishops Conference of the Philippines closely adheres to the policy of the Vatican. Official Catholic teaching, as expressed in the Catechism of the Catholic Church, is silent on the use of condoms against HIV/AIDS. However, Catholic teaching opposes the use of condoms for artificial birth control, and many bishops' conferences, Vatican officials, and theologians have interpreted this as an all-out ban on condom use for any purpose. The potentially lethal implications of this interpretation have divided Catholic ethicists between those who support condoms as a "lesser evil" than HIV infection and those who fear that allowing any leeway for condom use will promote sexual promiscuity and ultimately lead to the acceptability of condoms for birth control. This latter position was articulated by the Catholic Bishops Conference of the Philippines in 1993 in its first pastoral letter on the AIDS epidemic.

4. The moral dimension of the problem of HIV/AIDS urges us to take a sharply negative view of the condom-distribution approach to the problem. We believe that this approach is simplistic and evasive. It leads to a false sense of complacency on the part of the State, creating an impression that an adequate solution has been arrived at. On the contrary, it simply evades and neglects the heart of the solution, namely, the formation of authentic sexual values.

Moreover, it seeks to escape the consequences of immoral behavior without intending to change the questionable behavior itself. The "safe-sex" proposal would be tantamount to condoning promiscuity and sexual permissiveness and to fostering indifference to the moral demand as long as negative social and pathological consequences can be avoided.

Furthermore, given the trend of the government's family planning program, we have a well-founded anxiety that the drive to promote the acceptability of condom use for

the prevention of HIV/AIDS infection is part of the drive to promote the acceptability of condom use for the contraception.

This statement echoed a 1989 statement by Pope John Paul II, in which he condemned "morally illicit" means of HIV prevention as "only a palliative for deep troubles that call upon the responsibility of individuals and society" and "a pretext for a weakening that opens the road to moral degradation."

The Holy See, which represents the Vatican diplomatically and enjoys non-member state permanent observer status at the United Nations, has at various times sought to omit references to condoms from U.N. documents. At the June 2001 United Nations General Assembly Special Session (UNGASS) on HIV/AIDS, for example, the Holy See representative, Archbishop Javier Lozano Barragan, stated that the Vatican "has in no way changed its moral position" on the "use of condoms as a means of preventing HIV infection." The following year, at the May 2002 UNGASS on Children, the Holy See joined the United States, Iran, Libya, Pakistan, and Sudan in endorsing sexual abstinence "both before and during marriage" as the only way to prevent HIV.

Some Catholics hold that the issue of condoms and AIDS should be left to the discretion of public health officials, pastoral health workers, or simply the conscience of individual Catholics. And indeed, at the level of pastoral practice, many Catholic service providers advise their parishioners to use condoms against HIV. However, Catholic theologians who condone the use of condoms against AIDS risk swift censure from the Vatican. In 1988, Joseph Cardinal Ratzinger, in hiswriting tothe head of the Vatican's Congregation for the Doctrine of Faith, criticized the U.S. Conference of Bishops for having supported condom use in their document, "The Many Faces of AIDS." When South African bishop Kevin Dowling urged the use of condoms against HIV, the South African Bishops Conference responded with a statement condemning condom use, except in the case of couples in which only one partner is HIV-positive. The mere observation of a softening within the church can generate a backlash, as in 2000 when two Catholic scholars concluded that some bishops support the use of condoms against HIV/AIDS. "There is a cold wind blowing from the Vatican at revisionists," wrote Father Daniel Kroger, a Catholic ethicist in the Philippines, in February 2004.

Human Rights Watch recognizes the freedom of all people to follow their conscience in deciding whether to support or oppose the use of condoms. However, the duty of governments to protect public health requires that they rely on scientifically accurate information to craft the most effective possible HIV/AIDS prevention measures. Moral objections to devices that also can be used for birth control are not an adequate basis upon which to condemn thousands to an otherwise preventable death in the absence of equally effective alternatives.

Although condoms are not 100 percent effective, broad objections to condoms as an HIV prevention strategy find no basis in science. Laboratory tests show that no STD pathogen, including HIV, can permeate an intact latex condom. Both the WHO and UNAIDS recommend the use of condoms against HIV, stating in August 2001 that "[t]he consistent use of male latex condoms significantly reduces the risk of HIV infection in men and women." This statement followed an extensive review of condom effectiveness convened by the U.S. National Institutes of Health (NIH) in 2000, in which the combined analysis of several studies showed an 85 percent decrease in risk of HIV transmission among consistent condom users versus non-users. Studies of sero-discordant couples, in which one partner is infected with HIV and the other is not, show that, with consistent condom use, the HIV infection rate among uninfected partners is less than 1 percent per year. Condoms can also have some effect against HPV by hastening the regression of lesions in the cervix and on the penis and by speeding up clearance of the virus, according to two Dutch studies published in the international journal in December 2003. A 2003 UNAIDS-sponsored study estimated that factors such as breakage, slippage and improper use lead to condom ineffectiveness in approximately 10 percent of cases.

International law recognizes the right to the highest attainable standard of health, which includes access to information and services necessary for physical and mental health.Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically obliges governments to take all necessary steps for the "prevention, treatment and control of epidemic . . . diseases," such as HIV/AIDS. The Committee on Economic, Social and Cultural Rights, the U.N. body responsible for monitoring implementation of the ICESCR, has interpreted article 12 as requiring "the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS." In the context of "general legal obligations," the committee notes:

States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also ensure that third parties do not limit people's access to health-related information and services.

According to the committee, the ICESCR does not only oblige governments to establish these programs "expeditiously and effectively"; it also prohibits them from "interfering directly or indirectly with the enjoyment of the right to health." Policies that frustrate HIV prevention by limiting access to condoms and HIV/AIDS information fit this description.

Access to complete and accurate information about condoms and HIV/AIDS is recognized by article 19 of the International Covenant on Civil and Political rights (ICCPR), which guarantees the "freedom to seek, receive and impart information of all kinds, regardless of frontiers." Parties to the ICCPR are obliged not only to refrain from censoring information, but to take active measures to give effect to this right. This is particularly true in the case of threats as serious as HIV/AIDS, a disease that has not only killed millions of people, but whose spread is facilitated precisely by lack of information and the inability to make informed choices about health.The Committee on Economic, Social and Cultural Rights has similarly stated that "information accessibility" is an essential element of the human right to health, noting that "education and access to information concerning the main health problems in the community, including methods of preventing and controlling them" are of "comparable priority" to the core obligations of the ICESCR.

Access to HIV prevention services, including condoms, saves lives. The right to life is recognized by all major human rights treaties and, as interpreted by the U.N. Human Rights Committee, requires governments to take "positive measures" to increase life expectancy. These should include taking adequate steps to provide accessible information and services for HIV prevention (particularly to marginalized populations), taking steps to correct life-threatening misinformation provided by private actors, and ensuring that any publicly funded programs do not withhold life-saving technologies and information about them.

Human rights law further recognizes the right to nondiscrimination in access to information and health services, as in all other services. Women, sexual minorities and people living with AIDS, all of whom are protected from discrimination under international law, stand to suffer disproportionately from programs that discourage condom use and promote abstinence and fidelity as primary HIV prevention strategies.There is strong evidence that women are biologically more vulnerable to heterosexually transmitted HIV than men and thus stand a higher risk of HIV infection in environments where condom access is restricted. This includes married women, who need to be educated about condoms insofar as they cannot ensure their spouses' fidelity.For lesbians and gay men, who cannot legally marry in most parts of the world, programs that promote sexual abstinence until marriage imply no option but lifetime abstinence, a misleading message when condoms provide a safe and effective method of HIV prevention.

The human rights to health, information, life, and non-discrimination are also recognized by specialized treaties such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Non-binding interpretations of international law, such as the Office of the High Commissioner for Human Rights (OHCHR)/UNAIDS International Guidelines on HIV/AIDS and Human Rights and the Declaration of Commitment of the United Nations General Assembly Special Session (UNGASS) on

HIV/AIDS, similarly support the right to complete information about HIV/AIDS.The guidelines recommend that "restrictions on the availability of preventive measures, such as condoms should be repealed," while the Declaration of Commitment calls for "expanded access to essential commodities, such as male and female condoms."

HIV/AIDS is a preventable disease, yet approximately 5 million people were newly infected with HIV in 2003, the majority of them through sex. Many of these cases could have been avoided, but for state-imposed restrictions on proven and effective HIV prevention strategies, such as latex condoms. Condoms provide an essentially impermeable barrier to HIV pathogens. According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), scientific data "overwhelmingly confirm that male latex condoms are highlyeffective in preventing sexual HIV transmission." However, many governments around the world either fail to guarantee access to condoms or impose needless restrictions on access to condoms and related HIV/AIDS information. Such restrictions interfere with public health as well as set back internationally recognized human rights, the right to the highest attainable standard of health, the right to information, and the right to life. In the midst of this crisis, the world's leading donor to HIV/AIDS programs, the United States, has ramped up its support for HIV prevention programs that promote sexual abstinence and marital fidelity. The United States Leadership against AIDS, Tuberculosis and Malaria Act of 2003 (commonly known as the President's Emergency Plan for AIDS Relief or PEPFAR) devotes 33 percent of prevention spending to "abstinence until marriage" programs, concentrating these programs on fifteen heavily AIDS-affected countries in sub-Saharan Africa, the Caribbean and Asia. As implemented domestically in the United States, government-funded "abstinence only" programs censor science-based information about condoms and suggest that heterosexual marriage is the only reliable strategy for prevention of sexually transmitted HIV. Abstinence-only programs do not provide a proven effective alternative to programs that include accurate information about condom use, and may cause harm.

Not only do these programs deprive people at risk of HIV of lifesaving information, but by teaching that heterosexual marriage is the only legitimate context for sex, they discriminate against lesbians and gay men, who cannot legally marry in most countries.

It is not only the United States that restricts access to condoms and lifesaving information about HIV/AIDS. In many countries, political and religious leaders have made public statements associating condoms with sin or sexual promiscuity, implying that people who use condoms lack the moral fortitude to abstain from sex until marriage. In countries with significant Roman Catholic populations, governments frequently bow to pressure from religious leaders to censor information about condoms in school-based HIV/AIDS curricula or other HIV-prevention programs. The Holy See, which represents the Vatican diplomatically and exerts considerable influence over HIV/AIDS policy in many Roman Catholic countries, explicitly

objects to condom use and at times has publicly distorted scientific information about the effectiveness of condoms against HIV. Since the announcement of PEPFAR in 2003, pressure by the U.S. to make abstinence a more central part of HIV prevention strategies in donor counties appears to have reduced condom availability and access to accurate HIV/AIDS information in some countries.

Given these restrictions, it should come as no surprise that the vast majority of people at risk of HIV lack the basic tools to protect themselves from this fatal disease. In 2003, fewer than half of all people at risk of sexual transmission of HIV had access to condoms. Less than one quarter had access to basic HIV/AIDS education. The United Nations Population Fund (UNFPA) estimated in 2000 that over 7 billion additional condoms were needed in developing countries to achieve a significant reduction in HIV infection. International funding for procuring condoms declined throughout the 1990s, and U.S. condom donations remain well below levels seen in the early 1990s despite recent reported increases. At the same time, U.S. funding for international "abstinence until marriage" programs increased exponentially in 2003 with the enactment of PEPFAR.

Condoms are not a complete solution to the spread of HIV, but they are a necessary tool to combat that spread. In the absence of equally effective alternatives or of evidence that abstinence-until-marriage programs work, there is no scientific basis for restricting access to and information about the only device available to prevent HIV transmission through sex. While abstinence and fidelity may work for some people in some cases, promoting these behaviours at the expense of condoms deprives people of complete information and services for HIV prevention. To avert this health and human rights crisis, governments and international donors should immediately lift any restrictions on access to condoms and take concrete steps to guarantee comprehensive and science-based HIV prevention services to all those who need them.

Official Roman Catholic teaching, as expressed in the Catechism of the Catholic Church, is silent on the use of condoms against HIV/AIDS. However, Roman Catholic teaching opposes the use of condoms for artificial birth control, and many bishops' conferences, Vatican officials, and theologians have interpreted this as an all out ban on condom use for any purpose. Catholic leaders have repeatedly made public statements discouraging condom promotion. On World AIDS day in 2003, Cardinal Javier Lozano Barragan, president of the Pontifical Council for Health and Pastoral Care, stressed the importance of programs that focus on abstinence and fidelity. In addition, the Holy See has taken advantage of the unique level of access afforded by its non-member permanent observer status at the United Nations to lobby for the exclusion of references to condoms in U.N. policy documents.

Statements by senior Vatican officials suggest that the Roman Catholic Church's

principal objection to condoms is that they promote sexual promiscuity. In December 2003, Cardinal Alfonso Lòpez Trujillo, the president of the Vatican's Pontifical Council for the Family, wrote that "condoms may even be one of the main reasons for the spread of HIV/AIDS." In the same statement, Trujillo praised members of the Spanish Episcopal Council for taking a stand against condom promotion programs on the grounds that they "tend to be deceitful, . . . hide information, and because they do not contribute towards prevention, but rather to a greater spread of risky behaviour." This statement built upon comments Trujillo had made in 1995 that teaching children sex education was an "abuse" and that the promotion of "safer sex" was "a dangerous and immoral policy based on the deluded theory that the condom can provide adequate protection against AIDS."

As in the United States, condom opponents within the Roman Catholic church have at times made false scientific claims about condoms in order to buttress their moral arguments. In an October 2003 interview with the BBC, for example, Cardinal Trujillo suggested that HIV can permeate microscopic pores in condoms. Calling the use of condoms "a form of Russian roulette," Trujillo stated: "The AIDS virus is roughly 450 times smaller than the spermatozoon [spermatozoa]. The spermatozoon can easily pass through the 'net' that is formed by the condom." Trujillo's claim was not new. Since 2002, various bishops have claimed that HIV can permeate condoms, called for health warnings on condom packets, and cited anti-condom studies by the pro-"abstinence- only" Medical Institute for Sexual Health.

The claim that condoms contain microscopic pores that are permeable by HIV pathogens flies in the face of science. In October 2003, the World Health Organization dismissed claims of condom porosity as "totally wrong." Simultaneously, the European Union Commission criticized the Vatican's campaign against condoms for being unscientific and for contributing to the spread of the epidemic by discouraging condom use. In 2004, Anglican Archbishop Desmond Tutu of South Africa challenged the Roman Catholic claim that promoting condoms leads to promiscuity. In June 2001, UNAIDS director Peter Piot publicly asked the Roman Catholic Church to stop opposing the use of condoms against AIDS, saying that "when priests preach against contraception, they are committing a serious mistake which is costing human lives."

Anti-condom messages promoted by senior Vatican officials can exert considerable influence over national and regional Catholic bishops' conferences. In 2003, for example, the Catholic Bishops Conference of the Philippines (CBCP) successfully blocked legislation that would have authorized the use of national funds for condoms and other contraceptive supplies. The CBCP issued in 1993 a statement that condemned the promotion of condoms against HIV/AIDS as "tantamount to condoning promiscuity and sexual permissiveness." In 2004, the Croatian Bishop's Conference also opposed condom education efforts. In 2001 Catholic bishops from southern Africa condemned the use of condoms to fight AIDS, a position they

reaffirmed in October of 2003. Bishops from southern Africa are not unanimous in the position however, Kevin Dowling, a bishop from South Africa has been outspoken in his position that opposition to condoms amounts to a death sentence for women, particularly in Africa, who cannot insist on abstinence or fidelity.

In Uganda, the use and availability of male condoms is essential to preventing unplanned pregnancy and the spread of diseases such as HIV/AIDS. From 1992 to 2002, Uganda successfully reduced the prevalence of HIV/AIDS from 18% to approximately 6%; however, some concerning trends are emerging and HIV prevalence has increased with an estimated 7.3% of adults currently infected. Despite some opposition from religious and political leaders, male condoms continue to be an important part of Uganda's national strategy for HIV prevention, and the dual protection offered by condoms is a key component of reproductive health programs. In Uganda's current market, the number of condoms needed to protect all sexual acts from HIV infection and unplanned pregnancy (universe of need) is much higher than the actual number of condoms on the market (volume). Condom use among the general population has increased, but overall demand still remains low, which helps explain why volumes are also low. Rates of use are higher among youth, but have decreased within some groups, including males with casual partners and females with multiple partners. In addition, equitable distribution of free or subsidized condoms has not improved since 2006 as individuals in the wealthiest quintile were still much more likely to report condom use than those in poorer quintiles.

The condom market in Uganda consists of three sectors: the public sector, which distributes fully subsidized (free) condoms, the social marketing sector, which distributes partially subsidized condoms at low cost, and the commercial sector, which sells condoms for a profit. In 2011, the value of the total market was estimated at $5,091,264, a 28% increase from the market value in 2006. Approximately 98% of condoms on the market were fully or partially subsidized and commercial sector activity was negligible. Concerns about appropriate pricing strategies, "crowding out" the commercial sector, and inefficiencies in the use of public funds, prompted the Program for Accessible Health, Communication and Education (PACE), PSI's Ugandan affiliate, and the United Nations Population Fund (UNFPA) to adopt a total market approach (TMA) to help manage the condom supply in Uganda. The total market approach provides an opportunity for improved efficiency, equity, and sustainability in Uganda's market for male condoms. TMA requires that the three sectors public, social marketing, and commercial work together to "grow the condom market" and meet the needs of different segments of the population. The results of our study yielded several important findings. As it stands, condom subsidy programs in Uganda have been inefficient, with wealthier classes benefitting from free and socially marketed condoms. A lack of collaboration between the three market sectors has resulted in an erratic condom supply, which disproportionately affects the poor and those living in rural areas. Enhanced reporting systems could improve commodity projections and forecasting, which would help identify market

needs as well as gaps in supply. The overall Ugandan condom market has suffered from limited growth and demand for condoms must be increased, especially among Ugandans with multiple or casual partners. The presence of three socially marketed condoms on the market could be crowding out the commercial sector, especially if prices are not set high enough to encourage the commercial sector to become active on the market.

Uganda is one of the countries most hit by HIV/AIDS. The first HIV/AIDS case was identified in Rakai district in 1982, after which the virus spread widely and severely affected Uganda (Konde-Lule, 1995). Estimates indicate that there were 1,438,000 and 1,107,644 adults and children living with AIDS as of December 1999 and 2000 respectively. The cumulative deaths due to AIDS were reported at 848,492 by December 2000 (MoH, 1999 and 2000). Uganda, whose HIV prevalence rate peaked at 18.5% in 1995 was the first country in sub-Saharan Africa to reverse its own epidemic. The rate dropped to 16.3% in 1996, 14.7% in 1998. By 1999, this had been halved to 8.3%. The steady decline has been attributed to strong preventive measures including condom use, public awareness raising campaigns and behaviour change messages. Other factors include behaviour change in sexual patterns, control of sexually transmitted infections and fear of death (Ntozi and Ahimbisibwe, 1999). Risk factors for HIV transmission are mainly sexual intercourse, having multiple sexual partners, non-use of condoms especially with casual sexual relations, blood transfusion, and intra-venous injections. Knowledge about these among the Uganda population is high and almost universal. Given such knowledge, one would want to assess people's perceptions of the risks they have for contracting HIV. In the 1995 Uganda Demographic and Health Survey, 65% of women and 84% of men who had heard of AIDS said they had little or no chances of being infected. Women were more likely than men to report that their chances of getting HIV were great (13% against 6%). The proportion who said they had no chances of getting HIV was higher among the younger men and women, the never married, those who had no sexual partners other than their spouses in the preceding 12 months, the rural and those in Northern Uganda.

Condom use is central to the prevention of STDs, including HIV among sexually active populations. As such, condom use is dramatically increasing despite the fact that men in particular do not like using them. For example, in a longitudinal study carried out in Kasangati - Uganda among 1990 respondents over a 7 year period (1987-1994), results showed a 7.3 fold increase in condom use over the study period. Ever use of condoms rose from 28% in 1987 to 26% in 1992 and to 41% in 1994 (Konde-Lule et al, 1997). Social marketing campaigns have played a vital role in this together with the increased awareness about AIDS (Finger, 1998). A number of studies on condom use in Africa have been carried out to particularly assess condom acceptance and use among different populations. In a Nigerian study among unmarried female trade apprentices, sex risk behaviors Innocent Najjumba Mulindwa et al: Risk Perception and Condom Use in Uganda 69 were identified and

these include low levels of condom use during the first and last sexual intercourse, lack of prompt treatment of sexually transmitted diseases and lack of assertiveness skills. In addition, they had limited knowledge about the benefits of condom use for prevention of HIV. Girls were fearful of unwanted pregnancy and sexually transmitted diseases including AIDS, and expressed problems with using condoms (Dada et al, 1998). Focus group discussions and in-depth interviews conducted in Ghana - Cape Coast revealed that condom use was rare and associated with infidelity. Men perceive condoms as reducing sexual sensitivity and they are unlikely to remain with a partner who insists on condom use (Ankomah, 1998). Agha (1998), in a study carried out in Lusaka - Zambia revealed that Zambian women are limited in their ability to negotiate condom use in sexual relationships. In the same study, it was found that men's age and education were significant predictors of condom use for men. In addition, condom use was significantly associated with non-marital sexual activity. A number of studies on condom use have also been carried out in some districts of Uganda. In a study carried out in Lira and Soroti districts on a sample of 1358 and 1464 residents respectively, it was revealed that around 6% of the respondents in each district had ever used condoms. Condom use during the last sexual intercourse was greater with non-regular partners than with spouses or regular partners. The main reason for non-use of condoms was unavailability of the same followed by objection by partner and personal dislike of condoms. The same study confirmed the great shortage of condoms in the areas surveyed. Regarding other attributes, men were more likely to report condom use than females. People also believed that sex with a non-regular partner was more risky than with a regular partner (Opio et al, 1997). Another study was also carried out in Kampala on a sample of 301 men. Forty-six per cent of them reported having used a condom at the last sexual encounter and 31% reported always using a condom with casual partners. Correlates of condom use included higher condom self efficacy, lower embarrassment around condoms, knowing where to buy a condom, knowing how to use a condom and increasing number of casual sex partners (Kamya et al, 1997). Recent studies on condom use have also focused on the efficacy, tolerance, and acceptability of the female condom. In Kenya and Brazil, for example, sampled women in both countries praised the female condom for its protection from pregnancy and disease, lack of interference with sexual pleasure, comfort relative to the male condom, and an opportunity for couples to stay together longer after ejaculation (Ankrah and Ettika, 1997). Similarly, the majority of commercial sex workers in Zimbabwe liked the female condom very much or fairly well (Ray and Maposhere, 1997).

Marie Stopes Case on Condoms

Marie Stopes Uganda, which prides itself as Uganda's largest and most specialized sexual and reproductive healthcare organisation, was dragged to court for allegedly distributing defective condoms of Life Guard brand. Two people, Joseph Kintu and Sulaiman Balinya filed a suit at the Civil Divi-

sion of the High Court seeking a declaration that Marie Stopes was negligent and should pay them sh22m in damages at an interest rate of 30%. Kintu said that in October 2019, he bought a packet of Lifeguard condoms batch number 1904205 from a drug shop in Kapeeka, Nakaseke district to protect himself against sexual transmitted infections and other related consequences of unprotected sex. He claimed the condom burst during the act of sex. Court documents indicate that Kintu later, through the media, got information that the said condoms had been declared defective by the Health ministry and National Drug Authority (NDA). Kintu says having tested negative twice before in June and September that, he tested HIV positive on November 6, the same year. He further asserted that it was reported by the Minister of State for Health in her report to Parliament on November 11 last year that the batch of Life Guard condoms had been supplied by Marie Stopes to the public illegally and without following the prescribed procedure.

According to court documents, Kintu stated that following the minister's statement, NDA later recalled the said batches of Life Guard condoms as they were illegally on market. He adds that on October 22, that year he bought Life Guard condoms batch number 19050105 from Shifa Pharmacy in Ibanda town. He says thereafter, on the same night he used the said condoms for sexual intercourse. "On completion of the act, he realised that the condom had burst," reads part of the court documents. Balinya states that being a regular condom user, he retained the other condoms he did not use for further consultation. He further says that on October 24, the same year, he felt pain in his private parts and went to Ruhoko Health Centre IV in Ibanda for treatment where he was found with gonorrhea.

"I have never been tested or diagnosed with gonorrhea or any other sexually transmitted diseases before the use of the said condoms," he stated.

Balinya asserts that he found out that NDA had recovered from Shifa Pharmacy the said defective condoms. Kintu says as a result of the negligent actions of Marie Stopes, he contracted HIV, which he also transmitted to his wife and as a result he has suffered mental anguish. The deputy court registrar, Sarah Langa has ordered Marie Stopes to file its defence within 14 days. On its website, Marie Stopes Uganda said it provides "a wide range of high quality, affordable, client-centered services." The services include the distribution of male condoms.

CHAPTER TWENTY THREE
HIV AND THE LAW: A CRITICAL APPRAISAL AND THE NEED FOR REVIEW

HIV/AIDS epidemic is still a global concern because of the number of deaths it causes annually. Uganda is no exception; the first cases were reported along the shores of Lake Victoria in Rakai District in 1982.[159]The government has since undertaken several policies and legislative frameworks both at international, regional and national to curb the transmission of the disease. Indeed, the prevalence rate stood at 6,4 percent in 2005 from 18 percent in 1992,[160]it however increased to 7,3 percent in 2011.[161] In order to assess the success of the legislative and legal frameworks that have been adopted, it is crucial to ascertain the justiciability of the right to health in Uganda which is the starting point in analyzing any health issue.

The 1995 Constitution does not expressly provide for the right to health, however, the National Objectives and Directive Principles of State Policy (NODPSP)[162] acknowledge the right, although it is still uncertain whether the principles are justiciable. Egonda Ntende J in Tinyefuza v Attorney General,[163] held that NODPSP are important aids in interpreting the Constitution, however, he did not expressly state whether they are binding. Discordant views were expressed in Zachary Olum & Another v Attorney General,where the court agreed that NODPSP are part of the Constitution, however, the learned justices were quick to add that they are not justiciable. It is therefore uncertain whether the NODPSP are justiciable. However, with the introduction of Article 8A (1) in the 2005 constitutional amendment which provides that Uganda shall be governed based on principles of national interest, it can be argued that the NODPSP are now justiciable.[164]However, some commentators such as Twinomugisha,[165] have argued that this provision is not absolute because clause 2 requires Parliament to 'make laws for purposes of giving full effect to clause (1) of this Article.'[166] Unfortunately, Parliament has not yet invoked this clause.

Although there have been very few cases dealing with HIV/AIDS specifically because of stigma associated with the disease, the courts have gone ahead to rely on civil and political rights to advance the broader right to health in numerous cases, an example of such a case is CEHURD and 2 Ors v The Executive Directive Director

[159] *Jenny Kuper, 'Law as a tool: The challenge of HIV/AIDS in Uganda' Crisis States Research Centre (October 2008)*

[160] *Uganda Aids Commission, HIV/AIDS in Uganda: The Epidemic and the Response, Kampala: Uganda Aids Commission, 2002.*

[161] *Ministry of Health Sero-Behavioural Survey (2011) 9.*

[162] *Objective XX (on medical services)*

[163] *Constitutional Petition 1/1999.*

[164] *C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' HURIPEC Working Paper (2008)*

[165] *Ben Kiromba Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.29.*

[166] *Art 8A(2)*

Mulago Referral Hospital and the Attorney,[167]where Justice Lydia Mugambe held that denying the parents of the child the opportunity to bury their baby, was a violation of their right to health in contravention of objectives XX and XIV (b) of the Constitution, in addition to Article 12 and Article 16 of the ISECR and the African Charter respectively which guarantee the right to health. This judgement is important because it demonstrates judicial activism where judges have reliedon civil and political rights which are well defined in the Constitution to protect the right to health. Specifically, the court observed that the hospital's actions amounted to psychological torture which violated Articles 24 and 44 of the Constitution.

This paper will be structured in three parts in analyzing the human rights instruments and policies on HIV/AIDS.The first part will address the international measures while the second will address the regional measures and finally the national measures. The appraisal is relevant because Uganda has committed to address HIV/AIDS issues using a Rights Based Approach (RBA)at all these levels. The RBA refers to the processes of 1) using human rights as a framework for health care development; 2) assessing and addressing the human rights implications of any health policy, programme or legislation; 3) making human rights an integral dimension of the design implantation, monitoring and evaluation of health related policies and programmes in all spheres, including political, economic and social.[168]The salient features in these frameworks are the administrative measures vis-a-viz the criminalization approach in attempting to curb the spread and transmission of HIV/AIDS. The analysis will also highlight the key cases at both regional and domestic level which have dealt with HIV/AIDS.

International Policy and Legal Frameworks

World Health Organisation (WHO) Constitution

The World Health Organization (WHO) Constitution defines health as the general wellbeing not merely the absence of disease.[169]The preamble of the same constitution provides,

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.[170]

The WHO Constitution was the first international instrument that attempted to define the right to health, key to note in this definition is the fact that health is not restricted to merely the absence of disease. This covers the measures that have been taken

[167]*(CIVIL SUIT NO. 212 of 2013) [2017] UGHCCD 10*

[168]*WHO 2002 at 16-17.*

[169]*WHO 1946.*

[170]*WHO 1946.*

to reduce the spread and transmission of HIV/AIDS. The preamble also prohibits discrimination in the enjoyment of the right on any ground. This is important for people living with HIV/AIDS (PLHA) because of stigma they often find it difficult to access health care services.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) defines the right to health by stating,

[e]veryone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or the lack of livelihood in circumstances beyond his control.[171]

The drafters of the Universal Declaration should be applauded for including the right to health among the bill of rights. However, the definition is not conclusive because it gives health as part of adequate standard of living. Put simply, it was not given much weight yet health is such a crucial right for the wellbeing of society.

International Convention on Social Economic and Cultural Rights

The right is also defined under the International Convention on Economic Social and Cultural Rights (ICESCR) which provides that:

'State parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[172]

'The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

The provision of the reduction of stillbirth-rate and of infant mortality and for the healthy development of the child;

The improvement of all aspects of environmental and industrial hygiene;

The prevention, treatment and control of epidemic, occupational and other diseases;

The creation of conditions which would assure to all medical service and medical attention in the event of sickness'.[173]

[171] *Art 25(1) of the Universal Declaration.*

[172] *Article 12(1)*

[173] *Article 12(2)*

The CESCR has expounded on this right.[174] According to the Committee, one of the core obligations of the state is;

'To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.'[175]

The above provisions are very important for PLHA considering the discrimination they face in their day to day lives especially accessing basic medication. Indeed, Justice Lydia Mugambe in CEHURD v Executive Director of Mulago and Anor (supra), relied on Article 12 of the ICESCR in finding the defendant hospital liable.

International Convention on Civil and Political Rights

The rights contained in the ICCPR unlike the ICESCR are not subjective to progressive realization. They should therefore be achieved immediately because they have no cost implication. For example, the inherent right to life,[176] freedom from torture or degrading treatment,[177] and the right to liberty.[178]

Convention on the Rights of the Child (CRC)

The CRC also expressly provides for the right to health of children, it states that:

'State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services'.[179]

The Constitution also provides that no child should be deprived of medical treatment.[180] These are very important provision for the protection of children living with HIV/AIDS.

International Policy Frameworks on HIV/AIDS

International Guidelines on HIV/AIDS and Human Rights

The guidelines arose because of various calls for their development in light of the need for guidance on how best to promote, protect, and fulfil human rights in the context of the HIV epidemic.[181]Although not binding the guidelines provide

[174]*CESCR, General Comment No. 14.*

[175]*Para.43(a) of General Comment 14.*

[176]*Article 6 of the ICCPR.*

[177]*Article 7 of the ICCPR.*

[178]*Article 9 of the ICCPR.*

[179]*Article 24 of CRC.*

[180]*Article 34(3) of the 1995.*

[181]*https://www.unaids.org/en/resources/documents/2006/20061023_jc1252-internguidelines_en.pdf*

compelling policy guidance from the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Office of the High Commissioner for Human Rights (OHCHR) on how to ensure that internationally guaranteed human rights underlie national HIV responses.[182] There are twelve guidelines but in this paper we shall analyze three crucial ones that are relevant for our discussion.

Guideline 3 on Public Health Legislation provides,

States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV and that they inconsistent with international human rights obligations.

The above guideline further goes on to state the components the legislation should include. For example; pre- and post- test counselling,[183] the HIV status of an individual should be protected from unauthorized collection,[184] etc.

Guideline 4 on Criminal laws and Correctional Systems provides:

States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted at vulnerable groups.

The Guideline goes on to provide that criminal or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to deal with elements of foreseeability, intent, causality, etc.[185] This guideline is crucial because the criminalization of HIV/AIDS is likely to increase the stigma PLHA face and it will encourage many people not test for fear of penal sanctions. In the later part of the paper we shall analyze with Uganda has reformed its criminal laws to comply with this guideline.

It is also worth considering Guideline 5: Anti-Discrimination and Protective Laws which provides,

States should not enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, that will ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation and provide for speedy and effective administrative remedies.

[182] *HIV/AIDS, Human Rights, and Legal Services in Uganda: A Country Assessment, at p.7.*

[183] *Guideline 3(c) of the International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated Version)*

[184] *Guideline 3(f) of the International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated Version)*

[185] *Guideline 4(a) of the International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated Version)*

The effect of the above is to prevent discrimination in work places and to ensure the privacy of PLHA. There states should pass the relevant laws for their protection. We shall assess whether Uganda's laws comply with this requirement.

Regional Instruments and Case law on HIV/AIDS

The African Charter on Human and Peoples Rights (ACHR)

The African Charter provides for the right to health of everyone, it states that:

'Every individual shall have the right to enjoy the best attainable state of physical and mental health'.[186]

States are obliged to take necessary steps to 'take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.[187]

The African Commission has expounded on this right using General Comments. The Commission has for example noted that women and young girls are adversely affected by HIV.[188] State parties are therefore obliged to create enabling and supportive environments to protect women from HIV.[189]

The above instruments contain guarantees which are very pertinent in addressing HIV/AIDS issues. Kuper notes that they include: the rights to non-discrimination, equal protection, and equality before the law; to life; to the highest attainable standard of physical and mental; of women and children; to liberty and security of the person; to freedom of movement; to seek and enjoy asylum; to privacy; to freedom of opinion and expression and to freely receive and impart information; to freedom of association; to work; to marry and found a family; to equal access to education; to an adequate standard of living; to social security, assistance and welfare; to share in scientific advancement and its benefits; to participate in public and cultural life; and to be free from torture and cruel, inhuman or degrading treatment or punishment.[190]

The African Commission deliberated upon Article 16 in Social and Economic Rights Action Center & the Center for Economic and Social Rights (SERAC) v Nigeria,[191] where the communication alleged that the military government of Nigeria was guilty condoned and facilitated illegal operations of oil corporations in Ogoniland. The Commission ruled that the Ogoni had suffered violations of their right to health

[186] *Art 16(1)*

[187] *Art 16(2)*

[188] *General Comment on Art 14(1) (d) & (e) of the Protocol of the African Charter on the Rights of Women in Africa.*

[189] *Para 10.*

[190] *Kuper (2005), p.26.*

[191] *Communication No. 155/96.*

contrary to Article 16 of the African Charter.

National Policy Frameworks

Before analyzing the law, it is important to appreciate the policy frameworks on HIV/AIDS. Kuper observes that in the initial years of the National Resistance Movement (NRM) government, the HIV/AIDS strategy was almost entirely policy-based.[192] It has been contented that policy frameworks are useless because they have no legal effect. However,in the Kenyan case of Patricia Asero Ochieng & Others v The Attorney General,[193]the High Court relied on the Kenya National AIDS Strategic Plan 2004-2009, the 2007 Kenya AIDS indicators Survey and the 2010 National HIV and AIDS Estimates. In holding that the Anti-Counterfeit Act, 2008 violated the right to health guaranteed in the Kenyan 2010 Constitution by categorizing generic drugs as part of counterfeit goods.

To-date Uganda has many policy frameworks in this area which have been designed to reduce the transmission of HIV, these are summarized below:

To begin with, it worth highlighting the documents for the National HIV and AIDS Response, 2015/2016-2019/2020. The response is comprised of four documents: the National HIV and AIDS Monitoring and Evaluation Plan,[194] the National HIV and AIDS Indicator Hand Book,[195] the National HIV and AIDS Priority Action Plan,[196]and the HIV/AIDS Strategic Plan (NSP)[197] which replaces the NSP 2011/2012-2014/2015. The new NSP represents fresh thinking and innovative approaches all of which are necessary to stay ahead of the epidemic.[198] The ultimate goal is to observe the global call of Zero new infections, Zero discrimination and Zero AIDS-related deaths by 2030 which was agreed during the 69th United Nations General Assembly and Joint United Nations Programme on HIV and AIDS (UNAIDS).

Other national policy frameworks include: the Second National Development Plan (NDP II) provides that quality health care will be achieved through delivery of preventative, curative, palliative and rehabilitative care.[199] The NDP II further acknowledges the need to reduce the HIV infections among adults and HIV related deaths.

National Legislation

[192] *Kuper (2005), p.8.*

[193] *Petition 409/2009 (High Court of Kenya)*

[194] *2015/2016-2019/2020*

[195] *2015/2016-2019/2020*

[196] *2015/2016-2017/2018*

[197] *Republic of Uganda National strategic plan for HIV/AIDS 2015/16-2019/20.*

[198] *Above, p.1.*

[199] *National Development Plan (NDP II) 2015/16-2019/20.*

The primary legislation in construing the national legislative framework on HIV/AIDS is the HIV and AIDS Prevention and Control Act, 2014. The objective of the legislation is to control and reduce the transmission of HIV/AIDS. The appraisal of this Act will call for an analysis whether it meets public health guidelines and human rights principles that have been laid in the international policy and legal frameworks discussed above. Like earlier stated, since there hasn't been much litigation on the ethical issues surrounding HIV/AIDS, reference will be made to cases in other countries especially Southern Africa where there has been considerable litigation on the issue.

Some commentators like Twinomugisha,[200] acknowledge that the Act contains a number of progressive provisions which can be justified from public health and human rights perspectives. Indeed, the Act focuses on the international 3Cs i.e. Confidentiality, Counselling, and Consent.[201] In the recent decision of the English Supreme Court, Montgomery v Lanarkshire Health Board,[202]the court examined whether a diabetic expectant mother should be informed of the risk of shoulder dystocia and the safer option of caesarean section. Court held that there should be informed consent before any treatment is done even if it is in the best interests of the patient. The rationale for the principle is the notion of autonomy of ones' body. The significance of informed consent is also highlighted in Patients' Charter.[203] This very important in the context of HIV/AIDS, inasmuch as the State wants to combat the disease, there must be voluntary consent. In the South African case of C v Minister of Correctional Services,[204] the High Court found that the Johannesburg Prison did not comply with the national strategy regulating HIV/AIDS in prison. The prison's deviation from the norm of informed consent and lack of pre-test counselling led the court to award damages to the plaintiff. Similarly, in Diau v Botswana Building Society,[205]court held that to punish an individual for refusing to agree to a violation of her privacy is demeaning, degrading, and disrespectful to the intrinsic worth of being human. Therefore punishing the applicant for refusing an invasion of her right to privacy is inconsistent with human dignity.

The Act also provides for state responsibilities such as ensuring the equitable distribution of health facilities including essential medicines and universal HIV treatment on a non-discriminatory basis[206] as well as the establishment of an HIV/AIDS Trust Fund to support HIV response.[207]In Minister of Health and Ors v

[200] *Ben Kironda Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.106.*

[201] *Secs 3 – 23, part III of the Act.*

[202] *[2015] UKSC 11.*

[203] *Article 10 of the Patients' Charter (October 2009)*

[204] *1996 (4) SA 292 (T).*

[205] *2003 (2) BLR 409.*

[206] *Section 24 of the HIV Control and Prevention Act, 2014.*

[207] *Section 25 of the HIV Control and Prevention Act, 2014.*

Treatment Action Campaign.[208]In this case, the South African Constitutional Court interpreted the right to access to health care as provided for under the Constitution and ordered the government to modify its programme for the Prevention of Mother to Child Transmission of HIV (PMTC) in order to ensure that the nevirapine is available to the public health sector. These are very progressive steps which comply with international guidelines on HIV/AIDS.

In addition to the above provisions, the Act expressly prohibits discrimination in the workplace and in schools on the ground of ones' sero-status.[209] It also provides guidelines within which bio-medical research on HIV should be conducted without violating the rights of the subjects participating in the research.[210] The right to equal opportunity in employment was illustrated in the South African case of Hoffman v South African Airways,[211] the appellant applied as a cabin attendant with the South African Airways. At the end of the selection he was found to be a suitable candidate for employment but he was later denied employment because he tested HIV positive. Court declared that PLHA "must be treated with compassion and understanding" and they "must not be condemned to 'economic death' by the denial of equal opportunity in employment." The Court held that the refusal of the defendant to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality.

However, the Act has loopholes which have water-downed the merits of the legislation. The first gap is the inadequate provisions in the treatment of children. It does not specify how children can test and access treatment of HIV. The Act provides that minors are incapable of giving informed consent to testing.[212] This is unrealistic considering minors above the age of twelve become sexually active. The Gillick's competence test should be applied to allow minors to consent to HIV testing. This test was developed in the case of Gillick v West Norfolk and Wisbech Area Health Authority & Another,[213]where a mother (plaintiff) refused the provision of contraceptives to her daughter without her informed consent because she was below the age of 16.In rejecting her refusal, court held that a 'mature minor' has a right to consent to her own treatment. The same analogy can be applied to allow minor's to consent to HIV testing as long as they understand the purpose of the test.

Perhaps the most controversial aspect of the Act is the preference of the criminalization as opposed to the management strategy in controlling and reducing the transmission of HIV/AIDS. HIV criminalization is an emerging global concern considering several countries have adopted laws that specifically allow for HIV criminalization.

[208] *2005 (5) SA 721 (CC)*

[209] *Secs 32 & 33*

[210] *Secs 29 & 30*

[211] *[200] 12 BLLR 1365 (CC)*

[212] *Section 10*

[213] *(1985) 3 All ER 402.*

Unlike 2012 East African Community HIV/AIDS Prevention and Management Act, which adopts a management approach, the Ugandan Act has the potential to increase stigma and discrimination against PLHA.[214]This because it attracts negative media attention and spreading of inaccurate information which culminates into victimization of PLHA.The Act provides for offences and penalties.[215] Key to note is the criminalization of attempted transmission of HIV, the Act provides that:

'A person who attempts to transmit HIV to another person commits a felony and shallon conviction be liable to a fine of not more than twelve currency points or imprisonment of not more five years or both'.[216]

This has been criticized by Twinomugisha,[217] because it violates the Constitutional provision that '[e]xcept for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined'.[218] The Act also criminalizes intentional transmission of HIV, it states that:

'A Person who wilfully and intentionally transmits HIV to another person commits an offence, and on conviction shall be liable to a fine of not more than one hundred and twenty currency points or to imprisonment for a term of not more than ten years or to both'.[219]

'A Person shall not be convicted of an offence under subsection (1) if –

the person was aware of the HIV status of the accused and the risk of infection and he or she voluntarily accepted that risk;

the alleged transmission was through sexual intercourse and protective measures were used during penetration'.[220]

This has also been criticized because there are already elaborate sanctions against assault, homicide, and causing bodily harm in the Penal Code Act.[221] The Penal Code defines "harm" to mean 'any bodily hurt, disease or disorder whether permanent or temporary'.[222] The Act goes on to provide for "bodily harm," 'any person who commits an assault occasioning actual bodily harm commits a misdemeanor and

[214]*Ben Kironda Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.106.*

[215]*Part VIII of the HIV Control and Prevention Act, 2014.*

[216]*Section 41.*

[217]*Ben Kironda Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.108.*

[218]*Art 28(1) of the Constitution.*

[219]*Section 43(1)*

[220]*Section 43(2)*

[221]*Ben Kironda Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.109.*

[222]*Section 2(g)*

is liable to imprisonment for five years'.[223]This was illustrated in the UK case of R v Dica,[224] whether the defendant Mohamed Dica was charged with inflicting two counts of grievous bodily harm under Section 20 of the Offences against the Person Act 1861. The defendant was charged on the basis that while knowing he was HIV positive, he had unprotected sexual intercourse with two women who were unaware of his infection. Both women were infected with HIV. The issue was whether the complainants were consenting to the risk of infection with HIV when they consented to sexual intercourse with the defendant. The court held that there had been no intention to spread the infection, but by the complainants consenting to unprotected sexual intercourse, they are prepared, "knowingly, to run the risk – not the certainty – of infection." The court went on to say that to criminalise consensual taking of such risks would be impractical and would be haphazard in its impart. This decision is in line with Section 43(2) of the HIV Act.

The issue of condom use was considered in the Canadian case of R v Mabior, [225] where court said that disclosure of HIV status is only required only if there is a realistic possibility of transmission. The court went on to say that condom use causes no realistic sexual transmission risk. This holding is only in tandem with the HIV Act. It however raises policy questions. For example, what if the condom is defective and this is known to the accused, will he or she still be exonerated?

The issue of criminalization of HIV/AIDS was considered in the case of Makuto v State, where the appellant was convicted of rape. Under the Penal Code Amendment, he was required to undergo an HIV test before being sentenced. He tested positive and under the Penal Code a person who proves to have HIV is subject to a minimum of 15 years imprisonment if he was unaware at the time of the offence and 20 years if he was aware of his status. This compared to a minimum sentence for rape by a non-HIV positive person of 10 years. The court held,

'A law enacted for the purpose of providing an enacted for the offence which takes into account circumstances which occur after and which are unconnected with the commission of that offence cannot be considered a law for the punishment of that offence. Neither can it be considered to deter people from the commission of that offence. It is neither just nor necessary for the prevention of the offence because it bears no relationship with the crime which the law seeks to punish…the provision offends the constitution because it is too broad and discriminatory.'

The above case is an authority for the proposition that criminalization of HIV/AIDS by enhancement of the sentences of HIV positive convicts is not a deterrence mechanism. In Uganda such discrimination is outlawed under the Constitution.[226] It

[223] *Section 236.*

[224] *[2004] EWCA Crim 1103.*

[225] *[2012] 2 SCR 584.*

[226] *Art 21.*

has also been held that denial of bail to a person who is alleged to have committed rape to satisfy public interest objectives of confining serious crime or combating the HIV/AIDS epidemic is not proportionate to the infringement of person's right of personal freedom.[227] The Constitution recognizes the right of everyone to apply for bail.[228] This provision equally applies to PLHA, therefore such draconian mechanisms to combat the disease cannot be tolerated.

Transmission of HIV is a public health concern, the HIV Act provides that reasonable care should be taken to avoid transmission of HIV.[229] This was espoused in Uganda in Uganda v Namubiru Rosemary,[230]this case revolved around exposure to HIV due an act of professional negligence. The accused who is a nurse and HIV positive is alleged to have pricked herself with a needle and then negligently injected a child with the same needle. Post exposure prophylaxis (PEP) was administered on the child and she tested negative. However, the Magistrate court still sentenced her to three years imprisonment. The court held:

The appellant was a health care provider. She acted so recklessly that she exposed a baby to the risk of infection of disease of a disease [HIV], which is dangerous to life. There is need to protect society from such reckless behaviour. This country continues to grapple with various life threatening diseases. Court cannot shut its eyes from the reality of the situation in which we live. The confidence and trust put in health care professionals by the people should not be abused, or misplaced.[231]

The High Court overturned this Magistrates' Court sentence of 3 years and reduced the sentence.This was perhaps influenced by the fact the child was not infected with HIV although it was not explicitly stated in the judgement. Another possible reason was because the nurse had been on remand for 5 months.

Ben Twinomugisha makes an interesting argument in his book 'Fundamentals of Health Law in Uganda'. He contends that we do not need a law specifically targeting a disease such as HIV/AIDS. Why target HIV/AIDS? Are we going to have a separate legislation to tackle TB, hepatitis, typhoid and other communicable diseases?[232] The Ugandan Parliament should therefore review the HIV legislation in order for it to comply with the international guidelines which prohibit the criminalization of HIV/AIDS. A starting point could be to adopt the management approach adopted by the EAC Act. The Government should also ensure that the fund is established in order to ease the access to essential services to PLHA.

[227] *State v Marapo 2002 2 BLR 26.*

[228] *Art.23*

[229] *Sec 2.*

[230] *HCT-00-CR-CN-0050-2014 (Unreported)*

[231] *Namubiru Rosemary (excerpt from Ben K Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.193.*

[232] *Pg.115.*

Access to Medicines in the context of HIV/AIDS

Access to medicines is an important component of the right to health.[233] The WHO defines 'essential medicines' as those medicines which 'satisfy the priority health care needs of the population'.[234]The new international legal regime brought upon by the 1994 WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS) rendered pharmaceutical products such as ARVs too expensive and at times inaccessible for poor countries like Uganda.[235] The granting of a patent over the manufacture of a medicine or pharmaceutical product gives the patent holder a monopoly.[236]

The UDHR provides for a right to protect inventors and exploit the benefits of science.[237] However, this has to be read together with General Comment 14 of CESCR which elaborates on the right to health to include access to health facilities, goods and services, appropriate treatment as well as provision of essential drugs.[238] It creates levels of obligation upon the state to include:

Availability of essential drugs as defined by the WHO.[239]

Accessibility to goods and services including medicines.[240]

Acceptability of available medicines.[241]
Quality of goods and services.[242]
However, the TRIPS Agreement has in-built flexibilities such as compulsory licensing,[243] which enables the government to license the use of a patented invention to a third party without the consent of a patent holder against payment of adequate remuneration.[244]
The Doha Declaration is a significant development aimed at re-formulating intellectual property as a social policy tool for the benefit of the society as a whole. The Doha Declaration re-affirmed the flexibilities in the TRIPS Agreement.[245] The delegates agreed that the TRIPS Agreement does not prevent members from taking

[233] *Ben Kironda Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.54.*

[234] *WHO The selection of essential medicines: Policy perspectives on medicine (2002) 4.*

[235] *Ben Twinomugisha, 'Protection of the Right to Health Care of Women Living with HIV/AIDS (WLA): The Case of Mbarara Hospital,at p.25.*

[236] *SF Musungu 'The right to health, intellectual property, and competition principles' in T Cottier et al (eds) Human Rights and International Trade (2005) 305.*

[237] *Article 15 of the UDHR.*

[238] *Article 12.2(c)*

[239] *Para. 12(a)*

[240] *Para. 12(b)*

[241] *Para. 12(c)*

[242] *Para.12(d)*

[243] *Art.31.*

[244] *D Murthy 'The Future of compulsory licensing: Deciphering the Doha Declaration on the TRIPS Agreement and public health' (2002) 17 American University International Law Rev 1307*

[245] *Ben Kironda Twinomugisha 'Fundamentals of Health Law in Uganda,' at p. 59.*

measures to protect health, in particular to promote access to medicines for all.[246] The approach taken reiterates General Comment 14 of the CESCR which guarantees access to essential medicines. This is particularly important for PLHA who would timely and accessible medication.

With this background, it important to examine the Anti-Counterfeit Goods Bill, 2015 to find out whether it incorporates the TRIPS flexibilities and to analyze its definition of counterfeit in relation to access to medicines. The Bill defines to counterfeit goods to mean

'goods that are imitation of something else with an intent to deceive, and includes any device used for the purpose of counterfeiting and goods which breach intellectual property rights and goods intended to gain unfair commercial advantage with goods of a similar nature'.

The Bill has affected the use access to medicines for PLHA because it impliedly restricts the use of generic drugs by broadly defining counterfeit goods. Generic drugs are a pharmaceutical product which is not protected by a patent in force and which is commercialized under a non-propriety name or a brand name. The same arose in the Kenyan case of Patricia Asero Ochieng & Ors v The Attorney-General & Anor,[247] in this case three petitioners Kenyan affected by HIV receiving generic ARVs petitioned the High Court challenging the Anti-Counterfeit, 2008. They argued that the Act confused generic with counterfeit medicines and if implemented would significantly affect PLHA thus constituting a violation to the right to life guaranteed under the Constitution and ICESCR. The Court found that State's obligation with regard to the right to health encompasses not only the positive duty to ensure that its citizens access essential medicines. The court agreed with the petitioners that the Act's definition of counterfeit would likely be read as including generic medication and would adversely affect the manufacture, sale and distribution of generic drugs.

Although the above definition is merely persuasive, it should be used as a bench mark to reform the Ugandan Anti-Counterfeit Bill, 2005 which if passed in its current form would affect access to medicines for PLHA.

Role of Judicial Officers in advancing the right to health of PLHA

The first role of judicial officers is to interpret the Constitution, which can be categorized as 'sui generis'[248]because of its unique status. The Constitution should be interpreted as a living document to adapt to the changing times or patterns. In Tinyefuza v Attorney General,[249] the Constitutional Court held that, 'while

[246] *Para 4 of Doha Declaration.*

[247] *Petition 409/2009 (High Court of Kenya).*

[248] *Emanuel 'Latin for Lawyers,' at p.402. Sui generis means in a class of itself, different from others.*

[249] *Constitutional Petition No.1 of 1996.*

the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and , therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive, and liberal or flexible…'This approach should be used by judges to protect the rights of PLHA although not expressly provided for in the Constitution. In Susan Kigula and Ors v Attorney General,[250]it was held that Article 45 caters for rights not specifically mentioned, it can therefore be argued the rights of PLHA are guaranteed by Article 45.

The Constitution should also be treated as a whole, in Charles Onyango & Another v Attorney-General,[251]the Constitutional Court held that the instrument being construed must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole. Justice Lydia Mugambe in CEHURD v Executive Director of Mulago and Anor (supra),adopted the same approach to hold that the defendants had violated the complainant's right to health which is provided for under Objectives XX and XIV (b) of the Constitution.For emphasis the aforementioned objectives provide that:

'All Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits'.[252] [emphasis added]

'The State shall take all practical measures to ensure the provision of basic medical services to the population'.[253]

This is a paradigm shift from Zachary Olum (supra), where court held that the NODPSP. Judicial officers should follow the approach taken by Justice Lydia Mugambe in order to protect the rights of PLHA.

Needless to say, Uganda has ratified several international instruments such as the ICCPR, ICESCR, and CEDAW. The Courts should also apply international guidelines and human rights principles in protecting the rights of PLHA. In effect Uganda is bound by these obligations by virtue of ratification.[254] Even when they have not been ratified, it is the duty of court to apply the international instruments in constitutional

[250] *[2009] UGSC 6.*

[251] *Constitutional Petition No. 15 of 1997.*

[252] *Objective XIV (b)*

[253] *Objective XX*

[254] *Mayeso Gwanda v the State (High Court Constitutional Cause no. 5 of 2015) (Malawi).*

interpretation.[255] In CEHURD v Executive Director of Mulago (supra), Justice Lydia Mugambe relied on Articles 12 and 16 of the ICESCR and African Charter in finding the hospital liable. Therefore the instruments can be harnessed to protect the rights of PLHA.

Judicial officers should also use civil and political rights which are well-defined to protect the rights of PLHA. In Salvatori Abuki v Attorney General, [256] the right to life was found to include a right to a livelihood. The same approach can be used to protect PLHA.

What can Uganda learn from best practices elsewhere?

Firstly, Uganda can adopt the approach taken by Southern Africa states such as Botswana which has no specific law on HIV/AIDS, it only has a general law known as the Public Health Act (2013). The Act attempts to comprehensively address key public health concerns in Botswana by creating regulatory structures and setting normative standards on certain issues such as which diseases should be notifiable. Part XII of the Act identifies HIV as a significant public health issue facing Botswana, and it sets a number of norms relating to HIV prevention and control.

South Africa, the country with the highest prevalence rate of HIV/AIDS also has no specific law on the disease. It only has laws that seek to protect PLHA. The statutes that expressly deal with matters pertaining to HIV are the Bill of Rights in South Africa's Constitution; Section 27 on health care provides that:

'Everyone has the right to have access to -

Health care services, including reproductive health care;

Sufficient food and water; and

Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.

The state must take reasonable legislative and other measures, within its available resources, to progressive realization of these rights.

No one may be refused emergency medical treatment.

Other South African statutes include: the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000. There ae also codes of good practice

[255] *Constitutional Petition No. 6 of 1999 (unreported).*

[256] *Constitutional Petition No. 2 of 1997.*

outlined in terms of the provisions of Labour Relations Act No. 66 of 1995 and the Employment Equity Act No. 55 of 1998.

Ugandan judges can also borrow from the Southern African courts in their assessment of sentencing. As was seen in the case of South Africa v Magida, where the court held a court in considering an appropriate sentence, may take into account a convicted person's ill-health and how it may relate to the effect of a contemplated sentence. In respect of treatment that may be or may not be available in particular prisons, an appropriate order after an investigation of all the facts may address the needs of the person to be sentenced. The same analogy can be adopted in assessing sentences of PLHA.

In countries like Kenya which have an Act in pari materiawith the HIV/AIDS Prevention and Control Act, 2014. The controversial sections of the Kenyan Act has been the subject of court litigation. For example, Section 24(1) of the Act requires a person aware of being HIV-positive to:

"take all reasonable measures and precautions to prevent the transmission of HIV to others" and to "inform, in advance, any sexual contact to persons with whom needles are shared" of their HIV-positive status".

Subsection (2) prohibits "knowingly and recklessly, placing another person at risk of becoming infected with." Contravention of the aforementioned provisions is a criminal offence punishable by imprisonment for up to seven years, and/or a fine. 'A medical practitioner who becomes aware of a patient's HIV-status may inform anyone who has sexual contact with that patient of their HIV-status'.[257]

Section 24 of the Kenyan Act was espoused in AIDS Law Project v Attorney-General & Others,[258]the petitioner challenged the constitutionality of Section 24 of the HIV/AIDS Prevention and Control Act 14 of 2006. It was contended on behalf of the petitioners that the undefined terms of "inform", "in advance" and "sexual contact" renders section 24 vague and overbroad, contrary to the principle of legality. The court held that the section is likely to undermine the already existing HIV prevention methods because it will discourage people from finding out their status. Ugandan courts can adopt the same approach while reviewing the HIV Act.

Another best practice is the recognition of PLHA as persons with disabilities, as was seen in the case of Bragdon v Abbott,where Sidney Abbott went to Bragdon to have a cavity filled. Citing his fears of HIV transmission from a patient, Dr. Bragdon refused to fill her cavity in his office solely because Ms. Abbott disclosed on a medical questionnaire that she has HIV. Dr. Bragdon claimed that people with HIV

[257] *Section 24(7).*

[258] *Petition 97 of 2010 (High Court of Kenya).*

who were not yet manifestly ill did not meet the Americans with Disabilities Act (ADA) definition of "disability."The ADA defines a disability as a health condition that "substantially limits one or more major life activities." Justice Anthony Kennedy gave a broad and expansive interpretation to the definition of "major life activities," and specifically noted that Sidney Abbott was substantially limited in the major life activity of reproduction because of the risk of infecting her partner and her child. This broad definition can used by judicial officers to protect the rights of PLHA.

Recommendations

The first recommendation is there is need to overhaul the entire HIV/AIDS Prevention and Control Act, 2014 because there is no need for the specific legislation. As we have already seen this increases the stigma against PLHA. In the alternative that the legislation is retained, there is need to reform the Act to suspend the provisions which criminalise HIV/AIDS.

There is need to train judicial officers to enlighten them about the international guidelines and instruments related to HIV/AIDS prevention. This will ensure protection of PLHA.

CHAPTER TWENTY FOUR
CORONER OFFICE: ACASE FOR INDEPENDENT INVESTIGATION INTO SUSPICIOUS DEATHS IN UGANDA

Human rights groups in Uganda have for a long time blamed the lack of a comprehensive framework to facilitate an effective investigation process on mysterious deaths especially at the hands of the police for promoting absence of transparency and accountability on such things. As a matter of fact, it contributed to the problem of lack of redress to victims of torture and ill treatment. The absence of a coroner's office to conduct independent investigations into the cause of suspicious deaths has been seen as hindering access to justice for the families of victims. After years of campaigns for independent and conclusive investigations into unexplained deaths, especially in the hands of the police.

Investigation of sudden and unexplained death takes many forms throughout the world and in Uganda; this has mostly been through a public inquest established under Sections 385-387 of the Criminal Procedure Code. The coroner service is one of the oldest public services in existence. In the UK, for example, the coroners legislation has been in existence since 1844, only getting updated in terms of assessing its adequacy for societal needs. Coroner services are associated with what are often tragic circumstances, something that may have done little to encourage the general public to urge for a special law on the services. The enactment of the new law therefore is a good development, also given the essential value placed by the constitution, 2010 on the right to life. It means that going forward; no death should be left uninvestigated unless there is a clear and certifiable reason for the death.

The coroner system in other jurisdictions is quasi judicial but at the same time independent from the medical profession, or any control of state agencies or any parties who might have an interest in the outcome of a death investigation. In other jurisdictions, such as Northern Ireland, UK and the USA, the coroner service reassures society through a process of public hearing which can establish that nothing underhand has taken place. In general, he must hold an inquest if he believes that the death was violent or unnatural or happened suddenly and from unknown causes.

There are multiple objectives as to why the legislation is necessary, These are mainly;
- to provide for the establishment of the National Coroner Service and appointment of coronial officers; to provide for investigation of reportable deaths in order to determine the identities of the deceased persons, the times and dates of their deaths and the manner and cause of their deaths.

Other objects are to provide for the complementary role of forensic medical science

services to the police in handling investigations involving decedent bodies and scene management and finally to provide for matters relating to exhumation of bodies at the order of the courts etc, provide for the mandatory requirement to report reportable deaths; establish the procedures for investigations, by coroners of reportable deaths; assist in policy formulation by advising the Government, by forensic study, on possible measures to help to prevent deaths from similar causes happening; and facilitate the participation of the coroner at inquests to advise on matters connected with reportable deaths, including matters related to public health or safety and the administration of justice.

A coroner is a qualified person or official whose duty is to investigate the cause of any death occurring due to non-natural cause. He/she will generally not be involved where a person died from some natural illness or disease for which he was being treated.

Although the Coroner-General has powers to undertake full medical investigations of all deaths suspected to be of criminal nature, at least fourteen situations of foul deaths are presented to be falling into the investigative jurisdiction of the Service.

They are listed below;

the deceased person is reported to have died of a violent or an unnatural death;

the deceased person is reported to have died of a sudden death of which the cause is unknown;

the deceased person is reported to have died in police custody or military custody;

Death occurs during or following an assault within twenty four hours following surgical or invasive or surgical procedures;

death occurs during or following administration of anaesthesia;

death that occurs 24 hours immediately after discharge from hospital or any health facility;

a person who suffers an injury and dies within one year and one day;

suspicious maternal deaths, termination of birth, cot deaths and sexual violence related deaths;

it is a case of infanticides;

death that occurs in circumstances prescribed by regulations under any written law and classified as reportable deaths;

death occurs in an institution with children facilities or mental hospital;

death occurs during or while in care of any institution or person;

the death was a death in custody of any other person authorized in law to retain custody of a person for a specified period; and

death as a result of child abuse.

Once a death has been reported a cycle starts from which an exit can be made at different points. In the simplest case, and where no blame or suspicion arises, a coroner's inquiries confirm that the death was in fact natural and he issues report, this is expected to end within a week of the report (section 32). In other circumstances, the investigation of the death is much more detailed and may go all the way to a formal inquest (sec 5). This process can involve retention of organs (or tissues) for special analysis which means that a post mortem report may not be completed for a number of weeks.

CHAPTER TWENTY FIVE
ORGAN DONATION (A CASE FOR TRANSPLANTS)

"It was the best of times, it was the worst of times."'

Charles Dickens' description of revolutionary Europe in A Tale of Two Cities might very well be used to describe organ transplantation today. Enormous successes are paralleled by a fatal and worsening shortage of organs, discontent, and disquieting uncertainty about the future. In 1993 there were 13,540 cadaveric, solid organ transplants in the United States.' Since 1980 almost 150,000 solid organ transplants have been performed in this country and, since 1985, more than one million tissue transplants. The number of trans- plant programs in the United States has more than doubled since 1980s. The effectiveness of transplantation is demonstrated both by the long-term survival rates of transplant patients and by the quality of life transplantation restores. By 1991, the ten-year survival rate of patients with cadaveric kidney transplants was eighty percent. The five-year survival rate for more recently developed procedures was eighty percent for pancreas recipients, sixty-seven percent for heart recipients, and sixty-three percent for adult liver recipients. Although transplantation is expensive, the cost effectiveness of transplant procedures is equal to, or greater than, many other accepted medical treatments, such as those for cancer, severe burns, and dialysis for end-stage renal disease.' That is real success, measured in terms of lives saved and improved, families reunited, and hope restored.

Despite impressive successes, transplantation is sharply curtailed by a shortage of donated organs and tissues. The number of people who either die of conditions for which transplantation is indicated or are maintained on suboptimal therapies in the absence of a transplant far exceeds the number of transplants performed. In addition, one can hardly pick up the morning paper without seeing a horror story involving transplantation. Controversies abound over racially based directed donations, 14 families billed for hospital charges related to donation, transplant programs and surgeons under investigation for illegal drug sales and profit-making, public officials moving up on waiting lists, 7 dramatic disparities in waiting times based on race, 18 transplant programs and medical examiners fighting over dead bodies, 9 wide variances in costs and charges for organ procurement and transplant procedures and the transmission of AIDS and other infectious diseases through transplantation.

Law and lawyers have proven to be a mixed blessing in human organ transplantation. Although law is in many ways responsible for the success of transplantation, most notably through the Uniform Determination of Death and Uniform Anatomical Gift Acts,' law is also one of transplantation's greatest impediments. This Article examines the primary laws applicable to organ donation and transplantation and

recommends renewed attention to three roles for law and lawyers in the future.

SOURCES OF TRANSPLANT LAW

A. Early Regulation by States

State legislatures adopted the earliest regulatory measures to facilitate transplantation. As advances in medical technology made the widespread transplantation of hearts and kidneys feasible, these institutions sought to encourage the donation of organs and to provide a legal framework for organ donation and transplantation.

1. The Uniform Anatomical Gift Act

In the 1960s the National Conference of Commissioners on Uniform State Laws began the process of formulating a model organ donation act. In 1968 the Conference adopted the Uniform Anatomical Gift Act (UAGA). By 1972 some version of the UAGA had been adopted in every state and in the District of Columbia.' The UAGA provides that any individual who is at least eighteen years old may make or refuse to make an anatomical gift.' Where a decedent has neither executed an anatomical gift form nor indicated opposition to such a gift, the UAGA provides that certain people may authorize a gift of all or part of the decedent's body.' Those persons must fall within one of six hierarchical classes of individuals who can authorize a donation: a spouse, adult son or daughter, parent, adult sibling, grandparent, guardian," or any other person authorized or under obligation to dispose of the body.' An individual may authorize the gift only if no member of a prior class is available at the time of death, and no actual notice of opposition by any member of the same or a prior class is evident. According to the UAGA "[an anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death."' The donation of a specific body part is not presumed to be a refusal to give other parts, should the next-of-kin consent to other body parts being donated." Similarly, the revocation by the donor of an anatomical gift is not presumed to be a refusal of the donor to make a subsequent anatomical gift, should the next-of-kin consent. The UAGA defines who may receive human body part donations and for what purposes as: a hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science; an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or a designated individual for transplantation or therapy needed by that individual.

The UAGA provides that human body parts may be donated through a will or by another document. If the gift is through a will, it becomes effective upon death and does not have to wait for probate. If the donation is by another document, most commonly a donor card, the 1968 UAGA required that the document be signed in the

presence of two witnesses; today, however, witnesses no longer are required unless the intent to donate is expressed orally.' Under the UAGA, a donor may, but is not obligated to, specify a recipient of the anatomical gift." The donor may revoke a gift at any time, even if notice of the intent to donate was given to a specified done. Where donation does take place, the UAGA requires that the organ or tissue be taken without unnecessary mutilation and that the decedent's body be returned to the family or the person who is under obligation to dispose of the body." Furthermore, any per- son who acts in good faith in accordance with the terms of the UAGA or of any state's or nation's anatomical gift laws is not liable for civil damages or subject to criminal prosecution for his or her act.'

THE ROLE OF LAW

The expanding legal regime governing transplantation is almost wholly at odds with the legal principles that are emerging in the larger health policy context. Health policy analyst and law professor James Blumstein has characterized those trends in the broad health policy context as "market-oriented" values, including the increased use of financial incentives and enhanced respect for pluralism and decentralization.' The government's organ transplant policy runs directly counter to these trends, emphasizing instead altruism, centralization, and a weighing of competing interests that focuses on the needs of donor and donor families to the virtual exclusion of the interests of would- be recipients whose lives hang in the balance and of society as a whole. Perhaps because it is so out of synch, that policy has proven to be ill-conceived, poorly implemented, underfunded, and rarely enforced. In the case of organ donation, transplant law offers no incentives for individuals to donate or for health professionals and institutions to facilitate donation. On the contrary, the law largely impedes donation. For example, despite overwhelming public support for transplantation, current law assumes that no one wishes to donate organs or tissues upon death. According to a 1990 Gallup poll, ninety-four percent of Americans report having heard or read about organ transplants; eighty-four percent believe that transplants are successful in prolonging and improving the quality of life; eighty-nine percent said that they were likely to honor loved ones' requests that their organs be donated after their death." Still, the law presumes an unwillingness to donate. The law provides two avenues around this presumption. First, an individual may sign a donor card or otherwise indicate a willingness to donate." But many impediments prevent a donor card from having any effect. While every state and the District of Columbia mention organ donation in connection with drivers licenses, only ten have a donor card as part of the license." Of those states providing a check-off box, twelve states and the District of Columbia cover their licenses in a non markable laminated surface, so that the box must be checked prior to issuance of the license.' Twenty-eight percent of those surveyed in the 1990 Gallup poll reported completing a donor cardless than a third of those who claimed they were willing to donate"--and very few people who complete the cards have them in their possession at the time of death. Despite laws in most states placing an obligation on law enforcement officials

to search for a donor card on accident victims,"° "[n]o state has a comprehensive procedure to be followed by law enforcement and medical personnel who might be involved with accident victims for determining if a potential donor is carrying a card."""" On the contrary, procedures for emergency fire and hospital personnel quickly separate injured people from their wallets and purses. Even if a valid donor card is found and presented to the physician in charge of the patient's care, doctors and hospitals fear professional criticism and legal liability if they procure organs against the wishes of the next-of-kin. Donor cards are legally binding in forty-eight states"° and health professionals who act on them are immune from liabili- ty under the UAGA in every state,1°7 but the cards have proven to be useless unless next-of-kin approve the donation. The second, and by far more important, means to obtain consent is from the next of kin." But federal and state routine inquiry and required request laws have proven to be ineffective. One study found that thirty percent of the families of medically appro- priate potential donors were never asked, despite the legal obligation to do so."°W An- other, more recent study found that forty-seven percent of medically suitable patients were "overlooked" by hospital personnel. Even where requests are made, families increasingly refuse to donate. In fact, "[t]he most common reason for lost donors ... is denial of consent from next-of-kin. In 1989, more than half of those asked said no.' The reasons for the increase in refusals are unclear, but certainly include both inappropriate, ill-timed, and insensitive requests and declining public confidence in the fundamental fairness of transplantation." 2 It comes as no surprise that if the govern- ment requires overworked health professionals to make a request that is difficult and unpleasant, for which neither training nor reimbursement is offered, those requests are not likely to succeed. And to date, there is no reported case of a government agency seeking to enforce routine inquiry or required request laws. The law thus presumes that a person does not want to donate and then minimizes the likelihood that a donor's legally expressed desire to donate will be respected. Those laws that encourage transplantation, such as required request statutes, frequently receive inadequate resources to assure their implementation and little if any enforcement. In short, the legal framework is stacked against donation.

ALTERNATIVES

The legal system is not without options for addressing some of the problems with transplantation that it has contributed to creating. Alternatives to the voluntary consent and required request systems currently are used in various states and foreign countries. The real question is whether sufficient political will exists to investigate and, where appropriate, implement those alternatives.

A. Presumed Consent

The most dramatic alternative to the voluntary consent system-under which it is presumed that a person does not wish to donate human body parts-is a "presumed consent" system, under which the presumption is that the decedent does want to

donate. Instead of registering consent by carrying a donor card, under a presumed consent sys- tem one registers a desire not to donate by carrying a "non-donor" card or through some other system. Presumed consent systems are being used, to varying degrees, in sixteen countries."' In Finland, Greece, Italy, Japan, Norway, and Spain, doctors ask the next- of-kin whether they object to the donation. In Austria, Czechoslovakia, Denmark, France, Israel, Poland, Singapore, and Switzerland, the law permits doctors to proceed with removal of needed organs absent notice of a prior objection by either the decedent or the next-of-kin, though in actual practice doctors seldom do." Another form of presumed consent presumes the decedent's consent to donate organ and tissues only after a "reasonable" or "diligent" search is made to determine whether the decedent objected to donation prior to dying. Most likely, the search should involve trying to notify the decedent's next-of-kin to give the next-of-kin an opportunity to rebut the presumption of consent. This alternative is followed in a number of states which permit coroners to remove body parts for research or transplant purposes from cadavers within the coroner's jurisdiction or for which an autopsy is required, or both. For instance, twenty-one states currently have some form of presumed consent law that applies to the removal of corneas for transplantation." These laws generally provide that a coroner or medical examiner may remove the corneas from a cadaver in the course of a legally-required autopsy, provided that a need for the tissues is demonstrated and that no objection from either the decedent or the next-of-kin is known. Many of these states require that before removing corneas, the coroner or medical examiner make a reasonable search to deter- mine whether such objection exists. Seventeen states permit the removal of pituitary glands under similar conditions."6 The revised UAGA permits a coroner or medical examiner to remove body parts from a cadaver within the official's custody provided that the parts are needed, and a "reasonable effort" is made first to determine if the decedent had objected to making an anatomical gift.117 The UAGA also permits the local public health officer to release a cadaver that is not already within the custody of the coroner or medical examiner for the purpose of removing organs and tissues for transplantation or therapy."'

B. Compensation

Another significant alternative to elicit donations is the use of financial incentives. As noted above, NOTA prohibits the purchase and sale of human organs and tissues for "valuable consideration."This provision acts as a positive prohibition on the use of financial incentives to encourage organ donation, even in the face of dramatic organ shortages and increasing waiting lists. This section was adopted without study of the possible consequences and without justification for the exclusion of financial incentives from this one area of medical practice. Moreover, the text of the prohibition permits payments to everyone involved in the transplant process except the donor and his or her family. The government's determination not to allow payment for organs and tissues has restricted the development of any type of financial incentive for enhancing the supply of organs, despite the widely recognized

fact that the supply of transplantable organs falls far short of the need. The decision has raised concerns about the seriousness of the government's commitment to saving lives with transplantation and the fundamental fairness of the transplant system. The public cannot be expected to tolerate indefinitely payment to everyone except organ donors. Consider this item from the February 21, 1991, UPI newswire: MOORE, Okla. (UPI)-Susan Sutton's heart offered extended life to an Oklahoma City man, her liver was donated to a patient in Pennsylvania and her come as went to Texas for eye transplants. Her bones will be used for reconstructive surgery and some of her skin will provide grafts for victims of bums. The rest of her body was to be buried Wednesday in an unmarked grave. Her mother, Judy Sutton of Moore, said it isn't right that her 27-year- old daughter, who died Friday of a self-inflicted gunshot wound, should be buried in a pine box without a marker because her family cannot pay for anything better."

There are alternatives to the outright sale of a body part. Examples include: a controlled, government-regulated market;'2' tax incentives;' allowing the hospital in which the donor died to reduce the donor's hospital bill by an amount not to exceed the value of the organ or tissue removed; a discount on insurance premiums in exchange for a binding commitment to donate body parts upon death, for which the insurance company would be reimbursed by the hospital or the government; payment to the charity of the donor's choice; preferential access to an organ or tissue bank; u and credits for college tuition or vocational training expenses."2 Compensation may not need to reflect the approximate value of the donated organs or tissues in order to pro- vide an effective incentive for donation. Even a relatively insignificant payment may serve as a sufficient incentive or a symbolic motivator to cause those people who are already predisposed to donate to execute a donor card. Debate over what property interests exist in the human body exacerbates the issue of incentives. The issue should be of more than passing interest-not only because of its profound ethical implications-but because the current confusion over whether a donor has property rights in donated organs and tissues is a significant impediment to the success of the altruistic supply system." Professors Richard Schwindt and Aidan Vining have written that "problems emerge when something of value, in this case a human organ, is not clearly owned by anyone." 7 If human organs and tissues were treated with the same official respect as real property-which, for instance, the police will act immediately and forcefully to protect upon the death of the owner-a far greater supply of transplantable body parts would result. Because no automatic transfer of property interests in organs or tissues upon death to would-be recipients exists, the legal system does not protect the interests of recipients. People die for lack of those organs, but the legal system treats those organs as having no value. Ill-defined legal interests in human bodies affect financial incentives for organ procurement and transplantation, developing mechanical and chemical means for pro- longing organ viability, developing medical treatments involving transplantation, re- search using donated organs and tissues, insurance coverage for transplant facilities and procedures, and legal standing for enforcing procurement and processing standards.

C. Medical Alternatives

Important medical advances may help reduce the shortage of organs, but each of these poses significant legal, as well as ethical, issues. For example, one issue to re evaluate is how to measure the absence of brain activity in order to determine death. The Uniform Determination of Death Act merely refers to "accepted medical standards," but those standards vary from state to state and, in fact, from hospital to hospital. Some medical standards still require that two electroencephalograms be performed twenty-four hours apart. If approximately fifty percent of all potential donors succumb within twenty-four hours of admission to a hospital, however, one-half of the potential pool of donors is ineligible to donate under such a standard.": This standard is particularly important when we consider the use of anencephalic infants as organ donors. Anencephaly is "uniformly and rapidly fatal,"" but because of the current brain death criteria, it is often impossible to determine whether any infant less than seven days old-much less an anencephalic infant-has suffered "irreversible cessation of all functions of the entire brain, including the brain stem." All too of- ten, by the time the criteria are met, the infant's organs have become unusable for transplantation. The concern is not how death is defined; rather, it is how death is determined. The use of living donors, both related and unrelated, should be reexamined. Once cadaveric transplantation became routine, the medical community largely abandoned the use of living kidney donors. Yet studies suggest that kidneys from living related donors make better transplants and that the procedure poses little risk to the donor. 3' More- over, the transplantation of portions of livers from living, related donors has the very real potential of expanding the supply of organs. Xeno transplantation-the use of animal organs and cells--offers increasing prom- ise.'32 Dr. Thomas Starzl's transplantation of a baboon liver into a thirty-five-year-old man with hepatitis B in 1992, like the case of Baby Fae years earlier, has raised both hopes for the future of xeno transplantation and a storm of ethical debate. Medical technology now makes it possible to remove kidneys from non-heart-beat- ing cadaveric donors.'33 To do so, however, immediately after death, physicians must insert a catheter and perform a cooling procedure necessary for subsequent salvaging of the kidneys. Performing these procedures on a cadaver which neither consented to donation while alive nor for whom consent was obtained from next-of-kin raises important issues. In fact, each of these advances, like transplantation itself, raises serious legal and ethical issues.

THE ROLE OF LAWYERS

Lawyers have at least three roles to play if we are to eliminate the current ambiguity surrounding the impact of law on transplantation and contribute to resolving the fatal shortage of transplantable organs. First, lawyers must help investigate alternatives to current transplant practice and, where necessary, participate in altering the existing legal structure to make it possible for new procedures to be implemented. Second, because of relationships of trust between lawyers and clients, the legal profession has an unusual opportunity to raise the issue of donation, to provide accurate information

concerning the legal fight of every adult to donate, and to both provide advice to and act on behalf of clients to assure that a decision to donate is followed when medically appropriate.

The third and most important role for lawyers to play, however, is guaranteeing the integrity of the organ procurement, distribution, and transplantation system. For trans- plantation to truly succeed, the public-as citizens and as potential donors-must have confidence in the basic fairness and accuracy of the systems that regulate transplantation in this country. In addition to fairness, public confidence also depends on the system being rational. The federal government's policy of paying for immunosuppressive drugs only for the first eighteen months-recently extended to thirty-six months M-following the transplant operation does little to bolster public confidence. Without a lifetime of daily doses of immunosuppressive, anti-rejection drugs-for which the government will not pay-the patient rejects the donated kidney and must be transplanted again-a procedure for which Medicare will pay. Similarly, the steadfast refusal of the government and transplant professionals to consider creative, if provocative, solutions to the dramatic shortage of organs does not build faith in the system. What do we say to Susan Sutton's mother: "Sorry, we'd like to help but Congress won't let us." It won't fly, as we are learning from declining consent rates throughout the nation. Members of the Bar are uniquely skilled in influencing, critiquing, and challenging the government's legislative and regulatory activities. Attorneys are well-trained to spark a reexamination of laws and regulatory policies that are not working for the thou- sands who die while waiting for organs and the even greater number who are never listed. Lawyers can bring actions to assure that each individual's legal right to donate is respected. They can push for enforcement of required request and routine inquiry laws or argue for their repeal if they are ill-conceived. Lawyers can bring their experience in other health policy arenas to help design creative alternatives to the current system and lobby for the necessary legislative or administrative changes to see them implemented.

ORGAN TRANSPLANTATION

An organ transplant is a surgical operation where a failing or damaged organ in the human body is removed and replaced with a new one. An organ is a mass of specialized cells and tissues that work together to perform a function in the body. The heart is an example of an organ. It is made up of tissues and cells that all work together to perform the function of pumping blood through the human body. Any part of the body that performs a specialized function is an organ. Therefore eyes are organs because their specialized function is to see, skin is an organ because its function is to protect and regulate the body, and the liver is an organ that functions to remove waste from the blood. A graft is similar to a transplant. It is the process of removing tissue from one part of a person's body (or another person's body) and surgically re- implanting it to replace or compensate for damaged tissue. Grafting is different from transplantation because it does not remove and replace

an entire organ, but rather only a portion. Not all organs are transplanted. The term "organ transplant" typically refers to transplants of the solid organs: heart, lungs, kidneys, liver, pancreas and intestines. Animal and artificial organs may also serve as transplantable organs. Other types of transplants that are less invasive or may require specialized procedures, include:

- Skin transplants or grafts
- Corneal transplants (corneas are the outer layer of the eye)
- Bone marrow transplants

THE TRANSPLANT PROCESS

When a person falls ill because one of his or her organs is failing, or because the organ has been damaged in an accident or by disease, the doctor first assesses whether the person is medically eligible for a transplant. If so, the doctor then refers the individual to a local transplant center. The transplant center evaluates the patient's health and mental status as well as the level of social support to see if the person is a viable candidate for an organ transplant. If the patient is a transplant candidate a donor organ must be found. There are two sources for donor organs. The first source for organs removes them from recently deceased people. These organs are called cadaveric organs. A person becomes a cadaveric organ donor by indicating that they would like to be an organ donor when they die. This decision can be expressed either on a driver's license or in a health care directive. In Minnesota, designating your organ donation desires on a drivers license is legally binding. In some states, when a person dies and he or she has not indicated organ donation preferences, the family is asked if they would be willing to donate their relatives' organs. Some states' hospitals have policies requiring family consent for organ removal, regardless of whether organ donation wishes are written down.2 Therefore, many organ donation advocacy organizations encourage people to discuss their organ donation preferences with their families to assure that their wishes are known and followed.

The second source for donor organs is a living person. Living donors are often related to the patient, but that is not always the case. Spouses and close friends frequently donate organs to ailing loved ones. Some people who wish to donate their organs may decide to donate to a stranger. A few not-for-profit organizations maintain lists of willing living donors. For example, the National Marrow Donor Program maintains a list of people willing to donate bone marrow to a stranger and there are a variety of non-related living kidney donor organizations that maintain regional lists of willing donors.3 Individuals who wish to donate one of their organs to a stranger may also initiate a nondirected donation (NDD). Nondirected donors approach either a transplant center or a nationally sponsored organ procurement organization and offer one of their organs for transplant to anyone who may need it.

DISTRIBUTING CADAVERIC ORGANS

If a person does not have a readily available living donor or is ineligible for a living donation because their predicted outcome is questionable, they are placed into a waiting pool for an organ from a cadaver by their transplant center. The United Network for Organ Sharing (UNOS) maintains the list for the national waiting pool. When donor organs become available after a person dies an organ procurement organization (OPO) takes the organs into custody. The OPO then matches the donor organs with the appropriate transplant patients by gathering information about the donor organs and entering it into a computer program. The program takes this information and compares it to information about the patients in the waiting pool. The computer then generates a ranked list of transplant patients who can receive the donor organs. Information that factors into this ranked list include:

- Organ type, blood type and organ size
- Distance from the donor organ to the patient
- Level of medical urgency (not considered for lung transplant candidates)
- Time on the waiting list

After the generation of the ranked list, the donated organ is offered to the first patient's transplant center. However, the first person on the ranked list may not receive the organ. Additional factors to be evaluated before the organ procurement organization selects the appropriate candidate are:

- Is the patient available and willing to be transplanted immediately?
- Is the patient healthy enough to be transplanted?

Once the appropriate candidate is located, the organ procurement organization takes the organ and delivers it to the transplant center where the transplant will be performed. This entire process must occur very quickly as organs are only transplantable for a short time period after they've been removed. When the transplant patient is ready for the donor organ, the transplant center then surgically removes and replaces the failed or failing organ through the following general procedure:

1. Make an incision in the body near the failing organ
2. Cut the arteries and veins that run to the organ
3. Remove the organ through the incision
4. Take the new organ and insert it into the body through the incision
5. Connect the new organ to the arteries and veins
6. Close the incision

After the transplant, the patient embarks on a long road to recovery. If surgery goes well, the patient still must face the possibility of rejection. Rejection is the

process where the body fights off the newly implanted organ. Rejection is harmful to transplant success because the body fights off the new organ as it would a virus or bacteria. In fact, the body's immune system treats the organ as it would any other harmful foreign invader. The immune system makes proteins called antibodies that go to the transplanted organ and try to kill it. In order to hold back the antibodies that threaten the new organ, transplant patients have to take powerful immunosuppressant drugs to keep the level of antibodies down low enough for the organ to integrate into the body and start working.

A HISTORY OF ORGAN TRANSPLANTATION

The medical practice of organ transplantation has grown by leaps and bounds over the last 50 years. The major transplant-related medical advances in the last century include:

• Successful transplantation of different kinds of organs

What began with the kidney has now expanded to hearts, lungs, livers and other organs.

• Development of cadaveric and living organ donation practices

Deciding who can donate organs has been a flexible and changing process, starting with living donors and then moving to include deceased and brain dead donors. The debate about increasing and restricting the pool of eligible donors continues today.

In 2001, living donors outnumbered cadaveric donors for the first time in United States history.

• Development of anti-rejection drugs to increase success

Anti-rejection drugs have done wonders to increase the success of organ transplants. During the 1960s and 1970s, immunosuppressant drugs helped increase the success rate of organ transplants.

In the 1980s, Cyclosporine was discovered and dramatically improved the success rate for transplant recipients and helped improve patient outcomes.

• Using animal organs for human transplantation (called xenotransplantation)

In 1986, the first xenotransplanted organ transplant was performed. This intriguing field of study becomes more attractive to some researchers as the number of people needing organ transplants continues to grow.

• Invention and use of the first artificial organs

The first artificial heart transplant in the 1980s was closely followed by the news media and the American public.

• Splitting organs into pieces (either from living donors or cadaveric donors)

The first split liver transplant in 1996 allowed one cadaveric liver to be used among multiple transplant patients.

• Stem cell research

Stem cell research is examining adult and human embryo cells in an attempt to discover how organs are developed and what stimulates their growth.

ETHICAL ISSUES : THE ORGAN SHORTAGE

The primary ethical dilemmas surrounding organ transplantation arise from the shortage of available organs. Not everyone who needs an organ transplant gets one and in fact, the scales tip quite heavily in the opposite direction. The United Network for Organ Sharing (UNOS) maintains a comprehensive, up- to-date website that gives the status of people awaiting organ transplants. According to their website (updated daily at www.unos.org) over 83,000 people are currently awaiting transplants in the United States.

The UNOS website reports that in 2003 more than 19,000 organ transplants were performed. The organs were taken from approximately 9,800 donors both living and deceased. While 19,000 transplants may seem like a large number, 83,000 people remain on the waiting list for an organ and the gap between the number of available donor organs and the number of people who need organs grows daily. The following information from www.unos.org gives an idea of the extent of the organ shortage:

• "On average, 106 people are added to the nation's organ transplant waiting list each day--one every 14 minutes.

• "On average, 68 people receive transplants every day from either a living or deceased donor.

• "On average, 17 patients die every day while awaiting an organ -- one person every 85 minutes. In 2002, 6,187 individuals died on the U.S. organ transplant waiting list because the organ they needed was not donated in time."

The number of donated organs has stayed fairly constant over the last few years while the number of people needing organs continues to increase. Many explanations are offered to explain the length of the list – such as the number of new medical technological advances and the aging population. One possible explanation as to why the number of donated organs from cadavers remains static concerns the increasing effectiveness of seat belt campaigns and air bag use. In the past, a large source of healthy cadaveric organs came from victims of car crashes. With static or declining numbers of car crash fatalities, there are also declining sources of healthy human organs for transplant.

DISTRIBUTION OF AVAILABLE ORGANS

The concept of distributive justice – how to fairly divide resources – arises around organ transplantation because there are not enough organs available for everyone

who needs one. Distributive justice theory states that there is not one "right" way to distribute organs, but rather many ways a person could justify giving an organ to one particular individual over someone else. This list of possible distributive justice criteria comes from the University of Washington School of Medicine website:

1. To each person an equal share
2. To each person according to need
3. To each person according to effort
4. To each person according to contribution
5. To each person according to merit
6. To each person according to free-market exchanges

One distributive justice criteria is equal access. Organs allocated according to equal access criteria are distributed to patients based on objective factors aimed to limit bias and unfair distribution. Equal access criteria include:

- Length of time waiting (i.e. first come, first served)
- Age (i.e. youngest to oldest)

Equal access supporters believe that organ transplantation is a valuable medical procedure and worth offering to those who need it. They also argue that because the procedure is worthy, everyone should be able to access it equally. To encourage equality in organ transplantation, the equal access theory encourages a distribution process for transplantable organs that is free of biases based on race, sex, income level and geographic distance from the organ. Some who believe in equal access distribution would also like to have an organ distribution process free of medical or social worthiness biases. Medical "worthiness" biases could exclude patients from reaching the top of the transplant waiting list if lifestyle choices like smoking and alcohol use damaged their organs. Social "worthiness" biases would factor in a patient's place in society or potential societal contribution before giving them an organ. This would affect, among others, prisoners being punished for offenses against society.

The primary reasons for wanting to prevent individual worth from factoring into organ distribution include:

a) the argument that individual worth does not determine medical need;

b) the dilemma involved in deciding who will make decisions of who is worthy or not worthy to receive an organ, and;

c) the slippery slope of determining an individual's worth and whether or not it is fair to label someone worthy of a medical procedure. On the other hand, some ethicists

argue that individual worth is important to consider during organ distribution. They argue that distribution is biased against worthy individuals when individual worthiness factors are not included. One example of this argument comes from a 1990s article in the Canadian Medical Association Journal by E. Kluge. Kluge argues that equal access distribution of organs is not fair and just if it includes people whose lifestyle choices, namely tobacco and alcohol use, ruined their organs. Kluge's argument states that people who engage in poor lifestyle choices are behaving irresponsibly and could have prevented their illness and are, in essence, increasing the need for organs and depriving people who, "have no control over their need," of necessary treatment.

A second type of distributive justice criteria is maximum benefit. The goal for maximum benefit criteria is to maximize the number of successful transplants. Examples of maximum benefit criteria include:

• Medical need (i.e. the sickest people are given the first opportunity for a transplantable organ)

• Probable success of a transplant (i.e. giving organs to the person who will be most likely to live the longest)

People who support the maximum benefit philosophy believe organ transplants are medically valuable procedures and wish to avoid the wasting of organs because they are very scarce. To avoid waste, they support ranking transplant candidates by taking.

Recent research shows that when given scenarios of two people who both need an organ transplant, the general public's organ distribution preferences are influenced by whether or not a person made behavioral lifestyle choices that caused their illness.

SUPPORTERS OF MAXIMUM BENEFIT DISTRIBUTION

Organs should be distributed so that the greatest benefit is derived from every available organ into account how sick the patient is and how likely it is that the patient will live after he or she receives a transplant. Successful transplants are measured by the number of life years gained. Life years are the number of years that a person will live with a successful organ transplant that they would not have lived otherwise. This philosophy allows organ procurement organizations to take into account several things when distributing organs that the equal access philosophy does not – like giving a second organ transplant to someone who's already had one or factoring in the probability of a successful medical outcome. Three primary arguments oppose using the maximum benefit distribution criteria.

First, predicting medical success is difficult because a successful outcome can vary. Is success the number of years a patient lives after a transplant? Or is success the number of years a transplanted organ functions? Is success the level of rehabilitation and quality of life the patient experiences afterward? These questions pose challenges

to those attempting to allocate organs using medical success prediction criteria. The second argument against maximum benefit distribution is that distributing organs in this way could leave the door open for bias, lying, favoritism and other unfair practices more so than other forms of distribution due to the subjective nature of these criteria. Third, some ethicists argue against using age and maximizing life years as criteria for distributing organs because it devalues the remaining life of an older person awaiting a transplant. Regardless of how old someone is, if that person does not receive a transplant they will still be losing "the rest of his or her life," which is valuable to everyone.

CURRENT ORGAN DISTRIBUTION POLICY (A REFORM FOR UGANDA)

The current organ distribution method in the United States relies on each transplant center to determine which criteria they will use to fairly allocate organs. UNOS encourages transplant centers to consider the following criteria for distributing organs:

1) Medical need;

2) Probability of success, and;

3) Time on the waiting list.

According to a 2001 article by James Childress, most experts agree that these three criteria are relevant. Childress states that ethical conflicts arise both when specifying what the criteria mean, and when weighing the criteria in cases of conflict

"Policies need to be aimed at both increasing organ donations as well as creating a system that allocates them in the fairest ways possible."

Not everyone believes in the need to increase the number of organ transplants. There are some who believe that organ transplantation inappropriately encourages the medicalization of society. In fact, one on-line website suggests that organ transplants are merely one way in which United States citizens attempt to transcend death. A second point of view that questions increasing the practice of organ transplantation relies on the assumption that resources for health care are scarce and organ transplants are costly. The questions this raise include – what is the social worth of organ transplants and are they diverting money from other necessary medical care? Finally, a recent article suggested that not enough research has been conducted on poor transplant outcomes. The authors suggest that unsuccessful transplant patients continue to receive aggressive, curative treatment when they should be receiving more caring and holistic treatment.

ETHICAL ISSUES: DONOR ORGANS

One way to avoid the ethical problems associated with the shortage of transplantable organs is to increase the number of donor organs. However, fears abound that policies to maximize organ donations could go too far – leading to organ farming or premature declarations of death in order to harvest organs. Many, if not most, people agree that taking organs from any source is a justifiable practice within certain ethical boundaries. Controversies result from an inability to define exactly where those boundaries lie.49 Everyone may have their own unique ideas about the boundaries they would like to see concerning the following three sources of transplantable organs: cadaveric donors, living donors and alternative organ sources.

Cadaveric organ donation

Currently, once a person dies, his or her organs may be donated if the person consented to do so before they passed away. A person's consent to donate their organs is made while still living and appears on a driver's license or in an advance directive. After consenting to donate organs, nothing happens with that information until the person dies. A person is considered dead once either the heart stops beating or brain function ceases (called brain death). After death, the organs are taken from the deceased person's body. If possible, the deceased person may be kept on life support once they have died until the organs can be taken, in order to preserve the organs until they are removed. If the deceased person's organ donation wishes are unknown, the hospital, physician, or organ procurement organization will approach a family member to obtain consent to remove the organs. The family members with the authority to do so is generally determined by this hierarchy:

- Spouse. If no spouse, then…
- Adult child. If no adult children then…
- Parent. If no parents, then…
- Adult sibling. If no siblings, then…
- Legal guardian.

One cadaveric donor can provide organs for several different people. Which organs and tissues can be recovered may depend on the cause of death or damage to an organ, but typically several organs can be recovered from a single cadaver. In 2002, more than 22,000 organs were recovered from 6,182 cadaveric donors.

Five strategies to increase cadaveric organ donations

Since one cadaveric donor can provide multiple organs, this is a natural place to look to increase the number of available organs. Efforts to increase the number of cadaveric donors have met with much debate and controversy. There are five primary strategies currently under consideration for the future.

Strategy to increase cadaveric organs: Education.

Education is the first strategy suggested by many to increase cadaveric organ donation. Some educational efforts focus on increasing the number of people who consent to be an organ donor before they die. Other educational efforts focus on educating families when they are considering giving consent for their deceased loved one's organs. Social responsibility and the idea of "the gift of life" are popularized by UNOS and other organizations that seek to promote the idea of cadaveric organ donation.

2. Strategy to increase cadaveric organs: Mandated choice.

A second potential strategy to increase organs from cadaveric donors is mandated choice. Under this strategy, every American would have to indicate their wishes regarding organ transplantation, perhaps on income tax forms or drivers licenses. When a person dies, the hospital must comply with their written wishes regardless of what their family may want. The positive aspect of this strategy is that it strongly enforces the concept of individual autonomy of the organ donor. A mandated choice policy would require an enormous level of trust in the medical system. People must be able to trust their health care providers to care for them no matter what their organ donation wishes. A 2001 survey of 600 family members who had experience donating organs from a deceased loved one, found about 25% of respondents would be concerned that a doctor wouldn't do as much to save their loved one's life if they knew they were willing to donate their organs. A mandated choice policy was tested in Texas during the 1990's. When forced to choose, almost 80% of the people chose NOT to donate organs, which was not an increase in the number of available organs. The law enacting mandated choice for Texans has since been repealed.

3. Strategy to increase cadaveric organs:

Presumed consent is a third strategy aimed to increase cadaveric organ donation. This method of procuring organs is in fact the policy of many European nations. In countries with presumed consent, their citizens' organs are taken after they die, unless a person specifically requests to not donate while still living. Advocates of a presumed consent approach might say that it is every person's civic duty to donate their organs once they no longer need them (i.e. after death) to those who do. People against presumed consent would argue that to implement this policy, the general public would have to be educated and well- informed about organ donation, which would be difficult to adequately achieve. Doubters of the presumed consent approach might also argue that requiring people to opt out of donating their organs requires them to take action and this might unfairly burden some people. There are worries that people who frequently choose not to donate organs for religious and cultural reasons (minority cultural groups and immigrants, primarily) might find it the most challenging to opt out of donating due to language barriers, transportation difficulties or for other reasons.

4. Strategy to increase cadaveric organs: Incentives

The fourth strategy under consideration to increase cadaveric organ donation is the use of incentives. Incentives take many forms. Some of the most frequently debated incentive strategies are:

1. Give assistance to families of a donor with funeral costs
2. Donate to a charity in the deceased person's name if organs are donated
3. Offer recognition and gratitude incentives like a plaque or memorial
4. Provide financial or payment incentives

One of the most highly debated incentives would give donating families assistance with burial or funeral costs for their loved one. With funerals costs in the thousands, this could be an attractive incentive for many families. The majority of members of the American Society of Transplant Surgeons support funeral reimbursement or charitable organization donation as a strategy to increase donation. Many people favor charitable donation or recognizing donors as an incentive for organ donation. Some argue that providing recognition of a donor is not really an incentive at all, but merely an appropriate response to a very generous donation. Another twist on this group of incentives is offering recognition or charitable donation to people while they are living to encourage them to donate. Proponents say that since the person will be dead and unable to receive the recognition, that this would not be a coercive action. Some ethicists believe that many of the incentives above, while not attached directly to cash money, are still coercive and unfair. They believe that some people will be swayed to donate, in spite of their better judgment, if an incentive is attractive enough. They further argue that a gesture may seem small and a mere token to one person, but others might interpret it quite differently. A final anti-incentives argument offered by some ethicists discourages the practice of incentivizing organ donation. They believe that society should instead re-culture its thinking to embrace a communitarian spirit of giving and altruism where people actively want to donate their organs.

5. Strategy to increase cadaveric organs:

Prisoners The final strategy under consideration to increase the number of available cadaveric organs is to use organs taken from prisoners who are put to death. One argument in favor of taking organs from prisoners who are put to death, is that it is the execution that is ethically unsound and not the organ removal. Indeed, in light of the severe organ shortage, some ethicists could make the argument that to not use the organs for transplantation is wasteful. John Robertson, in a 1999 article, put forth the argument that obtaining organs from condemned prisoners is allowable if the prisoner or their next of kin consents to donation, as long as organ donation is not the means by which the prisoner is killed because that violates the principle that a cadaveric donor be dead prior to donation. Finally, some could argue that

organ retrieval from executed prisoners is morally justifiable only if a "presumed consent" donation practice was in place.64 Many, if not most, bioethicists consider taking organs from condemned prisoners a morally objectionable practice. Colorful language used by some ethicists includes the following words to describe the practice: "immoral," "repugnance," and "revulsion."

LIVING ORGAN DONATION

A person with organ damage or organ failure may look for a living donor to donate an organ, allowing the patient to bypass the national waiting pool to receive a cadaveric organ. According to UNOS, there are a number of benefits to living donation, both for the donor and the patient:

• The donation can be pre-arranged, allowing the patient to begin taking anti-rejection drugs in advance, thereby increasing the chances of success

• There are often better matches between donors and recipients with living donation, because many donors are genetically related to the recipient

• Psychological benefits for both the donors and recipients

Not everyone encourages the practice of living donation for all people. Drawbacks to becoming a living donor may include:

• Health consequences: Pain, discomfort, infection, bleeding and potential future health complications are all possible

• Psychological consequences: Family pressure, guilt or resentment

• Pressure: Family members may feel pressured to donate when they have a sick family member or loved one

• No donor advocate: While the patients have advocates, like the transplant surgeon or medical team (who are there to advise the patient and work in favor of his or her best interests) donors do not have such an advocate and can be faced with an overwhelming and complicated process with no one to turn to for guidance or advice.

A few medical and ethical professionals argue that living donation is inappropriate under any circumstances and should not only be discouraged but abandoned all together because of the risk and dangers associated with donating organs. Other critics seek to discourage living donation because they think extending life through costly and physically taxing medical procedures is not the purpose of health and healthcare in America. Although there are some who object to the practice of living donation, this potential source of organs is currently a major focus as a way to reduce the shortage of organs in America. Increasing the number of living donors could occur through a variety of strategies from education and civic duty promotion to the sale and purchase of organs.

BUYING AND SELLING ORGANS

Paying people to donate their kidneys is one of the most contentious ethical issues being debated at the moment. The most common arguments against this practice include:

- Donor safety
- Unfair appeal of financial incentives to the economically disadvantaged
- Turning the body into a money-making tool
- Wealthy people would be able to access more readily

There are a few non-financial incentives available as options to increase living donation, such as medical leave or special insurance for living donors. The idea of non- financial incentives may be rising in popularity as a way to entice people to donate their organs. In January of 2004, Wisconsin became the first state to offer a living donation incentive to its citizens. The new law allows living donors in Wisconsin to receive an income tax deduction to recoup donation expenses like travel costs and lost wages. Financial incentives aimed at encouraging living donation have received much attention from bioethicists lately. Most experts argue that buying and selling human organs is an immoral and disrespectful practice. The moral objection raised most often argues that selling organs will appeal to the socio- economically disadvantaged (people who are poor, uneducated, live in a depressed area, etc.) and these groups will be unfairly pressured to sell their organs by the promise of money. This pressure could also cause people to overlook the possible drawbacks in favor of cash incentives. On the other hand, wealthy people would have unfair access to organs due to their financial situations. The current United States policy does not allow for the sale of human organs. The National Organ Transplant Act of 1984 banned such a practice.78 In 2002, an article that examined the effects of offering payment for kidneys in India was published in the Journal of the American Medical Association. Although critics pointed to a variety of methodological issues. The findings uncovered some interesting data:

- 96% of people sold their kidneys to pay off debt
- 74% of people who sold their kidneys still had debt 6 years later
- 86% of people reported deterioration in their health status after donation
- 79% would not recommend to others that they sell their kidneys

Arguments that favor the buying and selling of human organs are scarce, but a few do exist. Robert Veatch's book, Transplant Ethics, argues that the United States has the money and resources to eliminate socioeconomic disparities, and if this were done, people could then sell their organs, because it is poverty that requires people to act out in desperation for money and not with an objective and informed mind. Another argument that does not object to the purchase of organs suggests that payments aren't

necessarily a gbad idea if they work to increase the number of donated organs. The position contends that donating an organ is a relatively small burden compared to the enormous benefit reaped by recipients. Finally, John Dossetor argues that buying and selling organs is not morally objectionable, but that the system as it exists is inadequate to provide appropriate safeguards. This critique extends not only to the medical system, but also to legal and religious safeguarding organizations as well. In June of 2003, the American Medical Association (AMA) testified before the United States Congress that the shortage of organs is so critical in America, that studies need to be conducted on the effectiveness and outcomes associated with incentivized donations, including possible financial incentives. The AMA does not endorse incentives, they stress, but want to encourage research in the field. This testimony is likely to influence organ donation policy research in the near future.

Alternative organ sources

With the state of discrepancy between organ donors and people waiting for an organ transplant, researchers and advocates have begun to consider non-traditional donation. Some potential non-traditional sources of organs are:

1. ANIMAL ORGANS – Animals are a potential source of donated organs. Experiments with baboon hearts and pig liver transplants have received extensive media attention in the past. One cautionary argument in opposition to the use of animal organs concerns the possibility of transferring animal bacteria and viruses to humans.

2. ARTIFICIAL ORGANS – Artificial organs are yet another potential option. The ethical issues involved in artificial organs often revert to questions about the cost and effectiveness of artificial organs. People who receive artificial organ transplants might require further transplanting if there is a problem with the device.

3. STEM CELLS– Stem cells are cells that can specialize into the many different cells found in the human body. Researchers have great hopes that stem cells can one day be used to grow entire organs, or at least groups of specialized cells. The ethical objections concerning stem cells have focused primarily on their source. While stem cells can be found in the adult human body, the seemingly most potent stem cells come from the first few cells of a human embryo. When the stem cells are removed, the embryo is destroyed. Some people find this practice morally objectionable and would like to put a stop to research and medical procedures that destroy human embryos in the process.

4. ABORTED FETUSES – Aborted fetuses are a proposed source of organs. Debates address whether it is morally appropriate to use organs from a fetus aborted late in a pregnancy for transplantation that could save the life of another infant. Many people believe that this practice would condone late-term abortions, which some

individuals and groups find morally objectionable. Another objection comes from people who fear that encouraging the use of aborted fetal organs would encourage "organ farming," or the practice of conceiving a child with the intention of aborting it for its organs.

FIRST PERSON CONSENT LAWS

In the 1990's, states began to pass first person consent laws. These laws require hospitals and organ procurement organizations to follow a patient's organ donation wishes as indicated on their driver's license or in a health care directive. Where the laws are enacted, the hospital and the organ procurement organization has a legal right to follow a deceased person's written organ donation wishes and does not require them to approach the deceased person's family for permission to remove the organs. Some advocacy organizations suggest that as many as 2/3 of people who sign organ donation consent forms do not have their wishes honored when they die. This is because when families are approached for consent to remove the organs, they do not give it. The first person consent laws attempt to eliminate the discrepancies between a person's organ donation wishes and family consent by putting the patient's decisions above the decisions of their family. This practice supports and acknowledges autonomy. Autonomy is the right to make decisions for oneself and to practice self-determination and self-governance. Many Americans value autonomy very highly and consider self- determination a fundamental right.

THE IMPACT OF TRANSPLANTATION

Receiving an organ donated from a living or deceased donor is a life changing event. Organ donation impacts a staggering number of people and the stories of how organ transplantation has affected someone's life are often collected to be shared with others.

CHAPTER TWENTY SIX
A REFORM ON GMO'S
(GENETICALLY MODIFIED ORGANISMS)

There is presently no universal consensus on definitions of biosafety and biosecurity accepted around the world. For some in Africa, the term biosafety refers to genetic engineering applied to agricultural products (crops and animals) for improving the productivity and safety of the food supply and for protecting plant biodiversity and the environment. Others view biosafety as minimizing risks in order to keep medical and scientific laboratory workers safe from potential harms from the pathogens or organisms they are working with. Still others see biosafety on a continuum with biosecurity, which is aimed at keeping pathogenic organisms in the laboratory and out of the hands of terrorists or persons intending to harm others.

The biological risk do overlap of biosafety and biosecuritydbgovernment officials are in a better position to determine the need for government intervention to ensure safety and what type of regulatory framework might be valuable.

The Biotechnology / Biosafety Bill in Uganda

In 2008, the Ugandan Cabinet approved the National Biotechnology and Biosafety Policy that establishes a system whereby the country can benefit from safe applications of modern biotechnology while at the same time assess and address any potential risks from those applications (Government of Uganda, 2008). In 2009, the Uganda National Council for Science and Technology developed the Biotechnology / Biosafety Bill which, among other things, is meant to implement the 2008 policy and minimise and manage any potential risks to the environment, human and animal health that may be associated with genetically modified organisms ("GMOs") (UNCST, 2009). A GMO is an organism where DNA from a different organism has been added in the laboratory using recombinant DNA techniques. The question many policy makers are asking is whether it is necessary to include biosafety and biosecurity measures for medical and scientific laboratories working with pathogens and infectious agents in this bill. In response to this question, this consensus study was undertaken by the Uganda National Academy of Sciences by convening an expert committee to respond to the following Statement of Task.

Statement of Task

Dialogue on biosafety and biosecuity is currently hindered because these terms often mean different things to different stakeholders, professionals, and scientists. Recognizing this, the Uganda National Academy of Sciences convened a multi-disciplinary, consensus committee to look at definitions of biosafety and biosecurity

in different contexts and establish overlaps and areas of agreement among them. The Committee was also asked to outline activities conducted in and out of laboratory and research facilities that fall under the domains of biosafety, biosecurity or both and to include the risks those activities pose to human, animal, plant and/or environmental health. Additionally, the Committee was asked to recommend ways in which the terms biosafety and biosecurity might be expressed in order to optimize communication among different communities that have different understandings of what the terms mean.

Uganda should have an accurate inventory of scientific and medical laboratories and the organisms (pathogens and infectious agents) they are working with, and the levels of biosafety and biosecurity in those particular laboratories. This information is critical to ensuring appropriate biosafety and biosecurity in Uganda. Uganda National Council of Science and Technology (UNCST), in consultation with relevant stakeholders, should be the agency to catalogue the scientific and medical laboratories and the (most dangerous of the) organisms they are working with. There are more than five hundred medical laboratories in Uganda with a mix of Government, NGO and private laboratories at various levels (Balinandi, 2009). Government and NGO owned laboratories are primarily service delivery oriented and barely require any financial obligation to the beneficiary, but most privately owned laboratories provide services at fees that vary depending on the tests and are primarily for profit.

Overall, laboratory personnel in Uganda are mostly Diploma and Certificate holders, but the number of graduates is gradually increasing. At the same time, techniques in hospital based laboratories are mainly basic, whereas research laboratories are diverse ranging from the basic to state-of-the-art techniques. The organisms handled also vary, from non-pathogenic to highly infectious material (Balinandi, 2009). However in Uganda, the current capacity for research on dangerous pathogenic material and the capability to conduct research on the causative agents of disease that may emerge at a future time is small. Investigations on dangerous pathogenic material are handled at laboratories found at UVRI, MUWRP, Infectious Diseases Institute (IDI) at Makerere University College of Health Sciences, Joint Clinical Research Centre in Mengo, Kampala, the National Agricultural Research Organisation of the Ministry of Agriculture, Animal Industry and Fisheries, among others. The volume of material handled is unknown. (Katongole-Mbidde, 2009).

Other countries are encouraging formal registers or inventories of labs holding dangerous pathogens. For example in Europe, European Union member states were encouraged to set up formal registers or inventories of laboratories holding live SARS coronavirus (CoV) (Eurosruveillance Weekly, 2004). Similarly, countries in the Pacific Island Region have called for an inventory of laboratories that retain wild poliovirus infectious materials or potentially infectious materials. Those laboratories working with wild polioviruses infectious or potentially infectious materials were

asked to immediately implement BSL-2/polio requirements (WHO, 1999). The United States among other nations has also called for such an inventory.

In the US, the National Select Agents Registry (NSAR) Program oversees the activities of possession of biological agents and toxins that have the potential to pose a severe threat to public, animal or plant health, or to animal or plant products. The NSAR currently requires registration of users and facilities including government agencies, universities, research institutions, and commercial entities that possess, use or transfer biological agents and toxins. The US Select Agents List is a vital reference point in this regard (Rose and O'Connell, 2009).

The primary risks from work in medical and scientific laboratories with pathogens or toxins are unintentional exposure/infection of workers, community, and the environment (including plants and animals) to those pathogens or toxins. However, biosecurity measures prevent malicious exposure/infection of workers, community, and the environment (including plants and animals). The assignment of an agent to risk groups and corresponding biosafety levels, which triggers certain preventive and mitigation measures, is based on a risk assessment (WHO, 2004). The information regarding the type of organisms, mode of transmission, virulence, host range, locally available prevention and treatment options, and capability of personnel, among other criteria, is crucial for development of measures for each research organism.

Biosafety guidelines and protocols should always be in place for laboratory work involving any pathogens and toxins. In the recent past, several laboratory-associated infections have occurred in different parts of the world involving both known and previously unknown agents (CDC and NIH, 1999). This development, coupled with the growing concerns about bioterrorism has led to considerable interest in biosecurity and biosafety matters in recent years. There should therefore always be a combination of standards, practices, safety measures and equipment and facilities in various laboratory settings in an attempt to ensure safety of the employees, the community and the environment. The implementation of these biosafety measures should, however, be based on a risk assessment of the pathogens and toxins being used in the laboratory and the activities the lab is engaged in (CDC and NIH, 1999). Continuous training and retraining in safety would complement the above measures.

Based on the results of a survey of existing Ugandan law to implement the Biological Weapons Convention (BWC) and the United Nations Security Council Resolution 1540 (Resolution 1540), the current legal and regulatory framework in Uganda does not comprehensively prevent or prohibit the malicious use of pathogens and toxins, i.e., biological weapons as defined in the BWC. All States have the obligation to prevent and prohibit the proliferation of biological weapons, either as a State Party to the Biological and Toxin Weapons Convention (BWC); a member of the United Nations, subject to the provisions of UN Security Council Resolution 1540

(Resolution 1540); or both (See Box 2 for details on the BWC and Resolution 1540). One responsibility arising from this obligation is the need for States to fully implement these instruments through their national laws and regulations. (Spence, Woodward, and Escauriaza, 2009)

The Verification Research, Training and Information Centre (VERTIC) – an independent, non-profit-making, non-governmental organisation, established in 1986 to promote the effective verification and implementation of international arms control and environment agreements – works with countries to implement the BWC and the Resolution 1540. Through their National Implementation Measures (NIM) Programme, VERTIC assists different countries to take a variety of measures to bring their domestic law into conformity with their obligations under international law. These measures may include laws, administrative procedures and regulations. In terms of nuclear, biological and chemical weapons, such measures are important because they enhance national and international security by preventing misuse of materials related to these weapons and by prohibiting any activities involving such weapons throughout a State's territory (Spence, Woodward, and Escauriaza, 2009)

According to VERTIC, national implementation of the BWC and the biological weapons-related provisions of Resolution 1540 can be accomplished by:

1. Understanding the BWC and Resolution 1540 and their requirements;

2. Then implementing the BWC and Resolution 1540 through laws and regulations including: a. Adopting criminal prohibitions and penalties, and establishing national and extraterroritorial jurisdiction over these crimes; b. Implementing a comprehensive national biosafety and biosecurity framework, including licensing, reporting and inspections, in order to prevent the proliferation of dangerous pathogens that could be weaponised; and c. Establishing enforcement measures including policy and response agencies (e.g., a BWC National Authority) and investigative mechanisms; and

3. Taking advantage of existing opportunities: a. VERTIC assists states through cost-free legislative analysis and legislative drafting assistance (on-site or remotely) b. VERTIC provides States with legislative drafting tools in five languages, including a model law and regulatory guidelines (Spence, Woodward, and Escauriaza, 2009).

With a national legislative framework in place for implementation of the BWC and the biological weapons- related provisions of Resolution 1540, States can investigate, prosecute and punish offences associated with biological weapons activities committed by non- State actors, including terrorists. It also allows States to monitor and supervise peaceful activities such as domestic research and disease prevention, as well as transfers involving dangerous pathogens and toxins.

The primary risks from agricultural laboratory research with genetically modified organisms (GMOs) are the unauthorised release of the organism to the environment and any potential adverse impacts on agricultural interests and biological diversity. Laboratory containment practices are implemented to prevent such impacts. Theoretically, there is also the risk of the unintended creation of GMOs with excessive levels of toxic compounds with the potential to harm consumers. This risk is controlled at the laboratory level by regulators to make sure that scientists use genes that are known to be safe.

The "contained use" of a GMO means that the research is being conducted in a space enclosed by physical barriers from the outside environment. In practice, this involves work in agricultural and microbiology laboratories, animal houses, plant growth facilities (including growth rooms in buildings and suitable glasshouses) and greenhouses, each of which provides a high level of containment so that the GMO is not released into the environment.

The vast majority of work with GMOs for agricultural purposes in contained use is inherently safe. In each case, there are physical barriers that prevent the escape and persistence of the GMO in the environment. In addition, the researcher usually also uses biological containment strategies that also reduce the chances that the GMO will survive and multiply if it does escape into the environment. Biological containment strategies can include actions such as sterility of the plants or crippling the organism so that it can only grow with specific nutrients not found easily in the outside environment. Thus, safety is built into the experimental design through the physical and biological containment. There could, however, be some exceptions. There is, for example, a possibility that introducing a gene into a plant may create a new allergen or cause an allergic reaction in susceptible individuals (NRC, 2000).

There are no known risks of infection to humans and animals from laboratory research involving agricultural GMOs. Biosecurity measures are therefore not foreseen as an issue in this context. GMOs in food and agriculture have been around long enough for scientists to have some background against which to assess possible infectious risks to humans (Jaffe, 2004). There has been as yet no proven health effect on human life, nor even of a risk pathway for humans to get an infection from GMO plants and animals. "Biosecurity" usually involves the prevention of the intentional release of a pathogen or infectious agent that can harm humans or animals. For agricultural GMOs, there is no known pathway where such organisms could enter the human body and cause an infectious disease. Therefore, there is no need for biosecurity measures. Biosafety measures alone are sufficient to address possible risks from agricultural research with such organisms (Fresco, 2001).

The potential risk level of a confined GMO field trial can be determined by the persistence of the crop and the potential for harm from the introduced trait to the

environment. It is at the confined field trial stage, not the laboratory stage, when some potential risks from research with GMOs become more relevant. The most relevant risks are to the environment and biodiversity.

The regulatory approval of commercial genetically modified crops that will be planted by farmers in the field initially requires small, restricted experimental trials known as confined field trials (Linacre and Cohen, 2006). The purpose of the field trial is to gain information about potential risks of the GMO if it becomes a commercial product in order to conduct the necessary regulatory risk assessment. These small scale experiments provide researchers with important information on environmental interactions and agronomic performance of the crop in a safe and contained manner.

A confined field trial is a restricted environmental release of a GMO under conditions designed to prevent the spread of the organism from the field trial site or its persistence in the environment. It is usually small-scale in size (less than one hectare) and conducted for research purposes in order to evaluate the performance of the organism or to collect data to analyze the safety of the organism. The field trial is considered "confined" because it is conducted under planting conditions that limit the ability for the GE organism to escape from the site. Those conditions might include biological, physical, geographical, temporal, and/or chemical methods of confinement. If there is sufficient confinement, a confined field trial poses relatively little risk to human health or the environment because the chance of escape into the food supply or persistence into the environment is small (Jaffe, 2006). The confined field trial will attempt to gather data about whether the commercial GMO will have any environmental risks. For commercial GMO products, there are three types of risks associated with agricultural genetic modification with respect to the environment (see Box 3). Two of these risks – weediness and gene flow – relate to the possibility that crops or their relatives may invade new territory, displace existing plant communities, or reduce species biodiversity. The other type of risk deals with a range of possible consequences due to effects on pests and pathogens. (Cohen, 2005)

Commercial GMO products may also raise potential food safety risks for humans. The potential risks generally relate to "the possibility of introducing new allergens or toxins into food-plant varieties, the possibility of introducing new allergens into pollen, or the possibility that previously unknown protein combinations now being produced in food plants will have unforeseen secondary or pleiotropic effects" (NRC, 2000). Those risks, however, do not apply to confined field trials as the confinement conditions prevent those crops from becoming part of the food supply. Each of those risks, however, is evaluated in the regulatory risk assessment with data that is obtained from research experiments using plants involved in the confined field trials and contained use experiments (Cohen, Komen and Zambrano, 2005; Linacre and Cohen, 2006;).

Some nations have developed control lists and/or risk levels of certain pathogens and toxins that have the potential to be used as biological weapons. Enhanced biosecurity measures are triggered by any activities involving pathogens and toxins on these control lists, and ideally build on biosafety measures in place for all laboratories. Activities involving controlled pathogens can be regulated and monitored through controlled agent lists based on threats to public health and safety and national security. Examples of controlled agent lists include the US select agent lists; the Australia Group lists for biological agents, animal and plant pathogens and dual-use technology and equipment; the UK's approved list of biological agents; and the European Union's Community-wide export control lists.

Uganda may wish to consider these lists and either adopt one of these as its own or develop its own, taking into account its own national security and public health situation, concerns and strategies. Lists to control domestic activities or transfers of particularly dangerous pathogens and toxins are discussed in more detail in VERTIC's Regulatory Guidelines for National Implementation of the 1972 Biological and Toxin Weapons Convention and Biological Weapons-Related Provisions of UNSCR

Many nations have already addressed laboratory biosafety and biosecurity issues. Uganda should study and learn from those experiences and then use aspects of those systems that apply to the situation in the country. This could include adopting risk control levels and associated lists of highly pathogenic organisms and toxins that trigger biosecurity measures, and codes of conduct, guidelines, manuals, and procedures that address biosafety and/or biosecurity.

In Uganda, the above biosafety and biosecurity issues are already in place at the UVRI. Other labs in the country can learn from UVRI. Uganda may also find it useful to refer to model laws and provisions in drafting national implementation measures, although no model law or provision will cover all the individual circumstances and needs of all states. The country can use these models to inform her drafting procedures, tailoring them to fit into the Ugandan context. VERTIC also has the counter-terrorism legislation and resources page where there are links to model measures relating to counter-terrorism in general and to international money laundering in particular. There are also links to model law resources in the Exports Control section.

A harmonised international regime that enhances biosecurity is needed to reduce the risk of bioterrorism (Atlas and Reppy, 2005). Like other security regimes, this will entail mutually reinforcing strands, which need to include: enactment of legally binding control of access to dangerous pathogens, transparency for sanctioned biodefence programmes, technology transfer and assistance to developing countries to jointly advance biosafety and biosecurity, global awareness of the dual- use dilemma and the potential misuse of science by terrorists, and development of a

global ethic of compliance. In an attempt to assist countries in drafting legislation to implement the 1972 Biological and Toxin Weapons Convention and the biological weapons-related provisions of UN Security Council Resolution 1540, VERTIC has, for example, developed a "Sample Act" (see footnote 1). It is a tool which legislative drafters may freely use, while taking into account their country's legal framework, level of biotechnological development, and other national circumstances:

"Legislation to prevent and prohibit biological weapons activities should include offences and penalties for any misuse of biological agents and toxins by non-State actors, as well as provisions enabling a State to effectively regulate activities. These two approaches together form a robust deterrent against those who would spread fear and panic, injury and death through the intentional release of disease" (VERTIC, 2009).

VERTIC has also developed "Regulatory Guidelines" for States based on the Sample Act to guide States when engaged in the process of preparing regulatory and administrative measures to supplement their primary legislation for national implementation of the BWC as well as the biological weapons-related provisions of the UN Security Council Resolution 1540. The guidelines consist of suggestions, tips and links to examples of best practices which States may review and adapt to local circumstances. Part of these Guidelines focuses on biosecurity. They also provide guidance on the establishment of control lists for biological agents, toxins, and dual-use equipment and technology, including intangible technology (see footnote 1).

Biosafety and biosecurity measures implemented by other countries are usually meant to protect personnel from unintentional exposure to and prevent unauthorised access to hazardous biological materials (EU, 2006). These measures usually consist of a combination of laws, regulations and standards for biosafety and biosecurity. A majority of States which have already implemented measures to minimise risks focus their national legislation, regulations and standards on safeguarding the workforce handling biological materials and on the protection of the environment, including the population, against accidental release or loss of hazardous materials.

Based on national statements, the report of the 1540 Committee to the UN Security Council of April 2006 on the status of implementation of national legislative and other measures for the physical protection of BW-related materials counts 48 States having legislation in place that provides for licensing or registration requirements for hazardous biological materials and indicating that they have specific laws and regulations addressing different safety and security concerns. With regard to enforcement measures, most of these States have indicated that their penal codes or specific laws contain criminal or administrative penalties against violations of safety and security requirements. Compared with the global occurrence of a wide range of micro-organisms of concern and the need for medical, veterinary or phytosanitary

diagnosis relating to diseases caused by these agents, the number of States that have implemented respective legislative and other measures seems surprisingly small (EU, 2006).

The July 2008 Report of the Committee established pursuant to resolution 1540 identifies specific measures that States have in place to implement resolution 1540, including steps they have taken since 20063. They range from developing new institutional means to incorporate the obligations of resolution 1540 in national practices to adopting new legislation and enforcement measures, executing new policies and creating new assistance programmes directed towards implementation of the resolution. Overall, according to this report, there has been a qualitative improvement in progress towards achieving full implementation of the resolution.

International agreements like the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Methods of Warfare; and the Biological and Toxin Weapons Convention (BTWC or BWC) which was signed in 1972; are crucial to creating a normative framework and umbrella under which regional and national non-proliferation efforts can thrive. But these need to be domesticated via national legislation. National legislation can then be used to implement the tenets of international treaties and agreements, and to issue additional national guidance (UNAS, 2008). Article IV of the BTWC, for example, requires that:

Each State Party shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere. 4 (EU, 2006).

The precise details of what measures are necessary to accomplish such a complicated task have been left to the discretion of individual States Parties. Different national circumstances and legal systems will necessitate different approaches to implementing the provisions of the Convention. VERTIC, as discussed above, can continue to co-operate with Uganda in the development of legislation to implement the BWC, including biosecurity measures. Some States, especially those implementing legislation after 9/11, focus their approaches on the physical protection of BW-related biological materials to prevent unauthorised access by theft or diversion by non-State actors, including terrorists (EU, 2006). For example in the United States, the following pieces of legislation have been enacted:

The USA Patriot Act of 2001 criminalises possession of biological weapons; x Bioterrorism Preparedness Act of 2002 inter alia requires registration of facilities that work with select agents (human, plant or animal) and regulates transfers of

select agents and requires background checks for personnel; x Pandemic and All-Hazards Preparedness Act of 2006 inter alia establishes a national organisation for health preparedness and response and establishes an R&D organisation to improve and facilitate development of advanced countermeasures (UNAS, 2008).

Additionally, some States have found value in considering integrated legislation that addresses national implementation of both an arms control treaty and of other treaties Uganda may wish to consider amending existing legislation or developing a stand alone Act for the comprehensive prevention and prohibition of biological weapons proliferation. This could include provisions referring to the biosafety and biosecurity measures discussed in the conclusions.

As bio security is a relatively new and rapidly developing field, many countries have yet to devise or implement laws specific to bio security (OECD, 2009 some cases, it may be possible to adapt existing laws within related areas like national security and bioterrorism. Tables 2 and 3 show current legislation in Uganda with a bearing on biosafety and biosecurity. These Acts could potentially be adapted and/or integrated to start addressing this relatively new area of biosecurity (see VERTIC's Sample Act and Regulatory Guidelines referred to above, for example).

Uganda is signatory and party to both the Convention on Biological Diversity (CBD), 1992 and the Cartagena Protocol on Biosafety (CPB), 2000. These internationally legal binding instruments among other things provide for access to and transfer of biotechnology that is relevant to the conservation and sustainable use of biological diversity. The Cartagena Protocol on Biosafety in particular which now represents a global consensus on the potential adverse effects of living modified organisms (LMOs) to human health and the environment obliges member states in their adoption and application of biotechnology to apply the precautionary principle when making decisions with regard to the transboundary movement of LMOs. As a party to these international instruments, it is good practice that any position that Uganda takes on GMOs has to be reflective of its obligations under the said instruments. Although Government has been preparing a national policy on biotechnology and biosafety under the aegis of the Uganda National Council for Science and Technology (UNCST), it is instructive to note that Government has not articulated any clear position on whether Uganda allows or encourages the importation of LMOs, also commonly referred to as GMOs into Uganda. In fact, there has been considerable public anxiety, often expressed through news papers, and triggered by contradictory statements from different Government officials

recently (February, 2004) the Director General of National Agriculture Research Organization (NARO) tried to clear the clouds around the issue, not so many Ugandans appreciated it especially in the context and manner in which it was given. Many questions remain unresolved in people's minds as to when and how such a

position was reached and whose position it represents. This is especially so because on the day the said policy position was published, the Speaker of Parliament had just directed the State Minister of Agriculture to present a paper to members of parliament about Uganda's position on the subject. In any case, isn't GMOs such an important policy issue that could even warrant a public hearing so as to mobilize public awareness and input into the final position of Government? And what happened to the participatory policy development approach that was supposed to underpin the Plan for Modernization of Agriculture (PMA)? In our view, while there have been efforts to finalize the preparation of the policy on biotechnology and biosafety, the fact that we continue to see these contradictory statements on an important policy matter that goes to the heart of our agriculture-based economy leads us to at least three conclusions. First, the issue of GMOs needs to be addressed in a different policy context distinct from non- contestable forms of biotechnology. Second, Government or perhaps Parliament should conduct public hearings on the issues to obtain input from the general public, raise awareness and generate consensus that would influence the Government of Uganda. And thirdly, future successful sector will depend on public confidence and public acceptance of the technology, and Government officials should not monopolize decision making over this issue.

Here below is what has been said by different people at different times. Many of these are Government of Uganda officials. While initially there was no agreement on the issue of GMOs, the statements point to an emerging consensus, at least among Government officials that Uganda can not only invest in GMO technologies, but should also encourage the importation and application of GMOs. In fact, this consensus seems to be shifting beyond the importation of GMOs for food and feed to include importation of GM seeds which could have adverse effects on Uganda's small scale farmers. In our view, unless there is a very unequivocal rebuttal of this interpretation, this is our reading of the implications of the statements coming out of senior level government policy makers.

Political Statements are Superceding the Policy Making Process

One of the challenges that we face as a country is the slow pace at which policy and legislation is developing. For over two years now, Government has been developing a national policy on biotechnology and biosafety. The policy is the only instrument that can articulate shared national vision, priorities and direct the necessary investments in scientific and technical infrastructure that a country needs to harness any potential benefits of GMOs and manage the associated risks. So where is the policy and how much longer should Ugandans wait? In our view, good science must be led by policy and not politics. The reverse only takes care of short- term political considerations and ignores the long-term national strategic goals and objectives.

Four Years could be too Long: Have we Forgotten Cartagena Protocol?

It is clear from the pronouncements highlighted above that the emerging Uganda's position on GMOs is not reflective of the precautionary principle embedded in Principle 15 of the Rio Declaration and affirmed in Article 2 of the Cartagena Protocol on Biosafety. Indeed, the position stated by the Director General (NARO) Dr. Otim Nape that "Until proven otherwise, GMO maize and other food products may be safe for human consumption", if indeed that is the position of Government, contradicts the Precautionary Principle. The Principle as articulated in international legal instruments demands among other things that where there are threats of serious and irreversible damage, lack of full scientific certainty as to the likely risks/dangers associated with any invention or products, shall not be used as a reason for postponing effective measures to prevent environmental degradation.

I have observed that the adoption of the Cartagena Protocol on Biosafety represents a global consensus on the potential risks associated with LMOs. Therefore Uganda as Party to the protocol is obliged to consider the Precautionary Principle in its policy decision making processes.

Defining Our National Strategic Interests

As to whether GMOs may provide the magic solution to problems of agricultural productivity in Uganda or elsewhere in Africa is still a million dollar question. What about the problems of scientific, agro-processing and marketing infrastructure?. What about problems of governance and conflicts?. As State Minister of Agriculture Hon. Kibirige Sebunya put it at a regional workshop organized by ACODE and NOGAM on Organic farming, however good the technology may be, you cannot increase agricultural productivity and agricultural incomes in Northern Uganda, or Sierra Leon and Liberia." In other words, new technologies will only work because we have clearly defined the problem as scientific, we have addressed the infrastructure that facilitates the application and harnessing of the technology – and remember one fundamental point, we have agreed to adhere to good governance in which we prescribe policy solutions to policy problems and political solutions to political problems and not vice versa.

Are Fears about Loosing Niche Agricultural Markets Real?

This is the question that is often not answered by our policy makers. Shouldn't the Ministry of Agriculture, Animal Industry and Fisheries or the Ministry of Tourism, Trade and Industry be either confirming these fears or dispelling the myth through studies that are driven by national strategic interests. Or actually we don't have any national strategic interests? What about the fact that markets for organic products are growing at a rate of 20% per annum in California – the biggest farming state of the United States. Or what about the fact that the markets for organic products are growing globally all triggered by shifts in consumer preferences? True, we can join

the big rush and join this technology revolution. But before we make the final jump, let our policy makers answer these questions as well.

Is the Public with us?

Introduction of GMOs in agriculture can be a highly controversial and politicized issue. In any case, the successful adoption and application of the technology will largely depend on the levels of awareness and the level of public confidence in both the farmers and consumers. The ongoing policy process could actually have been used to build and strengthen public confidence among the public. In as much as the Uganda National Council for Science and Technology has made tremendous attempts to involve the public, public participation in this process has been confined to organized civil society and in a few exceptions, public surveys. In our view, the ongoing policy process should be used as an opportunity to organize and conduct public hearings on GMOs. This would popularize the debate, create awareness and ensure that the general public is with us in whatever position we take or whatever decisions we make. Short of this, the public will be left behind and the victim will be the science that we are trying to promote.

What is the way forward?

We tend to agree with Minister Kisamba-Mugerwa that GMOs cannot be wished away. But we suggest that the immediate policy problem is not whether to allow importation of GMOs as food or feed, neither is it whether we should allow the importation of GM seeds and their applications in Uganda's agriculture. Our problem is adopting a policy that defines the "road map" for developing our national capacity in biotechnology including GM technologies, through targeted investments in science and human capacity development, and public confidence building in the socio-economic and environmental benefits of modern biotechnologies. If we set these as our policy targets and avoid being driven by political emotions, public anxiety or scientific "adventurism", the road map should tell us when we make the right decisions to put GM foods on our dining table or GM seeds in our gardens. In conclusion, while we believe in the potential contribution of science and technology in addressing problems afflicting humanity at the moment, any country will only stand to gain if policy defines national scientific directions rather science defining the direction of policy.

Agricultural GMO activities require different biosafety measures than scientific and medical laboratory work on human, plant and animal pathogens and toxins. Therefore, Uganda should move to establish a separate national GMO law and regulations to address issues around the research and commercial development of genetically engineered plants and animals.

With the National Biotechnology and Biosafety Policy now in place, Uganda National

Council for Science and Technology has drafted a Biotechnology / Biosafety Bill which, among other things, seeks to establish a regulatory structure to oversee the commercialisation of agricultural GMOs so as to minimise and manage any potential risks to the environment or human health that may be associated with them (UNCST, 2009).

While Uganda considers enactment of a biosafety law to establish a regulatory system to assess and manage any potential risks from agricultural GMOs, such regulatory systems have been established in many other countries in Africa and around the world. South Africa passed its Genetically Modified Organism Act in 1997. The South African biosafety regulatory system has been operational for over ten years, approving numerous field trials and commercial releases (Jaffe, 2004). Kenya approved the Biosafety, Act in 2009. This law will replace the use of existing Kenyan laws to regulate confined field trials and add a regulatory system to address commercial releases. 6 Burkina Faso passed a biosafety law in 2006 and has established a National Biosafety Agency and regulatory system that has approved one commercial product (Bt cotton). These pieces of legislation have, in some, established various Authorities that carry the day to day functions under the said legislation. The Act therefore instead of having the existing legislation repealed or amended ,it recognizes the existence of the said legislation and it is for this reason that section 3 of the Biosafety Act that the provisions under the Biosafety Act will be in addition to those under the existing legislation.

Other countries in Africa that have or are in the process of enacting biosafety laws which establish biosafety regulatory systems for GMOs include Mali and Ethiopia. Numerous developed countries also have used either existing law or specific Biosafety laws to establish regulatory systems for agricultural GMOs, such as the EU, the United States, Argentina, and Taiwan (Jaffe, 2004). Therefore, it is common practice around the world to establish a biosafety law and regulatory system to regulate agricultural GMOs. In each instance, those laws address the unique issues around agricultural GMOs and leave the regulation of laboratory biosafety and biosecurity for medical and scientific labs working with pathogens and infectious agents to be addressed with other new or existing laws. Thus, it would be appropriate for Uganda to follow the approach of its African neighbours and developed countries and pass a biosafety bill that solely addresses agricultural GMOs. Consensus was reached on definitions on biosafety in the GMO context and biosafety and biosecurity in the laboratory context and also in the BWC context. The Committee recommends that these are the definitions pertinent to the Ugandan context.

Defining Biosafety and Biosecurity in a Laboratory Context with Pathogens and/or Infectious Agents

According to the World Health Organisation (WHO), laboratory biosafety and

biosecurity are two complimentary but distinct concepts. While they mitigate different risks, they share a common goal: keeping valuable biological material (VBM) safely and securely inside the areas where they are used and stored (WHO, 2006). Laboratory biosafety describes the containment principles, technologies and practices that are implemented to prevent the unintentional exposure to pathogens and toxins or their accidental releases (WHO, 2006). Laboratory biosecurity on the other hand describes the protection, control and accountability measures implemented to prevent the loss, theft, misuse, diversion or intentional release, retention or transfer of valuable biological materials and agents (including pathogens and toxins) within labs (WHO, 2006).

Laboratory biosecurity may be addressed through the coordination of administrative, regulatory and physical security procedures and practices implemented in a working environment that utilizes good biosafety practices, and where responsibilities and accountabilities are clearly defined. Because biosafety and laboratory biosecurity are complementary, the implementation of specific biosafety activities already covers some biosecurity aspects and vice versa. The systematic use of appropriate biosafety principles and practices reduces the risk of accidental exposure and paves the way for reducing the risks of VBM loss, theft or misuse caused by poor management or poor accountability and protection. Laboratory biosecurity should be built upon a firm foundation of good laboratory biosafety (WHO, 2006).

CHAPTER TWENTY SEVEN
ACASE FOR INTELLECTUAL PROPERTY RIGHTS

A REFORM ON PATENT LAW IN UGANDA

Despite Uganda being among the fastest growing economies in Africa, with sustained growth rates of an average of 7.8 per cent since 2000, the country was ranked only 154th out of 177 countries on the United Nations Development Programme's (UNDP) Human Development Index in 2007/2008, with a per capita GDP of $1.45. Agriculture remains the dominant sector in Uganda's economy: according to UNCTAD, the agricultural sector contributes over 40 per cent to Uganda's gross domestic product (GDP) and employs 80 per cent of the working population. Reliance on agricultural commodities, combined with infrastructural gaps, low human development, a low GDP and a relatively low combined primary, secondary and tertiary gross education enrolment ratio of 63 percent indicate that Uganda's scientific and technological development is currently at a low level.

Accordingly, Uganda's 2007 Communication to the WTO Council for TRIPS of Priority Needs for Technical and Financial Cooperation stresses that:

At this stage of Uganda's path to development, it is necessary for the country to seek and receive support from the international community on the use and management [of] IPRs in combination with well-designed government support measures that address domestic development needs such as the promotion and establishment of a domestic creative and innovative industry and the development of its technological base.

… However, much more can be done to strengthen our embryonic scientific and research institutions and implement appropriate interventions to reinforce existing national polices, incentives and programs aimed at both the public and the private sector. Much more can also be done to encourage better-targeted incentives for transfer of technology by developed countries.

Comparable observations were made in a 2007 ICTSD report, which found that "Uganda has a weak domestic scientific and technological base, relying on acquisition of foreign-owned technology and know-how to support industrial development."

The country's current weak level of technological expertise has important implications for the design of its domestic intellectual property laws, as will be explained below.

Poor countries like Uganda depend on the transfer of foreign technologies for their

economic and social development. As conceptualized by UNCTAD, "technology transfer involves the transfer of physical goods (e.g. capital goods) and the transfer of tacit knowledge. The latter is becoming more important and involves acquiring new skills and technical and organizational capabilities."

Product innovation may encourage consumption and thus rising incomes, which in turn would lead to differentiated consumer demands and thereby further stimulate product innovation. Process innovation may result in considerable decreases in production costs. In a longer-term perspective, technology transfer not only generates new products and higher productivity, but also provides a source of learning to countries seeking to develop their domestic technological capacities. In a world where everyday life and economic and social progress are increasingly dependent on technology applications, the building of technology expertise is crucial to a country's international competitiveness.

There are essentially two modes – formal and informal – of technology transfer. Technology may be transferred formally, as a commercial operation "that takes place through firm-to-firm arrangements and involves flows of knowledge, be they embodied in goods (as in the sale of machinery and equipment) or in the form of ideas, technical information and skills (through licensing, franchising or distribution agreements) and movement of experts and skilled labour". Provided a number of other factors are taken into account, formal means of technology transfer may in certain cases be encouraged through appropriate management and use of intellectual property tools, such as through licensing arrangements.

By contrast, informal means of transferring technologies take place outside of formalized commercial and/or legal agreements and include duplicative and creative technology imitation and adaptation, for instance through reverse engineering of existing technology products. Exclusive rights in these products tend to make informal transfers of technology more intricate.

Technology transfer to developing countries and LDCs has long been a pivotal aspiration of the international intellectual property system. The TRIPS Agreement has reaffirmed "transfer and dissemination of technology" as one of the fundamental goals of intellectual property protection (article 7) and obligated developed WTO members to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer" to LDC members "in order to enable them to create a sound and viable technological base" (article 66.2).

Some basic observations should be made at the outset. First, the extent to which intellectual property protection exists in a given country is not the only criterion for the question of whether foreign technologies are transferred and effectively

absorbed in the receiving country. While intellectual property protection plays an important role for investment decisions in areas involving R&D-intensive, complex and easily imitated technologies, foreign investors attach relatively little weight to intellectual property protection in areas of old, standardized and labour-intensive technologies that require little R&D. In any case, foreign investors will only be attracted to transfer technologies if the host country has created a conducive business environment, involving many other, non-intellectual property-related factors, such as the overall investment climate, including financial incentives and the existence of market demand; the quality of the country's infrastructure; the efficiency of certain administrative approval procedures; and the degree of unethical conduct among authorities.

Second, technology transfer through foreign investors cannot take place without existing absorptive capacity in the host country. Local workers, in order to benefit from foreign expertise, need a certain level of technological knowledge; otherwise there will be no actual collaboration in the form of joint ventures or licensing agreements. Next to a well-designed educational system, a country's domestic intellectual property system should be tailored to its level of technological development, allowing access to information required to build domestic skills. Thus, in the case of Uganda, capacity-building activities should be an important component of a transfer of technology strategy.

At its current stage of technological development, it appears realistic for Uganda to aspire to improve, in the short and medium term, its capacity in incremental innovation, in particular in those areas identified by the government as investment priorities (i.e. agriculture/agribusiness, education, information and communication technologies (ICTs), In this vein, the main objective of any future national strategy on technology transfer should be to reach a stage where stakeholders (industry, scientists, but also the general public) are in a position to better absorb knowledge and to use it in their particular environment.

For the general public, this means an improved educational standard through increased access to educational materials (this is the subject of chapter III of this report). For industry and science stakeholders, this means an enhanced ability to understand foreign technologies and adapt them to local conditions and preferences, or to come up with new uses of existing products (such as in the area of pharmaceuticals). Section 5 of this chapter will, inter alia, explore how some IPRs or alternative mechanisms may be used as tools to stimulate Uganda's capacities in incremental innovation.

Institutional set-up and objectives of the government

Issues related to technology transfer are handled by a variety of institutions that are briefly described in this section. One important element of technology transfer is, as suggested above, the creation of domestic technological absorptive capacity. Such

capacity may be promoted through specific policies, but also through an appropriately staffed intellectual property office, which could use its technical capacity to extract new technical information from patent applications. Both issues will be discussed in the following section.

The Uganda National Council for Science and Technology (UNCST) is charged with the development and the implementation of policies and strategies for integrating science and technology into the national development policies. It reports to the Ministry of Finance, Planning and Economic Development. The UNCST also provides policy advice to the government as regards science and technology and coordinates and guides national R&D.19 Finally, the UNCST is mandated "to protect intellectual property through appropriate patent laws and to operate a national patent office".

While UNCST staff would, according to interviews conducted with local stakeholders, have the technical capacity to understand technology issues included in patent applications, they are in practice not involved in the process of examining and granting patents. While any patent applications in Uganda are examined by the African Regional Intellectual Property Organization (ARIPO) under the Harare Protocol, the agency communicating with ARIPO is not the UNCST, but the Uganda Registration Services Bureau (URSB). This is an autonomous statutory body, established under the Uganda Registration Services Bureau Act (Ch 210). The Ministry of Justice and Constitutional Affairs has the power to establish the URSB's general policies. The URSB's objective is to "administer and give effect to the relevant laws and to provide registration services and collect and account for all revenue provided for under those laws". One of its functions is "to carry out all registrations required under the relevant laws".

Section 3 of Uganda's Industrial Property Bill (2007) and part V of the Uganda Registration Services Bureau Act determine that any registration of industrial property shall be carried out by a registrar who is a staff member of the URSB. A similar provision is included in section 41(1) of the Copyright Act (2006), according to which the URSB Board has the right to recommend a Registrar of Copyright to be appointed by the Minister of Justice. As a consequence of this, the URSB registers patents (after ARIPO examination), trademarks and copyrights.

Stakeholders expressed the concern that URSB staff do not have the capacity to grasp technological information included in patent applications. This lack of capacity would not only prevent them from effectively examining patent applications, but at the same time from absorbing new technical information and building domestic technological capacities. Stakeholders expressed the view that in order to address this problem, a national intellectual property office would have to be comprised of both lawyers (for the registration process and examination of procedural legal

requirements, especially in trademark law) and technical experts (for an examination of the involved technologies, as well as the dissemination of related knowledge after patent expiry). Stakeholders also expressed doubts as to whether the intellectual property office should be located within the Ministry of Finance, Planning and Economic Development, as is currently the case with the UNCST.

In addition to the UNCST and the URSB, there are some other important stakeholders in the area of technology development. The Uganda Industrial Research Institute (UIRI) undertakes applied research and develops and acquires technologies for the strengthening of Uganda's various industrial sectors. As opposed to the UNCST, the UIRI reports to the MTTI. The UIRI is not directly involved in the formulation of technology-related policies.

The Ministry of Information and Communications Technology provides strategic leadership and develops policies and laws in the area of ICT. The ministry has in particular developed the National Information and Communication Technology Policy, as discussed in section 4 of this chapter, below.

Finally, it should be noted that there are other institutions in Uganda dealing with research in specific technology sectors. It would, however, go beyond the scope of this report to cover these institutions.

As of 2009, Uganda has no overall national strategy directed at encouraging the transfer of foreign technologies. The 2009 National Science, Technology and Innovation Policy, the biotechnology policy and the National ICT Policy address issues related to technology transfer, but cannot be considered as being an inter-institutional technology transfer strategy as such. While biotechnology and ICT both have an important economic potential, a specifically dedicated policy is too narrow to address broad technology transfer issues in other sectors of industry. The Science, Technology and Innovation Policy does expressly state as its goal the strengthening of national capabilities "to generate, transfer and apply technologies", and refers to a number of "Strategic Policy Implementation Actions" that provide, inter alia, for the creation of "a system to facilitate the transfer, promotion and development of technologies". However, the Science, Technology and Innovation Policy does not specify what should be the elements of such a system.

The Uganda Millennium Science Initiative (MSI), launched by the UNCST and the UIRI, does not constitute a technology transfer strategy, but a government-sponsored programme for the award of research grants for, inter alia, the promotion of Uganda's scientific and technological base. The MSI does not provide for guidelines and strategies for the transfer of technologies. Rather, it seeks inputs from innovative individuals for transferring technologies in individual cases.

It would seem important for Uganda to agree on an overall strategy of how to promote the transfer of technology. Such a strategy should include elements that are valid in all sectors of industry. In general terms, a transfer of technology strategy should at least include the following elements:

1. The overall goal, which would be the promotion of Uganda's technological capacity for the benefit of society, in particular the capacity to learn technologies, adapt them to local needs and circumstances and disseminate knowledge;

2. A number of specific goals, such as:

(a) The promotion of technological literacy and skills, including both specific science and general education;

(b) The promotion of incremental innovation, especially in the forms of adaptations and new uses of existing technologies;

(c) The promotion of partnerships between domestic and foreign R&D actors;

3. Designing the tools to implement the overall and specific goals, such as:

(a) Creating the appropriate institutional framework by providing linkages and coordination among technology-relevant government agencies (i.e. the MTTI/UIRI; the Ministry of Finance, Planning and Economic Development/UNCST, the Uganda Investment Authority (UIA), the Ministry of Health (MoH) and the Ministry of ICT, R&D institutions such as Makerere University and the private sector (i.e. industry and financial institutions engaged in the funding of technology transfer activities);

(b) Designing the legislative framework on intellectual property (patents, utility models and possibly alternative mechanisms, trade secrets, copyright) and other areas (e.g. the UNCST Research Registration and Clearance Policy and Guidelines (2007), the Access to Genetic Resources and Benefit Sharing Regulations (2005) and the Uganda Investment Code Act (1991));

4. Providing for periodic reviews of the above goals and tools.

Such an overall technology transfer strategy would have to be complemented by sect oral policies to facilitate technology transfer, as they already exist, for example, in the areas of ICTs and biotechnology. These policies should take account of the particular needs of a specific sector, which cannot be addressed by an overall strategy. In particular, the involved government agencies and private sector stakeholders should address issues such as:

1. What are the technological needs in different sectors of industry? Where can these technologies be sourced from? Is it practically and economically feasible to import and use/adapt such technologies in the domestic context?

2. Which categories of IPRs may be considered as conducive to the building of technological capacities in a given sector, and which categories of IPRs should be approached with care?

3. What is the role of research institutes and universities in the technology creation and transfer process?

4. What are indicators of success or failure of initiatives aiming at the building of technological capacities? Indicators that could be considered in this context are, for instance: What is the amount/percentage of resources devoted to innovative activities in the public and private sector? Are there increasing linkages between public and private R&D activities? What is the percentage of domestic applicants for patents and utility models? Is this number increasing, compared to past years? To what extent have specific technology promotion projects, such as the MSI by the UNCST and the UIRI, resulted in concrete and useful results? Is there a growing number of R&D collaborations between domestic and foreign actors in selected areas of technology (e.g. agriculture, education, ICT, health)? What is the number of university students enrolled in engineering, biology and chemistry programmes? Is this number growing?

This chapter seeks to provide some guidance on how Uganda's intellectual property legislative framework could be designed in order to contribute to a transfer of technology strategy.

Review of some selected technology transfer projects and initiatives

Foreign direct investment (FDI) is considered as one principal channel for formalized technology transfer flows, alongside licensing agreements, joint R&D arrangements, sales and management contracts and informal means of transfer such as imitation. In Uganda, some of the sectors that have been identified as investment priority areas are, to an important extent, dependent on the successful transfer and absorption of technologies. These sectors include ICTs, health, education and agriculture/ agribusiness.

The promotion of foreign investment into these (and other, less technology-relevant) sectors has been considered as an area of high priority for the overall development of the country, as illustrated by a number of Presidential Investors Round Tables. While these round tables have established a number of working groups and issued recommendations in areas that may be considered as preparing a technology transfer-

friendly environment (e.g. education, infrastructure and the regulatory environment), they do not refer to the issue of technology transfer as such (and its relationship with investment). According to various interviews conducted with stakeholders, there do not seem to be any broader technology transfer initiatives, due to the lack of an overall transfer of technology policy. ICTSD has found that:

Notwithstanding various World Bank or multi-donor-funded projects undertaken during the period of economic reconstruction beginning in the mid-1980s, few of these included the transfer of technology or know-how to Uganda. … In relation to article 66.2 of the TRIPS Agreement, Uganda does not appear to be currently benefiting from any specific programmes or initiatives from developed countries in terms of provision of incentives to enterprises and institutions in the home country to promote and encourage technology transfer to Uganda.

Some interviewed stakeholders even expressed the view that technology transfer is not taking place in Uganda at all. There are, however, some sectoral activities undertaken by different stakeholders in an uncoordinated manner, which take place mainly in the identified investment priority areas, as follows.

CHAPTER TWENTY EIGHT
ACASE FOR THE THE HEALTH SECTOR

In February 2009, a joint venture between the Ugandan local pharmaceutical producer Quality Chemicals and the Indian generic manufacturer Cipla launched the production of several anti-retroviral (ARV) drugs and an anti-malaria medicament at the new production site in Luzira/Kampala. According to an agreement between these two companies, each firm holds a 50 per cent share in the joint venture, resulting in an even distribution of future benefits among the companies. While production was limited to 8 hours per day as of November 2009, full production (i.e. 24 hours per day) is envisaged for the future.

The range of products made at the Luzira site includes the ARV DUOVIR-N (a combination of three drugs in one tablet, containing the active pharmaceutical ingredients lamivudine, nevirapine and zidovudine), another fixed dose combination containing lamivudine and stavudine, and also the antimalarial product Lumartem (containing artemisinin and lumefantrin).

As of November 2009, the production site at Luzira was limited to drugs formulation activities. All ingredients required for the production of the above-mentioned drugs, including the active pharmaceutical ingredients (APIs), binders, etc., are currently being imported from Cipla's manufacturing plants in India. Cipla is envisaging the establishment of an on-site R&D centre, pending certain developments under Ugandan domestic intellectual property legislation.

The press has reported that the site is "a near clone of a Cipla facility in India, and uses the latest production and packaging equipment from the United States, Germany, Italy and elsewhere". According to Quality Chemicals senior staff, the Kampala site is fully capable of applying good manufacturing practice (GMP) and good laboratory practice. In November 2009, the joint venture submitted a request for WHO pre-qualification, which would open up organizations engaged in drugs procurement activities.

The agreement on the joint venture between the two firms was brokered by the Government of Uganda, i.e. the UIA, with firm support from the Office of the President. While in practice, this joint venture is a low risk investment for Cipla, it did require considerable investment on the part of the Ugandan Government.

Investment incentives provided to Cipla by the government include free land to build the plant, free set-up of the entire infrastructure, including the factory and its production facilities, roads, electricity, water as well as the payment of remuneration of Cipla's pharmaceutical experts for their training activities with local staff (see below). In addition, the government agreed with Cipla to procure from the new plant

in Kampala ARVs worth $30 million per year for seven years. Furthermore, the government promised to let the joint venture benefit from a 10-year tax holiday.

Apart from these economic incentives, Cipla seemed to be attracted by the fact that Uganda intends to make use of a number of patent law flexibilities available under the TRIPS Agreement, which facilitate the production of affordable generic drugs in Uganda. For instance, the 2007 draft of the Industrial Property Law takes advantage of a WTO waiver for LDCs, authorizing the suspension of pharmaceutical product patents until 2016. Under India's new patent law, the possibilities for generic producers such as Cipla to produce generic versions of patented drugs in India may be narrowed in the future. Such production may, however, be continued in LDCs that take advantage of the 2016 waiver. In addition, production costs may be kept at a minimum level, because manufacturers are not required to pay any patent licensing fees. It is also hoped in this context that the East African regional market would, in the future, offer economies of scale. Accordingly, Quality Chemicals staff referred to flexibilities under TRIPS as one reason for low production costs at the Kampala site, and has been quoted as stating that "this plant exists largely thanks to TRIPS". This being said, there are current concerns within Cipla that Ugandan intellectual property legislation is not sufficiently taking advantage of flexibilities available under the TRIPS Agreement, which may affect Cipla's investment decisions in the future.

An essential element of the agreement between the two companies is the training provided by Indian experts to Quality Chemicals personnel for the production of the above-mentioned drugs. Training is provided on the job during the production process as well as in key aspects of organizational activities, quality control and quality assurance protocols. Considering the growing importance of technological know-how for countries' international competitiveness, the transfer of tacit knowledge is becoming an increasingly important element of effective technology transfer, as compared to the provision of physical goods.

THE AGRIBUSINESS SECTOR

The UIRI is implementing a Business Incubation Project, providing assistance to local agricultural communities in the development of small and medium-sized enterprises for the exportation of their produce. The UIRI's incubation facility provides, inter alia, skills training and business advice to local entrepreneurs to bridge the gap between the innovation and the commercialization of a new product. This means that incubation only covers parts of the product development process, i.e. the prototyping and commercialization of the results of R&D activities. Incubation presupposes the capacity to undertake R&D, which in turn presupposes the successful absorption of technology expertise by local innovators. Thus, there seems to be a need to provide for broader strategies and programmes to promote the transfer and absorption of technology for the benefit of local entrepreneurs. According to the UIRI's website, technology transfer-related activities are also taking place in the areas of electronics

manufacturing and laboratory R&D for food, minerals and pharmaceuticals. However, senior UIRI staff pointed out that due to the lack of an overall technology transfer strategy, there is no comprehensive data on available technologies and no means to assess the success of existing technology transfer initiatives.

Apart from these national initiatives, there is a regional programme that focuses on the improvement of communication between scientists and policymakers in the agribusiness sector. The Swedish-funded East African Regional Programme and Research Network for Biotechnology, Biosafety and Biotechnology Policy Development (Bio-Earn) promotes the development and application of biotechnology in Ethiopia, Kenya, Uganda and the United Republic of Tanzania. Through human capacity-building, infrastructure support and policy and networking support, Bio-Earn has reportedly "strengthened national and institutional abilities to assess, develop and implement effective policies for biotechnology development and dissemination". In addition, the programme promotes collaborative research among scientists and postgraduate students from four universities in the above-mentioned countries, in order to develop biotechnologies "for use in enhancing agricultural productivity", for example through the creation of drought and disease-resistant as well as virus-free vegetables.

TECHNOLOGY DEVELOPMENT GRANTS

In a late 2007 announcement (second round of competitions for grants), the UNCST/ UIRI- sponsored MSI project under its third category ("Window C") made available grants, inter alia, to firms and researchers that identify technologies of particular interest to the private sector (Mode 1; up to $50,000) and collaboratively develop concrete innovative products (Mode 2; up to $150,000).56 Mode 1 in particular seeks to promote technology transfer, as grants under this facility may be used to;

(1) identify technology-related challenges faced by firms;

(2) conduct local, national and international searches for available technologies responding to such challenges;

(3) enquire about costs and market potential of transferring, adapting, importing and applying identified technologies; and

(4) prepare R&D proposals to develop, adapt or modify the identified technologies in collaboration with other firms, universities or research institutes. While results of this second round of competitions are not yet available at the time of writing this report, a preliminary proposals response analysis of a first round in early 2007 shows a rather uneven distribution of institutions having submitted grant proposals in the areas of research grants and undergraduate science and engineering programme development, with Makerere University alone accounting for 83 out of 163 initial proposals made, competing with 28 other institutions.58 Most proposals were

submitted from institutions belonging to the research areas of health, biomedicine and biological science (52 out of 163); agriculture, food and nutrition (34); environment, ecology and conservation (22); and mathematics, computing and information science (18).59 A final evaluation of the extent to which submissions under the first round of competitions have been successful is not yet available.

LEGISLATION, GUIDELINES AND POLICIES RELATED TO TECHNOLOGY TRANSFER

Relevant laws, regulations and policies in this context are, in particular, the UNCST Research Registration and Clearance Policy and Guidelines (2007), the National Environment (Access to Genetic Resources and Benefit Sharing) Regulations (2005) and the Uganda Investment Code Act (1991). In general, these pieces of legislation seek to provide formalized means of technology transfer on the basis of a commercial agreement. The Industrial Property Bill (of 2009) will be analysed in the following section.

UNCST Guidelines

The UNCST-administered Research Registration and Clearance Policy and Guidelines (hereinafter "the Guidelines") have the overall objective of documenting research and development activities in all sectors "so as to enable research coordination and oversight, guide public policy formulation." The specific objectives of the Guidelines do not expressly refer to the promotion of technology transfer, but to the related issue of access to data needed for research in Uganda. The Guidelines in their substantive part contain a number of mandatory basic requirements, but often leave the details up to the parties involved in a research project. For instance, section 9.0 of the Guidelines generally requires foreign researchers planning research activities in Uganda to become affiliated with a local institution appropriate for that type of research. The details of the affiliation may be arranged by agreement between the foreign researcher and the local institution. There are no mandatory rules on the terms of collaboration. The Guidelines in section 9.0 simply state that "local institutions of affiliation should support the researchers and work, as far as it is practicable, towards building long-term collaborative partnerships with the foreign researchers".

This provision leaves much flexibility as to the design of collaborative research agreements. Interaction with foreign researchers could potentially open up opportunities for technology spillovers and knowledge transfers. The researcher could potentially benefit from existing research facilities and other infrastructure, as well as from inputs from local scientists.

NATIONAL ENVIRONMENT REGULATIONS

While the UNCST Guidelines apply to any field of technology, the National Environment Regulations (hereinafter "the Regulations") contain a number of

provisions specific to the access to genetic resources and the sharing of benefits accruing from the use of genetic resources in Uganda. According to section 6(h) of the Regulations, it is one of the functions of the UNCST as the competent administrating authority "to ensure that technology transfer and information exchange in relation to genetic resources is affected by the persons accessing the genetic resources".

In order to pursue this function, the UNCST may revoke a permit to access genetic resources where the collector has violated any of the provisions of the Regulations. A pertinent provision in this regard is section 20, which lays down the obligation for users of genetic resources to share the benefits arising from such use. According to paragraph 2 of this section, such benefits include, inter alia:

(e) Transfer of knowledge and technology under favourable terms and, in particular, knowledge that makes use of genetic resources, including biotechnology, or knowledge that is relevant to the conservation and sustainable use of biological diversity; … (i) Joint ownership of patents and other relevant forms of intellectual property rights.

As opposed to the Guidelines, section 20 of the Regulations lays down a legally enforceable obligation to transfer technology, combined with potential sanctions in case of non- compliance. It does not, however, determine the nature and scope of the knowledge and technology to be shared as a benefit, but leaves this up to individual materials transfer agreements or accessory agreements to be concluded between the user of genetic resources and the lead agency responsible for the management and regulation of access to genetic resources. The lead agency therefore has considerable discretion in the determination of the extent to which the user of genetic resources has to share biotechnologies with domestic stakeholders. Considering the weak negotiating leverage of Ugandan authorities with respect to foreign investors, the effectiveness of such a provision remains to be seen. This situation is comparable to efforts to promote technology transfer under the Investment Code (see section 4.3 below). The success of these provisions will, inter alia, depend on the extent to which the lead agency actually exercises this discretion. Section 20, in referring to benefits that should be shared, is not limited to transfer of technology issues, but also mentions other potential benefits such as participation by locals in certain scientific research (paragraph (2)(a)); sharing of access fees and royalties (paragraph (2)(b)); and payment of salaries (paragraph (2)(c)). In the absence of an overall technology transfer strategy informing all sectors of government activity, it cannot be excluded that the lead agencies responsible for the negotiation of materials transfer agreements will not be fully aware in all cases of the important technology transfer opportunities offered under the Regulations. Without a nationwide database on needed technologies, lead agencies may also ignore the types of technologies that should be included in materials transfer agreements.

Finally, in order to ensure coherence between environment and patent policy, the Industrial Property Bill should establish a reference to the obligation under the

Regulations (section 20) to share the benefits arising from the use of genetic resources. The appropriate place would be section 21(8) of the Industrial Property Bill, which includes a disclosure of origin and prior informed consent requirement for patent applications based on genetic resources or traditional knowledge. This provision could be amended to expressly demand the showing, by the patent applicant, of compliance with section 20 of the Regulations.

The Investment Code

The Uganda Investment Code Act contains a number of provisions to facilitate technology transfer from foreign investors to Ugandan nationals. Foreign investors wishing to operate a business enterprise in Uganda need to apply for an investment licence with the UIA. The latter shall, when considering such an application, take into account the capacity of the proposed business enterprise to contribute to a number of economic development objectives, such as "the introduction of advanced technology or upgrading of indigenous technology". Theoretically, this provides the UIA with some important leverage in the design of the terms and conditions of the investment licence. Investors that agree to transfer technology are subjected to a number of important conditions potentially generating some significant impact on the technological absorption capacity and economic viability of domestic investment partners. Section 30 of the Investment Code provides that:

(1) Every agreement for the transfer of foreign technology or expertise shall be subject to the following condition;

(d) Any technical assistance shall, where necessary, include technical personnel as well as full instructions and practical explanations expressed in clear and comprehensive English on the operation of any equipment involved;

(e) The transferee shall acquire the right to continued use of that technology or expertise after the termination of the agreement; and

(f) The transferor shall, if the transferee so requires, continue to supply spare parts and raw materials for a period of up to five years following the termination of the agreement.

(2) An agreement for the transfer of foreign technology or expertise shall not contain a condition which:

(a) Restricts the use of other competitive techniques;

(b) Restricts the manner of sale of products or exports to any country;

(c) Restricts the source of supply of inputs; or

(d) Limits the ways in which any patent or other know-how may be used.

However, the success of these provisions depends, inter alia, on the extent to which the UIA actually uses the authorization to consider technology transfer as

a key objective under an investment licence. Again, the creation of an overarching technology transfer strategy instrument, including some guidelines, would likely raise awareness in this respect. In its recommendations, The Report of the Presidential Investors Round Table Meetings – 2004/6, prepared by the UIA, does not refer to the promotion of technology transfer through the tools established under the Investment Code. Part of the reason may reside in the fact that Uganda as an LDC has little negotiating leverage vis-à-vis foreign investors, whose intention is often not to collaborate in joint ventures involving the transfer of technology, but to seek modes of investment that are predominantly driven by cost considerations. To address this problem, stakeholders have suggested limiting the validity of an investment licence from the current minimum of five years to two or three years only. However, the government should closely consult with the UIA and other interested stakeholders to ensure that such an amendment does not deter foreign investors. Such consultations would also have to address the issue of determining the appropriate authority to monitor the effectiveness of technology transfer activities by foreign investors.

Under the Investment Code, any investment licence may contain various obligations on the part of the investor, such as "to employ and train citizens of Uganda to the fullest extent possible with a view to the replacement of foreign personnel as soon as may be practicable". Again, while this provision could potentially entail beneficial consequences for domestic technological skills, stakeholders have expressed the view that Uganda as an LDC has too little negotiating power vis-à-vis foreign investors to implement such a provision. For this reason, it would be important to develop appropriate incentives for investors to engage in training of domestic personnel. As the example of the Cipla-Quality Chemicals joint venture illustrates, financial incentives and the provision of the appropriate infrastructure are important elements in this respect.

As in the case of the technology transfer obligation under the National Environment Regulations, the Industrial Property Bill could be used to promote coherence between patent and investment policy. Section 21 of the Industrial Property Bill could be amended to require the patent applicant to show compliance with the technology transfer provisions under section 30 of the Investment Code, to the extent the patent applied for is part of an agreement on the transfer of foreign technology or expertise.

Finally, the UIA seems fully aware of the importance of regional collaboration for the creation of economies of scale to attract investors. In the context of the East African Community (EAC), the UIA is currently contributing to the drafting of an Investment and Industrialization Strategy. Again, these efforts do not seem to be directly targeted at the specific issue of technology transfer.

The National Information and Communication Technology Policy

Uganda's National Information and Communication Technology Policy of 2003,

which is discussed in more detail in the chapter on access to textbooks, also emphasizes the importance of skills transfer to local stakeholders. In order to enable the transfer of relevant technologies from abroad, the policy proposes partnering domestic ICT training institutions with foreign ones, as well as designing incentives to encourage foreign-based Ugandan ICT experts to return to Uganda and make their skills available. Along the same lines, the policy proposes the establishment of an enabling environment for investment into the ICT sector, highlighting the need for paying increased attention to local ownership and participation, as well as the utilization of local facilities. The policy emphasizes the need for substantial investment in the adaptation of ICTs to circumstances prevailing in Uganda.

While all of the above legal and policy documents lay down important rules and guidelines in particular sectors, these provisions cannot replace an overall policy instrument focusing specifically on the promotion of technology transfer, including related guidelines. Due to the lack of such an overall strategy, there is no mechanism in place to measure the extent to which the above sectoral initiatives and laws have been successful in transferring and absorbing technologies.

Analysis of the intellectual property legislative framework relevant to technology transfer

As noted in the introduction to this chapter, effective technology transfer cannot take place without the capacity of domestic firms and researchers to absorb the know-how made available to them. This point is of particular relevance in the LDC context. In addition, if foreign investors are to be motivated to engage in joint ventures generating technology spillovers, they have to be convinced of actual benefits accruing from such arrangements, in terms of inputs of additional expertise, in particular with respect to the adaptation of technologies to domestic conditions (the need for which is also emphasized in Uganda's ICT Policy). This report therefore attaches great importance to the creation of some domestic technological absorption capacity as a prerequisite for subsequent transfers of technologies, in line with existing UNCTAD research.

A country's intellectual property legislative and policy framework can provide important contributions to the creation of an environment conducive to the dissemination of technology- related knowledge and the transfer of technologies. Intellectual property laws and policies can generate impact on two different levels of knowledge: more generally, on access to learning materials – which is the subject of the specific access to textbooks chapter in this report – and more specifically on access to technology information incorporated in industrial products and scientific research activities. The present analysis will focus on the latter.

By granting their holders exclusive rights over the use of technology products in

a country's territory, IPRs provide important incentives to domestic stakeholders to engage in technology development as well as to foreign investors to make their technologies available in the domestic market. At the same time, however, IPRs, due to their exclusive character, may prevent domestic firms (and possibly researchers) from using relevant information needed for technological learning, as well as incremental and follow-on innovation. Countries like Uganda, at an early stage of technological development, depend to a great extent on informal means of technology transfer, i.e. the acquisition of technologies through imitation, reverse engineering and, at a more advanced stage, adaptation to local conditions. Accordingly, Uganda's 2007 Communication to the WTO Council for TRIPS of Priority Needs for Technical and Financial Cooperation emphasizes the importance of the public domain as a source of knowledge building and technology absorption. At early stages of development, exclusive rights in technology information, which in Uganda are mostly held by foreigners, render the use of informal means of technology transfer more difficult or even entirely impossible, thus complicating the creation of domestic technological expertise. This may be seen as one of the reasons for the extension, by the WTO Council for TRIPS, of particular LDC transition periods, prior to which LDCs such as Uganda do not have to comply with most of the TRIPS Agreement minimum standards of intellectual property protection. Once a country reaches higher levels of development, it may still opt for an increase in intellectual property protection, provided an appropriate balance between rights holders and competitors is maintained.

IPRs encourage technology transfer through formal means, such as licensing agreements and joint venture arrangements. In the absence of a certain level of technological expertise in the receiving country, however, there is no basis for actual cooperation between the foreign investor and the local firm. The potential chilling effect of expansive exclusive rights on foreign firms' decisions to invest in a country has also been observed in a 2003 study of the Organization for Economic Cooperation and Development (OECD) on the impact of IPR protection on FDI, finding that:

The results do not imply that stronger patent protection (or correlated IPRs) will always raise FDI and trade. There may come a point where these types of IPRs are too strong – in the sense that they grant producers of intellectual products excessive market power – in which case IPRs may negatively influence FDI and trade. Thus, the empirical finding [that there is a positive correlation between IPR protection and the promotion of FDI] is conditional on intellectual property systems not reaching excessive levels of strength.86

For developing countries and especially LDCs like Uganda, it is therefore essential to adopt levels of intellectual property protection that are reflective of their actual level of development and needs for technological learning. This means that Uganda's intellectual property system should seek to accommodate domestic dependence on reverse engineering and to promote what may be considered a realistic achievement

in terms of technological development, i.e. the capacity to engage in incremental innovation. The domestic intellectual property system should seek to strike an appropriate balance between incentives for innovators and avenues for competitors to access technology-relevant information. In striking this balance, intellectual property legislation should take account of the importance of the public domain for technological learning and incremental innovation.

It should be acknowledged, in this context, that an intellectual property system that promotes access by domestic innovators to foreign technologies at the same time facilitates access by foreign firms to domestic technology. Due to the national treatment principle of the TRIPS Agreement, which applies to LDCs even during the transition periods, foreigners may claim access to public domain information to the same extent as Ugandans. In comparison, the creation of innovation from a broad public domain and under flexible patent laws will probably generate higher costs for Ugandans than for highly skilled OECD-based competitors.

For this reason, we think that small-scale innovators, who rely on information available in the public domain, should be granted some form of protection to prevent competitors from the wholesale copying of their inventions. While small-scale inventions should not benefit from patent protection (in order to maintain high standards of patentability and a robust public domain), the role of second tier categories of IPRs such as utility models or trade secrets may be considered, as these generate less impact on the public domain, while nevertheless providing some protection (and thus) incentives for small innovators.

In the present section, we will analyse to what extent Uganda's Industrial Property Bill is in line with the objective of promoting the transfer of technology, and incremental innovation in particular.

Patent eligibility criteria (Sections 10–12, Industrial Property Bill)

Sections 10(2) and (3) lay down a strict novelty standard, providing that any written or oral prior art publicly available (including other applications for patents or utility models) in any country of the world shall destroy the novelty of an invention claimed in Uganda. By restricting the possibilities to claim existing inventions as new, this section contributes to the safeguarding of a public domain needed for domestic researchers' freedom to operate.

This being said, most patent applications in Uganda are channeled through ARIPO, which carries out the substantive examination for all patent applications, even those that are directly filed at the national intellectual property office and then transmitted to ARIPO. According to section 3(9) of the Harare Protocol, only such prior art that has been disclosed in written form or by use or exhibition shall be considered as destroying novelty. As opposed to section 10(2) of the bill, there is no reference to

oral disclosure. In case the core elements of a pharmaceutical invention are disclosed in an oral presentation by a third party (i.e. not the patent applicant), for instance at a university, this would arguably not be considered as prior "use" or "exhibition" of the invention under the Harare Protocol. The stricter standard under section 10(2) of the Industrial Property Bill would in practical terms not be considered, unless the URSB had a means to find out about the oral presentation and communicated this to ARIPO, referring to the stricter novelty standard under Ugandan law.88 This would have to be done within only six months from receiving a notification from ARIPO regarding the results of the substantive patent examination. While these options seem to raise practical problems, it is at least questionable whether the alternative, i.e. an amendment to the Harare Protocol, inserting a reference to oral prior art, would be politically feasible at the present time.

The above problem arises in particular where the applicant files only a national (i.e. Ugandan) or regional (i.e. ARIPO) application. In case of an international application following the procedures under the Patent Cooperation Treaty (PCT), the major patent offices of the world, designated by the PCT Assembly, carry out the prior art search ("international search") and establish a non-binding, preliminary written opinion on the question of whether "the claimed invention is or seems to be patentable or unpatentable according to any national law" ("International Preliminary Examination Report", article 35(2), PCT). Such an examination would have to take account of the novelty standard under the Ugandan Industrial Property Bill. This being said, the general challenge confronting patent examiners, i.e. work overload, also applies in the case of PCT examiners and might affect their possibilities to conduct exhaustive prior art searches and patentability examinations. In addition, PCT examiners may not be familiar with certain interpretations of national patentability criteria that are not obvious from the sole language of the patent law, especially if the law is new. The latter point applies specifically to the inventive step and industrial application requirements, as explained in the following paragraphs.

The inventive step standard under section 11 is comparable to the one used in many countries. In order to preserve in the public domain technological developments that are predictable from existing prior art, the provision could be amended to specify that the assessment of non-obviousness of the invention does not need to be based on a local person skilled in the art, but rather on skills existing anywhere in the world, including in OECD countries. Importantly, the provision may be interpreted as encompassing prior art that is not contained in a single document, but spread across a variety of sources (multiple prior art references). This is the approach recently mandated under United States patent law by the United States Supreme Court, thereby considerably raising the bar of patentability.

Finally, the industrial application standard in section 12 corresponds to the standard of many other countries. In order to maintain researchers' freedom to operate, this provision may be interpreted as excluding from patentability research tools for which

no particular use has been specified in a patent application; this would correspond to practice by the European Patent Office of denying patents on research tools that are claimed for an undefined variety of different uses.

In case the above interpretations of the inventive step and industrial application standard meet the approval of Ugandan stakeholders, it seems advisable to include them, in express form, in national patent examination guidelines or regulations, or even directly in sections 11 and 12 of the Industrial Property Bill. This would take account of the fact that for PCT applications, the International Preliminary Examination Report is carried out by foreign PCT examiners, who have to rely on written documentation. The sole language used in the current sections 11 and 12 on inventive step and industrial application does not reveal how these requirements should be applied to a concrete case.

Disclosure of patented invention (Section 39, Industrial Property Bill)

By requiring the inventor to disclose "at least one mode for carrying out the invention", section 39(a) does not take full advantage of the flexibility provided under article 29.1 of the TRIPS Agreement, which authorizes members to require patent applicants to even disclose the best mode for carrying out the invention. This is an important contribution to helping local innovators and researchers fully understand the technology claimed in the patent. The traditional justification for granting exclusive rights rests upon the assumption that in exchange for the grant, society should benefit from the new technology incorporated in the invention. Many areas of today's technologies are so complex that patent applications alone are often not comprehensible to potential competitors of the patentee. A best mode requirement would thus be an important step toward the creation of a pro-competitive environment for technology development and follow-on innovation. It would also respond to Uganda's 2007 Communication to the TRIPS Council of Priority Needs for Technical and Financial Cooperation, where the government emphasizes the need for the development of a patent information service to support innovation and technology transfer. Clearly drafted patent applications could play an important role in this respect. Furthermore, a best mode requirement would also be in line with a 2004 study by the Uganda Law Reform Commission (ULRC), which emphasized the need for the inventor to "effectively disclose how to make and use the invention to the public, which facilitates further technological advances". Finally, it would follow a recommendation made by UNCTAD in a 2008 study on the patent laws of the EAC partner States.

Experimental use exception (Section 44(a), Industrial Property Bill)

While the availability of exclusive rights provides an important incentive for inventors to engage in inventive activity, the privatization of certain substances and processes must not at the same time hinder scientific and technological progress. Researchers involved in basic research must experiment "on" a patented invention

to gain new knowledge on the subject matter itself. They also need to use patented inventions as research tools (i.e. research "with" existing inventions) in order to develop new products and thus contribute to scientific and technological progress. An experimental use exemption carves out a "safe harbour" for research activities that might otherwise be blocked by patents.

Another question arises concerning the extent to which researchers in commercial enterprises are authorized to conduct applied research on or with patented inventions for the purpose of developing commercial products based on the protected subject matter, such as improvements or adaptations of existing products or processes, or for discovering ways to "invent around" the patented invention (commercial research). The TRIPS Agreement itself is silent on this question of commercial research and no WTO panel has so far provided any authoritative interpretation of article 30 of the TRIPS Agreement with respect to the question of whether and to what extent it allows commercial research.

Section 44(a) of the Industrial Property Bill exempts from patent infringement claims uses of a patented invention without the authorization of the patent holder "to carry out any acts related to experimental use on the patented invention, whether for scientific or commercial purposes". This is much broader in scope than comparable provisions in many countries, even in the East African region, and in an earlier draft of the Ugandan Industrial Bill.

As to the scope of this exception, the reference to "commercial purposes" should not be interpreted as allowing for activities by competitors whose main purpose is to commercialize the patented invention without the patent holder's authorization. The reference to "acts related to experimental use" makes clear that the overall objective of any activity falling under this provision must be the generation of new knowledge on the protected substance, as opposed to the mere promotion of competitors' commercial activities. New knowledge in this sense should be knowledge that was not contained in the original patent claims or their equivalents, and may take the form of either new uses of the patented existing substance, or of new knowledge enabling the manufacture of a new product with potentially superior qualities. In order to prevent misunderstandings, section 44(a) of the Industrial Property Bill should be amended to this effect, referring expressly to the overall purpose of the provision as being the generation of new knowledge on the patented product.99 This would follow the template in article 9(b) of the new Swiss Patent Act,100 which has been interpreted as allowing experimental use of patented inventions for both non-commercial and commercial purposes, provided that the overall purpose of the activities at issue is the generation of new knowledge on the patented invention.

Further guidance in this context may be found in a 2009 decision by the United Kingdom's High Court regarding the scope of the United Kingdom's experimental use exception. The High Court expressed the view that a commercial purpose behind a competitor's use of patented substances does not automatically rule out

the possibility of invoking the experimental use exception. Most pharmaceutical research is driven by commercial considerations. However, the purpose of the experimental use defence/exception is not to promote competitors' commercial activities, but to enable the generation of new knowledge on the protected substance. Thus, the defendant in a patent infringement suit needs to show that the immediate purpose of his activities was not to generate revenue, but to gain new knowledge on the patented product (e.g. to enable future modifications of a drug). Where the defendant's activities have mixed purposes, the generation of new knowledge needs to be the preponderant purpose, while the generation of revenue may constitute a secondary purpose.

The language used in section 44(a) ("experimental use on the patented invention", emphasis added) seems to indicate that the exemption does not cover activities that experiment "with" the patented substance, i.e. use it as a research tool to develop new products that are independent of the originally patented product. It is essential, for the promotion of technological progress, to make research tools freely available to scientists. This may be done either by exempting their use from patent infringement claims, or by providing researchers with a right to claim from the patentee a non-exclusive licence for the use of the research tool. The United Republic of Tanzania seems to have adopted the former approach in its Industrial Property Rights Bill (version as of March 2008), while the new Swiss Patent Act provides for a licence of right in the area of patented biotechnological research tools.

The Swiss approach seems to strike an appropriate balance between the need to provide incentives for the development of research tools and the need to make these tools available to the research community. The justification for treating experimental uses "on" the invention differently from experimental uses "with" the invention lies in the fact that experiments "on" the invention do not affect the normal exploitation of the patent by the right holder, while experiments "with" the invention may be the only purpose of a patented research tool. In that case, expanding the experimental use exemption to research tools would render impossible the normal exploitation of the patent. Along the above lines, a robust experimental use exemption is also needed in case Ugandan universities and research institutes go ahead with their plans to apply for patents on the results of publicly funded research, as is the case with Makerere University. As illustrated by experiences in the United States with respect to university patenting under the Bayh-Dole Act, restrictive licensing of upstream inventions by universities may cause serious bottlenecks in the transfer to the industry of know-how needed for the marketing of new technologies. Such blocking effects could be mitigated by invoking an experimental use exemption that enables industry to use the results of basic research to develop new or follow-on technologies.

Prohibited terms in a licence contract (Section 55, Industrial Property Bill)

This provision addresses restrictions in patent licences that unduly restrict the licensee's possibilities to benefit from the licensing agreement in terms of technological learning, technology absorption and transfer, and overall economic viability. Article 55(1) states that: "The registrar may refuse to register a licence contract if the registrar is of the opinion that any clause in the licence contract imposes unjustified restrictions on the licensee with the consequence that the contract, taken as a whole, is harmful to the economic interests of Uganda."

The main objective of this provision is to promote technology spillovers from (mostly foreign) patent holders to local licensees. In this sense, this provision may be seen as complementary to article 30 of the Investment Code on conditions in technology transfer agreements between a foreign investor and a domestic partner (see discussion above).

The promotion of technology transfer and dissemination is one of the main objectives of intellectual property protection, according to article 7 of the TRIPS Agreement. Article 8.1 of the TRIPS Agreement authorizes members to formulate their laws in a way that is conducive of promoting "the public interest in sectors of vital importance to their socio-economic and technological development". Article 8.2 of the TRIPS Agreement authorizes members to adopt appropriate measures to, inter alia, prevent practices by intellectual property holders that adversely affect the international transfer of technology. Section 55 of the Industrial Property Bill may be based on these authorizations. It would be useful, in this respect, to expressly refer to the protection of intellectual property as a means to promote technology transfer in an overall intellectual property policy document (which remains to be established).

Most of the practices listed under section 55 have parallel provisions in article 30 of the Investment Code, which is of particular importance in the present context. It states that:

(1) Every agreement for the transfer of foreign technology or expertise shall be subject to the following conditions: …

(e) The transferee shall acquire the right to continued use of that technology or expertise after the termination of the agreement; and …

(2) An agreement for the transfer of foreign technology or expertise shall not contain a condition which: …

(d) Limits the ways in which any patent or other know-how may be used.

Subsection (d) of this provision should be understood as not limiting the use by the licensee of intellectual property-protected technology that was part of the transfer

agreement. A similar understanding is warranted in the case of section 55(2)(s) of the Industrial Property Bill. It considers an unjustified restriction in a licensing agreement any terms that:

… impose confidentiality after the expiry of the licence agreement or … impose unreasonably long periods for secrecy following the commissioning of manufacturing facilities using the licensed technology, or … impose measures which limit technological learning and mastery, except those which relate to industrial property rights. (emphasis added)

The same observation applies in the context of section 55(2)(x), which considers as restrictive any terms that "restrict the licensee from taking measures that will enhance Ugandan technological capacity and which are not prejudicial to the licensor's industrial property rights". (emphasis added)

It is not clear what is meant by "prejudicial", and which IPRs are decisive in this context. The licensee should have the right to use the licensed intellectual property to build his own expertise, in line with article 7 of the TRIPS Agreement and the above provisions under the Investment Code. Paragraphs (s) and (x) of section 55 of the Industrial Property Bill should be understood as being limited in their scope to those IPRs that are not encompassed in the licensing agreement. A licensee cannot expect to have access to technologies and expertise that is not included in a licensing agreement. As to those IPRs that are actually licensed, the law should not encourage licensors to further limit licensees' rights in a way not consonant with the objective of intellectual property protection under the TRIPS Agreement and the technology transfer provisions under the Investment Code.

Finally, it is important to note that section 55 does not seem to address a number of important anti-competitive practices, as enumerated under article 40.2 of the TRIPS Agreement, i.e. exclusive grantback conditions and conditions preventing challenges to validity. Exclusive grantback conditions may be defined as those contractual practices "requiring the acquiring party to transfer or grant back to the supplying party, or to any other enterprise designated by the supplying party, improvements arising from the acquired technology, on an exclusive basis, without offsetting consideration or reciprocal obligations from the supplying party, or when the practice will constitute an abuse of a dominant market position of the supplying party".

Conditions preventing challenges to validity have been defined as conditions "requiring the acquiring party to refrain from challenging the validity of patents and other types of protection for inventions involved in the transfer or the validity of other such grants claimed or obtained by the supplying party, recognizing that any issues concerning the mutual rights and obligations of the parties following such a

challenge will be determined by the appropriate applicable law and the terms of the agreement to the extent consistent with that law".

Anti-competitive agreements are addressed under part VI of the Ugandan Draft Competition Act (version of 2004). However, neither of the above-mentioned anti-competitive practices is mentioned under those provisions. In addition, the Draft Competition Act, while defining abuse of dominance (part VII), does not specifically refer to abuse of intellectual property. As this notion is relevant under both intellectual property and competition law, it would seem appropriate to include a definition of intellectual property abuse under both the Ugandan Draft Competition Act and the Industrial Property Bill, in a coherent manner.

For this purpose, the TRIPS Agreement is silent on the notion of "abuse", leaving its definition up to each member. National laws in various WTO members differ on what they consider to be abusive practice. The meaning of "abuse" has been the source of considerable controversy. While a few developed countries, notably the United States, limit the concept to anti-competitive practices bordering on antitrust violations, the TRIPS Agreement does not oblige members to limit the scope of intellectual property abuse to violations of competition law. Members may consider abusive any use of an IPR that defeats its core purpose of promoting innovation and technology dissemination, even where the IPR holder in question is not in a position of market dominance

For the purpose of determining the extent of "abuse" under national legislation, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides some guidance. According to the set:

Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries and whether they are:

(a) Appropriate in the light of the organizational, managerial and legal relationship among the enterprises concerned, such as the context of relations within an economic entity and not having restrictive effects outside the related enterprises;

(b) Appropriate in light of special conditions or economic circumstances in the relevant market such as exceptional conditions of supply and demand or the size of the market;

(c) Of types which are usually treated as acceptable under pertinent national or

regional laws and regulations for the control of restrictive business practices.

UNIVERSITY INTELLECTUAL PROPERTY POLICIES: ACASE FOR PROF. OGWANG COVIDEX INVENTION IN UGANDA.

In one of its publications, the Bio-Earn Programme considers intellectual property management "an increasingly important part of research collaboration, technology transfer and commercialization of research". The development of institutional intellectual property management policies or structures within East African research institutions is considered to "encourage innovation, facilitate international collaboration, assure scientists of a reward system and attract private sector investment in science-based enterprises". The objective of such intellectual property management policies would be to enable the patenting by universities and research institutions of the results of publicly funded research, along the lines of the 1980 Bayh-Dole Act in the United States. As stated by so and others in a recent article:

Bayh-Dole encouraged American universities to acquire patents on inventions resulting from government-funded research and to issue exclusive licences to private firms, on the assumption that exclusive licensing creates incentives to commercialize these inventions. A broader hope of [Bayh-Dole], and the initiatives emulating it, was that patenting and licensing of public sector research would spur science-based economic growth as well as national competitiveness. And while it was not an explicit goal of [Bayh-Dole], some of the emulation initiatives also aim to generate revenues for public sector research institutions.

Accordingly, Makerere University has had an intellectual property policy in place since 2006, which seeks to protect university inventions and ensure returns from their commercialization. There are no provisions in the Industrial Property Bill that specifically address the patenting of inventions resulting from publicly funded research. Provided these inventions do not fall under any of the exclusions from patentability in section 8(3) of the Industrial Property Bill and meet the requirements of novelty, inventive step and industrial application, the Industrial Property Bill does not stand in the way of university patenting.

In this context, it is important to refer to serious concerns, expressed in the literature, regarding potential negative effects in the United States of the Bayh-Dole Act on research activities and technology transfer and innovation. In brief, some of the most important lessons drawn after 28 years of experience with the Bayh-Dole Act are the following:

• The role of university patents in the promotion of technology innovation has been largely overstated; other features unique in the United States are of much more importance in this connection, such as generous public funding of university R&D;

• According to empirical research, a significant share of the few university patents and licences that resulted in commercial products could have been effectively transferred either in the public domain or under non-exclusive licences;

• The returns earned by universities from the licensing of inventions are much lower than usually expected, accounting for not even 5 per cent of total academic research income (i.e. non-patent-related public and industry funding). This may partly be explained by the high costs of licensing patents, which do not only include legal fees, but also the operating and salary costs for technology transfer offices. According to recent research, "net returns from patenting and licensing by US universities are, on average, quite modest", and "universities should form a more realistic perspective of the possible economic returns from patenting and licensing activities";

• The patenting of upstream research results may lead to patent thickets and thus complicate the transfer of technology to industry;

• Non-exclusive licences granted by universities to industry do not seem to have had a negative impact on transferring and commercializing technologies;

• There is a danger that universities apply a "one size fits all" model to the patenting of research, even though different areas of technology respond differently to patent protection (e.g. the pharmaceutical sector and the ICT sector).

Considering the above, it seems at least doubtful whether a Bayh-Dole approach to university research and technology transfer is appropriate for Uganda. Researchers in developed countries increasingly recognize the need for collaborative and open research, which is not promoted by exclusive rights, but through open source innovation, scientific commons or at least the collective management of intellectual property (e.g. open, non- discriminatory patent pools). Aggressive university patenting may end up inhibiting the very collaboration with other researchers and the private sector that some Ugandan stakeholders have been emphasizing. While it is understandable that universities and research institutions seek additional sources of income, it is at least questionable whether Ugandan firms are willing or even capable to pay licensing fees for using technologies generated by university research. In the end, it could be affluent foreign firms that bring these technologies to (foreign) markets, thus the process of technology development, transfer and innovation would bypass Ugandan domestic firms.

Against this background, the government may want to consider putting in place a number of safeguards, some of which have been suggested in the literature. A first safeguard in this respect would be to maintain Uganda's priority for a full implementation of the TRIPS Agreement flexibilities. For instance, as analysed above, the patent eligibility requirements under sections 10–12 of the Industrial Property

Bill were drafted with a view to maintaining a broad public domain. Enabling the patenting of university research, possibly academic research tools, should not lead to the patenting of research tools for which no particular use has been specified in a patent application. Such a wide application of the industrial application requirement could have a blocking effect on follow-on research.

Second, universities should not license their patents, in particular research tools, on an exclusive basis. Licensing an invention to many firms at the same time will ensure technology improvement through inter-firm competition much more than under monopoly conditions.

Third, institutions that patent publicly funded research results should be publicly accountable for their activities. They should be required to make public all information necessary to assess whether they are actually serving the public interest, such as the number of patents and licenses obtained, funds spent, revenues from licensing and terms of the licence. In this vein, the government could make the availability of research funding (be it from its own or from foreign sources, such as state agencies or private donors) dependent on the extent to which research institutions are prepared to license patented technologies into a common patent pool, which should be open for new entrants and make available all patented technology for all interested parties on certain, predetermined terms (including modest licensing fees, affordable to local stakeholders). Third parties interested in using a publicly funded university invention could be provided a licence of right to use the invention, in exchange for remuneration payable to the university.

Fourth, the government should preserve its own right to override a licence that does not succeed in promoting technology transfer and innovation ("march-in rights"). Finally, the government should also have at its disposal the discretion to issue a government use licence for the patented invention, as authorized under the TRIPS Agreement.

UTILITY MODEL PROTECTION

Utility models may be an appropriate way of encouraging incremental innovation. As opposed to patents, utility models are generally used to protect inventions that do not meet the "inventive step" test under patent law, but that nevertheless contribute a new and useful product to society. As opposed to patents, the TRIPS Agreement contains no minimum standards on the protection of utility models, leaving this up to members' entire discretion.

Section 68(1) of the Industrial Property Bill makes most of the provisions regarding patents applicable to utility models, including the exclusive rights provided under section 38. These rights shall last for 10 years counted from the date the utility model is granted (section 69(3)). Eligible inventions have to be new and industrially

applicable in the patent sense, but do not need to meet the inventive step requirement (section 69(1) and (2)). While the worldwide novelty standard seems appropriate in the patent context, it is questionable to what extent domestic small-scale inventors, who are expected to benefit most from utility model protection, will be capable of meeting this rather strict standard. It would seem that local innovators are better served by introducing, through legislative amendment, a domestic novelty standard specifically in the context of utility model protection.

The term of protection for utility models in Uganda (i.e. 10 years from the granting date) seems quite long as compared to parallel provisions in other countries: Australia provides for a maximum term of eight years and utility model protection in Germany normally lasts for a term of three years, renewable in several instances up to a total of 10 years. As opposed to the situation in Uganda, Australia and Germany make protection dependent on the existence of an albeit lowerinventive (or "innovative") step. On the other hand, if our recommendations on the tightening of patentability standards are implemented, local innovators will often be excluded from patent protection, due to the rather low level of their inventive activities. This may be justified against the assumption that a robust public domain is important to promote access by technology learners to needed information. This being said, local innovators will still need some incentives to engage in potentially costly and time- consuming R&D. In order to accommodate such a need, a 10-year period of utility model exclusivity may constitute an appropriate means. Alternatively, a non-exclusive "use and pay" regime is suggested in the next section to address possible concerns about blocking effects that utility model systems may have on the public domain. It will be a matter of national preference to decide whether to favour exclusive or non-exclusive incentive schemes.

The promotion of incremental innovation through "use and pay" regimes

While the utility model system may be considered as providing appropriate incentives to incremental innovators, it should be acknowledged that due to their exclusive rights character, utility models could raise concerns comparable to those under patent law, i.e. regarding the blocking effects on follow-on innovation and competition. Supporters of a robust public domain may question to what extent such exclusivity, especially a relatively long term such as 10 years, may be justified in the case of inventions that do not even meet an inventive step threshold.

An alternative way of promoting incremental innovation is through the establishment of a regime of compensatory liability, or "use and pay", which in principle authorizes third parties to use the invention in order to develop improvements, but obliges them to pay compensation for such use to the inventor. This approach addresses concerns about blocking effects of exclusive rights in substances needed by competitors, but at the same time provides some incentives for small-scale innovators to invest

in incremental innovation. In the literature, such a system has been suggested to stimulate incremental innovation in general as well as in new applications of traditional knowledge in various contexts.

In practice, the International Treaty on Plant Genetic Resources for Food and Agriculture establishes a use and pay regime for plant breeders who breed new varieties off of exemplars deposited in a repository managed by the Consultative Group on International Agricultural Research. Similarly, the United States Federal Insecticide, Fungicide and Rodenticide Act establishes a use and pay system in the area of agricultural chemical test data, which is, however, preceded by a 10-year term of exclusivity in these data.

A use and pay/compensatory liability regime, as suggested in the literature basically confers three separate rights on the incremental innovator:

1. The first right is the right to prevent second comers, for a certain period of time, from wholesale imitations of the right owner's product. In the case of traditional knowledge products, the term of protection could be longer than for other small-scale innovation, taking account of the slow accretion of traditional knowledge over time. A term of protection of 20 years has been suggested in this context. In areas of more systematic, commercially driven technological innovation, the term of protection could be shorter, also taking account of divergent lengths of product life cycles. There would be no need to protect short-lived innovations from wholesale copying for a period of more than a few years;

2. Under the second right conferred, the incremental innovator may claim reasonable compensation from any party that uses the protected innovation for value-adding improvements, for a specified period of time. This right, which could last for up to 20 years, could be preceded by a much briefer period of market exclusivity for the inventor (e.g. one or two years), in order to establish his brand. Under the subsequent, longer period of compensation, the original innovator would be prevented from blocking access by competitors to his innovation, unless wholesale duplication is sought. This differs from a utility model regime, under which competitors would generally be excluded from the use of the protected substance for follow-on improvements, in any case where they follow commercial purposes. As to the amount of compensation payable to the incremental innovator, Reichman has suggested royalty rates between 3 and 9 per cent of the sales revenue of the improved product. The amount of payable royalties would, inter alia, depend on the amount of resources needed by the second comer to develop the improved technology or application. Disputes over the amount of royalties to be paid to the incremental innovator should be settled through mediation or arbitration. Importantly, the mediation or arbitration procedures would not entitle the right holder to ask for an injunction; thus his technology could be used for follow-on improvements, while all royalties would be payable after the final

mediation or arbitration award is rendered;

3. Finally, the third right conferred under a use and pay regime would entitle the original inventor, for a certain period of time, to make use of a second comer's technical improvements, in exchange for the payment of reasonable compensation to the latter.

This right could be just as long as the second right (i.e. to claim reasonable compensation for improvement uses of the original technology), but this would be up to policymakers to decide.

In most cases it will not make sense to implement a utility model regime and a use and pay regime in coexistence. The purpose of the use and pay regime is to avoid the kind of blocking effects generated by exclusive utility models. Taking account of the importance of an accessible public domain for incremental innovation, a use and pay regime seems to be at least as appropriate for technological learning in Uganda as an exclusive rights-based utility model regime. On the other hand, it has to be acknowledged that the introduction in Uganda of an untested use and pay regime will generate some learning costs. The incremental innovator must have the possibility to have his innovation registered. This could possibly be done with the authority responsible for the registration of utility models (i.e. the URSB) and would arguably avoid any additional costs. What could prove more difficult is to determine the royalty to be paid to the innovator. Experienced mediators or arbitrators would be needed, and a court would have to be in place to supervise the resulting awards. In addition, a number of technical details would have to be agreed upon before a use and pay system could be useful in the Ugandan context, for example, whether it should benefit local innovators only, or also apply to foreigners, and whether such system would rely on a "first to file" or "first to invent" principle.

Taking the above considerations into account, the government may wish to consider testing the use and pay approach in a limited area, while maintaining the utility model regime in place until the first experiences in the operation of compensatory liability regimes have been collected. The TRIPS Agreement does not impose any restrictions in this regard. The government could limit the use and pay approach to the promotion of new applications of traditional knowledge, before considering an extension to areas of targeted, commercially driven R&D. Under such a regime, communities willing to make their traditional knowledge publicly available would be entitled to prevent others from the slavish reproduction of their know-how, for a period to be determined in an agreement between the government and the provider communities. In addition, the latter would be eligible to receive compensation from users for improvement applications of their knowledge, for a period of time that could last much longer than under the current Ugandan utility model regime (e.g. 20 years from the date of making the traditional knowledge available).

TRADE SECRETS PROTECTION

In June 2009, the Ugandan Trade Secrets Protection Act 2009 entered into force. Prior to this new legislation, there was no law protecting trade secrets in Uganda. Eligible for protection is information that (1) is not generally known (i.e. secret) among persons that usually deal with comparable information; (2) has commercial value because it is secret; and (3) has been subject to reasonable steps, by the holder of the information, to keep it secret.

While a patent on a product prevents the unauthorized reverse engineering of that product and even its independent development, trade secrets protection is based on the concept of "unfair competition" under article 10bis of the Paris Convention, which does not rule out the discovery and appropriation of someone else's undisclosed information through honest commercial means, such as independent development and reverse engineering. While trade secrets thereby provide a possibility for competitors to access technology-relevant information, they also provide protection to (often foreign) technology developers and entrepreneurs. Such protection may give foreign investors some confidence to transfer certain technologies to domestic counterparts (provided the latter are capable of absorbing the incoming know-how). This seems especially important against the background of article 8(3)(b) of the Industrial Property Bill, which excludes methods for doing business from patent protection. It appears legitimate to seek non-exclusive forms of protection for business plans, as the denial of any protection would likely have a deterring effect on many foreign investors, including generic producers of pharmaceuticals. In addition, trade secrets protection does not depend on any formalities, such as registration, but comes into effect as soon as certain information meets the eligibility requirements, as discussed above.

The fact that under trade secrets law, independent development of the protected information or its discovery through reverse engineering constitutes a defence to trade secrets infringement claims puts much importance on the allocation of the burden of proof in litigation. This is similar to the situation under copyright law, where independent creation is also a defence to copyright infringement allegations, but differs from patent law, where the claimant only needs to show the unauthorized use of the protected substance by the defendant.

The Trade Secrets Protection Bill is silent on the allocation of the burden of proof. In other jurisdictions, there seems to be a lack of consensus in this regard. Under United States law, for instance, there is no uniform approach among state jurisdictions. While it is established practice that use of the protected information by the defendant (to be shown by the plaintiff) may constitute a prima facie case of trade secrets misappropriation, there is some controversy, at least among United States courts, regarding the question of how to allocate the burden of proof after the defendant has countered the misappropriation claim by asserting independent development. This

has an important impact on the effectiveness of trade secrets protection.

• According to one approach, the defendant, upon raising the defence of independent development, has to substantiate this defence by showing that he has substantial capacity to independently develop matter claimed to be secret by the plaintiff. Upon such showing, however, it is up to the plaintiff to disprove the defence by showing that in the particular case, the defendant, despite his alleged capacity, did not arrive at the protected information through independent means. Thus, the plaintiff has to prove a negative. If he fails to do so, the defence advanced by the defendant will be upheld and reverse the prima facie presumption of misappropriation that was established by the defendant's use of the protected information;

• The problem with the above approach is that it imposes the burden of proving a negative on the plaintiff despite the fact that the latter in general has no access to the relevant information on how the defendant arrived at discovering the protected know- how. It would seem more appropriate to burden the party that has better access to such information. Otherwise, the use of trade secrets to protect information is seriously limited. In this vein, it seems reasonable to expect the defendant to show that he had the capacity to arrive at the use of the protected information through his own, independent means. Under this approach, the defendant, upon asserting independent development, would not only have to show his general capacity to do so, but would also have to persuade the court that in the particular case, he effectively arrived at the protected information through independent means. If he failed to do so, the prima facie presumption of misappropriation as established through the use by the defendant of the protected information would remain valid.

Considering Uganda's important need to build domestic technological capacities through informal means of technology transfer, and considering at the same time the country's dependence on foreign technology inputs through investment and other means, effective trade secrets protection combined with elevated criteria for patentability could possibly strike an appropriate balance between the interest of foreign investors and local competitors. In order to ensure effective protection, the government may want to consider adopting, either in the recently enacted Trade Secrets Protection Bill or in separate administrative regulations, a general rule on the allocation of the burden of proof, along the lines described above.

Recommendations

Policy level

The above analysis has shown the importance of a national (i.e. inter-institutional) strategy on technology transfer. The promotion of technology transfer is a policy objective that cuts across various sectors of a country's domestic policy, ranging from economic and legal to infrastructural and governance issues. Actors in various agencies must be aware of the importance of technology transfer for their activities, as shown by the example of the Investment Code and the potential, for the UIA, to exert an impact on the design of investment licences under technology transfer agreements (see above). For this reason, it seems essential for any country seeking to attract technologies to adopt an explicit strategy directed at encouraging the transfer of foreign technologies.

Adapt a transfer of technology strategy whose overall objective of a strategy on technology transfer would be to promote overall, coherent principles and move away from uncoordinated and merely sectoral initiatives. Such an overall technology transfer strategy would have to be complemented by sectoral policies to facilitate technology transfer, as they already exist for example in the areas of ICTs and biotechnology. These policies should take account of the particular needs of a specific sector, which cannot be addressed by an overall strategy. In essence, an overall transfer of technology strategy should aim at building capacities in incremental innovation, and design the intellectual property tools to implement this objective. Sectoral policies should determine specific indicators for success of technological learning and dissemination.

INSTITUTIONAL LEVEL

Technology transfer is a cross-cutting issue that should be promoted by many different institutions and ministries (trade and industry, health, agriculture, education, etc.). However, it is important for these different actors to pursue their specific technology transfer policy initiatives in a coordinated and mutually supportive manner. An overall technology transfer strategy as suggested above is indispensable in this regard.

Ensure that the institutional set-up of the intellectual property office is conducive to the transfer of technology strategy and the general innovation policy vision of the country. One way of building domestic technological capacities is by extracting technical information from patent applications, even though it should be acknowledged that in certain cases, it may prove difficult for local researchers to effectively understand the patent description and claims. In order to better link domestic research institutions with the country's intellectual property administration, the government should consider the establishment of a national intellectual property office staffed with, inter alia, technical experts capable of extracting relevant technical

information from patent applications, in addition to legal and administrative staff for the intellectual property registration procedures. This could also promote exchanges between the intellectual property office and domestic research institutions, which could increasingly benefit from the technology information contained in patent applications.

While the location of such an intellectual property office (within the URSB, the UNCST or elsewhere) is a matter of government choice, it seems essential to ensure that such an office benefits from the expertise available in institutions such as the UNCST, the UIRI and others. The Kenya Intellectual Property Institute or the Ethiopian Intellectual Property Office may serve as examples in this regard.

In order to ensure synergies, the national intellectual property office should be established under a ministry that is actually involved in activities related to intellectual property. For example, the Kenya Intellectual Property Institute is a department under the Kenyan Ministry of Trade and Industry. The Ethiopian Intellectual Property Office is a unit of the Ethiopian Science and Technology Agency. Uganda may wish to consider comparable institutional arrangements.

LEGISLATION

Provisions under the Industrial Property Bill should be interpreted to leave a workable public domain for technological learning, collaborative research and follow-on innovation while at the same time ensuring a balanced system that encourages innovation and promotes legal security. In particular:

• Section 11 on inventive step could be amended to specify that the assessment of non-obviousness of the invention does not need to be based on a local person skilled in the art, but rather on skills existing anywhere in the world, including in OECD countries. Importantly, the provision may be interpreted as encompassing prior art that is not contained in a single document, but spread across a variety of sources (multiple prior art references), following a tightening of the non-obviousness standard in countries such as the United States;

• In order to maintain researchers' freedom to operate, section 12 on industrial application may be interpreted as excluding from patentability research tools for which no particular use has been specified in a patent application; this would correspond to the European Patent Office practice of denying patents on research tools that are claimed for an undefined variety of different uses;

• In case the above interpretations of the inventive step and industrial application standard meet the approval of Ugandan stakeholders, it seems advisable to include them, in express form, in national patent examination guidelines or regulations, or even directly in sections 11 and 12 of the Industrial Property Bill. This would

take account of the fact that for PCT applications, the International Preliminary Examination Report is carried out by foreign PCT examiners, who have to rely on written documentation. The sole language used in current sections 11 and 12 on inventive step and industrial application does not reveal how these requirements should be applied to a concrete case.

Recommendation no. 4: Provide inter-policy coherence between patent and other policies

• In order to ensure coherence between patent policy on the one hand, and environment and investment policy on the other hand, the Industrial Property Bill should establish a link between the obligations of a patent applicant to disclose certain information and the technology transfer provisions under the National Environment Regulations and the Investment Code. In particular: o Section 21(8) of the Industrial Property Bill (regarding a disclosure of origin and prior informed consent requirement for patent applications based on genetic resources or traditional knowledge) should be amended by providing that the patent applicant should show compliance with section 20 of the National Environment Regulations; o A new paragraph should be added under section 21 of the Industrial Property Bill to require that the patent applicant show compliance with the technology transfer provisions under section 30 of the Investment Code.

Best mode disclosure obligation in patent applications

• Section 39 on disclosure should contain an obligation of the patentee to disclose the best mode for carrying out the invention, known at the time of filing the application. This is an important contribution to helping local innovators and researchers fully understand the technology claimed in the patent.

Use of patented inventions by researchers

• In order to prevent misunderstandings regarding the scope of the experimental use exemption, section 44(a) (i.e. experiments "on" the patented invention) should be amended, to the effect that the generation of new knowledge on the patented product should be the overall and preponderant purpose of the experiment. The generation of revenue may constitute a secondary purpose;

• The patented invention should also be available for those who intend to use it as a research tool to develop new products that are independent of the originally patented product (i.e. experiments "with" the patented invention). Following the example of Swiss patent law, use of the patented invention as a research tool should not be covered by the experimental use exemption, but should be subject to a licence of right from the patent holder. To the limited extent that research tools are patentable under a tight standard of industrial application (see above, Recommendation no. 3 on

section 12), patentees should receive remuneration for their use by others, but should not be allowed to prevent access to protected research tools. In this vein, a separate provision should be established, within the Industrial Property Bill, for experiments "with" the patented invention.

Tailor the novelty standard under utility model protection to the capacities and needs of local inventors

• With a view to promoting incremental domestic innovators, the novelty standard in sections 68(1) and 69(1) of the Industrial Property Bill for purposes of utility models should refer to domestic novelty, as opposed to the novelty standard under patent law.

Introduce a "use and pay" regime for applications of traditional knowledge and genetic resources

• As an alternative to utility model protection, incremental innovation lacking product novelty and/or an inventive step could also be protected through a use and pay regime, limiting the innovator's exclusivity to two years maximum, followed by a longer period during which the innovator is entitled to remuneration for any improvement uses of his invention. This tool would avoid the blocking effects on the public domain and thereby enable enhanced follow-on innovation, while at the same time providing incentives to domestic innovators. On the other hand, an immediate introduction of an untested use and pay regime would generate learning costs in the beginning, such as the establishment of a system for the determination of the royalty payments (through arbitration and a supervisory court). In addition, a number of technical details would have to be agreed upon before a use and pay system could be useful in the Ugandan context;

• Taking these considerations into account, the government may consider the limited introduction of a use and pay regime for uses of traditional knowledge and genetic resources only, thus enabling the provider communities to receive remuneration for the use of their know-how and biodiversity. This may improve domestic capacities in agricultural technologies, agribusiness and pharmaceuticals, which are among the investment priority areas of the government.

How to allocate of the burden of proof in trade secrets infringement litigation

• A robust system of trade secrets protection may provide an appropriate balance between the need to provide incentives to foreign investors and technological first comers on the one hand, and the need to enable domestic technological learning and follow-on innovation. While exclusive rights protect the inventor, reverse

engineering through independent and honest commercial means is permitted and may promote domestic incremental innovation. In order to constitute an effective legal tool, however, it is essential to appropriately allocate the burden of proof in infringement litigation. It seems reasonable to expect the defendant (i.e. the alleged infringer) to persuade the court that in the particular case, he effectively arrived at the protected information through independent means. If he fails to do so, the prima facie presumption of misappropriation as established through the use by the defendant of the protected information should remain valid.

Ensure licensed intellectual property may be used for technological learning

• The references to IPRs in section 55(2) (s) and (x) of the Industrial Property Bill should be understood as being limited in their scope to those IPRs that are not encompassed in the licensing agreement. A licensee cannot expect to have access to technologies and expertise that is not included in a licensing agreement. As to those IPRs that are actually licensed, the law should not encourage licensors to further limit licensees' rights in a way not consonant with the objective of intellectual property protection under the TRIPS Agreement and the technology transfer provisions under the Investment Code.

Provide for definitions of intellectual property abuse and certain anti-competitive practices

• In order to facilitate the screening of prohibited terms in technology licensing contracts, section 55 of the Industrial Property Bill should provide definitions of intellectual property abuse, exclusive grantback conditions and conditions preventing challenges to validity.The same definitions could be provided under the (draft) Competition Act.

CHAPTER TWENTY NINE
RIGHTS OF THE LGBT COMMUNITY, THE LEGALITY OF OBJECTYPHYLIA AND BEASTIALITY

While under arrest, same-sex practising people either perceived or actual – are disproportionately vulnerable to the use of torture and cruel, inhuman or degrading treatment. Yet impunity for torture exits in Uganda. This is in violation of Article 5 of the African Charter. Hence the recommended action is as follows:

• Uganda must ensure that the prohibition against torture and the use of cruel, inhuman or degrading treatment is vehemently adhered to.

Same-sex practising people in Uganda are also disproportionately affected by the abuse of police powers, extortion and arbitrary arrests in violation of Article 6 of the African Charter. In the uneven application of the so-called sodomy laws, Ugandan police and government officials are denying Ugandans their right to liberty. Hence, the recommended action is as follows:

• Uganda should remedy the lack of police accountability in order to ensure the protection of its citizens' fundamental human rights.

Discrimination against same-sex practising people is pervasive in Uganda. Articles 140, 141 and 143 of the Ugandan Penal Code are in violation of Articles 2, 3, 28 of the African Charter. In its specific application to same-sex practising people, it is also in violation of Articles 4, 5 and 6. Hence the recommended action is as follows:

• Articles 140, 141, 143 should be repealed to bring Uganda in line with the African Charter, international human rights standard and to ensure that equality before and of the law for lesbian, gay, bisexual and transgender persons in Uganda is respected.

Uganda's HIV/AIDS "Abstinence-until-marriage" policy has a harmful effect on same-sex practising people and directly affects their right to health as protected under Article 16 of the African Charter. Hence the recommended action is as follows:

• Policies should be amended to address the needs of same-sex practising people in the fight against HIV/AIDS.

The constitutional amendment on the Prohibition of Same-Sex Marriage stands in violation of Articles 2, 28 and 3 of the African Charter. The prohibition is redundant in Uganda given the illegality of homosexual acts and the already implicit Constitutional prohibition against same-sex marriage. Hence the recommended action is as follows:

• In order to bring Uganda in conformity with the African Charter, it is necessary that the Constitutional amendment be reversed. The International Gay and Lesbian Human Rights Commission and Sexual Minorities Uganda.It is reported has been developed

by the International Gay and Lesbian Human Rights Commission (IGLHRC) and Sexual Minorities Uganda (SMUG). SMUG is a Uganda- based network of several gay and lesbian groups working in Uganda to achieve equality and justice for lesbian, gay, bisexual and transgender (LGBT) individuals. They provide direct assistance and advocacy on behalf of Ugandan LGBT people who face human rights violations. IGLHRC is a US-based non-profit, non-governmental organization (NGO) whose mission is to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance. This chapter has been developed in response to Uganda's periodic report submitted to the African Commission on Human and Peoples' Rights (the Africa Commission) pursuant to Article 62 of the African Charter on Human and Peoples' Rights (the African Charter). The principal obligation of every State party to the African Charter is to recognize the Charter rights and to give effect to them by adopting relevant legislative and other measures. The presentation of a State's report to the African Commission, and the Commission's consideration of that report, also presents the international community with an opportunity for inspection of the State's compliance with its obligations under the treaty. This shadow chapter raises a number of critical issues of concern that Uganda's periodic report fails to mention. It makes no claim to provide a comprehensive or exhaustive list of issues with regards to the implementation of the African Charter in Uganda. Rather, it purposefully focuses on the specific concerns of LGBT people in Uganda and how specific human rights violations illustrate Uganda's failure to comply with its international obligations. Because Uganda has signed and ratified numerous international human rights conventions, its human rights obligations are clearly accessible. In addition to the African Charter1, Uganda is a State party to the International Covenant on Economic, Social and Cultural Rights (ICRESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Uganda's international obligations under these instruments are relevant in further clarifying its obligations under the African Charter. In interpreting and applying the Charter, Article 60 empowers the African Commission to "draw inspiration from international law on human and peoples' rights…as well as from the provisions of various instruments adopted within the…United Nations of which the Parties to the present Charter are members." Law Office of Ghazi Suleiman v Sudan specifically acknowledged the relevance of Article 60 by applying jurisprudence from the European Court on Human Rights and the Inter- American Court of Human Rights. In fact, several African Commission cases draw from jurisprudence decided in analogous regional human rights bodies.Uganda has also incorporated several protections into its domestic law, with several internationally recognised human rights paralleled in its Constitution.in its May 2006 report to the African Commission, Uganda states that it: "undertakes to honour treaty obligations and to this end endeavours to interpret the various articles contained in the covenant

[the ICCPR] in good faith with a view of realising each covenant's objectives." It furthermore states that the foreign policy of Uganda shall be based on the principles of respect for international law and treaty obligations and opposition to all forms of domination, racism and other forms of oppression and exploitation." In making these statements, Uganda has promised to meet international standards of respect for human rights. IGLHRC and SMUG commends this commitment but is concerned that there have been several sexuality-based human rights violations in Uganda that are illustrative of its failure to conform with international standards of respect for all citizens including sexual minorities.

Indeed, Uganda's report distinctly ignores the existence of any human rights violations against its citizens on the basis of sexual orientation and gender identity. The report is notably silent concerning LGBT rights. Given the prevalence of human rights violations on the basis of sexual orientation in Uganda, this silence seems at odds with the human rights situation on the ground.

Critical Issues in Uganda

The critical issues in relation to LGBT rights protection in Uganda fall under five areas of reform, namely:

Reform of impunity for torture and cruel, inhuman and degrading treatment.

Reform of the police system to ensure accountability for abuse of police powers.

Reform of Uganda's Penal Code to remove the discriminatory Articles 140, 141 and 143.

Reform of Uganda's HIV/AIDS "Abstinence-until-marriage" policy.

Reform of the same-sex marriage prohibition recently added to the Ugandan Constitution.

Impunity for Torture and Cruel, Inhuman and Degrading Treatment

Amnesty International has reported on cases of torture and cruel, inhuman and degrading treatment perpetrated against members of the LGBT community in Uganda. In its 2001 report "Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment based on sexual identity", Amnesty reports that one Ugandan lesbian human rights activist was tortured and raped in secret detention after being left alone in a room with three male detainees. The other members of her organization were also arrested and subjected to beatings, sexual abuse and degrading treatment such as being made to sleep in a toilet and clean it twice a day with their hands. The five members of this organization were released after two weeks of detention. Five years on, there has still been no governmental action to remedy the abuses that occurred. The United States Department of State has reported that although Ugandan law prohibits torture and other cruel, inhuman or degrading treatment, there have been

"credible reports that security forces tortured and beat suspects." This is particularly concerning for LGBT detainees. Given the propensity for torture and ill-treatment to occur in general, it is arguable that LGBT prisoners are increasingly susceptible to abuse. President Museveni has been particularly vocal in his condemnation of "abominable" homosexual acts and in 1999 he ordered the Criminal Investigations Department to "look for homosexuals, lock them up and charge them." State-sponsored media has similarly called for stronger measures against homosexual conduct. In July 2005, a writer for the government owned New Vision encouraged the government to crack down on homosexuality, writing "the police should visit the holes mentioned in the press, spy on the perverts, arrest and prosecute them. Relevant government departments must outlaw or restrict websites, magazines, newspapers and television channels promoting immorality including homosexuality [and] lesbianism." Such public comments create a climate of impunity for the ill-treatment of sexual minorities in violation of Article 5 of the African Charter.

The African Commission has held that Article 5 of the Charter prohibits "not only cruel, but also inhuman and degrading treatment [which] includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience." In Curtis Francis Doebbler v Sudan, the Commission held that whether an act constitutes a violation of Article 5 will depend on the circumstances of the particular case, but it also decided that "torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses." This broad interpretation of what behaviour is prohibited is also complemented by the Human Rights Committee's interpretations of the correlative provisions under ICCPR.

The Human Rights Committee's General Comment No. 20 established that the purpose of the prohibition against torture and cruel, inhuman or degrading treatment is to "protect both the dignity and the physical and mental integrity of the individual." The Human Rights Committee has also stated that the protection contained in Article 10 of ICCPR imposes a "positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty." However, given the protection contained in Article 5 of the African Charter is not limited to circumstances where persons are deprived of their liberty, it is clearly broader in its application. Furthermore, the Human Rights Committee has affirmed that even in times of public emergency, no derogation from Article 7 is permissible. This protection is mirrored in the African Charter, which allows no derogationfrom rights contained in the Charter.

The UN Special Rapporteur on Torture has specifically addressed the prevalence of the use of torture against sexual minorities. In his 2001 Report he outlined communications he had received where "members of sexual minorities have been subjected, inter alia, to harassment, humiliation and verbal abuse relating to their

real or perceived sexual orientation or gender identity and physical abuse, including rape and sexual assault." In particular, he expressed concern that "members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations."

In order to guarantee respect for Article 5 of the African Charter, as well as international human rights standards, Uganda should implement clear policies to address the current impunity for torture. It should specifically educate officials to end social stigma surrounding homosexuality which heightens same-sex practising peoples' vulnerability to torture and cruel, inhuman and degrading treatment.

Lack of Accountability for Police Abuse

In July 2005, Ugandan government officials raided the home of a lesbian human rights activist. Amnesty International and IGLHRC reported that local councillors in Kampala raided the woman's home in her absence. They seized documents and other materials – apparently looking for "incriminating material" – and arbitrarily arrested and detained another woman staying at the house. The councillors had no authority to take such action and no warrant was produced on request. The arrested woman was taken to the police station and subjected to humiliating and degrading treatment including being made to undress.

Almost one-and-a-half years after the incident, there has been no governmental investigation or action at any level to remedy the wrongs that occurred. The human rights activist is currently attempting to pursue a private suit and Uganda should ensure that both her and similarly situated individuals are guaranteed protection in making such claims.

In relation to ensuring this protection, it is relevant to note that the UN Special Rapporteur on Torture specifically states that "discriminatory attitudes towards members of sexual minorities can mean that they are perceived as less credible by law enforcement agencies or not fully entitled to an equal standard of protection." In addition, "members of sexual minorities, when arrested for other alleged offences or when lodging a complaint of harassment by third parties, have reportedly been subjected to further victimization by the police, including verbal, physical and sexual assault." Such statements reflect the situation in Uganda where the lack of police accountability translates to abuse of police power.

The aforementioned case provides a clear example of how Uganda is failing to uphold Article 6 of the African Charter. The basis of the search and the arrest is presumably the so called sodomy laws contained in Articles 140, 141 and 143 of Uganda's Penal Code. These laws have been used in Uganda to specifically target same-sex practising people and deny them of their right to liberty. Relevantly, the UN Working Group on Arbitrary Detention has recently declared that the detention

of eleven men in Cameroon on the basis of their presumed sexual orientation constitutes an arbitrary deprivation of liberty contrary to the ICCPR. The UN body further called on the government of Cameroon to adopt measures to remedy the situation, including the possible repeal of the offending laws. Given the existence of similar sodomy laws in Uganda, any detention made on the basis of such laws would be subject to the same finding.

Articles 140, 141 and 143 of Uganda's Penal Code have in fact been the basis of recent arrests. In September, Evangelista Ariel Ramos, a Philippino national, was reportedly arrested in Mbare along with Hamis Ssentongo, a Ugandan national under the sodomy laws. David Kamoga is being held in Kirinya Prison pursuant to the sodomy laws and Mutayi Vincent and Safari Joseph have recently been arrested in Kibye. The occurrence of such arrests has also forced many Ugandans to go into hiding in order to avoid their own arrests. Given the specificity of the UN Working Group's recent determination, it seems clear that Uganda would be subject to similar determinations in relation to these arrests.

Abuse of police power also comes in the form of extortion. Extortion is the single most common abuse facing gay men and lesbians in Uganda. IGLHRC and SMUG have documented dozens of cases of gay men and lesbians who have been forced to pay money to extortionists. Extortion usually takes the form of a threat by someone to inform police, family, school or employers about someone's sexuality. The police themselves often act as the blackmailer, and when they are not, they are still often complicit in the crime. The Ugandan Constitution has no guarantees for its citizens' protection from sexuality-based discrimination. In fact, laws against "carnal knowledge" and the new same-sex marriage prohibition in the Constitution send a clear message to the population that same-sex practising people have no enforceable rights. Without explicit protection of individuals against sexuality-related discrimination, extortionists operate with impunity.

Whether the victim pays the extortionist or not, blackmail leaves the victim demoralized and vulnerable. If the victim pays, the result may be financial bankruptcy, particularly if the perpetrator continues with demands for money. If the victim cannot or does not pay, the result can be loss of employment, housing, children, ostracism from family and the community, imprisonment or even death. Extortion can also take the form of demands for sexual favors—lesbian and bisexual women are at particular risk for this type of abuse placing them at increased risk for sexually transmitted diseases including HIV and unwanted pregnancies.

The government of Uganda should ensure that the police are held accountable for their acts and in particular ensure that extortion and arbitrary arrests are strictly prohibited.

DISCRIMINATION AGAINST MARGINALIZED GROUPS AND DENIAL OF EQUAL PROTECTION OF THE LAW

i. Legal Discrimination

Uganda's Penal Code criminalizes homosexual acts. Article 140 criminalizes "carnal knowledge against the order of nature" and imposes a maximum penalty of life imprisonment. Article 141 punishes "attempts" at carnal knowledge with a maximum sentence of 7 years imprisonment and Article 143 outlaws acts of "gross indecency", imposing up to 5 years imprisonment by way of penalty. Despite the clear-cut ruling of the Human Rights Committee condemning sodomy laws, Articles 140, 141 and 143 remain intact and indeed operational in Uganda.

The concerns related to these laws are numerous. One key concern relates to their discriminatory application to sexual minorities in Uganda. While the laws' language is gender neutral, rendering them potentially applicable to heterosexual acts as well, their application in reality is limited to same-sex practising individuals. As such, their existence amounts to discriminatory treatment prohibited under Article 2 of African Charter. Toonen v Australia established that States cannot abridge the human rights of their citizens based on sexual orientation, yet Uganda's sodomy laws continue to apply to a specific group of individuals solely on the basis of their sexual orientation.

The existence and application of these laws amounts to discrimination which is prohibited under Article 2 and 28 of the African Charter. While the African Commission does not have extensive jurisprudence outlining a clear interpretation of Articles 2 and 28, Article 60 encourages the consideration of international law and decisions from comparable human rights bodies in understanding the rights contained in the Charter. In determining the meanings of the analogous non-discrimination protections in ICCPR, the Human Rights Committee stipulates that "non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."30 While "discrimination" is not defined in ICCPR, the Human Rights Committee has drawn from the CERD and CEDAW to elucidate its meaning. The Committee has stated that "discrimination" under the ICCPR "should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion…or other status…which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

The categories of prohibited discriminatory grounds are broad. Importantly, the Human Rights Committee in Toonen v Australia interpreted references to "sex" in Articles 2(1) and 26 of ICCPR as including sexual orientation. It furthermore stated that any domestic law criminalizing private, same-sex sexual behaviour between

consenting adults violates the principle of non-discrimination. It is clear, then, that States cannot abridge the rights of their citizens on the basis of sexual orientation.

Complementary to the protection of non-discrimination contained in Articles 2 and 28, Article 3 of the African Charter outlines the protection of equality before the law. In Legal Resources Foundation/Zambia the Commission referred to the importance of the right to equality. Elaborating on this, the Commission noted that "citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all citizens." They further stated that "equality, or the lack of it, affects the capacity of one to enjoy many other rights." According to international human rights law, the right to equality before the law and the equal protection of the law is a broader, more expansive protection than its non- discrimination counterpart. Eminent legal theorist, Manfred Nowak, has stated that "the prohibition of discrimination for personal characteristics is merely one aspect of the substantive structuring of the principle of equality." While the requirements of Article 2 and 28 protects enjoyment of the African Charter rights, Article 3 applies to any legal right and is not restricted to those enunciated in the Charter. As a consequence, it seems clear that discriminating or denying equality before the law on the basis of sexual orientation is covered under international human rights law.

In particular, the Human Rights Committee decision of Young v Australia held that Australia had violated Article 26 of the ICCPR – the analogous equal protection clause under ICCPR – by "denying the author a pension on the basis of his sex or sexual orientation." In so doing, the Committee decided that a distinction made on the basis of sexual orientation, was a denial of the right to equality before the law. The Committee recalled its earlier jurisprudence of Toonen "that the prohibition against discrimination under Article 26 [also] comprises discrimination based on sexual orientation." 35 Furthermore, Young extended the application of Toonen, by applying a standard set in relation to a criminal law to the administrative matter of pension benefits. Such an extension demonstrates the importance for respect of equality in relation to sexual orientation.

Sodomy laws are not only inherently discriminatory, but they also foster a climate of social discrimination against LGBT persons. As demonstrated by the complainant in Toonen v Australia, the criminalization of homosexual acts "fuels discrimination and violence against and harassment of the homosexual community." This has indeed been the case in Uganda, where several human rights organizations have documented a "climate of hostility and prejudice against members of the LGBT community." Indeed, the United States Department of State noted that "homosexuals faced widespread discrimination and legal restrictions" in Uganda in 2005. Furthermore, the UN Special Rapporteur on Torture has specifically noted that "discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture

and ill-treatment to take place." The legal proscription of homosexuality acts as badge of legitimacy allowing discrimination against same sex practising men and women to continue to occur.

Toonen also held that the Tasmanian sodomy laws violated Article 17 of the ICCPR – the right to privacy. While there is no analogous textual provision for the right to privacy under the African Charter, the African Commission should perhaps emulate the international standard set in the Human Rights Committee decision. The Committee held that it was "undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'." It further held that the sodomy law was "arbitrary" in its failure to be "proportional to the end sought and necessary in the circumstances." Notably, the Committee rejected Tasmania's argument that the criminalization of homosexual practices was a reasonable and proportionate measure to "achieve the aim of preventing the spread of HIV/AIDS" and to preserve morals. Importantly, the Committee also held that despite the law having not been used in 10 years, its "continued existence…continuously and directly 'interferes' with the author's privacy." This is particularly relevant since Ugandan laws are actually enforced and thus clearly fall within the scope of the Human Rights Committee's decision.

ii. Social Discrimination

On July 27 this year, Martha Gabula, a high school student, died in hospital after allegedly being assaulted by her teacher, Noah Nawagali. While the facts of the case remain unclear, it seems that Gabula was attempting to commit suicide after being accused by fellow students of lesbianism. Newspaper reports describe the teacher as beating Gabula in order to extract information from her on whether she had taken an overdose of chloroquine. Information reported to Kiira Road Police suggests that the "teacher…beat Martha so heavily that she later died at Mulago Hospital." Nawagali has been arrested in connection with Gabula's death.

Despite the lack of clarity in relation to the exact course of events, it seems undeniable that the accusations about Gabula being a lesbian played a significant role in her eventual death. In a society where the State criminalizes sodomy and discrimination and marginalization of sexual minorities is widespread, this case is a demonstration of the dangerous ramifications associated with being gay, or being perceived as gay. It is an illustration of how State-sponsored discrimination can result in the denial of the right to life and is thus demonstrative of a failure to respect Article 4 of the Charter.

The Article 4 protection of the right to life and the inviolability of the human person is arguably the most significant of all human rights protections. The Commission has called it "the fulcrum of all other rights…the foundation through which other rights flow." Gabula's death is a tragic illustration of the effect State-sponsored discrimination.

In order to take steps to eradicate all forms of discrimination and act in conformity with established international human rights standards, Uganda should immediately repeal the so-called sodomy laws.

Abstinence-until-Marriage" Policy and the Right to Health

Uganda's new and exclusive focus on abstinence-until-marriage HIV/AIDS prevention programming deny young people information about any other method of HIV prevention. In particular, there are no HIV/AIDS policies in Uganda that specifically address the particular concerns of same-sex practising people. Indeed, President Museveni has publicly condemned condoms as inappropriate for Ugandans, an action that is particularly harmful for same-sex practising people. Furthermore, restricted access to treatment and information regarding HIV transmission has increasingly excluded the LGBT community. In November 2004, the government of Uganda warned UNAIDS not to assist sexual minorities in organizing a campaign reaching out to the members of the LGBT community to stem HIV infections.

The "Abstinence-until-Marriage" policy reflects inherent social discrimination and marginalization of LGBT people in Uganda and thus has a detrimental effect on their ability to achieve the right to health. Ugandans are denied access to treatment and services on the basis of their perceived or actual sexual orientation which indisputably results in disproportionate HIV/AIDS awareness and treatment compared to their heterosexual counterparts. This government-sponsored lack of awareness may lead to the proliferation of unsafe sexual practices and increased HIV rates among the same-sex practising population. By continuously denying that homosexuality exists in Uganda, the government is implementing discriminatory and harmful HIV/AIDS policies that will deleteriously affect same-sex practising people and their achievement of the right to health in violation of Article 16 of the African Charter. Social Economic Rights Centre (SERAC) and Others v Nigeria has specifically held that the right to health "obligates governments to desist from directly threatening the health…of their citizens." In particular, governments must "desist from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual." The UN Committee on Economic, Social and Cultural Rights has also elaborated on the importance of the right to health: "health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."

Clearly, policies that deny access to treatment and information regarding HIV transmission are "directly threatening the health" of Uganda's citizens.

Incursions on freedom of expression contained in Article 9 of the African Charter also have a deleterious effect on the realization of the right to health. The government of Uganda has recently silenced the discussion of gay and lesbian rights and issues.

A radio station that hosted a lesbian and two gay men on a talk show was fined 1.8 million shillings (more than US$1,000) by the governmental Broadcasting Council. The guests were discussing issues of concern for same sex practising people in Uganda – including LGBT specific HIV/AIDS concerns – and calling for the repeal of the sodomy laws. The silencing of discussion in relation to these kinds of issues, not only impinges on the freedom of expression, but also denies Ugandans information about essential health related issues.

The Committee on Economic, Social and Cultural Rights states that "information accessibility" is an essential element of the human right to health. Recognizing the importance of information accessibility, the Committee also interpreted the right to health to include the "right to seek, receive and impart information concerning health issues." Furthermore, the Committee has affirmed that States must refrain from "censoring, withholding or intentionally misrepresenting health-related information, including sexual education information." Nevertheless, Uganda is doing little to ensure that same-sex practising people have access to information on HIV prevention, treatment and care. In fact, Uganda has stifled attempts to disseminate relevant information.

The government of Uganda should review its HIV/AIDS policies to specifically address the needs of men who have sex with men and women who have sex with women thereby ensuring the adequate protection of the right to health.

Same-Sex Marriage Prohibition

On July 6 2006, the Ugandan Parliament amended Article 31 of the Constitution to prohibit same-sex marriage. The text of Article 31 already contained an implicit prohibition against same-sex marriage by stipulating that "marriage shall be entered into with the free consent of the man and woman intending to marry." The Article now explicitly prohibits same-sex marriage by stating that "marriage is lawful only if entered into between a man and a woman." It further specifies that "it is unlawful for same-sex couples to marry" and a Parliamentary spokesperson has noted that criminal sanctions for engaging in such marriages will be imposed in the future.

Given the already implicit prohibition against same-sex marriage and the criminalization of homosexual acts, this Constitutional amendment was unnecessary and redundant and therefore raises concern about invidious discrimination. Indeed, human rights activists have argued that "new criminal penalties against people who dare to marry can only have one purpose: to codify prejudice against same-sex couples." Its existence is thus a violation of Articles 2, 3 and 28 of the African Charter.

In order to comply with Articles 2, 3 and 28 of the African Charter, Uganda should reverse the constitutional amendment banning same-sex marriage.

Conclusion

Uganda has been a State Party to the African Charter for 20 years. It is plainly bound by the requirements of Article 1 to "recognise the rights, duties and freedoms enshrined in the Charter and…to adopt legislative or other measures to give effect to them." Yet this report illustrates the extent to which the country is failing to comply with its obligations under the African Charter. Central to human rights protections is the principle of non- discrimination and equality before the law. In Uganda, a climate of social and state- sponsored discrimination has developed to exclude same-sex practising people from the enjoyment of basic human rights on an equal footing with their heterosexual counterparts. This denial has in some cases culminated in serious violations including arbitrary arrest, invasions of the right to privacy, and impunity for the use of torture, inhuman and degrading treatment.

There are many areas where Uganda's actions in relation to LGBT persons are clearly sub-standard. Below are some areas on which the African Commission may request detailed and more accurate information from Uganda when it examines the State's periodic report:

• The failure of the Ugandan government to protect against the use of torture and cruel, inhuman or degrading treatment.

• The failure to protect the right to liberty and freedom from arbitrary arrests through allowing police to search homes and arrest individuals without warrants.

• The justifications for maintaining Articles 140, 141 and 143 of the Penal Code given its inconformity with the African Charter and international human rights law.

• The justification for outlawing same-sex marriage given its already implicit prohibition in Uganda.

• The discriminatory HIV/AIDS policies which are disproportionately harmful to LGBT person.

Justiciability of surrogacy in Uganda.First and foremost, I write this thesis with full knowledge about the absence of a specific law guaranteeing a right to health and more so, that the National Objectives which would have sufficed to give rise to such a right, may also not be justiciable but nevertheless, I also believe in judicial activism as an important gateway to achieving the desired effect under the above national objectives.

Objective xx states that "The State shall take all practical measures to ensure the provision of basic medical services to the population." This shows a deliberate attempt by government to preserve and recognize the right to health but of which

such a right is not expressly guaranteed under the provisions of the 1995 constitution. The challenge arises that in Zachary Olum & Another v Attorney General, it was accepted the same way did Justice Egoola Ntende that though such objectives are part of the constitution and are aids to construe the same, yet they are not justiciable. This noted therefore, the justiciability of the National Objectives remains in question even after the Article 8A (1) in the 2005 constitutional amendment since clause 2 which would operationalize clause 1, is not yet implemented by parliament.

Regardless, I move to say that in the absence of a specific law recognizing the right to health, the courts have gone ahead to rely on civil and political rights to advance the broader right to health in numerous cases, an example of such a case is CEHURD and 2 Ors v The Executive Directive Director Mulago Referral Hospital and the Attorney, where Justice Lydia Mugambe held that denying the parents of the child the opportunity to bury their baby, was a violation of their right to health in contravention of objectives XX and XIV (b) of the Constitution, in addition to Article 12 and Article 16 of the ISECR and the African Charter respectively which guarantee the right to health. This judgement is important because it demonstrates judicial activism where judges have relied on civil and political rights which are well defined in the Constitution to protect the right to health.

In the same vein, I can authoritatively state that the lacuna created by absence of a specific law permitting surrogacy agreements in Uganda is sufficiently covered the operation of judicial activism in the manner envisaged by Justice Lydia Mugambe in the E.D of Mulago case.

TOMORROW'S DILEMA

Patentability of Genes.

In instances where for instance, body organs have been held out for commercial realization benefits, it is inevitable to meet logger heads with issues of "who owns what and why?" this is imminent because at a certain point under a surrogacy practicing environment where we see sperm banks being depots for surrogacy purposes, a vigilant activist would wish to exercise their claim by for instance seeking a benefit or compensation from commissioning parents for his/her genetic contribution. Take an example; a commissioning spouse could be known for giving birth to albinos and owing to the gene contribution of a surrogate, this fact is escaped.Can this surrogate later claim an award for their fortune occasioned upon the commissioning parents?

Arguments for this are not only built in surrogacy but also owing to prevalent issue of blood sale and donation, sale of body organs, among others which could form grounds for future litigation. A question will arise on; Whether a surrogate mother or a sperm donor can attain copyright over their DNA and thus seek an award therefrom?

First of all, a gene patent is the exclusive rights to a specific sequence of DNA (a gene) given by government to the patent holder. The later can be an individual, an organization or corporation who claims to have first identified the gene.

Prior to 2013, about 4,300 human genes had been patented in the US. This meant that the holder of patent would dictate how the gene could be used, in both commercial settings such as clinical genetic testing and in noncommercial settings including research, from 20 years from the date of the patent. The position changed in the case of Association for Molecular Pathology v. Myriad Genetics, Inc where the supreme court of the US rejected the notion that human genes should be patented. The court rejected such patent with a view that DNA is not patentable since it is a product of nature. It is important to note that among the considerations for granting any patent is that the applicant must have created something new or added something new to the already existing. This therefore means that patent cannot be granted over a human gene since nothing new is created apart when discovering the gene. However, the court found that complementary DNA's can be patented since there is a modification of the existing. The standpoint therefore remains that things which are products of nature cannot be patented. Patenting such would lead to monopolization of genes which would hinder research and also slow down medical results.

The "baby selling" impasse

There has been a continuous belief by some members in surrogacy practicing nations that the monetary compensation to a surrogate mother cannot survive being termed "baby selling" and which practice would be both immoral and unlawful. The second issue lies in computing the amount of compensation to a surrogate mother.

Should there be a standard compensatory amount? and If standardized, would surrogacy not be viewed as a commercially viable business for women and male donors? and if all answered in this positive, where does this leave the morals of Uganda? in an instance where surrogacy institutions form the revenue base bearing in mind Uganda's traditional centeredness.

Am drawn to allude to the words that "you cannot uproot a tree in London and plant it in African soil, expecting it to grow normally".In my opinion, if not rotted by the soil, (the law) it would be suffocated by the surrounding weeds (the customs). Compensated Surrogacy is the practice in which the surrogate receives compensation for the reproductive care she provides beyond reimbursement for reasonable direct expenses(also known as commercial surrogacy). The standard price for surrogacy compensation in Uganda remains unsettled but a 2005 precedent has it that it goes for about 4.5 million (16 years ago) and considering economical changes, the price currently must be doubling. Standardizing the compensation amount has a moral effect of permitting what is viewed as "baby selling" and also an effect of failing the parties' freedom of contract.

What constitutes the surrogacy cost? The compensated amount may include the cost of paying agents or brokers for their service, the cost of advertising by the agency, matching, carrier screening services, background checks, creating an intended parent's profile, counselling, education and support to both parties, coordinating and overseeing the surrogacy process health wise, legal services, medical expenses i.e. paying for IVF treatments, surrogate compensation and reimbursement, matching services do well to establish a relationship between the surrogate and intended parents. The cumulative cost of such surrogacy compensation in for instance America goes for about $75,000m- $125,000 which in Uganda shillings, the former amounts to approximately 270m but of course not all these facilities are given or affordable in Uganda hence the price will be so much lower. The moral question of "baby selling" has finally been answered thus;

In any case, as the cost of surrogacy goes high, practitioners need to take into account the growing competition from the ongoing sale of body organs. Where does the ongoing sale of body organs leave the practice of surrogacy?

Organ trafficking poses a potentially strong alternative to surrogacy practice which I believe will be cheaper, child friendly and less burdensome to courts of law in regards questions of parentage, adoption and the best interests of a child. In 2011, a uterus transplant was witnessed of a one Turk Derya Sert, which now provides an option for those born without a uterus as cases have been reported in Uganda. The natural attachment of a mother to their fetus will groom a better concern, care and obligation to raise a child genuinely than what is possible for an adopting parent. Recently, 62 Ugandan medical officers have been probed over sale if human organs to the global black market not forgetting that dozens of illegal transplants have been carried out within. Often times, transplants have been done on people with end-stage kidney failure but as the situation seemingly turns commercial, other body organs like too are reportedly on sale, which could facilitate an alternative to surrogacy. In my finding, I have encountered a kidney sale at Ushs. 130 million in 2019, which is somewhat fair price. The challenge is how they are done illegally and as a 2021 UN report reads that young girls are given about Ushs. 300,000- shs. 500,000 for selling their organs to Ugandan middlemen who resell them at 10 million. The sluggishness of law makers to appreciate this practice and enact a law thereto would in turn cause health risks and genetic inflammations owing to absence of standardized facilities to operate such transplants.

The future of national law. Criminal law and national health policies would ordinarily operate to prohibit all parties in the illegal organ trafficking and surrogacy transaction but there remains a confusion where some participate knowingly while others do so unknowingly. The profile of culprits in the process is also a confusion that would encompass the real people living on criminal trafficking, doctors, ambulance drivers, legitimate medical professionals who may not intend to participate in the offence. In

response, the UN has formulated the Trafficking in Persons Protocol supplementing the Transnational Organized Crime Convention which is concerned with trafficking of persons for organ removal. This means that in an instance that surrogacy and organ trafficking remain operating in the backstage, national criminal law too will encounter a need to adjust accordingly and formulate deterrent rules or else, gliding rules shall need to be made to direct the operations. Various national laws including but not limited to the contracts Act 2010, the Sale of Goods and Supply of Services Act 2017 (for instance section 2 which defines a "good") will need to be amended to encompass body organs such as uterus, liver, kidney among others as within the meaning of the term "goods."

More to this, reports show that in 10 years to come, human kind will be capable of manufacturing a synthetic human from building a synthetic genome out of human nucleotides and if this is so, commercial surrogacy will experience a boost given "my imagination" that a person can own an artificial person as property which will where possible be used in surrogacy to do the "hectic work" of carrying the embryo and giving birth to a child which shall automatically belong to the owner of the artificial person (only thinking out loud.

The moral dilemma

Others go deeper in the religious precincts and say that the practice of traditional surrogacy where a woman's spouse would have intercourse with another woman outside their marriage is detrimental to the sanctity of marriage and whether permitted by the spouse or not, is an adultery which is potentially harmful to the marriage's survival. Therefore the future of surrogacy in Uganda stands at a verge of condemnation from the Christian fraternity. In justifying this conclusion, it is alleged that surrogacy "places children at risk and is not in their best interests or those of society at large," "has the potential to undermine the dignity of women, children, and human reproduction by commercializing childbearing." Considering this analogy, it is most probable that surrogacy will face this as a thorn in the neck of its durability.

The DNA dominance factor.Intended parents might abandon disabled children.The intended parents may have a tendency to claim dominion over certain genetic benefits stemming from their family DNA and may in so doing reject a child for failure to possess a specified appearance common from their family DNA. a couple may claim that their DNA only produces tall children and so they have no responsibility over the short or short-nosed. Take for instance, the US Task Force were met with a challenge where a disabled child was abandoned by its intended parents in one case, when a fetus was diagnosed with Down syndrome and the intended parents told the surrogate to abort the fetus. When the surrogate refused to abort, the intended parents relinquished any claim to the child. This poses a bad position in Uganda where abortion is illegal. The question of patenting human DNA has been settled in the negative but nevertheless, the challenge would lie in such DNA related matters that affect a resultant child's appearance. The surrogate nonetheless gave birth to

the child, and she and her partner took custody of and assumed responsibility for the child. While any parent, regardless of how the child was conceived, could choose to relinquish their child due to the child's disability, surrogacy laws must proactively address this risk. Under the CPSA, the intended parents are legally obligated to accept custody of the children immediately upon birth regardless of number, gender, or mental or physical condition and agree to assume sole responsibility for the resulting children.

In a nutshell, any researcher can only discuss what they find but could never encompass all scenarios nor imagine all the future developments. Nevertheless, here's an attempt to look through the shorter lenses to the future and so many developments lie ahead in the fate of surrogacy practice in uganda and globally which are incapable of conclusive summary. The few I can imagine are deemed to form my submission; "Tommorrow's Dilema.

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APPENDIX A

PRENUPTIAL AGREEMENT
PRENUPTIAL AGREEMENT
OFJOHN KINTU AND JANE KINTU

****

On the day of.....,20.....,JOHN KINTU, residing at..... ..... ; and JANE KINTU, whose address is, , in contemplation of their future marriage, have entered into an Agreement with respect to such marriage for the following reasons and with reference to the following facts:

ARTICLE I. PURPOSE:

Intent to Define Property Rights

It is the desire of the Parties that conflicts regarding financial matters be minimized in the planned marriage, and this agreement is intended to prevent such conflicts. The Parties desire to make reasonable and sufficient provisions for each other, all of which are set forth herein, in release of and in full satisfaction of all rights which, after the solemnization of the marriage, they might or could, by reason such marriage, have in the property which each now owns or may hereafter acquire, and the liabilities each of the Parties may now owe or hereafter incur. The Parties desire to fix and determine by this agreement the rights and claims that will accrue to each of them in the estate and property of the other by reason of the marriage, and to accept the provisions of this agreement in lieu of and in full discharge, settlement, and satisfaction of all such rights and claims.

ARTICLE II. RECITALS:

Children By Previous Marriage

2.01 JOHN KINTU was formerly married and has two surviving children, namely,.....and.....

2.02 JANE KINTU was formerly married and has three children,

namely,.....and.....

2.03 By entering into this agreement, the Parties assume no responsibility for the maintenance, support, education, or health of children of the other Party which are not of this marriage.

2.04 Disclosure of Property.

JOHN KINTU, has made a full and complete disclosure of the nature, extent and probable value of all the real and personal property and other assets, tangible and intangible, that he owns and wishes to remain his separate property. A list of the real and personal property owned by JOHN KINTU, designated as Exhibit "A", including any encumbrances, is attached to and made a part of this Agreement. The estimated gross market value of the real and personal property owned by JOHN KINTU is shown for each item listed in Exhibit "A". Included on Exhibit "A" is a list showing the approximate balance owing on each debt of JOHN KINTU. Regular recurring obligations which are paid on a monthly basis are not included as debts.

JOHN KINTU specificallywaives, relinquishes and releases any right to make a claim for reimbursement or equitable interest on behalf of the community estate or his separate estate against the separate estate or separate property of JANE KINTU. JANE KINTU specificallywaives, relinquishes and releases any right to make a claim for reimbursement or equitable interest on behalf of the community estate or her separate estate against the separate estate or separate property of JOHN KINTU.

JANE KINTU has made a full and complete disclosure of the nature, extent and probable value of all the real and personal property and other assets, tangible and intangible, that she owns. A list of the real and personal property owned by JANE KINTU, designated as Exhibit "B", including any encumbrances, is attached to and made a part of this Agreement. The estimated gross market value of the real and personal property owned by JANE KINTU is shown for each item listed in Exhibit "B". Included on Exhibit "B" is a list showing the approximate balance owing on each debt of JANE KINTU. Regular recurring obligations which are paid on a monthly basis are not included as debts.

As reflected in the written Waiver of Disclosure of Financial Information signed in accordance with section 4.006 of the Texas Family Code, each Party expressly waives in this written instrument any right to disclosure of the property or financial obligations of the other Party beyond the disclosure provided in this instrument. The Parties to this Agreement understand that the figures and amounts given above are approximately correct and not necessarily exact, but are intended to be reasonably accurate.

While the Parties have made a good faith effort to list all of their separate property assets and liabilities, the Parties agree that any omission of an item KINTUs not preclude a Party from later claiming its separate property characterization. The Parties have tried to use the correct legal description for each asset listed in any schedule attached to this agreement. If any asset is incorrectly described, the description used is adequate for the purposes of this agreement and accompanying schedules, and the Parties agree to execute any additional paperwork required to confirm ownership in

the name of the Party in whose schedule the asset appears.

2.05 Agreement Conditioned on Marriage.

The property owned by the Parties, as disclosed above, is listed for disclosure purposes, only, and the listing of such property is not regarded by either Party as an inducement to enter into this Agreement or the marriage. The Parties agree that the property listed above and all increases in value of all such property (including but not limited to increases resulting from the time, talents, efforts and labor of either or both of them) shall remain the separate property of the Party owning it. The Parties agree that they will use their best efforts to keep the property of the Parties as separate property by any means necessary, including not commingling it with community or marital property. Notwithstanding the foregoing, any commingling of such property shall not be deemed a waiver of the separate ownership of such property, except as may be specifically provided below in Section 3.16.

Except as otherwise specifically provided in this Agreement, to the extent that either has or would have in the future any rights, whether legal or equitable, in relation to the separate property of the other (including but not limited to increases in its value and the income it produces), those rights are specifically waived and released to the Party owning the property. The omission of any property or debt from either schedule is inadvertent and, for all purposes of this Agreement, any property or debt omitted is deemed to be included. The Parties agree that each of them shall retain full possession, control, and management of his or her separate property.

The Parties enter into this Agreement in consideration of marriage. The effectiveness of this Agreement is expressly conditioned on the occurrence of such marriage. This agreement is void following its execution if the Parties are not married within ninety days.

JOHN KINTU admits and acknowledges that each Party has been represented by independent legal counsel in the negotiation of this Agreement. JOHN KINTU, further acknowledges that he freely chose J. MARK SSEKANA to act as his own legal counsel, that he has read this Agreement, and that his counsel has explained to him the meaning and legal consequences of the Agreement, and that he fully understands the Agreement.

JANE KINTU admits and acknowledges that each Party has been represented by independent legal counsel in the negotiation of this Agreement. JANE KINTU further acknowledges that she freely chose MWESIGWA JOSHUA to act as her own legal counsel, and that she has read this Agreement, and that her counsel has explained to her the meaning and legal consequences of the Agreement, and that she fully understands the Agreement.

ARTICLE III. AGREEMENTS:

Separate Property to Remain Separate Property. All separate property of a respective Party existing at the date of the marriage between the Parties, and all appreciation and increments thereon occurring after the marriage date, shall be and constitute the separate property and estate of such respective Party.

Separate Liability To Remain Separate Liability. All separate liabilities of a respective Party existing at the date of the marriage between the Parties, make payments on separate property, operate separate property, or improve, maintain, or repair separate property, shall be and constitute the separate liability and separate obligation of such respective Party. The Parties agree that only the respective Party's separate property shall be subject to satisfaction of such separate liabilities of the respective Party.

Income from Separate Property To Constitute Separate Property. All income, including, but not limited to, interest, rents, dividends, stock splits, salary, trust distributions, permutations, increases or benefits, bonuses, or other distributions or increases in value of any kind or nature, which is derived from the separate property of either Party shall be and constitute the separate property of the respective Party who owns the property producing such income.

Earnings of JOHN KINTU and JANE KINTU To Constitute Separate Property. All Personal Service Earnings or incomes which are the product of JOHN KINTU's or JANE KINTU's labor, employment, or occupation will constitute the separate property of the Party to whom such earnings or incomes are paid. As used in this Premarital Agreement, "Personal Service Earnings" shall be broadly construed to mean all money, property, and benefits received by a Party as a result of their personal services, time, toil, and effort, and shall include, by way of example but not limitation, wages, salary, bonuses, retirement benefits, expense allowances, expense reimbursements, payment of expenses, commissions of any and all kinds and vacations.

Contributions to Retirement Accounts. All contributions, including, but not limited to, interest, employee contributions, employer contributions, paycheck deductions, deposits, permutations, increases or benefits, bonuses, or other distributions or increases in value of any kind or nature to any type of retirement account, including, but not limited to, individual retirement accounts, 401(k) plans, profit sharing plans, pension plans, self employed pension, Keogh, whether occurring before, on or after the marriage date shall be and constitute the separate property of the participant or owner of such retirement account.

Confirmation of Separate Property. In no way limiting the foregoing, the following property will remain the separate property of the Party who owns the separate property:

Property that is traceable to separate property owned before marriage;

Property that is acquired during the marriage from separate funds;

Property that is received in exchange for separate property;

Property that is purchased with proceeds of sale of separate property;

All increases of, including but not limited to increases resulting from the time, talents, efforts and labor of either or both of them, and income from, separate property;

All earnings, compensation, distributions, and income of every type from the listed assets attached as Exhibits A and B received by a Party prior to or during the marriage; and

All other property of every type whatsoever received or acquired by a Party during the marriage, except as provided for in Section 3.16 regarding ownership of joint bank accounts and other jointly purchased property.

Credit Obligations. Unless otherwise specifically agreed in writing by the Parties at any time, all contract or credit obligations of either Party existing prior to the marriage and those incurred by either of them alone after the marriage shall be separate obligations of that Party payable out of his or her funds. Any property purchased through the use of credit, will be the separate property of the Party in whose name title is taken, or if there is no evidence of title, such property will be the separate property of the Party making the credit transaction. Unless otherwise agreed in writing by the Parties at any time, the separate property of a Party existing at any time after the marriage (whether or not acquired before the marriage) shall not be liable in any way for the separate contract or credit obligations of the other Party, including but not limited to those that were in existence before the marriage (including those obligations that are renewed, extended, or renegotiated after the marriage).

New Credit Obligations. The Parties agree that each of them may enter into new credit transactions or extend, renew, or renegotiate credit existing prior to the marriage without the express approval or joinder of the other Party. If either Party, without the joinder of the other Party, enters into a transaction (or acts with respect to a transaction or any credit existing prior to the marriage) where credit is extended to (or renewed for) him or her or if he or she becomes liable or obligated for the repayment (contingent or otherwise) of credit extended by a third Party, then those liabilities or obligations (including penalties, interest, costs, attorney's fees, or other charges relating to them) shall be satisfied entirely from his or her separate property. In that connection, the Parties agree to advise interested third Parties that any liability or obligation of that nature is not a community or marital liability or obligation and is his or her separate property liability or obligation. The Parties further agree to

cause any documentation relating to those transactions to clearly reflect the separate character of the obligation or liability. In consideration of that Agreement, the Parties agree that the assets, if any, acquired without the other Party's express approval or joinder in the transaction shall be the separate property of the Party obligating his or her separate property in the transaction, unless the Parties agree otherwise in writing at the time the credit is extended.

Judicial Determination of Joint Debt. The Parties agree that in the event a creditor shall judicially establish joint liability for a debt incurred by one spouse, the spouse incurring the liability agrees to reimburse the other spouse in the amount of such liability if paid by the spouse not incurring the debt.

Indemnification. Notwithstanding any provision of this Agreement to the contrary, each Party agrees to indemnify and hold the other Party harmless of and from any and all claims, loss, damage, and expense (including, but not limited to, court costs and attorneys' fees) arising as a result of or in connection with (i) any act or failure to act of the indemnifying Party which occurred prior to the marriage or any contract, credit arrangement, or other Agreement which the indemnifying Party entered into prior to the marriage; (ii) any act or failure to act of the indemnifying Party which occurred following the marriage unless the other Party participated in the act or omission; and (iii) any contract, credit arrangement, or other Agreement which the indemnifying Party entered into after the marriage unless the other Party expressly consented in writing to be bound by the contract or Agreement.

Agreement to Partition Property. The Parties agree that all property they may acquire during their marriage when traceable to the listed assets on Exhibits A and B, which property would otherwise have been community property by operation of Texas law, or marital property subject to equitable division under the law of any other state, will be partitioned automatically by operation of this agreement into separate estates, except for jointly purchased assets as described in Paragraph 3.16 below. The property will be partitioned to the Party who earned it, or to the Party whose separate property funds contributed to its acquisition.

Agreement Regarding Income From Separate Property. The Parties agree that all of the income, increase in value, or property derived from all of each Party's separate property will be the separate property of the owner-spouse. This provision applies to the separate property the Parties own prior to marriage and to separate property that may be acquired during the marriage.

Payments and Improvements on Separate Property. The Parties agree that if either Party uses his or her own separate funds to make any payment toward the purchase of the other Party's separate property, or either Party uses any funds which he or she has any interest in to make a payment toward the purchase of the separate property

of the other Party, the property so paid for will remain entirely the separate property of the owner-spouse. The Party making such payment using his or her separate property will not be entitled to reimbursement. Such payments will be considered entirely a gift to the owner of the separate property.

Improvements to Separate Property. The Parties agree that if either Party uses his or her own separate funds to make any improvement on or to the other Party's separate property, or either Party uses funds in which he or she has any interest to make any improvement on the separate property of the other Party, the property so improved will remain entirely the separate property of the owner spouse. The Party making such improvement using his or her separate property will not be entitled to reimbursement. Such payments will be considered entirely a gift to the owner of the separate property.

No Intention To Create Community Property. The following events may not, under any circumstances, be considered evidence of any intention to create community property, but are not intended as an exclusive list:

the filing of joint tax returns;

the taking of title to property, whether real or personal, in joint tenancy or in any other joint or common form;

the designation of one Party by the other Party as a beneficiary of his or her estate or as trustee or any other form of fiduciary;

the combining or mixing by one Party of his or her separate funds or property with the separate funds or property of the other Party, including the pledging of joint or separate credit for the benefit of the other Party's separate estate;

any oral statement by either Party;

any written statement by either Party, other than a written agreement that contains an explicit statement of the Party's intent to change the Party's separately owned property into community property;

the payment from the funds of either Party for any obligations, including but not limited to the payment of mortgages, interest, real property taxes, repairs, or improvements on a separately or jointly held residence; and

the joint occupation of a separately owned residence, even though designated as a homestead.

3.16 Joint Accounts and Other Jointly Purchased Properties.

Joint Property. The Parties hereby agree that during marriage, they may from time to time, by mutual agreement, have the opportunity to acquire jointly owned property, either as jointly owned separate property or as community property. The Parties hereby agree that if property is acquired by both Parties' credit and is taken in the names of both Parties, and if both Parties sign their names to the document creating the liability, the Parties shall own such property as community property, unless they both declare in writing that they are holding the property as separate property, in which event any such property will be owned by each Party equally as equal separate property.

Joint Accounts. It is anticipated that during the marriage the Parties may create one or more accounts in financial institutions in joint names in which they may put Personal Service Earnings and for which either Party will have the right to withdraw for ordinary and customary living expenses. The Parties hereby agree that any funds in this account will be owned as community property.

Personal Items. Notwithstanding anything herein to the contrary, it is agreed that all personal clothing, jewelry, sporting goods, and items of adornment will be the separate property of the person who ordinarily uses or enjoys such property without regard to the source of the funds used to acquire such property.

3.17 Mutual Release of Marital Rights. Both Parties mutually agree that each Party waives, discharges, and releases any and all claims and rights, actual or contingent, that he or she may acquire in the separate property of the other by reason of their marriage. The waiver of interest in the other Party's separate property includes any and all claims or rights either Party would have under Texas law or the law of any other State, as a result of dissolution of the marriage, by the death of one of the Parties, or divorce. The provisions of this agreement are not intended to adversely affect the right of any child of this marriage to child support. The claims and rights that are hereby waived and released include but are not limited to the following:

The right to a family allowance;

The rights or claims of dower, curtesy, or any statutory substitutes therefor as provided by the statutes of the state in which the Parties, or either of them, may die domiciled or in which they may own real property;

The right of election to take against the Will of the other;

The right to a distributive share in the estate of the other should he or she die intestate;

The right to act as administrator of the estate of the other;

The right to any form of spousal maintenance or alimony, during or following the dissolution of this marriage; and

The right to act as guardian of the estate and/or person of the other unless designated as guardian pursuant to the Texas Probate Code.

Property Management. JOHN KINTU, will have sole and exclusive management of his separate property. JANE KINTU will have sole and exclusive management of her separate property. Each Party reserves the right to dispose of his or her respective separate property by any method, including by gift, will or other testamentary instrument, and reserves the right to sell, mortgage, or otherwise deal with his or her separate property without consulting the non-managing spouse. Neither Party is obligated to give, devise, bequeath, transfer or convey his or her property, whether separate, community, or marital, to or for the benefit of the other Party or his or her children.

Agreement to Join in Execution of Other Instruments. Both Parties to this Agreement covenant and agree that they will willingly, at the request of the other Party, or at the request of his or her successors or assigns, execute, deliver and properly acknowledge whatever additional instruments may be required to carry out the intention of this Agreement, and will execute, deliver and properly acknowledge any deeds or other documents necessary to effectuate this Agreement.

Invalid Provisions. The Parties agree that if any portion of this Agreement is held invalid or unenforceable for any reason, the remainder of the Agreement will remain in full force and effect.

Term of Agreement. This Agreement will terminate when the marriage terminates, whether by divorce, annulment or death. The Parties reserve the right to terminate this Agreement by mutual written Agreement.

Division of Property in Event of Divorce. The Parties that, although Texas courts are required to divide the property of divorcing couples in a manner they deem just and fair, if they own no community property at the time of divorce, there will be no property for the court to divide, and thus neither Party will be entitled to receive any property as a result of a court-ordered division of their estates. In the event that the marriage of JANE KINTU and JOHN KINTU is dissolved by divorce, the Parties hereby agree that each Party shall receive (a) all separate property belonging to that Party; (b) all income, revenue, or property from separate property; and (c) one-half of all community assets, if any.

Wife's Surname. JANE KINTU reserves the right during the marriage to retain the use of her surname, "KINTU" for any or all purposes as she in her absolute and unfettered discretion may determine.

Gifts Between Parties. Nothing contained in this Agreement shall preclude one Party from receiving an inter vivos or testamentary gift of any property from the other Party.

Income Taxes. The Parties agree that they will each pay their respective federal (and state, if applicable) income tax liability based upon the income of the Parties hereto. Any such income tax liability shall be shared by the Parties in the ratio of the aggregate taxable income of each such Party to the total taxable income reflected in such tax return times the total income tax liability. In this fashion, such income tax liability will be paid, respectively, by the community estate, if any, by the separate estate of JOHN KINTU and by the separate estate of JANE KINTU on a pro rata basis. JOHN KINTU and JANE KINTU shall agree upon an equitable apportionment of such tax liabilities where their respective incomes have varying characteristics.

Binding Effect. This Agreement will bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the Parties.

Entire Agreement: Modification. This Agreement contains the entire Agreement between the Parties. Any oral representations of modifications made before or after the execution of this Agreement will be of no force or effect, provided, however, that the Parties expressly reserve the right to amend (in form or in substance) or terminate this Agreement at any time by the execution by both Parties of a written instrument acknowledged before a Notary Public for that purpose. Such written Agreement must specifically refer to this Agreement. The waiver by a Party of any breach of any provision of this Agreement by the other Party shall not invalidate this Agreement or any provision of it, (including the provision breached).

Miscellaneous. This Agreement:

shall remain in force and in effect unless and until it is altered or amended in

accordance with the foregoing provisions;

shall be governed by the laws of the State of Texas;

is enforceable in Texas or any other State the Parties may be domiciled in;

is binding on the Parties and their respective heirs, personal representatives,

successors, and assigns; and

represents the entirety of the Agreement of the Parties as to the subject matter and there exist no other understandings, representations, or warranties, express or implied, oral or written, relative to its subject matter as of the date of its execution.

Tort Liability. All tort liability of a Party arising prior to or after the marriage shall be enforceable against and discharged from the separate property of that Party only,

and not from the separate property of the other Party.

Waiver. Each Party acknowledges that by executing this Agreement, he or she may be permanently surrendering rights and claims he or she may have under Texas law governing marital property. Each of them acknowledges that he or she is entering into this Agreement voluntarily.

Place of Residence. The Parties, at the time of entering into this Agreement, intend to reside together during their marriage in the State of Texas. The Parties acknowledge that this agreement is to be fully binding and enforceable in Texas, as well as anywhere else they may live, and Texas law will govern this agreement in any court, regardless of where said court is located.

Confidentiality. The Parties agree that this Agreement (including its Schedules) is privileged and confidential. This Agreement shall not be disclosed to any third Party or be used for any purposes by the Parties or their attorneys, except in connection with the enforcement of the Agreement.

Ratification. The Parties agree that, not later than thirty days after their marriage, they will each execute two (2) original counterparts of the Ratification of Prenuptial Agreement (the "Ratification Agreement"), a copy of which is attached to this agreement as Exhibit "C". The Parties agree that, to the maximum extent allowed by law, the failure to execute the Ratification Agreement will not invalidate this agreement or affect any of its terms or provisions. Whether the Ratification Agreement is executed or not, all the provisions of this agreement are binding, including but not limited to the effect of causing the income from the separate property of JANE KINTU to be JANE KINTU's separate property and the income from the separate property of JOHN KINTU to be JOHN KINTU's separate property.

Mediation/Arbitration.

It is the intent of the Parties that any conflict or controversy that may arise regarding this agreement, its interpretation, or its application should be resolved amicably by the Parties and without the necessity of court intervention. In furtherance of such desire, the Parties agree that in the event any conflict or controversy arises, the matter will promptly be submitted to mediation by the Party opposing the requested interpretation or application notifying the mediator of the controversy or conflict and requesting that the mediator schedule a date for mediation. The mediator will be selected by agreement of the Parties, or if failing agreement, by court appointment.

In the event any Party files for dissolution of marriage or if any dispute or controversy arises out of the interpretation, enforcement, and division of the estate of the Parties under this Premarital Agreement and mediation KINTUs not resolve the dispute and controversy, the Parties hereby agree to submit any such dispute or controversy to binding arbitration, and each Party expressly waives any right to trial by a court or trial by a jury. This provision for binding arbitration shall be in accordance with the provisions of the Texas Family Code § 6.601 and § 153.0071, if applicable, and Texas Civil Practice and Remedies Code § 171.001 et seq. or any successor statute as may be enacted by the Texas Legislature. The Parties agree to appoint one arbitrator whose decision shall be binding in all respects and whose ruling shall be the basis for division of the marital estate of the Parties in the event of a divorce. Any arbitrator appointed by the Parties must be a member in good standing with the state bar association in the state where the arbitration is conducted. Should the Parties not be able to agree upon an arbitrator, each Party shall appoint a person of the qualifications listed above, and those two persons shall confer upon the appointment of a third arbitrator. The compensation of the arbitrator shall be paid as agreed upon by the Parties, or in the event of a disagreement regarding the compensation of the

arbitrator, the arbitrator shall be compensated as the arbitrator rules.

_____

THIS AGREEMENT IS EXECUTED in two (2) original counterparts by the Parties on

this ..... day of ..... , 20..... , to be effective as of the date of the marriage.

WITNESSES

Printed name of witness

JOHN KINTU

Printed name of witness

WITNESSES

Printed name of witness

JANE KINTU

Printed name of witness

_____

ACKNOWLEDGMENTS

BEFORE ME, the undersigned Commissioner of Oaths, on this day personally appeared JOHN KINTU, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the instrument for the purposes and consideration expressed in it.

GIVEN under my hand and seal of office this the.....day of..... , 20..... .

Commissioner of Oaths

BEFORE ME, the undersigned Commissioner of Oaths, on this day personally appeared JANE KINTU, known to me to be the person whose name is subscribed to the foregoing instrument, and she acknowledged to me that she executed the instrument for the purposes and consideration expressed in it.

GIVEN under my hand and seal of office this the.....day of ....., 20

Commissioner of Oaths

_____

Prenuptial Agreement - Page 13

Certification of Attorney for JOHN KINTU

I certify that I am an attorney at law, duly licensed and admitted to practice in the State of Texas; that I have been employed by JOHN KINTU, a Party to this Agreement, and that I have advised him with respect to this contract and explained to him its meaning and legal effects, and that JOHN KINTU, has acknowledged his full and complete understanding of this Agreement and its legal consequences, and has freely and voluntarily executed the Agreement.

J. MARK SSEKANA

Tel:.....Fax:.....

ATTORNEY FOR JOHN KINTU

Certification of Attorney for JANE KINTU

I certify that I am an attorney at law, duly licensed and admitted to practice in the State of Texas; that I have been employed by JANE KINTU, a Party to this Agreement, and that I have advised her with respect to this contract and explained to her its meaning and legal effects, and that JANE KINTU has acknowledged her full and complete understanding of this Agreement and its legal consequences, and has freely and voluntarily executed the Agreement in my presence.

MWESIGWA JOSHUA

Tel:..... Fax:.....

ATTORNEY FOR JANE KINTU

_____

Prenuptial Agreement - Page 14

EXHIBIT “A” to PRENUPTIAL AGREEMENT OF

JOHN KINTU AND JANE KINTU

Personal and Real Property owned by JOHN KINTU:

Residence located at

Real property legally described as

Real property located at

Bank, Account number , Checking

Bank, Account number , Savings

, Account number

, Account number

, Account number 9. Bank, Account number , C.D.

Bank, C.D.

, Account number , C.D.

Bank, Account number

Bank, Account number

, Account number

, Account number

Prenuptial Agreement - Page 15

$53,618,000

UGX 62,600.00

UGX 38,020,000

UGX 0.00

UGX 14,831,044

UGX 258,585,010

UGX 2,922,011

May have matured

UGX 117,396,083

UGX 161,510,050

UGX 113,431,029

UGX 72,919,024

UGX 115,119,095

UGX 22,181,087

UGX 26,013,060

EXHIBIT "B" to PRENUPTIAL AGREEMENT OF

JOHN KINTU AND JANE KINTU

Personal and Real Property owned by JANE KINTU:

1.	, Account number	UGX 19,148,064
2.	, Account number , Cash	
	Surrender Value	UGX 29,294,042
3.	, Account number , Cash Surrender Value	UGX 35,068,892
4.	, Account number , Paidup	
	Death Benefit	UGX 1,500,000
5.	, Account number , Paidup	
	Death Benefit	UGX 1,000,800
6.	, Account number , Paidup	
	Death Benefit	UGX 2,500.700
7.	, Account number , Paidup	
	Death Benefit	UGX 1,000,900
8.	, Account number	UGX 7,081,737
9.	, Account number	UGX 7,000,000
10.	1997 Ford SW Taurus	UGX 8,000,800
11.	Real Estate Lien Note,	UGX 55,000,400
12.	Residence located at	UGX 38,000,700
13.	Blackjack property located at	UGX 13,800,500

_____

Prenuptial Agreement

Exhibit “C”

RATIFICATION OF PRENUPTIAL AGREEMENT

of

JOHN KINTU and JANE KINTU

JOHN KINTU, and JANE KINTU, having married each other on the day of , 20 , do hereby re-execute, confirm and ratify the marital property agreement dated the day of , 20 , between them, pursuant to Paragraph 3.33 of the Agreement.

JOHN KINTU

JANE KINTU

APPENDIX B
PRENUPTIAL AGREEMENT

THIS AGREEMENT made this _____ day of _____, 20___, by and between NAMBWAYO SHADIA, residing at _____ _____, hereinafter referred to as "Jane" or "the Wife", and MARVIN KANYESIGYE, residing at _____ _, hereinafter referred to as "MARVIN" or "the Husband".

W I T N E S S E T H:

SHADIA is presently ___ years of age, and has not previously been married and has no children. MARVIN is presently ___ years of age, has been married once previously and was divorced in _____. MARVIN has three children from his prior marriage, [identify children by name, date of birth and age].

The parties hereto have been residing together for a period of years, and in consideration and recognition of their relationship and their mutual commitment, respect and love for one another, the parties contemplate marriage to one another in the near future, and both desire to fix and determine by antenuptial agreement the rights, claims and possible liabilities that will accrue to them by reason of the marriage.

The parties are cognizant that MARVIN has significant assets as reflected in Schedule "A" annexed hereto. It is the parties' express intention and desire for this agreement to secure not only the pre-marital and separate property rights of MARVIN, but also to preserve, shield and protect the beneficial interest which MARVIN's children have in their father's estate. In as much as MARVIN has been previously divorced, both MARVIN and SHADIA desire to enter into a contractual agreement which is intended to govern their financial affairs and obligations to one another in the event of a dissolution of their marital relationship, said agreement being a deliberate and calculated attempt by MARVIN and SHADIA to avoid a painful and costly litigation process.

The parties are over the age of eighteen and are fully competent to enter into this Agreement, each being of a sufficiently mature and sound mind to understand fully the contemplated promises contained in this Agreement.

Except as expressly provided in this agreement to the contrary, each party desires

that all property owned by him or her at the date of the parties' marriage together with any appreciation or increase thereon shall be free from any claim of the other that may arise by reason of their contemplated marriage, and that in the event of

a termination event as hereinafter set forth, all such property shall be his or her respective separate property and shall not be subject to any equitable distribution or community property laws in the event that the parties establish a domicile or residence in a state that has adopted either of such systems.

The parties specifically intend and desire to enter into an agreement, under Section 236B, subdivision 3, of the New York Domestic Relations Law, that fully provides for the ownership and distribution of their marital property and for certain other rights and obligations arising from the marital relationship, which they further intend shall control and be determinative in all respects for the present and in the event of the dissolution of the marriage.

The parties further intend that this Agreement is made in consideration of and is conditioned upon the parties entering into a valid marriage with each other, and this Agreement shall become effective only upon the parties entering into a valid marriage with each other.

The parties further specifically intend and desire that this prenuptial agreement and the terms and provisions hereinafter set forth shall control and be binding upon them in the event of divorce or a "Termination Event." For purposes of this Agreement, a "Termination Event" shall be defined as set forth in Article1 of this agreement.

NOW, THEREFORE, in consideration of the mutual covenants, promises and agreements hereinafter set forth, the parties do fully and voluntarily agree as follows:

ARTICLE I. TERMINATION EVENT

As used in this Agreement, "Termination Event" shall refer to any one of the following events:

The commencement by either party against the other party of an action or proceeding for divorce, separation, annulment or dissolution of the parties' marriage;

The sending of a written notice by one party to the other party, by certified mail, return receipt requested, stating that the marriage between the parties is no longer viable and that the receipt of said letter shall constitute a Termination Event; or

The parties cease residing together and/or remain in a state of marital separation, for a period of sixty (60) days or more, and do not thereafter reconcile.

ARTICLE II. GENERAL PROPERTY WAIVERS

Except as otherwise specifically provided in this agreement, neither party shall by virtue of the marriage have or acquire any right, title or claim in or to the other

party's real or personal property or estate upon the other party's death, or in the event of the dissolution of the impending marriage.

By the execution of the within Agreement, each party specifically waives any right that each now has or may ever have pursuant to the following provisions of New York's Domestic Relations Law, and accepts the terms of the within Agreement in lieu thereof:

Section 236 B(4) as to compulsory financial disclosure, except as may be required if the issue of child support is extant;

Section 236 B(5) regarding disposition of marital property and declaration of separate property;

Section 236 B(6) as to maintenance;

Section 236 B(8) regarding specific relief in matrimonial actions; and (e) Section 237 with regard to counsel fees and expenses, except as provided in Article XV of this agreement.

ARTICLE III. ESTATE WAIVERS

Except as otherwise provided in the within agreement, neither party shall by virtue of the marriage have or acquire any right, title or claim in or to the other party's real or personal property upon the other party's death. In the event of the death of either party, that party's estate shall descend to, or vest in his or her heirs at law, distributees, legatees or devisees and in such a manner as may be prescribed by his or her Last Will and Testament or Codicil thereto, or in default thereof, by the statutory law then in force, as though no marriage between the parties had ever taken place. The waivers set forth herein shall include, but shall not be limited to the following:

RIGHT OF ELECTION: The right to elect to take against any present or future Last Will and Testament or Codicil of the other party pursuant to Estates, Powers and Trusts Law [of New York] (EPTL) § 5-1.1-A, and by law amendatory thereof, or supplemental or similar thereto.

RIGHT TO TAKE: The right to take his or her intestate share of the other party's estate pursuant to Article 5 of the EPTL, and by law amendatory thereof, or supplemental or similar thereto.

RIGHT TO ACT: The right, if any, to act as administrator or administratrix of the other party's estate pursuant to Article 5 of EPTL, and by law amendatory thereof, or supplemental or similar thereto.

RIGHT TO CLAIM: The right to claim or assert a claim for the declaration of marital property and the distribution thereof pursuant to the Domestic Relations Law of the State of New York, and any law amendatory thereof, or supplemental or similar

thereto; except as specifically set forth in the within agreement.

RIGHT TO ASSERT: The right to assert a claim for maintenance and/or support pursuant to the Domestic Relations Law of the State of New York, and any law amendatory thereof, or supplemental or similar thereto; except as specifically set forth in the within agreement.

Nothing herein contained shall be deemed to constitute a waiver by either party of any bequest that the other party may choose to make to him or her by Will or Codicil dated subsequent to the execution of this agreement.

ARTICLE IV. SEPARATE PROPERTY WAIVERS

All property owned individually by either of the parties at the time of their marriage, whether real, personal or mixed, wheresoever situated, and whether vested, contingent or inchoate, together with the appreciation, rents, issues, enhanced earning capacity, and profits thereof, whether passive or active, or due in part or in whole to the direct or indirect contributions of the other party, and the proceeds of the sale thereof or mergers and acquisitions thereto, and the investments and reinvestments thereof and the appreciation, rents, issues, enhanced earning capacity, and profits of such investments and reinvestments along with any liabilities in connection thereto and together with all property, real, personal or mixed, which the parties may acquire in their individual names hereafter or during their marriage, from any source whatever, hereby is declared to be and shall remain the separate property, (as defined by Section 236, Part B, of the Domestic Relations Law) of the respective party now owning, or hereafter acquiring such property, free and clear of any rights, interests, claims or demands of the other. Each party hereby covenants and agrees to make no claim or demand on the separate property of the other, or on the heirs, executors, or administrators of the other in the event of his or her death, with respect to such separate property of the other, except as otherwise expressly provided herein.

Without in any way limiting the definition of separate property as set forth in paragraph numbered "1" of this Article, separate property shall include the following:

MARVIN shall retain as his sole and separate property all of the assets set forth in Schedule "A" annexed hereto;

SHADIA shall retain as her sole and separate property all of the assets set forth in Schedule "B" annexed hereto;

all property derived from personal services, skills, efforts and employment, whether performed before or during the marriage or after the occurrence of a Termination Event, (e.g., including but not limited to wages, bonuses, royalties, commissions, deferred compensation plans, retirement plans, profit sharing plans, employer provided savings accounts, stock warrants, stock options, incentive awards, and any other form of compensation or asset provided as a result of his or her employment); and

all articles and accessories of attire, jewelry, personal effects, and sports equipment acquired by way of purchase, gift (whether inter-spousal or from a third party) or otherwise, primarily for the use of that party.

Inheritance and Inter-Spousal Gifts: In addition, the parties make the following specific declarations relative to their respective separate property interests:

Any funds or property inherited by either party shall remain the sole and separate property of the party so inheriting such funds or property; and

Any inter-spousal gifts, i.e., gifts from SHADIAto MARVIN or gifts from MARVIN to Jane, during the parties marriage, shall constitute the sole and separate property of the recipient of the gift(s).

ARTICLE V. THE MARITAL RESIDENCE

The parties acknowledge that MARVIN is the owner of a house located at ____ _____, New York. The parties acknowledge that MARVIN is the sole owner of this property and that SHADIA has made no contribution or investment therein.

It is the intention of the parties to reside in this house after they are married.

During the course of the marriage while they reside in the said home, MARVIN shall be responsible for payment of the carrying charges (mortgage/home equity loan payment, if any, real estate taxes, homeowner's insurance, utilities, etc.) for the residence.

It is agreed and understood between the parties that upon the occurrence of a Termination Event, MARVIN may give SHADIA ninety (90) days written notice of his desire for SHADIA to vacate the said residence, and SHADIA agrees that she shall, within forty-five (45) days of receipt of such written notice, remove herself from the said home.

Simultaneous with Jane's vacatur from the marital residence pursuant to this Article, MARVIN shall pay to Jane, as a rental allowance for a residence, a one-time lump sum payment of _____ ($_____) Dollars.

The provisions of this Article shall apply to any subsequent or successor residence of the parties that is owned in the name of MARVIN only.

It is specifically agreed that all items of furniture, furnishings, household goods and appliances, books, works of art and other miscellaneous items of personal property presently located at _____, New York, shall belong to MARVIN, with the exception of the personal effects belonging to Jane, which shall remain her separate property.

ARTICLE VI: AFTER-ACQUIRED PROPERTY

All property and accounts hereafter acquired in the name of each party shall remain the separate and distinct property of the party acquiring such property or accounts. However, all property and accounts acquired or maintained by the parties jointly and in the joint names of the parties shall be considered for purposes of this agreement the joint property of the parties. Such jointly held property shall be subject to the following:

Upon the occurrence of a Termination Event, the jointly held property shall be divided equally between the parties, as follows:

the joint property shall be valued as near as practicable to the time of the Termination Event;

if an item of joint property lends itself to a distribution in kind, to the extent possible, the property shall be distributed equally in kind;

if the item of joint property does not lend itself to distribution in kind, the parties shall attempt to resolve between themselves a method of distributing such property so that all such property is distributed equally. If, within ninety (90) days following the occurrence of a Termination Event, the parties are unable to agree upon a method of distributing such property, the property shall be sold and the proceeds shall be divided equally with each party receiving one-half of the net proceeds (defined as the total selling price less the expense of sale) and each party bearing one-half of any tax consequences

Upon the death of a party during marriage, the surviving spouse shall be entitled to the full interest in the jointly held property, i.e., such jointly held property shall be deemed to be held as joint tenants with the right of survivorship.

Co-Mingled Separate/Non-Marital Property:

In the event of a Termination Event, and in the event that SHADIA and MARVIN shall co-mingle any of their Separate Property, including any income or profits derived therefrom, their Separate Property shall not as a result become Marital Property, unless SHADIA and MARVIN express in writing their intent that it become Marital Property. If the Separate Property of SHADIA and/or MARVIN may be co-mingled with the Separate Property of the other or with Marital Property, then it shall be known as "co-mingled property".

If it is the nature of the co-mingled property that it lends itself to division and distribution in kind and it is possible to determine Jane's and MARVIN's contributions therein, then co-mingled property shall be divided and distributed to SHADIA and MARVIN in kind, the appreciation and interest to be divided pro rata in accordance with the parties' contributions.

If it is the nature of the co-mingled property that it lends itself to distribution in kind, but it is not possible to determine Jane's and MARVIN's contribution, then, unless SHADIA and MARVIN can agree in writing on some other arrangement, the

property shall be divided and distributed equally.

If it is the nature of the co-mingled property that it cannot be distributed in kind and it is possible to determine Jane's and MARVIN's contributions to the cost of the property, then, unless SHADIA and MARVIN can agree in writing on some other arrangement, the property shall be sold and the proceeds of sale shall be divided and distributed pro rata with respect to their respective contributions.

If it is the nature of the co-mingled property that it cannot be distributed in kind and it is not possible to determine Jane's and MARVIN's contributions to the original cost of the property, then unless SHADIA and MARVIN can agree in writing on some other arrangement, the property shall be sold and the proceeds of sale shall be divided and distributed equally. Therefore, when co-mingling assets, SHADIA and MARVIN should make a special effort to document their respective contributions.

ARTICLE VII: WAIVER OF INTEREST IN QUALIFIED PLAN

Any individual retirement account, pension, retirement, death benefit, stock bonus, annuity or profit-sharing plan with respect to which MARVIN was, is, or shall at any time hereafter be, a participant or member including, without limitation, any plan of deferred compensation to which Section 401(a)(11)(B) of the Code and/or Section 205(b)(1) of ERISA shall apply, shall be deemed the separate property of MARVIN. SHADIA hereby renounces and disclaims, and covenants to renounce and disclaim, all interest under any such plan. SHADIA hereby consents to MARVIN's election to waive a qualified joint and survivor annuity form of benefit and a qualified preretirement survivor annuity form of benefit under any plan of deferred compensation to which Section 401(a)(11)(B) of the Code and/or Section 205(b)(1) of ERISA shall apply. SHADIA further consents to MARVIN's current and future designation of any alternative form of benefit and of beneficiaries other than SHADIA under any of such plans (and to any revocation and/or modification of such designations), including any of such plans referred to in Section 401(a)(11)(B)(iii) of the Code or Section 205(b)(1)(C) of ERISA. SHADIA hereby further agrees to execute any and all documents or forms which shall be required, at any time, and from time to time, by any or all such plans, including, but not limited to, any consents required by Sections 401(a)(11)(B)(iii) or 417(a)(2) of the Code or Sections 205(b)(1)(c) or 205(c)(2) of ERISA, together with any modifications or amendments thereto, to effect the payment of benefits in this manner. SHADIA hereby acknowledges that she understands the effect of MARVIN's elections and her consents thereto. SHADIA further acknowledges that she understands that, absent the consent contained in this paragraph, she would have the right to limit her consent to the designation by MARVIN of a specific beneficiary or a specific form of benefits, and SHADIA hereby voluntarily elects to relinquish both such rights. In the event that, notwithstanding the renunciations and disclaimers set forth in this paragraph, SHADIA receives any right, title or interest in any property so renounced or disclaimed, then SHADIA shall immediately transfer all such right, title and interest to the estate of MARVIN. It is the essence of this Agreement that after the

marriage of the parties each party shall reaffirm in writing the foregoing and provide such papers and documents properly executed and acknowledged to carry out and implement the foregoing.

It is expressly acknowledged and agreed by SHADIA that her proper and timely execution of the waivers and consents required herein shall be a pre-condition to her receiving any benefits provided under this Agreement. In the event that SHADIA shall fail to execute any waiver or consent required herein, such failure shall be deemed to be a material breach of this Agreement. In the event that SHADIA receives any benefits because she has failed to execute the foregoing waivers or consents of benefit plan rights, SHADIA shall thereupon become the constructive trustee of such received benefits, to hold and distribute such received benefits (net of any income tax SHADIA is required to pay thereon as a result of her erroneous receipt of such benefits) to such beneficiaries, other than Jane, who shall have been designated in writing by MARVIN to receive such benefits.

Any individual retirement account, pension, retirement, death benefit, stock bonus, annuity or profit-sharing plan with respect to which SHADIA was, is, or shall at any time hereafter be, a participant or member including, without limitation, any plan of deferred compensation to which Section 401(a)(11)(B) of the Code and/or Section 205(b)(1) of ERISA shall apply, shall be deemed the separate property of Jane. MARVIN hereby renounces and disclaims, and covenants to renounce and disclaim, all interest under any such plan. MARVIN hereby consents to Jane's election to waive a qualified joint and survivor annuity form of benefit and a qualified preretirement survivor annuity form of benefit under any plan of deferred compensation to which Section 401(a)(11)(B) of the Code and/or Section 205(b)(1) of ERISA shall apply. MARVIN further consents to Jane's current and future designation of any alternative form of benefit and of beneficiaries other than MARVIN under any of such plans (and to any revocation and/or modification of such designations), including any of such plans referred to in Section 401(a)(11)(B)(iii) of the Code or Section 205(b)(1)(C) of ERISA. MARVIN hereby further agrees to execute any and all documents or forms which shall be required, at any time, and from time to time, by any or all such plans, including, but not limited to, any consents required by Sections 401(a)(11)(B)(iii) or 417(a)(2) of the Code or Sections 205(b)(1)(c) or 205(c)(2) of ERISA, together with any modifications or amendments thereto, to effect the payment of benefits in this manner. MARVIN hereby acknowledges that he understands the effect of Jane's elections and his consents thereto. MARVIN further acknowledges that he understands that, absent the consent contained in this paragraph, he would have the right to limit his consent to the designation by SHADIAof a specific beneficiary or a specific form of benefits, and MARVIN hereby voluntarily elects to relinquish both such rights. In the event that, notwithstanding the renunciations and disclaimers set forth in this paragraph, MARVIN receives any right, title or interest in any property so renounced or disclaimed, then MARVIN shall immediately transfer all such right, title and interest to the estate of Jane. It is the essence of this Agreement that after the

marriage of the parties each party shall reaffirm in writing the foregoing and provide such papers and documents properly executed and acknowledged to carry out and implement the foregoing.

In the event that MARVIN shall fail to execute any waiver or consent required herein, such failure shall be deemed to be a material breach of this Agreement. In the event that MARVIN receives any benefits because he has failed to execute the foregoing waivers or consents of benefit plan rights, MARVIN shall thereupon become the constructive trustee of such received benefits, to hold and distribute such received benefits (net of any income tax MARVIN is required to pay thereon as a result of his erroneous receipt of such benefits) to such beneficiaries, other than MARVIN, who shall have been designated in writing by SHADIAto receive such benefits.

Notwithstanding any other provision in this agreement to the contrary, SHADIA shall be entitled to share in the appreciated value of MARVIN's interest in the _____ 401(K) Plan ("the Plan" hereinafter) subject to the following terms and conditions:

if the parties are married for less than five (5) years prior to the occurrence of a Termination Event, SHADIA shall receive a sum equal to ___% of the appreciation in value in the Plan from the date of this agreement (that being fixed at $_____) to the Termination

Event;

if the parties are married for at least five (5) years but less than ten (10) years prior to the occurrence of a Termination Event, SHADIA shall receive a sum equal to ___ % of the appreciation in value in the Plan from the date of this agreement (that being fixed at $ _____) to the Termination Event;

if the parties are married for at least ten (10) years prior to the occurrence of a Termination Event, SHADIA shall receive a sum equal to ___% of the appreciation in value in the Plan from the date of this agreement (that being fixed at $_____) to the Termination

Event; and

if the parties are married for at least fifteen (15) years prior to the occurrence of a Termination Event, SHADIA shall receive a sum equal to ___% of the appreciation in value in the Plan from the date of this agreement (that being fixed at $_____) to the Termination Event.

Providing that the divorce is not contested by SHADIA and that SHADIA does not challenge the financial provisions of this agreement, Jane's aforesaid share shall be paid to her as soon as allowable under the terms of the Plan following the entry

of a Judgment of Divorce, in accordance with a qualified domestic relations order (QDRO) which order shall direct the payment of Jane's aforesaid share into a rollover individual retirement account in Jane's name to be designated by her. MARVIN and SHADIA shall jointly retain the pension actuary and any costs attributable therefor shall be paid by MARVIN.

ARTICLE VIII: MAINTENANCE

(Option 1)

MARVIN acknowledges that he is in good health, is employed as a _____ at the offices of _____, and earns an annual income of $_____. MARVIN acknowledges that he is self-supporting, and that he will have sufficient means to provide fully for his own support, regardless of his future earning capacity. Accordingly, MARVIN KANYESIGYEs hereby waive, release, relinquish, and forever renounce any claim of past, present or future alimony, maintenance or spousal support, temporary or permanent, whether in the form of payments made directly to him as the spouse or to a third party.

SHADIA acknowledges that she is in good health, is employed as a _____, at the offices of _____, and earns an annual salary of $_____. SHADIA acknowledges that she is self-supporting, and that she will have sufficient means to provide fully for her own support, regardless of her future earning capacity. Accordingly, SHADIA does hereby waive, release, relinquish, and forever renounce any claim of past, present or future alimony, maintenance or spousal support, temporary or permanent, whether in the form of payments made directly to her as the spouse or to a third party.

The foregoing waiver by SHADIA of her right to apply for spousal support, alimony or maintenance (temporary or permanent), necessaries or otherwise shall not preclude a request for child support for a child in the event that SHADIA becomes pregnant or the parties become parents of a child or children.

Nothing herein contained shall be deemed a waiver of obligations to provide household support and the sharing of normal household and marital expenses during the course of the marriage as the parties mutually agree.

(Option 2)

SHADIA acknowledges that she is in good health, and is gainfully employed as _____, at the offices of _____ _, earning an annual salary of approximately $_____. SHADIA acknowledges that she is capable of self support and that she will have sufficient means to provide fully for her own support, regardless of her future earning capacity.

SHADIA further acknowledges that she is entering into this agreement with full knowledge that MARVIN has substantial financial responsibilities to his former wife, _____ and to the children of his first marriage, including but not limited to maintenance obligation, child support payments, medical and life

insurance premiums, education and extra-curricular expenses and miscellaneous other expenses pertaining to his children.

Notwithstanding the foregoing, the parties agree that upon the occurrence of a Termination Event, MARVIN shall pay to Jane, toward her support and maintenance, the following sums, payable in monthly installments, and continuing for the durational periods set forth herein, but subject to earlier termination upon the earliest occurrence of any of the following events:

The death of either of the parties hereto;

The remarriage of Jane, which shall be defined to include a ceremonial marriage, regardless of whether such remarriage shall thereafter be terminated by divorce, annulled, voidable or declared null and void;

Jane's habitual living with another male and holding herself out as his

"wife" within the meaning of Domestic Relations Law §248;

The sharing by SHADIA of the same principal residence with an unrelated adult for a substantially continuous period of six (6) months or more, even though no ceremonial marriage may have been performed. "Cohabitation" as used herein shall mean living with such adult while engaged in an intimate relationship, even though no religious or civil ceremonial marriage may have been performed, and without the necessity of demonstrating that SHADIA and the unrelated adult share household expenses or in any manner functioned as a single economic unit.

The maintenance payments shall be as follows:

Termination Event occurring on or before the following anniversary date of the marriage:	Annual Amount (in equal monthly installments)	Duration (in months)
3rd Anniversary	$	
5th Anniversary	$	
8th Anniversary	$	
10th Anniversary	$	
15th Anniversary	$	
18th Anniversary	$	
20th Anniversary	$	
After 20th Anniversary	$	

The parties are aware of the fact that under Federal and State income tax law, SHADIA is required to include the aforesaid maintenance payments in her income for income tax purposes, and MARVIN is entitled to deduct said payments on his income tax returns. Hereafter, neither party shall assert a position upon his/her separate income tax returns inconsistent with this undertaking. Should the tax effect as set forth above ever cease to be the case, whether by reason of a prospective or retroactive change in the federal and/or state tax law, the sums due hereunder shall be renegotiated so as to achieve, as closely as possible, the same after-tax effect for the pay or spouse, i.e., MARVIN, as is contemplated herein.

Except as provided for in this Article, SHADIA and MARVIN each waive and forever relinquish any right or claim she or he may have or might ever have against the other for payments of temporary or permanent maintenance, spousal support or alimony, whether in the form of payments made directly to him as the spouse or to a third party, under the laws of any jurisdiction.

New Maintenance Guidelines Legislation: The parties acknowledge receiving advice that pursuant to the new Maintenance Guidelines Legislation signed into law by Governor Andrew M. Cuomo on September 25, 2015 (Chapter 269, Laws of 2015), the "temporary maintenance provisions" contained in this new law are applicable to matrimonial actions commenced on or after October 26, 2015, and that "post-divorce maintenance provisions" apply to matrimonial actions commenced on or after January 25, 2016. The parties acknowledge receiving advice that, among other provisions, the new statute contains (a) various formulas for calculating temporary maintenance and post-divorce maintenance; (b) the definition of "income" to be utilized when undertaking maintenance calculations for temporary and post-divorce maintenance; (c) advisory durational schedules for post-divorce maintenance based upon the length of the marriage (i.e., from the date of the marriage until the date of commencement); and (d) the requirements when deviating from the maintenance guidelines where the payor's income exceeds a "cap" of $178,000 per year, with a COLA adjustment to the "cap" every two years thereafter. In accordance with this legislation, the following are the 15 post-divorce maintenance factors which are to be considered in determining the additional amount of maintenance, if any, on the payor's income which exceeds the cap, or where there is to be an adjustment or "deviation" in the guidelines amount:

The age and health of the parties;

The present or future earning capacity of the parties, including a history of limited participation in the workforce;

The need of one party to incur education or training expenses;

The termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;

The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

The existence and duration of a pre-marital joint household or a pre-divorce separate household;

Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

The availability and cost of medical insurance for the parties;

The care or children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

The tax consequences to each party;

The standard of living of the parties established during the marriage;

The reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;

The equitable distribution of marital property and the income or imputed income on the assets so distributed;

The contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

Any other factor which the court shall expressly find to be just and proper (which, in post-divorce maintenance only, must also include consideration of the effect of any barrier to remarriage).

Note: Except as otherwise noted, all of the above factors are also included in the

13 temporary maintenance factors, with the exception of factors "(m)" and "(n)".

A copy of the Maintenance Guidelines is reproduced and incorporated herein as Schedule "___".

8. Opting Out of the New Maintenance Guidelines: The parties further acknowledge receiving advice that nothing in the new legislation prohibits parties from entering into validly executed agreements which deviate from the maintenance guidelines. Thus, notwithstanding the effect of the new maintenance guidelines legislation, after due consideration of the 15 postdivorce maintenance factors delineated above, the parties expressly intend and agree that the maintenance obligation shall be governed by the terms of this Agreement, and they expressly waivetheir right to fix the maintenance obligations under the new Maintenance Guidelines.

ARTICLE IX: INCOME TAX RETURNS

The parties agree that, at the election of MARVIN, they shall execute and file joint income tax returns, both federal and state, for any year during their marriage. In connection with said joint tax returns:

SHADIA shall provide to MARVIN, at his request, information regarding her income for the prior year.

MARVIN shall decide, no later than March 15th of any year, whether joint returns shall be filed for the year ending on December 31st immediately preceding such March 15th.

Such joint returns shall be prepared at the expense of MARVIN by his tax advisors, provided that SHADIA may have the same reviewed by her tax advisors at her expense.

Aside from any withholding taxes from any wages earned by Jane, MARVIN agrees that he will forever save, hold harmless and indemnify SHADIA on account of all tax levies, assessments or fines arising out of said joint returns to the extent that the same are applicable to any item other than Jane's undisclosed independent income and/or improper deductions, if any. All refunds, if any, due from said returns shall be the sole property of MARVIN, who is hereby granted the right to endorse the signature of SHADIA on all refund checks.

Any party receiving any notice of any kind from any taxing authority relative to any joint income tax returns filed by the parties shall forthwith tender a complete copy thereof to the other party.

MARVIN, at his sole cost and expense, shall have the right to contest the validity and amount of any claims for additional taxes, interest and penalties made by any Federal, State or City income tax authority arising out of any joint income tax returns hereafter filed by the parties, and he shall be entitled to litigate any such claims or demands. SHADIA agrees to cooperate with MARVIN, his accountants and counsel in connection with any proceedings for the purpose of contesting, abating, reducing or obtaining any refund of any tax, penalty, or interest assessed or due, or any part thereof. Such cooperation shall include, but shall not be limited to: (i) the execution of any amended tax return; (ii) the making available of such books, records and other data as may be necessary in order to conduct any tax audit or examination or deal with any dispute arising thereunder; and (iii) the joining in and execution of any protest, petition or document in connection with any proceedings for the purpose of contesting, abating, reducing or obtaining any refund of any tax, penalty or interest assessed or due or any part thereof.

ARTICLE X: LIFE INSURANCE (if applicable)

MARVIN agrees to maintain in full force and effect a policy or policies of life insurance, insuring his life, with SHADIA as beneficiary of an aggregate death benefit in the sum of $_____, which insurance shall be maintained from

the time of the parties' marriage and until MARVIN is no longer obligated to provide maintenance payments to SHADIA pursuant to Article VIII of this agreement.

SHADIA acknowledges that MARVIN's obligation to provide life insurance is contingent upon MARVIN being insurable, i.e., being able to obtain a life insurance policy from an insurance company for the amount set forth herein owing to his age and health history at reasonable premium rates relative to the coverage. MARVIN agrees to make a diligent effort to secure such life insurance.

Promptly after the execution of this agreement, MARVIN shall deliver to SHADIA such insurance policy or policies or a certificate or other instrument evidencing such designation of SHADIA as beneficiary of said insurance as provided herein, or documentation verifying the fact that he is not insurable.

ARTICLE XI: CHILDREN

Neither of the parties hereto contemplate that there will be any children born of this marriage. In the event that there are children born of this marriage, the parties jointly acknowledge their joint responsibility for the health, welfare, support and education of such children, and they agree that upon the occurrence of a Termination Event, they shall be joint legal custodians of any child(ren) of the marriage, and shall share decision making responsibility with respect to any such child(ren).

ARTICLE XII: DISCLOSURE & VOLUNTARINESS

Each party represents to the other that they have made substantial disclosure of his or her means, assets and resources as may hereinafter more fully be set forth in Exhibits "A" and "B" annexed hereto and that he or she is entering into this agreement freely, voluntarily and with full knowledge.

MARVIN acknowledges that:

He is fully acquainted with the income, assets and the resources of Jane; (b) SHADIA has answered all of the questions he has asked about her income and assets;

He regards such information as sufficient to enable him to make an informed decision concerning this Agreement and that he wishes no further disclosure from Jane, either oral or written;

He is under no duress or other pressure to refrain from obtaining detailed written disclosure;

He has at all times received the advice of independent counsel of his own choosing, namely, _____, with offices located at _____;

Upon the advice of his independent legal counsel, he is fully aware of and understands all of the rights that he is surrendering, waiving or releasing and the obligations he is undertaking pursuant to this Agreement;

He has carefully weighed all of the facts and circumstances likely to influence his

judgment, and he desires to marry SHADIA regardless of any financial arrangements made whether for his benefit or not, and;

He has entered into this agreement, freely, voluntarily and with full knowledge of Jane's means and resources as represented in Exhibit "B" attached.

SHADIA acknowledges that:

She is fully acquainted with the income, assets and the resources of MARVIN; (b) MARVIN has answered all of the questions she has asked about his income and assets;

She regards such information as sufficient to enable her to make an informed decision concerning this Agreement and that she wishes no further disclosure from MARVIN, either oral or written;

She is under no duress or other pressure to refrain from obtaining detailed written disclosure;

She has at all times received the advice of independent counsel of her own choosing, namely, , with offices located at _____ _____;

Upon the advice of her independent legal counsel, she is fully aware of and understands all of the rights that she is surrendering, waiving or releasing and the obligations she is undertaking pursuant to this Agreement;

She has carefully weighed all of the facts and circumstances likely to influence her judgment, and she desires to marry MARVIN regardless of any financial arrangements made whether for her benefit or not, and;

She has entered into this agreement, freely, voluntarily and with full knowledge of MARVIN's means and resources as represented in Exhibit "A" attached.

ARTICLE XIII: DISSOLUTION OF MARRIAGE

In the event of the dissolution of the impending marriage of the parties, the terms and provisions of this agreement shall constitute full settlement, satisfaction and discharge of any and all obligations that may arise from the marital relationship and each party covenants and agrees with the other to accept the terms and provisions of this agreement in full and final settlement, satisfaction and discharge of any obligation that may arise as a result of the marriage and in lieu of any other rights, claims or causes of action that they may have had against the other absent this agreement.

In the event that either party commences an action or proceeding for divorce, separation or dissolution of the marital relationship of the parties, each covenants and agrees to immediately provide his or her respective attorneys with a copy of this agreement and each further covenants and agrees to prepare and execute a Property Settlement Agreement, if necessary, pursuant to the terms of this antenuptial agreement.

The parties further covenant and agree that in the event any Order, Judgment or Decree, results from the commencement of action affecting the marital relationship, neither party shall seek an Order or Decree which shall be inconsistent with any of the provisions of this antenuptial agreement or any Property Settlement Agreement prepared and executed pursuant hereto. The parties further covenant and agree that the terms and provisions of the within antenuptial agreement or Property Settlement Agreement prepared and executed pursuant thereto shall be incorporated in and shall survive any such Judgment, Order or Decree, and shall not merge therein.

The parties further covenant and agree that in the event of either party commencing an action or proceeding for divorce, separation or dissolution of the marriage, each party shall be solely responsible for all attorney's fees, costs, and disbursements attendant to the interpretation of this Prenuptial Agreement, the preparation and execution of a Property Settlement Agreement, or the prosecution or defense of any matrimonial action affecting the marital relationship.

ARTICLE XIV: DEBTS

Except as otherwise provided in this agreement, SHADIA covenants and represents that she has not heretofore incurred or contracted, nor will she at any time in the future incur or contract any debt, charge or liability whatsoever for which MARVIN, his legal representatives or his property or estate is now or may become liable, and SHADIA further covenants at all times to keep MARVIN free, harmless and indemnified of any from any and all debts, charges, liabilities heretofore or hereafter contracted by her.

Except as otherwise provided in this agreement, MARVIN covenants and represents that he has not heretofore incurred or contracted, nor will he at any time in the future incur or contract any debt, charge or liability whatsoever for which Jane, her legal representatives or her property or estate is now or may become liable, and MARVIN further covenants at all times to keep SHADIA free, harmless and indemnified of and from any and all debts, charges and liabilities heretofore or hereafter contracted by him.

ARTICLE XV: COUNSEL FEES

Each party shall be responsible for the payment of his/her own counsel fees in connection with the negotiation and execution of this prenuptial agreement.

In the event of an action between the parties for divorce, separation, annulment or dissolution of the parties marriage, each party shall be responsible for the payment of his/her own legal fees and expenses, regardless of the outcome of the legal proceeding, and each party shall keep the other party free, harmless and indemnified on account of any liability therefor.

ARTICLE XVI: GENERAL PROVISIONS

In the absence of modification, and except to the extent specifically modified, this agreement shall continue in full force and effect. Any and all modifications to this agreement shall be in writing, and shall be acknowledged in the same manner and with the same formality as this agreement.

Each party shall, upon the other's request, take any and all steps to execute, acknowledge and deliver unto the other party any and all further instruments necessary or expedient to effectuate the purposes of this agreement.

The consideration for this agreement is the mutual promises and waivers herein contained and the marriage about to be solemnized. If the marriage does not take place, this agreement shall be in all respects and for all purposes null and void.

SHADIA acknowledges that she has entered into this agreement without coercion of any kind from any source whatsoever and that she clearly understands and consents to all of the provisions contained herein. She believes this agreement to be fair, just and reasonable, and acknowledges that the within agreement has been fully explained to her by her attorneys, to wit:

, and that this agreement has been negotiated and executed at the specific instance and request of Jane.

MARVIN acknowledges that he has entered into this agreement without coercion of any kind from any source whatsoever and that he clearly understands and consents to all of the provisions contained herein. He believes this agreement to be fair, just and reasonable, and acknowledges that the within agreement has been fully explained to him by his attorneys, to wit: _____ _____, and that this agreement has been negotiated and executed at the specific instance and request of MARVIN.

This agreement contains the entire understanding of the parties. There are no representations, warranties, promises or covenants, undertakings or otherwise other than those expressly set forth herein.

This agreement has been negotiated by the parties pursuant to Section 236 B(3) of the Domestic Relations Law of the State of New York, which specifically provides that the parties may enter such Agreement before marriage and such Agreement shall be valid and enforceable subject to the provisions of Section 5-311 of the General Obligations Law of the State of New York, provided that such terms were fair and reasonable at the time of the making of such Agreement and such terms and conditions and provisions contained therein are not unconscionable at the time of entry of final Judgment. This Agreement shall be examined, construed, interpreted and enforced pursuant to the Laws of the State of New York.

This agreement shall inure to the benefit of and shall be binding upon the heirs, executors and administrators of the parties.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this ____ day of _____, 20___.

_____ MARVIN KANYESIGYE

_____

NAMBWAYO SHADIA

ACKNOWLEDGMENTS

On the _____ day of 20__, before me, the undersigned, personally appeared MARVIN KANYESIGYE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Commissioner of Oaths

On the _____ day of 20___, before me, the undersigned, personally appeared NAMBWAYO SHADIA, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Commissioner of Oaths

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ABOUT THIS BOOK

Recent developments in the law have occurred against a background of mounting public anxiety about vi lent street crime. Leading politicians have proclaimed crime a priority rivaling even inflation and defense. As the sense of urgency intensifies, the desperate search for answers quickens. Virtually every day, a politician, editorial writer, or criminal justice professional offers a new prescription for ending crime. I believe the discussion currently raging over justice issues can best be understood by focusing upon a central question: Must we compromise the most basic values of our democratic society in our desperation to fight crime? I have elsewhere considered the implications of this question for issues of criminal responsibility and for policy choices in the administration ofjustice. In this book, I will examine the ways in which different answers to this fundamental question can affect the development of legal doctrine, particularly with respect to the constitutional rights of those accused of crime.

Proficiency in law involves a number of different skills and competencies. It requires knowledge of the rules wherein the elements of criminal offences are to be found. It requires knowledge of the rules of evidence and procedure. It requires an ability to identify the rule(s) applicable to a fact situation and to apply them logically and coherently. Attaining these latter competencies is necessary to discharge effectively the day-to-day tasks of a criminal lawyer – solicitor, advocate or judge. However, true mastery requires something further. It requires also a critical and evaluative attitude. The law in action is not just a matter of doctrine. law doctrine has as its purpose the delivery of justice and criminal justice is a contingent outcome in which rule, process and context all play their part. It is not simply a logical description of what happens when rule meets (prohibited) event. Understanding the law requires, therefore, an appreciation of the day-to-day workings and constitution of the criminal justice system. Moreover, it requires an understanding of the resources of the criminal law to produce substantive justice. If the mechanical application of a given rule to a fact situation acquits a dangerous or wicked person, or convicts someone neither dangerous nor blameworthy according to ordinary standards, the law may be considered not only 'an ass' but as confounding its own rationale. Understanding this rationale is also, therefore, a necessary preliminary to understanding the law itself since it will inform a realistic appreciation of what can be argued and what cannot.

At its most basic, to know what the law is may require an understanding of how to produce cogent and principled arguments for change. This book seeks to examine the rules of the law in an evaluative context. It concerns itself with what makes a crime, both at a general theoretical level and at the level of individual offences. It addresses what the law is and, from the point of view of the ideas, principles and policies informing it, also what it ought to be. We will explore some general matters which will help to inform such an evaluative attitude the principles and ideas informing decisions to criminalize will be considered. What is it, say, which renders incitement to racial hatred a criminal offence, incitement to sexual hatred a matter at most of personal morality and sexual and racial discrimination a subject of redress only under the civil law? This book examines punishment and the theories used to justify it. Although this is the subject-matter of its own discrete discipline, namely penology, some understanding is necessary for the student of law. It pro- vides a basis for subjecting the rules ofcriminal law to effective critical scrutiny. If we have a clear idea of why we punish, we are in a position to determine, for example, what fault elements should separate murder from manslaughter, or indeed whether they should be merged in a single offence. Without such an idea our opinions will, inevitably, issue from our prejudices rather than our understanding. Individual offences themselves are covered in . The elements of these offences vary but they have certain things in common. In particular, they require proof of some proscribed deed on the part of the offender unaccompanied by any excusing or justifying condition, together with a designated mental attitude, commonly known as guilty mind. Since this model of liability (conduct–consequence–mental attitude–absence of defense) is fairly constant throughout the criminal law these separate elements and the ideas informing them will be explored in before we meet the offences themselves, so as to avoid unnecessary duplication. Finally, we will examine how criminal liability may be incurred without personally executing a substantive offence, whether by participating in an offence perpetrated by another or by inciting, attempting or conspiring to commit a substantive offence. Before tackling these issues we will, examine some general issues pertinent to understanding the law and its operation, concentrating, in particular, upon the philosophy, workings and constitution of the justice system.

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