A CRITICAL ANALYSIS OF THE LEGAL REGIME ON HUMAN RIGHTS IN UGANDA.

BY

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DECLARATION

I **ODEKE RAYMON RICHARD,** solemnly declare that the information in this report is entirely mine and original, it has never been submitted to any organization or institutions for any academic award.

APPROVAL

I certify that I have supervised and read this study and that in my sense; it conforms to the acceptable standards of scholarly presentation and is fully adequate in scope and quality as a research project in partial fulfillment for the award of the DIPLOMA IN LAWS of Kampala International University.

.....

MR. KIIZA JAMES

SUPERVISOR/LECTURER KAMPALA INTERNATIONAL UNIVERSITY

This 12th Day of August 2014

DEDICATION

It is with profound love and pride that I dedicate this study report to my beloved family members, without whose sacrifice, it would not have been possible to undertake successfully this prestigious Law course. I must mention my grandfather, MZEE EGANE FASTINO, MZE EKELLOT OMODOI MICHEAL, MY BROTHERS , AOJAT JAMES PETER, OKAO MOSES, KIMA SAMSON, my sisters I have SARAH , ANIPO GRACE and her husband ONYANG FRIEND WITHOUT FORGETTING Adong Solemnly long time girl friend for their selfless support and forbearances for the sake of this study.

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ACRONYMS

AG	ATTORNEY GENERAL
CJ	CHIEF JUSTICE
DCJ	DEPUTY CHIEF JUSTICE
MAJECN	MAJOR GENERAL
PJ	PRINCIPAL JUDGE
R	REGINA (REPUBLIC)
RE	REFERENCE
UPF	UGANDA POLICE FORCE
UPDF	UGANDA PEOPLE'S DEFENSE FORCE

LIST OF STATUTES AND INSTRUMENTS

The constitution of the Republic of Uganda (as amended) 1995

Human Rights Commission Act

The penal code Act

The Civil procedure (miscellaneous provisions) Act Judicature Act

The Roman statute

South African Public Order Act

CHAPTER ONE
BACKGROUND TO THE STUDY

1.1 Introduction

The introductory chapter of this report that sought to find out the empirical evidence of the impact of interpretation of Uganda's 1995 Constitutional by the Courts of judicature on the improvement of the observance). huirl' rights, values which had suffered despicable abuses in the previous year's albeit the existence of courts of law which could have •enforced their observance without fear or favour.

Prior to the promulgation of Uganda's 1995 Constitution, the Country experienced horrendous and sordid human rights violations dating back to the advent of colonial administration through the post colonial era, where one authoritarian rule successively replaced the other, leading to British Prime Minister, Heath, describing Ugandan President, Idi Amin, "As a savage fascist" (the Drum Magazine 1977). Courts of law operated under hostile environment, making them facile to enforce decisions they reached, considering how the Chief Justice of Uganda, Benedicto Kiwanuka lost his life in 1970s (Vijay Gupta, 1985). However, an historic development occurred in 1995 when Uganda promulgated a new Constitution that guaranteed judicial space to act independently. What is left to be seen is if this space is not a mere political hypocrisy.

1.2 Background to the Study

The whole idea of Constitutional interpretation dates back to the era of common law regime where values cutting across different social communities became the basis of managing disputes among individuals and groups as common values or law, where the King held the preserve to interpret those common values (John Prophet, 1978). With passage of time, court circuits were developed across the United Kingdom to hear dispute and punish offenders, making the courts to posses such unfettered powers to interpret laws and enforce its observance. Historically, Constitution as codified set laws was not common in English society; actually it has its origin in the French civil system of the law (Ayebare et al, 2006).

In France, all Codes or laws derived their authority from the Constitution, thus making it a more superior law than the rest of the Codes. Legal Jurist, Kelsen called it a grand norm from which all norms or ethos derive their legitimacy. This philosophy born in France to have one codified set of rule to aid in the administration of justice and a basis of governance, spread rapidly in

Europe during industrial revolution and became acceptable ideal of democratic governance, considering the root it had taken in the new found territory of America (John Prophet, 1978).

The framers of a Constitution who want to make it a charter of liberties and not a set of constitutive rules, faced a difficult choice between common understanding of the provisions and accepting its interpretation by the authority that it bestows upon it substantial discretionary power to construct it. Currently USA has one of the most enduring Constitutions in the world, since 1776 when it was promulgated and amended without much fuss.

A Constitution of a State refers to the basic and fundamental principles which the inhabitants of the State consider to be essential for their governance and well being. It lays down political and other State institutions and distributes powers among them, putting limitations on the exercise of those powers (GW Kanyeihamba, 2004). In most Countries, the fundamental laws of the land are contained in one document or a series of documents for which the word 'Constitution' is reserved, but in a few Countries like the United Kingdom of Great Britain and Northern Ireland, there is no single document which embraces all these rules or which can be referred to specifically as the Constitution of the State.

Nevertheless, such Countries have Constitutions because the word 'Constitution' is a legal expression which identifies all the elements of how a Country is organized and governed. The difference between the two is one of form rather than substance. The nature of the Constitution depends on the character of the Country for which it is intended to govern (Ayebare et al, 2006). There are a number of factors which will have a bearing on the formulation, evolution and growth of a Constitution. The Country's historical, geographical, social, political, economic, religious structures as well as her racial and tribal composition play crucial part on its Constitutional development (OW Kanyeihamba, 2004).

Constitutional interpretation or construction is the process by which meanings are assigned to words in a Constitution to enable legal decisions to be made that are justified by it (Joseph, 1999). There is a question whether the meanings should be taken from the public meanings shared among the literate populace, the private meanings used among the drafters and ratifiers that might not have been widely shared, or the public legal meanings of the terms that were best known by the framers of it.

Article 2(2) of the Constitution the Republic of Uganda states that:

"If any law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency be void."

Therefore given that all other laws derive their authority from the Constitution, it must be interpreted with a lot of precision and caution.

In Troop v. Dufles, where a decision of the Supreme Court was reached at and Justice Wallen C.J stated that: "The provisions of the Constitution are not time worn adages. They are vital living principles that authorize and limit government powers in our nation. When the constitutionality of congress is challenged in court, we must apply these rules. If we do not, the words of the constitution become a little more than good advice"

Uganda was declared formally a British protectorate in 1894, marking the beginning of the British rule that lasted for more than half a century (Omara Otunu, 1985). The rule brought together under a modern Nation State structures, peoples of diverse ethnic, political economic and cultural developments. In 1900, the colonial Government signed an agreement with

Buganda Kingdom to usurp powers of the Kingdom and use force to expand its rule in what the agreement defined as Uganda (Onoria, 1998). With passage of time, in 1901, the first Uganda's Constitutional instrument, Order in Council was enacted, opening -a new chapter of constitutional Governance in Uganda.

This Constitution provided for an inception clause which permitted the Protectorate to apply with modifications and qualifications laws that were at the time in force in United Kingdom in the spirit of the 1889 Foreign Jurisdictions Act (FJA) (Oloka Onyango, 2001). Other Orders in Council were also established in 1926 and 1950s to elaborately address the emerging p constitutional needs of the protectorate, paving way for the Independence of Uganda. Following the grant of political independence to Uganda in October 1962, a Constitution drafted, debated and refined from Lancaster in the UK was adopted, setting in a new Constitutional order in the independent Uganda (Sir Edward Mutesa, 1973).

This independence Constitution negated certain strategic aspirations for certain communities which had suffered marginalization in the hands of colonial administration, making it to start off on a path of enormous uncertainty. Authoritarian rule, tyrannical and dictatorial Governments were constructed, creating an environment for new political agitation predicated on ethnicity and religion as a basis of social identity upon which to demand for political space in the independent Uganda. Struggle for constitutional governance has been part of Uganda's history that shaped the whole post independence history of Uganda (YK Museveni, 1998).

Unlike the pre-colonial court structures, the Independence Constitution created semi autonomous High Courts in the areas with Federal status like Buganda, Bunyoro, Ankole and Tooro among others, where justice was delivered in the name of the rulers of those Kingdoms. However, appeals as to the decisions of these Federal High Courts in respect of constitutional interpretation lay in the High Court of Uganda. The power and function to interpret the Constitution of Uganda in both 1962 and 1967 Constitutions were vested in the High Court of Uganda, for example the 1962 Constitution inter alia provides under Article 95 that:

"(1) Where any question as to the interpretation of this Constitution arises in

any proceedings in any court of law in Uganda (other than the High Court of Uganda or the court of appeal or a court-martial) and the court is of opinion that the question involves a substantial question of law the court may, and shall f any party to the proceedings so requests, refer the question to the High Court of Uganda."

"(2) Where any question is referred to the High Court of Uganda in pursuance of this section the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision."

The appeal arising from decision of the High Court of Uganda shall lie in Her Majesty Council as provided under Article 96:

(1) An appeal shall lie as of right direct to Her Majesty in Council from final decisions of the High Court of Uganda on any question as to the interpretation of this Constitution:

Provided that if a court of appeal is established under subsection (2) of this section an appeal shall lie as of right

(a) To the court of appeal from final decisions of the High Court of

Uganda on the interpretation of the provisions of Chapter Hi of this

Constitution;

(b) To Her Majesty in Council from final decisions of the court of appeal in

any such appeal.

After four years of independence, a struggle for power among political leaders seriously weakened the position of then Prime Minister Milton Obote. He responded by suspending the 1962 Constitution in April 1966. At the same time and with a show of military force, Obote ordered members of Parliament

(MPs) to pass the 1966 Constitution without debate. Though understood to be merely an interim Constitution, it made sweeping changes with both significant political and judicial consequences that would later redefine destiny of a four year old Country. At the national level, the Prime Minister became an executive President, in place of the preceding ceremonial President. These arrangements strengthened Obote's precarious hold on Government while appearing to respect the rule of law.

A year later, a draft version of the 1967 Constitution was introduced in Parliament and debated at length. When it was promulgated, three months later, it completed the process of centralization that had begun the previous year. The 1967 Constitution confirmed the President's position as the Chief Executive and led the Country to 1971 when its operation was suspended for eight years, until April 1979 (YK Museveni, 1998). Its operation was resumed in 1980 following the removal of Idi Amin from power by forces of Ugandan dissidents backed by Tanzania Peoples' Defense Forces (TPDF).

Nevertheless, as the case was in the pre-colonial era of Uganda, the whole history Uganda appears to have had extreme challenges when it came to enforcing fighting observance of human rights in respect of Constitutional interpretation. Traditionally, the regular historical human rights violators in have been State actors, most prominent of whom were security functionaries (Researcher's emphasis). However, interpretation of Constitutions in Uganda in respect of

commission or omission that breached provisions of the supreme law appears to have been largely against the State and the same State is required to enforce decision against itself in a manner that would uphold observation of human rights. The situation appears to slowly but steadily erode public confidence that the courts have Teeth to bite'. Article 35 of the 1962 Constitution made an attempt to make court perform both judicial and political functions that in a desperate effort (Peter Walubiri, 2004) to try to have its decisions enforced it notes that:

(4) During any period when the Vice President is required by subsection (1) of this section to perform the functions of the President and either

(a) The Vice President is unable to do so by reason of absence from Uganda or for any other cause; or

(b) The office of the Vice President is vacant; those functions shall be performed by the Chief Justice.

Upon coming to power in January 1986, the NRM Government issued a Statutory Notice number one of 1986, accepting the authority of the 1967 Constitution, and making it a basis for forming the NRM Government which set a new stage for new political, constitutional and economic order. The new NRM Government established a more complex court structures with justice at local levels being dispensed by local Council leaders. It gave local council quasi judicial powers with leaders popularly elected at village, sub-county and District levels.

In 1990, a Constitutional Commission was appointed with the mandate of coming up with a draft Constitution which was to be debated by the Constituent Assembly Delegates leading to the promulgation of The 1995 Constitution in October 1995. The Constituent Assembly elected in 1994 under universal adult suffrage, debated the Constitution which was amended nine years later on substantial political matters like removing of Presidential term limits, leaving the Country to date with dire need for its restoration.

Chapter VIII of the 1995 Constitution explicitly provides for Administration of Justice. Article 128 of the Constitution provides for the independence of the Judiciary and Article 137 particularly creates The Constitutional Court as the Court mandated to handle questions as to the interpretation of the Constitution. Article 137 states that:

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as Constitutional Court;

(2) When sitting as a Constitutional Court, the Court of Appeal shall consist of a bench of five members of that Court;

(3) A person who alleges that:

(a) An Act of Parliament or any other law or anything in or done under the authority of any law or;

(b) Any act or omission by any person or authority is inconsistent or in contravention of any provision of this Constitution,' may petition the Constitutional Court for a declaration to the effect, and for a redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this Article Constitutional Court considers that there is need for redress in addition to declaration sought, the Constitutional Court may:

(a) Grant an order of redress; or

(b) Refer the matter to the High Court to investigate and determine the appropriate redress

Since the promulgation of the 1995 Constitution, the Constitutional Court has determined so many cases in respect of interpretation of the Constitution, making the researcher to develop interest to explore and empirically determine to what extent has this interpretative role of the court contributed to the improvement of observance of human rights in the Country, given the heinous history of human rights abuse. So many statutes and conducts of public officials in relations to promoting human rights have been challenged in the Constitutional Court, but fundamentally the question of how these pronouncements of the courts have been enforced in an attempt to protect and promote respect of human rights remains unsettling legal issue.

It is against this elaborate background of the interpretative role of the courts of judicature that this study has conducted to assess its pragmatic impact on the improvement of observance of human rights in Uganda following the promulgation of the 1995 Constitution of Uganda.

1.3 Statement of the problem

Uganda like most African Countries has seen turbulent history that J substantially undermines the independence of judiciary to an extent that judicial officials faced physical harassment and in some occasion's loss of lives. This made judiciary at times to interpret the law with political expedience so as to avoid collision of path with the political authority of the day and offer it an appeasement. Successive Governments in Uganda have been at the fore front of human rights violations in effort to suppress political dissents and to actualize social hegemony of State authority.

Much as the situation appears to have significantly changed with the universalization of human rights values and adoption of international instruments to enforce observation of these rights through global partnerships and peer mechanisms, the empirical situation in Uganda does not appear to be as promising as perceived in the public. Courts have enormously interpreted the Constitution but how has this interpretation translated into improvement of observance of human rights in Uganda.

1.4 Broad objective

The overall objective of this study is to empirically assess how the Constitutional interpretation by the Courts of judicature has improved the observance of human rights in Uganda between 2000 - 2005.

1.5 Specific objectives

1. To find out to what extent courts of law have been able to enforce their decisions in attempt promote respect of human rights in Uganda;

2. To assess to what Extent State authority has respected decisions of courts in so far determining the meanings and implications of Constitutional provisions are concerned;

3. To determine the independence of judiciary in exercising its role to interpret the law;

4. To assess the existence of any practical link between Constitutional Interpretation and the improvement of observance of human rights.

1.6 Significance of the study

This study is uniquely significant in offering an in-depth insight into the rather neglected relations between Constitutional interpretation and the respect for human rights. More often than not courts have made interpretive declaration which is milestones in the protection and promotion of human rights but have been negated by human activists, academics and legal practitioners, leaving the violations to continue unabated.

This study has immensely and richly delved into the practical link that should be able to guide the effort for all stakeholders who wish to promote independence of the judiciary and promote observation of human rights in Uganda.

1.7 Rationale of the study

This study has been specifically undertaken as part of requirement for the award of Diploma in Laws and as well to contribute to the already existing body of scientific knowledge that has over time sought to assess the practical link between interpretation of the law by court and human rights observation. This could be a basis for an agenda for a bigger research to be undertaken by an organization that wishes to understand deeply the problem and enhance protection of human rights and independence of judiciary.

1.8 Justification of the study

Since the promulgation of Uganda 1995 Constitution, there have been escalating public disapproval of the conduct of, State functionaries with suggestion that it could be bent to intimidate judiciary. Twice, within the scope of this study, military group besieged Court precinct to re-arrest suspects who were released by Courts, creating practical need to assess through systematic scientific study how the effort to Courts to interpret the Constitution has contributed to the improvement of observance of human rights.

1.9 Scope of the study

The study concentrated largely on the decisions of the Constitutional Courts between 1995 and 2000, without looking at any specific geographical region but rather the whole Country. Much as the law mandates all courts to interpret the law, specific attention in this study was given to the Constitutional Courts as per Article 1.37.

1.10 Conceptual framework

The theoretical linkage between Constitutional interpretation and human rights observance is premised on the principle that Courts give greater regard to human rights issues that have arisen before it during construction of the law because the law must protect the wellbeing of human beings first before it gets into other issues in society. Construction of the law may be generous but tailored to the interest of human being which if ignored could cause irretrievably absurd consequences and defeat the whole philosophy that law is meant for human beings not human beings meant for the law. The Constitution is therefore constructed on the broadly the following ideals:

a) **Generosity** - meaning the law should look at the broad interest of society instead of the narrow goals;

b) Wholeness - this is a principle of interpretation which means that this must be constructed with its entirety, taking into account other provisions within the same law;

c) **Purposefulness** - the law should not fundamentally deviate from the original purpose or intention of the framers, taking into account the mischief at the time or in history of the Country that they wanted to address.

1.11 Study assumption

This study was conceived out of hypothetical assumptions of the human rights situation in the Country owing numerous petitions to the Constitutional Courts with view of challenging certain statutes and commission or omission of public officials which could have led to violations of human rights. The study was therefore premised on the following assumptions:

a) That human rights observation in the Country has improved owing to several decisions that have been taken by Courts on the matter;

b) That judiciary has realized greater degree of independence owing to decisions that it has taken against State authority, different from historical reality;

c) That State actors have not respected decisions of Courts, permitting continued violations of human rights;

d) That judiciary could be on the path of heavy politicization due appointments of politicians to the Bench of judges.

1.12 The study questions

These most central questions that guided the study to make attempt to gather the data most needed to address the objective of the study; some of the sampled questions include the following:

a) Is judiciary independent enough to take decisions on human rights even if such decision may go against the political interest of the State authority?

b) Do courts take decisions based on the known principle of Constitutional interpretation or rather for political expedience?

c) Have efforts by the Courts to interpret the Constitution improved the observance of human rights in the Country?

d) How have other stakeholders supported the Courts to enforce decisions of the Courts to improve the observance of human' rights in the Country?

CHAPTER TWO
LITERATURE REVIEW

2.1 Introduction

This chapter appraises and analyses related works by other researchers both in Uganda and in the rest of the world in relations to Ugandan situation. The researcher compares these works with the study he conducted and deeply assesses the lope holes in Uganda's situation of how courts have interpreted the law with view of improving human rights situation in the Country. Uganda 1995 Constitution offers Bill of rights in the whole Chapter (chapter 4), leaving it to courts to interpret the law in a manner that promote and uphold respect for human rights.

2.3 Definition of terms used

Jurisprudence - Jurisprudence is the study and theory of law. Scholars of jurisprudence, or legal theorists (including legal philosophers and social theorists of law), hope to obtain a deeper understanding of the nature of law, of legal reasoning, legal systems and of legal institutions.

Constitution - supreme law of, a Country from where all power and authority in the State emanate or originate and should be exercised in accordance with its provisions,

Human rights -these are inherent and inalienable entitlements whose enjoyment guarantees human dignity, wellbeing and harmony in any society.

Observance this is something developed as a practice, adherence or rite performed routinely as and when it is required to meet certain standard of human livelihoods

Judgment - this refers to decision, ruling, inference, conclusion or deduction that courts reach after assessing and critically analyzing facts availed before it by adversarial parties.

Originalism -this is a legal school of thought which postulates that laws must be constructed or interpreted with regard to its original purpose and probable intentions of its framers.

Interpretation -this refers to efforts by courts to unlock or construct a legal provision to the simplest understanding of a common man in society so that the law may have meaning in his life.

2.4 Views of literal interpretations and originalists

These are legal scholars who contend that law must be interpreted in its most bare and literal manner devoid of any moral or political expedience even if it might produce a preposterous

outcome. In the legal jurisprudence school of realism, where Madison is an astute subscriber, it is held that law is an aggregation of moral and political values and aspirations of the people and must be interpreted the way they plainly appear in the text and those realities embedded in the law are not placed under whims of judges. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.

According to James Madison, 1994, there are seven sources that have guided interpretation of the Constitution:

Textual - Decision based on the actual words of the written law, if the meaning of the words is unambiguous - verbis legis non est recedenchem

Historical - Decision based less on the actual words than on the understanding revealed by analysis of the history of the drafting and ratification of the law, for constitutions and statutes, sometimes called its legislative history, and for judicial edicts - Animus ho minis est anima scripti. (Intention is the soul of an instrument)

Functional, also called structural - Decision based on analysis of the structures the law constituted and how they are apparently intended to function as a coherent, harmonious system. Nëmo aliquam partem recte intelligere potest ante quam totum perlegit. (No one can properly understand a part until he has read the whole).

Doctrinal - Decision based on prevailing practices or opinions of legal professionals, mainly legislative, executive, or judicial precedents. Argumentum a simili valet in lege. (An argument from a like case avails in law).

Prudential - Decision based on factors external to the law or interests of the parties in the case, such 'as the convenience of overburdened officials, efficiency of Governmental operations, avoidance of stimulating more cases, or response to political pressure. Boni judicis est lites dirimere. (The duty of a good judge is to prevent litigation).

Equitable, also called ethical -Decision based on an innate sense of justice, balancing the interests 'of the parties, and what is right and wrong, regardless of what the written law might provide. /Equitas est perfecta qudam ratio qu jus scriptum interpretatur et emendat; nulla

scriptura comprehensa, sed sola ratione consistens. (Equity is a sort of perfect reason which interprets and amends written law; comprehended in no code, but consistent with reason alone).

Natural - Decision based on what is required or advised by the laws of nature, or perhaps of human nature, and on what is physically or economically possible or practical or on what is actually likely to occur. Jura naturae sunt iinmutabilia. (The laws of nature are unchangeable).

Madison, an originalist asserts that the Constitution is fundamentally a public text or a monumental Charter of a Government and a people, and Justices of the Courts must apply it to resolve public controversies. In this way, important aspects of the most fundamental issues confronting our democracy may finally arrive in the Courts for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions.

Justice WG Kanyeihamba in his text, Constitutional Governance in Uganda, notes that when litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the C9nstitution's provisions.

He further contends that courts' decisions are orders supported by the full coercive power of the State that propels societal changes in fundamental aspects. But how practical has this been in real life situation? Available evidence is that judiciary has been in standoff with the Executive arm due to the former's shrinking space as a result of political interference, making the view of the learnt Justice Kanyeihamba wanting in pragmatic aspect. He adds that "We Justices are certainly aware that we are not final because we are infallible; we know that we are infallible only because we are final."

Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate (GW Kanyeihamba, 2004). The source of legitimacy is, of course, a wellspring of controversy in legal and political circles. However, aptly adds relying on purpose as a reason for construction is risky because all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, but hid their differences

in cloaks of generality. This creates expedient need to adopt more realist and literal approach than any other.

From Kanyeihamba's view one notices that relying on the impute of intent and purpose of the framers of the law, who are actually politicians, would politicize the whole judicial process and make the arm inadvertently to further the unjust production or any other economic relations which could have been envisaged by political class who may want to use the law as super structure to maintain economic status quo as imputed by Karl Max.

He goes on to justify the remark by stating further that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use; that if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument. Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only, when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office.

There may be obscurity, as to the meaning, from' the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived from the whole structure of the instrument, or its avowed object.

2.5 Views of non-originalists

These are views held by jurisprudence theorists who think that the law is what the judge decide at a particular time based prevailing circumstances. This theoretical standpoint is held by positivists including Karl Max who think the law reflects the aspiration of the ruling class who want to protect their wealth by keeping the prevailing production relations among members of society.

Prof Hart, 1972, contends that in examining the Constitution, the antecedent situation of the Country, and its institutions, the existence and operations of the State Governments, the powers and operations of all sub- national authorities; in short, all the circumstances, which had a tendency to produce, or to obstruct its production, deserve a careful attention. To date, economic

crimes still form the basis of most serious crimes in jurisdiction like China; during industrial revolution in Britain, theft was punishable by death.

It is argued by Holmes that such sweeping power would tantamount to usurpation of the functions of legislators, and would make law rather unpredictable and judiciary heavily politicized. He relied on **the textualist and strict construction approach**; which suggests that decisions should be based on the actual words written in the law if the meaning of the words is unambiguous. Since a law is a command, then it must mean what it means to the law giver and if the meaning of the words used in it have changed since it was issued then the textual analysis must be of the words as understood by the law giver which for a constitution would be the understanding of the ratifying convention. A central argument for the subscribers of textualism and strict construction is that less strict interpretations of the constitution can become a method of legislative activism by judges which they feel is an abuse of judicial power. The

Supreme Court's power for constitutional review and extension of its interpretation was essentially self assigned in **Marbug v. Madison**

It is often asserted that Originalism is synonymous with a textualism and strict constructionalist approach in certain aspects. **In Smith v. United States**, Justice Scalia differentiates the two by pointing out that "Unlike an originalist, a strict constructionalist would not acknowledge that, 'He uses a cane' means 'He walks with a cane' because strictly speaking this is not what 'He uses a cane' means. Scalia has asserted that he is 'not a strict constructionist and no one ought to be;". He goes further calling strict constructionalism a degraded form of textualism that brings the whole philosophy of interpretation into dispute.

In the case of **De Clerk and Suct v. Du Plassis and Another**, the Supreme Court of South Africa stated that: "When interpreting the constitution and more especially the Bill of Rights, it has to be done against the backdrop of our repressive history in the human rights field." One main proponent of contextualism, Chief Justice William Howard Taft, explained that: "The language of the constitution cannot be interpreted safely except by reference to the Common Law and to British institutions as they were when the instrument was framed and adopted.

2.6 Uganda's situation

The National Objectives and Directive Principles of State Policy

Peter Mukidi Walubiri in his text, Uganda Constitution at crossroads, Uganda Law watch 1998 asserts that simple rationale to this canon is that the rights granted by the Constitution do not exist in a vacuum, and are not an end in themselves. They are granted upon a given background and it would be lethal for any Court to interpret the provisions in total segregation of the preamble and the directive principles. In Uganda, the basic importance of this was stated by Egorida Ntende J. in **Tinyefuza v. AG** wherein he stated that:

> "The binding values in this Constitutional dispensation are clearly set forth in the preamble. These are unity, peace, equality, democracy, freedom, social justice and progress. In order to ensure that all citizens, organs and Agencies of the State never lose sight of those values and are firmly guided by these values in all our actions, a statement of National objectives and Directives and state policy was set forth. The first paragraph states, the following objectives and principles shall hide all organs of the state... and persons applying or interpreting this constitution or any other law...for the establishment and promotion of a just, free and democratic society. That ought to be our first canon of construction of this constitution. It provides an immediate break or departure with past rules of constitutional construction."

2.7 Pragmatic approach:

This theory is founded on the idea of judge-made law doctrine but goes further to enlarge the interpretation aspect to be elastic enough to include broader historical events, practices, usages and political culture. It tends to focus on how the meaning came into being hence the idea of constitutional growth and evolution. Chief Justice Tan Warren exemplified this when he said the constitution needs to be interpreted in light of the evolving standards of decency that mark the process of a maturing society. A common criticism to this approach is that it makes a Constitution 'mean nothing' because it holds that it can mean anything. First, the pragmatic view contends that interpreting the Constitution with long out-dated views is often unacceptable as a policy matter and thus that an evolving interpretation is necessary. In **Osotraco Ltd v. AG**, where Justice Egonda

Ntende said:

> "The rationale for the proviso (b) to sec. 15 of the Government proceedings Act lies in the historical relationship between the Crown and the courts of England in terms of constitutional theory"

This Constitutional theory was explained by Lord Diplock in the following words in Jaundoo v. AG of Grenada, 'At the time of hearing a motion in the High Court, an injunction against the Government of Guyana would thus have been an injunction against the Crown. Thus a court in Her Majesty's dominion had no jurisdiction to grant. The reason for this in constitutional theory is that the court exercises its judicial authority on behalf of the Crown. Accordingly, any orders of the court are themselves made on behalf of the Crown and it is incongruous that the Crown should give orders to itself'

2.8 The constitution should be interpreted as a whole

It was settled by the Supreme court of the U.S "that no single provision of the Constitution is to be segregated from the others and to be considered alone but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effect the greater purpose of protecting and promoting fundamental human rights. Laws protect the rights of the poor by putting safeguard against excesses of the strong".

In the case of **Maj. Gen .David Tinyefuza v A.G,** Constitutional Court held that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of supremacy of the written Constitution. Manyindo D.C.J observed that as follows:

"The entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony completeness and exhaustiveness and the rule of paramouncy of the constitution that will make Courts orders binding to all authorities in the State.

On appeal, Oder J.S.C expressed the same view in this way. Another important principle governing interpretation of the Constitution concerning an issue should be considered all

together. The Constitution must be looked at as a whole. Therefore" .. .the Constitution being a logical whole, each of the provisions is an integral part thereof and it is therefore logically proper and indeed imperative, to construe one part in the light of the provisions of the other part so as to reduce complexity when it comes enforcement of decisions of the Courts".

2.9 The Meaningful and Effective rule of interpretation

Where the language of the Constitution is imprecise or ambiguous, then liberal, flexible and purposive interpretation must be given to cure the ambiguity. The rationale for this is that the Constitution is not an ordinary statute capable of amendment as and when legislators choose. In **Salvatore Abuki v A.G, Okello J held** that "If the purpose of the statute infringes a right guaranteed by the constitution, that impugned; statute is also declared F unconstitutional".

In this case the petitioners were banished from their homes for lOyears after serving a prison sentence for contravention of the Witchcraft Act. The Constitutional Court struck down the Act as being unconstitutional and inconsistent with the Constitution which guaranteed citizens from cruel, inhuman or degrading treatment. Court took judicial notice of the fact that most people in Uganda live in rural areas and survive on land. Court considered that banishment provisions denied the petitioners access to land and that such a person would be rendered a destitute upon leaving prison. The constitution permits a broader purposive approach by providing in Article 126 that "Judicial power is derived from the people and shall be exercised by. the courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people".

In **R v Big Drug Mart Ltd** the Supreme Court stated that "The interpretation should be a generous one rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charter's protection of their human rights and other fundamental welfare matters. The generous construction means that Courts "must interpret the Constitution in such a way as not to whittle down any of the rights of freedom unless by very clear and unambiguous words such interpretation is compelling".

2.30 Narrow Construction to be preferred in case of derogation from a guaranteed right

It is not in doubt that saves for the rights mentioned in Article 44 which are stated to be non-degradable, the rest can be limited. But the power to do so is not to be arbitrarily exercised by courts. Indeed under Article 43, it states that "In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. This ordinarily means that a victim of infringement has to do is to plead that his right has been violated unreasonably. Once he does this, the burden shifts to the alleged infringer to prove that this was in the circumstances reasonable and justified.

In **Charles Onyango Obbo & Andrew Mwenda v A.G,** the two petitioning journalists were charged with publication of false news contrary to section 50 of the Penal Code Act. Justice Mulenga JSC espoused the fact that the protection of guaranteed rights is the primary objective of the Constitution and the limitation of their enjoyment is an exception to their protection and is a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can only be overridden in exceptional circumstances that give rise to that secondary objective. He stated that the criteria to be satisfied include:

(a) The legislative objective which the limitation is designed to promote;

(b) The measures designed to meet the objective must be rationally connected to it and not arbitrary unfair or based on irrational considerations;

(c) The means used to impair the right or freedom must be no more than necessary to accomplish the objective. In his observation, there were two interests to be balanced.

The freedom of expression and that of the Country as a democratic society, let alone protection of the public. In the instant case, the derogation of the petitioner's rights didn't fulfill the three canons since such deprivation could only be invoked in public interest if there was real danger and not merely speculative or conjectural danger or alarm. Thus in limiting this rights, Court further took observance of the presuppose existence of universal democratic principles to which every society adheres. While there may be variations in application the democratic values and principles remain the same. Therefore for any legislation which seeks to limit rights in Uganda is not valid under the constitution unless it is in accordance with those universal principles.

2.31 The Constitution must be interpreted as a living document

This canon enjoins the courts to interpret the constitution having in mind present day circumstances. It also means that it is meant to cater for both the present generation and those unborn, in **Unity Dow v. AG,** it was remarked that:

"The Constitution is the supreme law of the land and is meant to serve not only this generation but generations yet unborn. It cannot allow being a lifeless museum piece. On the other hand the courts must breathe life into it as occasion may arise to assure the healthy growth of the state through it. We must not shy away from the basic fact that while a particular construction of a constitutional provision may be able to meet the designs of the society of a certain age... it is the primary duty of judges to make the constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider society governed by acceptable concepts of human dignity."

Fundamental rights are inherent and not granted by the state;

Fundamental human rights are not gifts from the State. As Egonda Ntende J explained that this provision by stating that these rights are inherent, the Constitution is recognizing their inherent existence to that extent they must be looked at in a different light from other rights created by the subordinate law. They are in a person by reason of his birth and therefore prior to the State and law. This is perhaps best supported by Article 126 (2)(e) which requires Courts of law to dispense substantive justice without any undue technicalities. Accordingly, it is the merits or substance of the petition and not the procedural technicalities that count. In Tinyefuza v. AG, Manyindo DCJ stated that:

"The case before us relates to the fundamental rights and freedoms of the individual, which are enshrined and protected by the Constitution. It would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all. This court should readily apply the provision of Article 126 (2)(e) of the constitution of a case like this and administer substantive justice without undue regard to technicalities."

2.32 International Human Rights Convention and treaties may be used in interpretation

This canon was well summarized in Unity Dow v. AG, wherein the Court remarked that although it is common view that conventions do not confer rights on individuals within the State until Parliament has legislated them and incorporated within local law, those conventions may be referred to as an aid to construction of the Constitution and that it would be wrong for the Courts to interpret the Constitution in a manner which conflicts with international obligations. The rationale is that whether ratified or not, these conventions contain universally recognized human rights too which no civilized Nation can derogate.

The harmonization of conflict principle

This means that where two constructions are possible and one is very restrictive of the guaranteed rights and the other permissive then the latter is to be preferred of the two. In **Mtikila v. AG** of Tanzania, the Court was encountered with conflicting Constitutional provisions. The Tanzanian Constitution granted every citizen the right to participate in the governance of the Country and the right not to be compelled to belong to or subscribe to a Political Party. However, an amendment was passed which barred any citizen from running for any Political Office unless they were members and recognized Parties. In holding these two provisions read together could not bar independent candidates from standing held that:

> "When a pro vision of the Constitution enacting a fundamental right appears to be in conflict with another provision of the Constitution... the principle of harmonization has to be called in aid. The principle holds that the entire Constitution has to be read as an integrated whole and no one provision destroying the other but each sustaining the other... if the balancing Act should succeed, the Court is enjoined to give effect toll the contending provisions. Otherwise the court is enjoined to incline to the realization of fundamental rights and may for that purpose disregard the clear words of a provision if their application would result in gross injustice... These propositions rest above all on the realization that it is the fundamental rights which are fundamental and not the restrictions."

The principles of Constitutional interpretation were summarized in the case of **Charles Onyango Obbo and Andrew Mujuni Mwenda v. AG Const. Pet. 15 1997/21/07/2000**. Twinomujuni JA

enumerated the various principles of constitutional interpretation referring to a number of cases; **Maj. Gen. David Tinyefuza (supra), Zachar Olum and Anor. V. AG(supra), and Dr. James Rwanya rare and Anor. V. AG (supra).** He asserted that the principles of constitutional interpretation can be summarised as follows:

principles of interpretation applicable to Statutory construction also apply to the construction of Constitutional instruments, words must be given their natural and ordinary meaning where they are not ambiguous, the instrument being considered must be treated as a whole and all provisions having bearing on the subject matter in dispute must be considered together s an integrated whole, provisions relating to the fundamental human rights and freedoms should be given purposive and generous interpretation in such a way as to secure maximum enjoyment of rights and freedoms guaranteed and where the state or any person or authority seeks to do an act or pass any law which derogates on the enjoyment of fundamental rights and freedoms guaranteed under Cap 4 of the constitution, the burden is on that person or authority seeking the derogation to show that the act or law is acceptable within the derogations permitted under Article 43 of the Constitution.

From the above, one notices that there is an overwhelming evidence that Uganda 1995 Constitution, relying on the various principles and rules of construction, has been construed to promote and protect human rights because operation of the Constitution largely centers around human welfare. Challenge that remain to be assess empirically is how have these noble constructions by the courts in a manner that protects and promotes observance of human rights been enforced. Judicial declaration or order is one thing, to bring to practical effect is another.

CHAPTER THREE
METHODOLOGY

3.1. Research Design

This research is a case study. It used specifically qualitative research method of data collection. Interviews were conducted with Court officials, questionnaires were administered to selected public officials and host of Court documents were studied by the researcher.

3.2. Study area

The study had its scope defined more in terms of the research issues and time frame rather than geographical scope. The study conducted largely within the Constitutional Court and the High Court premises had its scope limited, on decisions taken by Courts of law between 2000-2014 by Courts to interpret laws to improve human protect human rights situation in the Country. Court premises were chosen with view of accessing a range of documentary evidence of the decisions or decrees issued by the Courts in respect of interpretative roles to enforce observance of human rights. Geographically, the study limited itself within Kampala.

3.3 Target population

The researcher used biased sampling method to choose the population cluster to involved in this study because some of the date needed required some level of professional skills to provide them, in total 27people were involved in the study, ranging from Court officials, lawyers in private practice, police officers, officetif-the-AttorneyGeera1 and randomly selected members of the public

3.4 sample size and sampling procedure

The sample size was 15 people, 3 staff of Constitutional Court and High Court; 2 Advocates, 2 Police Officers, 4 members of civil organizations who work on human rights issues; and 4 randomly selected members of the public. Most respondents were members of the legal profession because most of the data needed was largely legal in nature, and it needed one who is abreast with what goes on in Court on regular basis so as to understand whether decisions taken by Courts on interpretation of the law is improving respect of human rights in the Country.

Civil Society leaders on human rights protection were chosen with view of learning from them if the human rights situation in the Country is improving, and if so, what could have contributed to

the improvement. Police officers were chosen for the study owing to the hypothetical imputes that security functionaries were unwilling to enforce Courts' decision due to pressure from politicians against whom some of the decisions have been taken. Members of the public were involved in the study because they are the victims of human rights violations and decisions taken by Courts could be to compensate them for the losses incurred and could help the study ascertain whether these decisions have impacted positively on them in so far as observance of human rights is concerned.

The sample size is as per below break-down: Out the 15 respondents, 7 were women; Men were 8 , 6 people are Government employees; 4 are Civil Society workers; 2 are private advocates and 3 are members of the public; the respondents are people within the age bracket of 30 50 years.

3.5 Data collection techniques

This techniques show the various tools applied in the data collection and why they were preferred to collect certain data.

a) Interview

This involved direct verbal interaction between the researcher and five (5) carefully chosen respondents based on their ability to comprehend the legal issues raised to them. The interviews were based on an interview guide that gave an outline of the aspects of the study and ensure asking of consistent and relevant questions which were simple and greater degree of clarity.

The choice of the respondents under this category was based on consideration of the office or responsibility they held in the judiciary and related Government departments, especially those with function to enforce Courts decision. The five respondents the researcher talked to included the Registrar of the Constitutional Court; the registrar of the high court, one official at the Registry of the Constitutional Court; two officials of the High Court Registry; and one, official of the Supreme Court Registry.

Biased sampling method was used to choose respondents for the interview on consideration on their access to wide range of data that would give empirical evidence of decision of Courts that have been taken in the cause of interpreting the law and whether they have been implemented or not, and if not why? Some of the Courts' decision was required compensation by the office of the

Attorney General and some of these officials were better place to know if such victims have received their compensation or not.

Out of the total of five respondents who took part in the interview

Male 03

Female 02

The justification of this method is that it generated quick feed-back, enabling the researcher to seek clarifications, and to probe deeper and gauge the real feelings of the respondents. The researcher faced linguistic, resource and time limitations in using this method. The researcher used note taking technique to record the interactions reaction which premised on technical legal issues. The research was accompanied in each occasion of the interview by at least one research assistant to help recording the interview and ask relevant questions which may have skipped the mind of the researcher.

b) Questionnaires

It comprised set of questions carefully chosen by the researcher in attempt to get data that answers the research question and address the research objectives as a whole. The research questions focused on the statement of the problem and objectives of the research. The questionnaires were structured and non- structured. Non- structured questionnaires permitted the respondent to provide wide range of information without any limitations.

In total, eight (8) questionnaires were administered to Government officials, private lawyers and some Civil Society Leaders. They were administered directly by the researcher with support of two (02) carefully trained research assistants to staff in Ministry of Justice, two law firms in Kampala and four (04) members of the general public.

Biased sampling method was used to sample the offices and individuals take part in this techniques of data collection premised on what kind of data would be required from such an office or individual, and also on one's ability to read and comprehend issues that the researcher sought from such respondent in so far as efforts of Court to enforce decision taken on human rights are concerned. Within the selected cluster (office) random sampling was used based on

whoever the head of department designated to handle the matter of this research. It was clearly put to the respondents that this research was purely for an academic purpose and therefore their response should be on voluntarism as no reward would be offered after their responses.

The researcher chose to use questionnaires as a method because it was convenient to those who would not have time for interview but to respond to the questionnaires at their free time. The researcher noticed that the questionnaires were also convenient for shy respondents who would not want to be quoted for any piece of information that would sensitive in Government circles since their questionnaires did not require the respondents to disclose their identity.

i) Distribution of questionnaires

This shows how the questionnaires were given out to people of different education, and employment factors in their lives

Five (5) questionnaires were administered to male respondents;

Three (3) questionnaires were administered to female respondents;

Three (3) questionnaires were administered to those above 40 years of age;

Five (5) were administered to those below 40 years of age.

A random sampling method was used to select sex, age and social status in society to take part in the response.

3.6 Source of data collection

The data for this research work was obtained essentially from secondary sources, largely by studying Courts' document within the different registries and documents on website of the judiciary. However, primary data was also collected from Civil Society, private legal practitioners and members of the public. All these of data offered rich information that immensely guided the study to produce a report that will richly add to the existing scientific body of knowledge.

3.7 Data management

The study confined within Kampala area, gave Courts greater attention owing the data hoped to be got from the Courts' Registry. The collected data was categorized guided by the research problem and the objectives of the study in four parts: the views of the public, views of legal practitioners (professional), views of Government officials and documents from Courts that were studied by the researcher. The categorized data was edited and coded. The coded data was interpreted to relate the findings with the theoretical principles of Constitutional construction, draw inferences and to bring out the real import of the findings.

3.8 Ethical consideration

In the collection of the data, it was made categorically clear to the respondents by the researcher and his Assistants that they had the discretion to answer the questions, because no reward, payment or any form of unethical method would be used to coerce or motivate them to answer any questions, and that the research serves academic purpose only and the views they expressed with confidentiality they deserve.

3.9 Study limitation and delimitation

The researcher experienced some limitations in the course of the study that include:

Financial constraints the researcher never realized the money that was budgeted for the entire study. In addressing this problem, the researcher was assisted by a friend with some money and he also reduced the number of research assistants and the offices to be visited.

Time limitation - the time was very short to have an elaborate study. The researcher addressed this problem by employing research assistants in order to increase the pace of the study.

Language barrier - some people in the public where this research was carried out did not know English and were comfortable using local language; the researcher addressed this limitation by hiring an interpreter who went through a day of training to carefully interpret research questions and responses of the people.

Reluctance to return questionnaires - some respondents never returned their questionnaires; the researcher substituted this method with interview schedule.

CHAPTER FOUR
PRESENTATION AND ANALYSIS OF DATA

4.1 Introduction

This chapter is the one that reveals the real findings of the study and makes attempts to interpret the data into usable information that should offer scientific contribution to re-direct policy and legislative focus of Uganda with greater influence in its whole body polity. The date has been categorized in four cardinal parts, namely: views of the public, views of legal practitioners (professional), views of Government officials and documents from Courts that were studied by the researcher

4.2 views of the public

The researcher interacted with some members of the public with view of seeking information from them on how the interpretive role of the Courts of judicature has practically resulted to the improvement of observance of human rights in the Country since the promulgation of the 1995 Constitution. Most of the respondents, if not all, agree that the judiciary enjoys greater independence today than ever in the history of this Country. They claim judicial officials in 1970s and 1980s faced greater risks from the State security apparatus and as such shied away to take decision against the political interest of the State authority, substantially shrinking the independence of judiciary' and eventually undermining the doctrine of separation of powers.

Some of them cited the murder of the Uganda Chief Justice in 1974, Hon Justice Ben Kiwanuka, a murder most horrid and believed widely by Ugandans that it was carried out by the State security functionaries of the day. Some of the respondents claimed that Kiwanuka acquitted British nationals who were accused of espionage by Ugandan security due to insufficient evidence against them. The Sate authority construed this as betrayal of Uganda's effort to curb emerging security challenges of the time.

The public still thinks that in spite of the reasonable degree of independence that the judiciary enjoys, the Executive has been working to undermine this independence by deliberately refusing to enforce certain crucial decisions of the Courts due to concerns that the decisions could be injurious to their political interest. Owing to the horrific history that the judiciary suffered in the hands of the Executive, the institution has remain rather timid to assert itself in the face of non-compliance with the decisions of the Courts. The public cited deplorable incidences where armed

paramilitary outfit, the Black Mamba besieged the High Court Premises in 2005 and 2007 to re-arrest suspects who had been granted bail by the Court to show the world that the courts were subordinate institution to the Executive arm of Government.

Most respondents expressed displeasure at the way the Courts reacted to the matter, arguing that they had expected the Courts abscond duty in protest of the act of Sate security apparatus until Executive had apologized with firm pledge of not repeating such a despicable act of savagery that profaned the institution of judiciary. Justice James Ogola, then Principal Judge, in his poetic presentation referred to the act as "Rape of the temple of Justice". The respondents who most lauded the Uganda Law Society for playing a vanguard role in expressing displeasure at the conduct of the State security, contend that the Courts have tried to interpret the law in a manner that improve observance of human rights.

Some respondents recall that the State has lost most human rights violation cases that have come before Court, citing treason cases against opposition politicians in 2001-2011 where several supporters of Dr Kiiza Besigye, the main challenger to the incumbent President, were arrested in what the respondents contend were politically motivated charges. A development they assert that it demonstrated indolence of the Courts in respect of construing the Constitution in a manner that improve and promote observance of human rights.

Some respondents suggested that appointment of past politicians as judges could also erode the professional image and the ideal of independence of judiciary because the judges would want to promote certain political views using the institution of judiciary and the law. Some of them cited GW Kanyeihamba, Bart Katurebe and Stephen Kavuma as judges with past political belief who may not act impartially as judges because they have political agenda pursue either for or against the State.

However, from the above, what does not appear to be in doubt is the fact that judiciary at the time of this study enjoyed significant degree of independence and have ably applied this independence to interpret the Constitution in a manner that would improve and uphold the observance of human rights. What remains unsettling challenge is where Courts have taken the decision and passed them over to other State Agencies for enforcement, if they do not comply what happens next?, can Court hold officials in such Agencies for its contempt? There still to be

grave apprehension among Ugandan public that the Country may revert to the turbulent times in history if the Political leadership continues to narrow space for exercise of judicial independence. Narrowing space may mean a opening room for human rights abuse, which might see the civil population consider violence to demand for human freedom and furtherance of democratic creed.

4.3 views of Government officials

Among this category of respondents, who Government officials from Judiciary, Police and Office of the Attorney General, there is strong contention that since the promulgation of the 1995 Constitution, the Courts have enjoyed unprecedented independence, arguing further that the onus is on the Courts to enforce their decisions against those whom the decisions have been delivered. These officials appear to cautiously agree with members of the public that there were gestures from some quarter's political leadership that could be interpreted that they calculated utterances to intimidate judicial officials.

Prominent among whom is statement attributed to President of the Republic of Uganda, H.E. YK Museveni for allegedly saying that" incredible, incredible, if you look at some of their judgments you will not believe it. We shall deal with some of the judges. This utterances run regularly on K FM, is purportedly made by the President in 2003, when High Court annulled the election of Hon Amama Mbabazi on grounds of irregularities, and President made the alleged remark to vent his frustration with Courts annulling the victor of Mbabazi. The officials believe that such statements could indeed scare judges with history of State barbarity directed towards them on politically sensate cases.

The officials told the researcher that most Constitutional cases decided in the Country between 2000 -2004, where premised on protection of human rights against violation and that the Government has made attempts within available means to honor and comply with such decisions of the Court They cite the milestone decision in the case of Dr Paul Ssemogerere and Others v. AG, 2000 HCB, challenging the manner in which Parliament passed Referendum and other Provisions Act, 2000. The Constitutional Court in an effort to protect the rights of political minority held that

Parliament acted unlawfully because there was no quorum, defining quorum as physical headcount but not registration of members. In the spirit of the decision, there was no political system adopted because all ensued after illegality.

They argued that such a decision demonstrated the independence of the judiciary which acted without fear or favour to declare the whole Government to be a product of an illegality. Staff in office of AG blames Government for allotting little money to cater for compensation and court awards, causing wanton delay in paying claimants. They claim the department handling such compensation receives Ushs 4 Billion annually to cater for vast number of claimants. They also blame leaders of State security Agencies for not offering sufficient training to their personnel in respect of human rights, or acting with strictness to restrain errant personnel who act in a way that infringes on the right of citizens attracting litigation that the State losses before Court. They suggest that each department in Government should bear the cost of compensation arising from misconduct by its errant personnel so that the leadership feels the strain and they act to restrain such misconduct in future.

These Government officials contend that human rights observance have significantly improved with good interpretation of the Constitution which has whole Chapter four containing the Bill rights, arguing that Ugandan

Constitution could be the best in terms of protection and promotion of observance of human rights. The hold that the improvement in the observance of human rights, quoting 2012 Human Rights Commission

Report, is largely attributed to the principled interpretation of the Constitution by the Constitutional Court and other subordinate Courts.

Some of them cited the case of Dr Kiiza Besigye and 22 others v. AG, 2007 (not reported yet) where the counsels of the petitioners averred that the manner in which the State functionaries conducted themselves in the case, there was strong likelihood that their clients would not get fare hearing as enshrined in Article 23.

They cited denial of bails to the accused, re-arresting them after being granted bail and besieging of the Court premises by paramilitary outfits. The Court agreed with the petitioners that the

interest exhibited by the State security could indeed make accused persons denied fare hearing, and the Court ordered the immediate release of the accused, warning that they must never be brought before any court in Uganda with facts bearing similar or the same evidence as those for which they were acquitted (Res Judi cata). In spite of loss some of them had suffered like death, those who were alive were released and this tremendously demonstrated the independence that the judiciary enjoys in Uganda under the 1995 Constitution.

4.4 views of legal practitioners

In his view, a Kampala based legal consultant, Kiiza James averred that more than half of petitions disposed of by the Constitutional Court were determined in a direction that would enhance protection and promotion of human rights. He cited the decision of Court of Appeal in the case of **Salvatore Abuki v A.G, where Okello J** held that "If the purpose of the statute infringes on any right guaranteed by the Constitution, that impugned statute is also declared unconstitutional"

In this case the petitioners were banished from their homes for 10 years after serving a prison sentence for contravention of the Witchcraft Act. The Constitutional Court struck down the Act as being unconstitutional and inconsistent with the Constitution which guaranteed citizens from cruel, inhuman or degrading treatment. Court took judicial notice of the fact that most people in Uganda live in rural areas and survive on land. Court considered that banishment provisions denied the petitioners access to land and that such a person would be rendered a destitute upon leaving prison. The constitution permits a broader purposive approach by providing in Article 126 that "Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people".

Kiiza contend that human rights agencies in the Country have done little to expand human rights awareness beyond the elite class and urban areas, making vast majority not to know that they have Courts which discharge their duties in the name of people of Uganda and in accordance with their values, norms and aspiration. This, added, that makes the right of a Ugandan a cardinal principle in every interpretation of the Constitution. The Courts must first make a thorough assess of the implication of their decisions on human rights before handing out the decisions to the parties involved. He stated further that the Courts will construe the Constitution with all

relevant modifications and qualifications to protect the rights of those who might. be affected by the declaration if not modified. He noted that this rule of interpretation is essential because definition of human rights continues to be expanded with social developments in society.

However, like the other people preceding him, Kiiza also believes that the State actors have, if not acting to undermine, done very little to support the Courts in enforcing or complying with their judgments. He claimed that the State actors have rendered Courts impotent and portrayed them in the eyes of citizens as 'anti-NRM', planting seeds of belligerence against the Courts within some political quarters.

A private legal practitioner in Kampala, Angulia Joseph said that Constitutional law is the supreme legal authority that protects and uphold observance of human rights against any form of violations without fear or favour. He notes that since 1986, judiciary has enjoyed greater independence than ever in the history of Uganda and has made several landmarked decisions have impacted significantly on the entire jurisprudence in the Country. He revealed that some of the cases have become popular precedents in African Courts, citing the case of Dr Paul Ssemwogerere and Anr v. AG, where the petitioners challenged the way in which Parliament passed legislation on a referendum to adopt a political system for Uganda without a quorum. Court ruled that quorum is physical headcount but not registration at the gate of Parliament. The Court set aside the legislation and every transaction emanating from the impugned law.

He noted that this case has been cited in the Republic of South Africa, Nigeria and Kenya have been elaborate Courts.

Many other legal personnel in the private practice largely share the views of the two advocates where they think Courts have exhibited enormous courage to take decisions that contradict political stance of State authority. Many of them also agree that the Sate authority has been reluctant to comply with decisions of the Courts, with some of them citing failure by the AG to pay Court awards to victims of human rights violation. One such prominent case is that of Reagan Okumu and Anr v. AG, petition No 42 of 2002, where the army broke into a Government Prison in Gulu and forcefully transferred the suspects on treason and selected murder to military facility. While in the hands the petitioners alleged that the suspects were

subjected to inhuman treatment where tortures were meted out on them. In the course of the transfer, one inmate was shot dead.

The learnt Judge, Augustine Kania, held that the military acted outside the law to transfer the inmates without due authorization of the Court given that there was not state of emergency declared in the area. He ordered that the family of the deceased be awarded Ushs 30 million and each of the surviving suspects be awarded Ushs 10 million for the stark violations of their rights. However, he did not vindicate them from the trial of the treason case pending against them as had earlier been prayed by the petitioner's lawyers.

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

In this chapter, the researcher draws a conclusion of the whole study based on the data obtained from the study and analyzed in the previous chapter to show in a more summarized form what the study found in relation to Constitutional interpretation and its resultant effect on the observance of human rights. The chapter also contains recommendation that should help policy makers, legislators, and all partners in Justice, Law and Order sector and the general public to enhance independence of judiciary and promote observation of human rights.

5.2 Conclusion

Unless the judges declare the meaning of law, the law is at risk of meaning anything to anyone at a particular time. It is from this study that we have learnt that law is not the grammatical text we read but rather the view of the judge embedded in certain moral, cultural, political or historical values that must be for the good of observance of rights and wellbeing of a human person. Courts efforts to observe, promote and uphold human rights using their candid interpretation of the Constitution are in no doubt, but why should abuse or human rights persist? From these research findings one could draw an inference that the political leadership, which is the ultimate State authority, does not appreciate the vision and sanctity of the judiciary to create a free and just society where all people - are equal before and under the law. However, much as violations of human rights still persist in the Country following a history of political disorder, the situation today is a lot better than in the past decades, in fact, it offers greater hope provided the judiciary and Executive can harmonize their visions for transforming Uganda into stable, democratic and free and fair society.

5.3 Recommendations

1) The 1995 Constitution (as amended) should be translated in local languages to enable the vast number of Ugandans who cannot ably comprehend in English the complex legal issues in the Constitution and appreciate their rights contain therein so as to seek enforcement where there is infringement.

2) The Government could consider setting up a special police unit attached to the Judiciary to swiftly enforce decision of the Courts to promoted greater observance of human rights like it is in other sectors.

3) The office of the Attorney General should be compelled by the sector players to respect decisions of the Courts in respect of compensating victims of human rights violation by State actors. There are victims whose compensations have not been paid in more than 15 years and have lost hope at they will ever be paid like that of Reagan Okumu & Anor V AG Petition No 42 of 2002.

4) Judiciary could consider creating a High Court Division within the broader Civil Division to handle specifically human rights violation cases and the subsequent failure by the perpetrators to compensate the victims.

5) Human Rights Commission should step-up rights awareness campaigns in rural areas of Uganda in local languages through periodic brochures, songs, dramas and community Barraza so as to improve public consciousness on their rights.

6) People who have played active role in secular partisan politics or those who have clearly demonstrated in public their support for a political persuasion should not be appointed judges so to uphold the sanctity of the institution of judiciary.

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Annexure

Judges can't be activities for Human Rights abuses

Last Week's judicial Routable on the Domestication of International instruments registered some startling views from the learned members of the bench who argued that suspects should stay on remand for longer periods without trial.

Apparently , the justices led court of appeal judge, Amos Twinomujuni, were up in arms - criticizing parliament for amending the criminal penal law thus reducing the remand days for capital offenders before they can qualify for automatic bail from 2360 to 180 days and 120 days for minor offenders .

Following these amendments to the penal code, the right to bail for accused persons has become a controversial issue in judicial circles. Different judges have given different interpretations to the new provisions causing confusion not only within the legal fraternity but among the public as well.

With due respect however justices reasoning that the reduced remand period for suspects in a threat to public order and security since thugs and fugitives would have a field day should not go unchallenged.

Although courts of law have interpreted the constitutional right to bail to be discretionary and not an absolute entitlement, this should be read together with article 28 (3) which provides that every person who is accused of a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

Further still, article 23 of the constitution guarantees the protection to personal liberty a right so important its only second to the right to life among those provided for in bill of rights provided for in chapter four of our constitution.

The exception to the right to liberty is for purposes of bring a person before court in execution of an order by court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda.

Article 23 also renders redundant the provisions of section 76 of the Magistrates Act which hitherto allowed a magistrate not to release a suspect from custody if its expedient for the protection of the public.

In the constitutional Court case of Uganda (DPP) vs. Dr. Kiiza Besigye, court noted that bail is a constitutional right which is derived from the presumption of innocence until proved guilty by a court of competent jurisdiction.

The constitutional court in this matter pronounced itself on the cardinal principle of constitutional interpretation. Court stated that when interpreting an article or clause of all articles bearing upon a subject matter under discussion, they have to be brought into purview and read or construed together as one whole so as to bring out the greatest effect of the document (constitution).

Bail court reasoned should not be denied mechanically simply because the state wants such orders. The refusal to grant bail shouldn't be based on mere allegations, the grounds must be substantial.

This is the reason why parliament granted courts the prerogative to exercise their discretion to grant bail in exceptional circumstances as stipulated under section 15 of the Trial on Indictment Act , which include, old age, grave illness, obtaining a certificate of no objection from the DPP , infancy of the accused.

It's not legally binding therefore for judges to treat remand as a punishment .

Suspects should be allowed to access justice because justice delayed is justice denied and this will always be unconstitutional .

A refusal to grant bail would contradict the suspect' inherent right of innocence and indirectly suggests that the law presumes the suspect guilty of the offence before he is put to his defense in court. In fact parliament should urgently amend the law to reduce the remand days further.

Suspects should not suffer long remand periods without trial because of government's inadequacies, incompetence and corruption experienced in the management of criminal cases.

Its only last year that daily monitor exposed these inadequacies when it quoted a secret police report which indicated that a single detective in police handles 58 instead of 12 criminal cases a year. According to the police report, crime is growing while state institutions are not responding adequately thereby denying Ugandans justice.

People should be arrested when there is reasonable proof that they have committed a crime and the state should then expendiently put them on trial.

Judges should also be reminded that we live in fragile political environment where flimsy charges are preferred against political opponents or vocal critics government without hard evidence.

This means that all Ugandans including flamboyant military generals are potential suspects of jail birds for that matter. The judiciary is a very important institution in ensuring the respect for human and civil liberties.

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MPS: Court erred in interpretation of the law

As we approach the final lap in what has truly been a grueling campaign period, the Constitution Court has thrown the proverbial spanner in the works by declaring the nominations of members of parliament who did not resign their seats before joining parties other than those for which they were elected MPs unconstitutional.

A legal assessment of this judgment handed out by a Coram of 5 judges of the Constitutional court shows that their justices applied the strict and literal interpretation rule when they considered the meaning of article 83(1)

(g) (h) of the constitution.

The article provides that a member of Parliament shall vacate his or her seat in parliament if the person leaves the party for which he or she stood as a candidate for election to Parliament to join another party or to remain in parliament as an independent member.

This particular provision is a recent addition to the constitution to cater for the complex issues of independents and errant MPs who cross party-lines in the course of their tenure. Indeed in the 8th parliament there are some 70 MPs who fall in this category and are directly affected by the Constitution Court's ruling.

But with due respect to the learned judges of the court, their interpretation of the meaning and application of article 83 was right in some respects but flawed in others. For instance the judges are right to hold that MPs who cross from one party to another must first vacate the seats for which they were elected as per the provisions of the constitution. This principle of the law also applies to independent MPs who have since joined parties of their choice before vacating their seats as independents. But because the term of the 8th parliament has come to an end and because the law (the constitution judgment is Law until otherwise quashed/reversed by a superior court) the errant MPs can only be compelled to refund the emoluments earned from the date when they illegally crossed party lines.

On the other hand, however, the Court erred in law when it extended the application of article 83 to the nominations of MPs for the next parliament.

It's clear from the wording of the provisions of article 83 that it's application is limited to the term of every seating parliament and therefore cannot be extended to the next Parliament which is even not yet constituted.

The candidates for seats in the next parliament therefore need not to resign as per article 83 as declared by court.' Otherwise how can one resign from a parliament that is not yet in existence?

In fact by operation of the law once a member of Parliament is nominated to contest seats in the next parliament their term as MPs should automatically expire. The sad thing, though, is that the law is silent about the transition period between nominations and when the next Parliament is inaugurated in May.

The learned judges again erred in law by interpreting article 83 in isolation of other provisions of the constitution especially article 72 which allows people to contest for elective positions on any political party platform they so wish.

One of the core principles of constitutional interpretation is that the constitution should be ready and interpreted as a whole. I hope the Supreme Court will revisit some of the contradictions in the Constitution Court ruling and settle the issues in clear terms.

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UGANDA: Court quashes law on sedition

Uganda's Constitutional Court has scrapped the provision on sedition from the Penal Code in a move that lawyers and media groups have described as a milestone in the enforcement of freedom of expression and press freedom.

Five Justices of the Constitutional Court unanimously declared the law unconstitutional in a judgment read by court registrar Ruhinda Ntengye on Wednesday.

The decision followed a joint petition filed by Andrew Mwenda, the Managing

Editor of the Independent, and the East African' Media Institute-Uganda

Chapter (EAMI) Mwenda and the media group had challenged the Penal

Code provisions on sedition and promotion of sectarianism on grounds that they contravened the right to freedom of expression guaranteed by the Constitution.

Sedition is where a person utters or publishes statements "aimed at bringing hatred, contempt or disaffection" against the President, the Government or the Judiciary. The punishment was imprisonment for up to seven years.

The five Constitutional Court judges unanimously agreed that "The sections on sedition are inconsistent with the Constitution, Ntengye said. "They are therefore null and void."

James Nangwala, who represented Mwenda, said the decision "is a milestone in so far as enforcing fundamental rights to freedom of expression and of the press and other media is concerned".

He added that it was a "license for people to criticize, comment and participate in managing their affairs", which previously "has been academic".

Kenneth Kakuru, who represented EAMI, said "You can now say anything without fear. The victory is not for journalists alone but for everybody". He said the law on sedition had narrowed constitutional rights journalists and the public at large.

The decision nullifies a number of pending criminal cases against various journalists who are facing charges of sedition.

The court case stemmed from a 2005 petition filed by Andrew Mwenda, then political editor of the Monitor and host of the Andrew Mwenda Live talk show on Kfm, after he was charged with sedition following his statements on the radio show about Uganda's culpability in the death of Sudan People's Liberation Movement leader John Garang.

Mwenda and EAMI had also petitioned the court against the offence of promoting sectarianism but the judges upheld these provisions. Nangwala said they would appeal this decision.

The lawyer said he had been particularly encouraged by the Court's pronouncement that "there is nothing called young democracy; you are either a democracy or not". Many Uganda leaders, as others elsewhere in Africa, have over the years justified laws that criminalize publication of certain information on grounds that there were still new nations and young democracies that are concerned more about the promotion of national unity and development.

Haruna Kanaabi, the Executive Secretary of the Independent Media Council of Uganda welcomed the court decision. "It is a big victory for freedom of expression in Uganda," he said. "More space has been created for people who want to express their views especially on political matters without fear of being arrested."

Kanaabi added, "The media will no longer give people a platform cautiously. They can use the platform to express matters that are important without fear."

Dniel Kalinaki, the Managing Editor of the Daily Monitor, who currently faced charges related to publication of confidential government documents, said "The Constitutional Court ruling which has struck down the colonial- era law on sedition is a triumph for progressive views over the backward, unworthy and primitive forces that seek to hold us back and imprison our freedom to hold those in power accountable for their actions."

Timothy Kalyegira of the online publication, Uganda Record, was the latest victim of the law on sedition. He was charged early t-his month after he questioned government's role in the July 7/11 Kampala bombings that killed at least 80 people and injured many others.

Other journalists faced the sedition charges include Charles Bichachi and John Njoroge formerly with the Independent Magazine, Radio One and TV Talk Show host Kalundi Robert Sserumaga, Siraje Lubwama formerly with the Daily Monitor, Musa Kigongo, presenter with the now closed CBS FM. Democratic Party Member of Parliament Betty Nambooze was also charged with sedition.

As journalists were celebrating the court decision, yesterday Kanaabi warned that the fight was not yet over. "The fight for a free and independent media is still on," he said. "There are still a number of hurdles for example the sectarianism section which has been upheld, the media offences section of the Police Act, the Press and Journalist Act and the Electronic Media Act, which have been used arbitrarily by the government to the extent of shutting down radio stations. We need to work harder to achieve total freedom."

Journalists faced charges of promoting sectarianism include Andrew Mwenda, James Tumusiime and Ssemujju Ibrahim Nganda of The Observer and Bernard Tabaire, a Daily Monitor columnist and General Secretary of ACME.

State Attorney Patricia Mutesi vowed to appeal the court's decision to quash the law on sedition.

But lawyer Nangwala noted that he was confident that Supreme Court would uphold the Constitutional Court's decision given that the lower court had based on the precedent set by the country's highest court on the question of laws that criminalize publication offences.

In 2004 the Supreme Court struck down the law against the publication of false news following a petition filed by Charles Onyango-Obbo and Mwenda.