THE EFFECT OF PUBLIC ORDER MANAGEMENT ACT 2013 ON CONSTIUTIONALISM & RULE OF LAW IN UGANDA

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DECLARATION

I, Muhwezi James Rwakoojo do hereby declare that the work presented in this dissertation arises out of my own research; I certify that it has never been submitted or examined in any university as an academic requirement for any award.

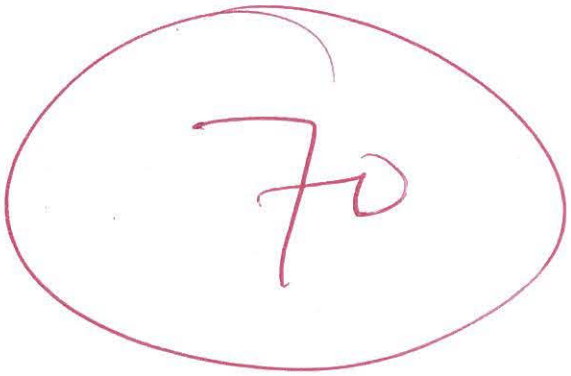
Sign ..... Date 1st July 2019

APPROVAL

This research report has been done under my supervision and it is ready for submission to the school of law.

MR. RUTARO ROBERT MUHAIRWE

Sign ..... Date 1/7/2019



DEDICATION

First I give praise and thanks to the Almighty GOD for giving me the strength and the capacity to complete this work successfully. This research coursework is a special dedication to my parents who are sacrificing a lot for my education and tirelessly struggling to lay the foundation for my academic success. I am thankful for the endless efforts and support you are giving me during the struggle for my education.

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ABSTRACT

The Public order Management Act Came into force on 2nd October 2013,ever since its enactment it was followed by a lot of protests and criticisms. The scenes have been as many as they have been predictable. Some people declared that they would exercise their right to freedom of assembly and demonstration unhindered as reported. The POMA was enacted to provide a regulatory framework for public assemblies. It however gives wide discretionary powers to the Uganda Police Force to deny and disperse any assemblies. It controls rather than regulates assemblies when it subjects free expression to the whims of the Inspector General of Police to determine whether people as individuals or collectively as associations can freely exercise the freedom of expression. It goes beyond to control the content of the meeting or gathering-discussions on politics or examining the performance of the elected government, not least its failures. The law contravenes Articles 20 (1) (2) and 29 (1) (d) of the Constitution of the Republic of Uganda for its provisions reverse a Constitutional Court ruling which repealed sections 32 (2) of the Police Act that granted the police powers to prohibit public assemblies and processions in the case of Muwanga Kivumbi vs Attorney General. The public international law respects state sovereignty and leaves some room for acting as the state may think fit; in other words, there are some critical issues, which fall within the state's sole discretion. All treaty bodies established to supervise the fulfillment of commitments undertaken by the State take into consideration the background in which a particular measure is employed and respect various needs that do not prejudice the human rights protection, a major concern of all civilized nations. This approach acknowledged in the international law is manipulated by the States on various occasions, as they tend to mask their real intentions under the cover of certain legitimate aims. Despite a number of solutions put in place and provisions by both the Constitution and other

international legislations, the police and other stakeholders are still violating the right to liberty in the country, this research highlights various recommendations to the recommended bodies in order to exercise the right to liberty in Uganda.

CHAPTER ONE

INTRODUCTION OF THE STUDY

1.0 Introduction

This chapter will present the background of the study, the statement of the problem, the objectives, research questions, purpose, scope and significance of the study.

1.1 Background of the study

Rule of Law and Constitutional Democracy as key tenants of good governance, have been identified as strategic areas that will enable Uganda reach middle income status as planned in both the national Vision 2040 and the realisation of the global Agenda 2030 and its 17 Sustainable Development Goals (SDGs) especially goal 16 on peace, justice and accountable institutions. Rule of law and constitutionalism also enhances overall institutional effectiveness, transparency and accountability in the management of public affairs, sustainability of economic growth, investment attraction as well as peace and security.

The principle of Constitutionalism and Rule of Law in Uganda binds all citizens irrespective of status, race, political or any other differences. However a authentic democracy is not merely the result of a formal observation of a set of rules but is the set of convinced acceptance of the values that inspire democratic procedures without which the deepest meaning of democracy is lost and its stability compromised[1]. Currently, the said conviction and commitment to the common good is often getting submerged by selfish drives that are pushing some individuals and groups into

[1] Pontifical council for Justice and Peace, Compendium of the Social Doctrine of the Church, #407

criminal charge. An arrest differs from a stop or search or questioning since it involves not only a detention but also an actual taking into custody. It therefore a point at which the enforcement of law may clash with, but takes precedence over acclaim to individual liberty. **In constitutional Rights Projects and others V Nigeria**[2] the African commission condemned arrest and detention of people where they had not violated the law.

Public order was agitated for prior to the British colonial time, it was first recorded in the early. The uneven handling of the 'Walk-to-work' campaigns and agitation for improved living and trading conditions brought to the fore the need to handle public order situations in a professional manner and to enact a comprehensive law on public order management for Uganda, which professes to the need of an open and democratic country. There have been accusations and counter accusations on the use of public order situations. Those who want to use public order to advance their cause have accused the police and other security agencies of brutality and indiscriminate violence[3]

Accordingly, the laws of arrest must harmonize the competing claims of law enforcement and individual liberty and do so whilst giving adequate scope for the normal actions of people involved in arrest, which may not be familiar with the relevant legal rules. For the protection of individual liberty, the law provides that an arrest is valid only where carried out under lawful authority, in a proper manner and for a proper purpose. Where authority is lacking, the arrest may be a "false arrest" actionable in tort. Where the manner of the arrest is improper where excessive or otherwise unjustified force is used the person making the arrest may commit assault and battery with consequent civil and or criminal liability.

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[22] Constitutional Rights Projects and Others V Nigeria (2000) AHRLR 227, 234, Para 50-52

[3]the jlos bulletin issue 002, 2011 published by Justice, Law and Order Sector Secretariat ,at ''article about Word from His Lordship the Chief Justice of Uganda''

behaving as if they are above the law. The result is the rampart social disorder that is not only among the electorate but even inside the legislative house.

Uganda being under representative democracy, the citizens are expected to participate in policy making processes through their elected representatives. Therefore the people's trust in their members of parliament need to be put at the fore front before, during and after any action in regard to legislative processes. This means that the collective will and trust of the citizens must be highly respected by their representatives. All the said cannot exist without the legislators themselves having that adequate knowledge of the national constitution and the corresponding provisions that are supposed to guide any undertaking while inside or outside the house.

Article 23of the Constitution of the Republic of Uganda, prohibits deprivation of liberty except in some peculiar circumstances under Article 23(1) (a-h)which include, where the restraint is in pursuance of an execution of a sentence or order of a court, For the purpose of bringing that person before court in execution of the order of court or upon reasonable suspicion that person has committed or is about to committee a criminal offence under the laws of Uganda, for the purpose of education and welfare of children, for the treatment and care of a person of unsound mind or drug/ alcoholic addicts and protection of the community from such people, for prevention of unlawful entry of a person into Uganda or removal of such a person from the country or any other similar circumstances as the law may authorize.

Everyone has a right to personal liberty, which should not be arbitrary restricted. At the international strata, Article 3 of the UDHR, Article 9 of the ICCPR and Article 6 of the African Charter on human and Peoples' Rights provides for the right to personal liberty. In law, an arrest is a deprivation of liberty for the purpose of compelling a person to appear in court to answer a

Where a proper purpose is lacking, the deprivation of liberty may amount to the offence of abduction or kidnapping. On the other side, it is an offence to resist person making a lawful arrest[4]. Similar provision in relation to obstructing court officers[5] and in some countries it is an offence to resist a police officer making even an unlawful arrest, unless the unlawfulness is clear beyond doubt, or excessive force is used by the officer. The most solid authority for affecting an arrest is a warrant issued by a court for the appearance of the accused[6].

The legal sector in Uganda comprises of various institutions concerned with the provision of legal services, the administration of Justice and the enforcement of legal instruments or orders. The main institutions as established by the 1995 Constitution of the Republic of Uganda include the Ministry of Justice and Constitutional Affairs, the Judiciary, the Parliament, the Uganda Police Force, the Uganda Law Reform Commission, the Uganda Human Rights Commission. Furthermore, there are the legal education institutions such as faculty of law – Kampala International University and Makerere University, interalia, the Law Development Center, professional bodies such as the Uganda Law Society, the Judicial Service Commission, and other organizations involved in legal sensitization, and advocacy.

1.2 Statement of problem

There is no doubt that Public Order is a necessary condition of both Safe and Secure Environment and Rule of Law[7],and so in order to achieve the same ,it was necessary for a law to be enacted to that effect, to safe guard and protect the citizens of Uganda. However it carries with it great human rights violation risks if not quickly reviewed, many have lost their lives or

[4] Section 238 of the penal code
[5] Section 112 of the penal code
[6] Section 54 of Magistrate Courts Act cap 16 and Trial on Indictment Act
[7] The United States Institute of Peace (USIP) Article at USIP blog, In the print edition, it resides within Section 7: Rule of Law

have suffered grave injury as a result of its implementation. To enable public order, the mission may need a very broad spectrum of capabilities that goes beyond establishing institutional capacity to include disrupting and dismantling spoiler networks that subvert the rule of law[8],in Uganda most of the target area has been Kampala (the capital city). Article 37[9] states that, every person has a right as applicable to belong, to enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others[10]. Despite the various legal systems in the country, the police and other governmental bodies are still prohibiting human rights and the right to freedom, therefore this research is focused on examining the various attempts and actions of the government in the prohibition and violation of the rights of Ugandans gathering together by the POMA.

1.3 Purpose of the study

To analyze the effect of public order management act 2013 on constitutionalism and rule of law in Uganda.

1.4 Objectives

1. To examine the institutional and legal bodies in their effort to enforce the POMA in Uganda.
2. To examine the legal framework and constitutional provisions to the POMA in Uganda.
3. To assess the challenges affecting the enforcement of the POMA in Uganda.

[8] Ibid see Section 6.5.10; for a discussion on economic-based threats, see Section 9.6.
[9] Of the Constitution of the Republic of Uganda
[10] Article 37 of the Constitution of the Republic of Uganda, 1995

1.5 Research questions

1. What are the institutional and legal bodies in their effort to enforce the POMA in Uganda?
2. What are the legal framework and constitutional provisions to the POMA in Uganda?
3. What are the challenges affecting the enforcement of the POMA in Uganda?

1.6 Scope of the study

The study has been carried out at police stations in Kampala examining individuals how their right to liberty and freedom of expression was deprived through arbitrary arrest and detention, meeting legislators at parliament inquiring from them as to whether the laws enacted are still existing if so are they adhered, the different occasions a round Kampala such as the Kabaka saga of 10th September 2009, the Mabira saga and the various opposition rallies and meetings that have been blocked by the Uganda police.. All those areas above have been chosen as the center of arbitrary arrest and detention and where people's right to liberty was totally deprived.

1.7 Significance of the study

The researcher hopes that the results of the research will help people in Uganda to analyze the enjoyment of right to liberty and how deprivation of liberty is negatively effective to human dignity.

It is also hoped that the researcher findings will aid the Human rights commission to decide whether to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right.

1.8 Methodology

In order to achieve the objectives of the study successfully, the researcher used secondary data from various books in the library and interviews were utilized to acquire more information relevant to the study. The interviews contained short and clear questions that sought to establish the various violations and hindrances to the right to liberty in Uganda, Kampala district and Uganda in general was used a case study.

1.9 Literature review

Hermann Kulke, Dietmar Rothermund (2004)[11].In his understanding of liberty asserts that freedom is found in a person's ability to exercise agency, particularly in the sense of one having the freedom to choose what authorities one will submit to agency with in exchange for rights derived from that authority to develop resources to carry out their own will, without being inhibited; Social Contract.

According to **Thomas Hobbes,** for example, "a free man is he that... is not hindered to do what he hath the will to do."However, John Locke rejected that definition of liberty. While not specifically mentioning Hobbes, he attacks Sir Robert Filmer who had the same definition. In the state of nature, liberty consists of being free from any superior power on Earth. People are not under the will or lawmaking authority of others but have only the law of nature for their rule. In political society, liberty consists of being under no other lawmaking power except that established by consent in the commonwealth[12].

Westbrooks, Logan Hart (2008). People are free from the dominion of any will or legal restraint apart from that enacted by their own constituted lawmaking power according to the trust

[11]Hermann Kulke, Dietmar Rothermund (2004). "A history of India". Routledge. p.66
[12]Hermann Kulke, Dietmar Rothermund (2004). "A history of India". Routledge. p.66.

put in it. Thus, freedom is not as Sir Robert Filmer defines it: 'A liberty for everyone to do what he likes, to live as he pleases, and not to be tied by any laws.' Freedom is constrained by laws in both the state of nature and political society. Freedom of nature is to be under no other restraint but the law of nature. Freedom of people under government is to be under no restraint apart from standing rules to live by that are common to everyone in the society and made by the lawmaking power established in it. Persons have a right to liberty to (1) follow their own will in all things that the law has not prohibited and (2) not be subject to the inconstant, uncertain, unknown, and arbitrary wills of others[13].

John Stuart Mill, in his work, *On Liberty*, was the first to recognize the difference between liberty as the freedom to act and liberty as the absence of coercion[14]. In his book, *Two Concepts of Liberty*, Isaiah Berlin formally framed the differences between these two perspectives as the distinction between two opposite concepts of liberty: positive liberty and negative liberty. He latter designates a negative condition in which an individual is protected from tyranny and the arbitrary exercise of authority, while the former refers to having the means or opportunity, rather than the lack of restraint, to do things. Mill offered insight into the notions of *soft tyranny* and *mutual liberty* with his *harm principle*[15]. It can be seen as important to understand these concepts when discussing liberty since they all represent little pieces of the greater puzzle known as freedom. In a philosophical sense, it can be said that morality must supersede tyranny in any legitimate form of government. Otherwise, people are left with a societal system rooted in backwardness, disorder, and regression.

[13]Two Treatises on Government: A Translation into Modern English, ISR/Google Books, 2009, p. 76
[14]Westbrooks, Logan Hart (2008) "Personal Freedom" page 134*In* Owens, William (compiler) (2008) *Freedom: Keys to Freedom from Twenty-one National Leaders* Main Street Publications, Memphis, Tennessee, pages 133–138,
[15]John Stuart Mill, *On Liberty and Utilitarianism*, (New York: Bantam Books, 1993), 12–16.

Thomas Paine stirred ordinary people to defend their liberty. He wrote the three top-selling literary works of the eighteenth century, which inspired the American Revolution, issued a historic battle cry for individual rights, and challenged the corrupt power of government churches. His radical vision and dramatic, plainspoken style connected with artisans, servants, soldiers, merchants, farmers, and laborers alike. Paine's work breathes fire to this day. His devastating attacks on tyranny compare with the epic thrusts of Voltaire and Jonathan Swift, but unlike these authors, there wasn't a drop of cynicism in Paine. He was always earnest in the pursuit of liberty. He was confident that free people would fulfill their destiny[16].

Thomas Paine still. The English monarchy hounded him into exile and decreed the death penalty if he ever returned. Egalitarian leaders of the French Revolution ordered him into a Paris prison he narrowly escaped death by guillotine. Because of his critical writings on religion, he was shunned and ridiculed during his last years in America. But fellow Founders recognized Paine's rare talent. Benjamin Franklin helped him get started in Philadelphia and considered him an "adopted political son." Paine served as an aide to George Washington. He was a compatriot of Samuel Adams. James Madison was a booster. James Monroe helped spring him from prison in France. His most steadfast friend was Thomas Jefferson[17]. Despite his blazing intelligence, Paine had some half-baked ideas. To remedy injustices of the English monarchy, he proposed representative government which would enact "progressive" taxation, "universal" education, "temporary" poor relief, and old-age pensions. He naively assumed such policies would do what they were supposed to, and it didn't occur to him that political power corrupts representative government like every other government.

[16]Paine, Thomas (1896). Conway, Moncure Daniel, ed. *The Writings of Thomas Paine, Volume 4.*
[17] Powell, David, 1985. *Tom Paine, The Greatest Exile.* Hutchinson.

Michael Hamilton2007,Before going to the overview of the approach of the Court towards the notions of 'necessity in a democratic society', 'fair balance between conflicting interests' and the 'principle of proportionality', it is recommended to have a look on the theoretical basis of restriction of a particular liberty, which stems from the legal philosophy. The notion of liberty-limiting principles is all the more important in considering the transitional period, when there must be certain consensus reached with a view to balancing the conflicting interests. In the course of transition from any form of governance to the democratic forms of governance, where pluralism is held to be one of the basic milestones, formerly excluded, hidden interests find their ways to public space and interact with other interests having been present in the society long before. Consequently, each actor present in the public space begins to fear that their interests will be harmed during the transitional period, thus giving ride to conflict of interests.

Still Michael Hamilton2007, During the transitional period any society faces the need for deriving the so called liberty-limiting principles on the basis of harm/benefit analysis, which will guide the balancing of conflicting interests in the society and which is so difficult to be elaborated, since there is no single approach to what is harm and what constitutes the benefit. It is argued among scholars that 'while law must assist in settling the definitions of 'harm' and 'benefit', it can only do so where there is ethical consensus about the transitional goals being pursued.'[18] In addition, 'harm' and 'benefit' are closely linked to the notion of good, most fiercely debated over the centuries. One may take democracy, tolerance and recognition as a conception of good for a transitional society, while others may extend this list or exclude the above conceptions at all. In this part of the paper, we will maintain these three conceptions of good and look at how they are viewed in the context of deriving the liberty-limiting principles.

[18]Michael Hamilton, *Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition*, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 76.

It is asserted in the relevant literature that 'the assertion that transition is never unitary or linear process. Instead, transition is dynamic and multi-layered.'[19] The law, which is thought to settle the definition of 'harm' and 'benefit', may face a crisis of legitimacy, if complicit in past wrongs. It is argued that 'the law must at once extricate itself from this legacy, establish its legitimacy in the present, and provide the basis for a more just future.'[20]

It is generally recognized that in a pluralist democracy, restrictions on the civil liberties should be narrowly tailored to legitimate aims and the more intrusive the intervention, the greater burden lies on the authorities to provide evidence that justifies the contested intervention. It is also debated that the transitional period requires rather differentiated approach and that the liberty-limiting justifications need not be so rigorously proven, as legally prescribed aims may well suffice.[21] It is difficult to assess the justifiability of interventions as there is no precise and accurate method of measurement of harms and benefits and as the latter terms are being framed depending upon the particular transitional goals being pursued.

Joel Feinberg1984, Restrictions to public events are usually imposed because of the need to prevent harm to third parties. Michael Hamilton asserts that the 'harm principle' is straightforward – preventing harm to parties other than the actor is always an appropriate reason for legal coercion.'[22] It has to be noted here that the risk of harm may, in many cases, be exaggerated, speculative or imaginary. Authorities often claim that sometimes tense political climate precludes peaceful assembly and contend that the national security considerations or a high risk of public disorder justify the imposed restrictions. In connection to the notion of

[19] Ibid, p. 77.
[20] Ibid
[21] Ibid, p. 78
[22] The harm principle was first articulated by J.S. Mill (J.S. Mill, *On Liberty* (1972) [1859] at 123-124)

'harm', Joel Feinberg has introduced 'the benefit-to-others principle'[23] According to the Michael Hamilton's wording, 'Harm is conceived as benefit unattained, not simply deterioration caused.' It is also contended that 'benefits' might also refer to discrete strategies aimed at securing particular goods, for example, facilitating inter-group contact (including dialogue between the main protagonists), promoting desegregation, bridging social capital, expanding relations of recognition and encouraging emphatic dehumanization.[24]

The complexity of the notion of 'harm' is underlined by scholars, who suggest that 'a 'harm' calculus arguably requires the enumeration of direct and indirect harms; minor, aggregative and serious harms; simple, composite and accumulative harms; possible and probable harms; individual and group harms; physical, emotional and psychological harms; and so forth.[25]

The human rights framework envisages directly some of the 'serious harms' that may become a ground for restriction of a particular right or freedom. The example of such 'serious harm' is the advocacy of national, racial or religious hatred, inciting discrimination, hostility or violence. Where a conflict of rights takes place, one of the rights shall be limited in favor of the other right or rights. That is why it is strictly necessary to define the threshold of interference. International treaty bodies supervising the protection of human rights on some occasions accord wide margin of appreciation to the national authorities. This margin of appreciation can be said is wider with respect to regulation of public events during the period of political instability.[26] It is suggested that 'the meaning and relative importance of rights will vary in different social, cultural, and

[23] Joel Feinberg, *Harms to Others: The Moral Limits of the Criminal Law* (1984), p. 27
[24] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 79
[25] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 80.
[26] Rai, almond and 'negotiate now' v. UK (1995), by contrast Stankov case.

political contexts, it follows that the point at which specific rights properly become engaged – the threshold of legal intervention – is necessarily contingent upon deliberatively achieved consensus about their scope.'[27]

A context specific interpretation of human rights standards makes it necessary to consider whether the legal interference shall give priority to personal autonomy over the public goods and social community. Michael Hamilton has put this dilemma in the following fashion: 'Should, for example, the right to private life extend so far as to prevent frequent and unwanted noisy processions along a public road adjacent to a housing estate? If all residents of the estate object to the incursion on their private life, should this more 'representative' objection hold any greater sway than an individual complaint?'

It is accepted in the theory that 'liberty-limiting principles must conform to a reasonable (rather than State-oriented) political conception of justice.'[28] Axel Honneth suggests that to avoid 'Theoretical cul-de-sac ... is to adopt a formal model of ethical life'.[29] Three such models have been closely scrutinized in relevant literature. These are the argument for democracy, the argument for tolerance and the argument for recognition.

The argument for democracy has fiercely been criticized on the account that it fails to provide normative framework for justifying interferences with liberty, especially during the periods of transition. It is suggested that rights can be seen as internal to democracy – developing and protecting the autonomy of the agent.[30] Despite this fact the interrelation of rights and democracy

[27] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 83.
[28] Ibid. p. 84.
[29] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (1995), pp. 245-46.
[30] Joseph Raz's perfectionist theory of harm, in Raz, 'Autonomy, Toleration, and the Harm Principle' in

is rather problematic. Democracy, inclusive of rights, may be relied upon in restricting a particular right or freedom. Michael Hamilton argues that 'a more subtle and pernicious conflict between rights and democracy occurs when democratically determined policies, pursuing ostensibly laudable objectives, produces outcomes which compromise the protection of fundamental rights.'[31] Frederick Schauer contends the following:

'Rights are no longer just an unqualifiedly desirable impediment to the evil and the ill-informed, but an impediment to what appear to be wise policies, an impediment whose virtues are either virtues in and of themselves independent of consequences ... or virtues whose long-run benefits are less likely to be perceived in the face of more salient short-term costs.'[32]

The problem of interrelation of rights and democracy is even more evident during the period of transition, when political transition takes place. In such period, the conflict between rights and democracy is more easily masked as policies, which seek not only to prevent harm, but also to produce some positive benefit, may have more profound appeal.[33]

It follows from the aforementioned that the argument for democracy is not always satisfactory when dealing with the restriction of a liberty. This gap, as argued, may be filled in with the help of the argument for tolerance and the argument for recognition.

Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* (1987) 313 at 329–31.

[31] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 85.

[32] F. Schauer, 'The Cost of Communicative Tolerance' in Raphael Cohen-Almagor (ed.), *Liberal Democracy and the limits of tolerance* (Ann Arbor: University of Michigan Press, 2000) at 31. See also Simon Lee, *The Cost of Free Speech* (1990) at 130.

[33] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 85.

The argument for tolerance recognizes the value of certain liberties. It presupposes that 'there are certain inviolate principles that cannot be sacrificed even in pursuit of democratically determined policies and that these principles should calibrate our measurement of potential harms.'[34] Some scholars base the argument for tolerance on the right to freedom of conscience.[35] Others rely on 'autonomy' or 'dignity'. However welcome, this argument is also criticized for it is difficult to achieve the consensus about the limits of tolerance. It is also hard to address 'the question of how far one should tolerate the intolerable.[36] Basically, it is argued that 'the argument for tolerance errs close to tautology – we value tolerance because it includes those conceptions of the good which we are prepared to tolerate and excludes those which we are not.'[37]

Another problem with the argument for tolerance is that it does not answer the question about extent of threshold of tolerance in the context of the period of transition. In relation to the freedom of speech, some scholars argue that the speech may be harmful to the audience under some conditions. Simon Lee contends that 'at some times free speakers can help us become more autonomous ... at other times, when we are weak, autonomy is better served by building up self-confidence than by undermining self-respect'.[38] One may argue that the argument for tolerance is 'context-blind', whereas others may suggest that 'the tolerance threshold inevitably set from the transitional vantage point, and so (depending on the quality and inclusiveness of the debate) implicitly takes account of contextual factors'.[39]

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[34] Ibid. p. 86.
[35] David Richards, *Free Speech and the Politics of Identity* (1999), p. 25.
[36] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 86.
[37] Ibid. p. 87.
[38] Simon Lee, *The Cost of Free Speech* (1990), p. 130.
[39] Michael Hamilton, Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principle in the Context of Transition, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), p. 88.

Finally, the rationale of the argument for recognition lies in recognizing, acknowledging the counterpart as a 'self' and thus, aiming at achievement of positive recognition between members of opposing groups. In this process, as suggested by Michael Hamilton 'liberties are valued, and restrictions upon them justified, if they advance not merely the goal of formal equality (for which the argument for tolerance might be sufficient) but also the goal of solidarity—of expanding relationships across ethnic boundaries.'[40]In the light of the foregoing, it can be concluded that notwithstanding the theoretical discussion over the pros and cons of the liberty-limiting principles, these principles may have practical value. By understanding the rationale of these principles in a proper way, the national authorities may develop an appropriate approach to the restriction of human rights and freedoms that best ensures the minimization of harms that follow the collision of different interests in a pluralist society.

Emmanuel Kasimbazi, In the case of Uganda, the law applicable to the right to liberty includes the 1995 constitution of Uganda, Penal code, Judicature Act, criminal procedure Act, International Instruments, common law, equity and case law. Ever since the introduction of colonial rule and new laws in Uganda, one main area of concern in the issue of protection of human rights, has been the protection of the right to personal liberty as a basic human right in Uganda and in the world at large, following propositions by the UDHR and other international instruments.

Emmanuel Kasimbazi, Concepts of human rights lack a definite and universally applicable definition. Human rights are inherent entitlements that accrue to every human being merely for being human[41]. They are rights of all people, in all places and at all times[42].Human rights are

[40] Ibid. p. 89.
[41]**Emmanuel Kasimbazi,** *"The Environment as a Human right: Lessons from Uganda"*

universal and therefore do not depend on geography, history or anthropology among others, but accrue independently of acts or declarations of law and that they are universally applicable[43].

Rights originally existed as natural rights but the 1948 Holocaust after the Second World War led to the Universal Declaration of Human Rights. The first form of recognised human rights in Uganda was under chapter 3 of the 1967 constitution and is now under chapter 4 of the 1995 constitution. Despite the criticism of human rights as being fictitious and virtually existent[44] because of their continued violation, the state under the constitution must protect, maintain and promote them[45].

Oloka OnyaNon Governmental Organization, A right to personal liberty is a right guaranteed under the constitution under article 23 aimed at protecting human beings from acts that cause discomfort, loss of property, restriction of movement and other acts that infringe on a persons' liberty. The right to personal liberty under the constitution is a civil and political right that must be enforced by the state or governments[46]. The history of Uganda, from the onset of colonialism, has been characterised by violation of this right to personal liberty[47]. This was experienced by citizens under different laws like the orders in council, the First National Constitution, the newest and recent 1995 constitution. This has left a question on whether the right was being promoted, enforced and protected, as all rights should be.

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[42]**Jack Donnoley& Rhoda E Howard,** "*International Hand Book on Human Rights*",
[43] Professor LowisHenkin
[41]**Xiaorong Li,** "*Postmodernism and Universal Human Rights Why Theory and Reality Don't Mix*
[45] G.W. Kanyeihamba; *Constitutional Law and Government in Uganda, 1975 pg 147*
[46] Re Sevumbi(1980) HCB36
[47]Oloka Onyango; *Judicial Power and Constitutionalism in Uganda, 1993 pg 42*

1.10 Chapterization

The first chapter will include the introduction of the study and it will assess the background to the study, the statement of the problem, the objectives, research questions, scope, significance, methodology and literature review.

The second chapter will review the institutional and legal bodies in their effort to enforce the POMA in Uganda.

The third chapter will review legal framework and constitutional provisions to the POMA in Uganda.

The firth chapter will examine the challenges affecting the enforcement of the POMA in Uganda.

Finally the fifth chapter will conclude and recommend to the various stakeholders in microfinance industry and how consumer protection is a necessity to this sector.

CHAPTER TWO

DETAILED EXPLANATION OF HISTORY OF CONSTITUTIONALISM AND RULE OF LAW IN UGANDA

2.0 Introduction

There are also critical principles that States can adopt from the Declaration on human rights defenders to enhance their protection. However, there have been challenges and obstacles within the policies and institutions established by Government that relate to the promotion and protection of the rights and work of human rights and the right to liberty.

2.1 Domestication of the provisions of the Declaration into national legislation

States are expected to take measures to ensure that the provisions of the Declaration on Human Rights Declaration[48] are domesticated in national legislation and policy. This would give effect to the Declaration and strengthen its potential as a support tool for human rights and Human Rights Defenders. In that respect, Uganda like any other State Party is expected to adopt "legislative, administrative and other steps" to effectively guarantee the rights and freedoms in the Declaration[49]. Uganda is a member of the UN and all member States have a duty to promote international instruments.

The colonial period in Uganda began in 1894 and ushered in new laws and rules to be followed by Ugandans although the concept of 'human rights' had not developed fully. The 1902 order in council seemed to recognise some form of rights and even mentioned the right to habeas corpus. However, this was a remedy without usefulness in practical terms as was shown in ***King Vs***

[48] Art 2
[49] Art. 2 (2

Exparte Sekgome[50] where court claimed that the issue of detention without trial applied but not to a person of a native, semi-barbarous group and hence, did not apply to the African applicant.

The colonial period was characterised by enactment of oppressive laws violating the right to personal liberty. There were laws like the Removal of Undesirable Natives Ordinance, 1907 and the Deportation Ordinance, 1908. Other laws included the Trading Ordinance 1938 and the Penal Code ordinance of 1951. The Removal of Undesirable Natives Ordinance was aimed at securing, public order based on Article 24 to 25 of the 1902 order in council. It allowed the commissioner and governors to cause removal or deportation of natives who were a threat to law and order in the protectorate. In pursuing this, there was detention pending removal or penalties for leaving the area of removal or deportation. There was also no judicial review, a situation which persisted up to the post independence period [51] In the colonial period therefore, the right to personal liberty, in its crude form, was violated with little possibility of protection, promotion and enforcement. There was need to overturn the situation and have a more nation-based system of administration, that would stringently enforce, protect and promote the right to personal liberty[52].

The advent of independence showed a departure from the colonial rule. It had the first constitution that recognised the concept of human rights, especially under chapter 3 of the 1967 constitution. However, this period was characterised by massive violation of the right to personal liberty because it had laws which were of colonial legacy. An example of this was the

[50] [1910] 2 KB 576
[51] As shown in Ibingira's case.

[52] American Anthropological Association, "Statement on Human Rights," 49 No. 4 (1947): 539

Deportation Ordinance which restricted the right to personal liberty, and the Emergency Powers Ordinance.[53]

In *Grace Ibingira and Ors Vs Uganda*[54], the right to personal liberty was violated by the Deportation Ordinance[55] which required Ibingira and others to be caused to be removed and deported, for acts committed. Despite being contested in court, the Deportation (validation) Act[56] was enacted to enforce the deportation of Ibingira and others[57] In *Uganda Vs High Commissioner of Uganda Prisons, Exparte Matovu* the right to personal liberty was violated under the Emergency Powers Act and the Emergency Repressions Regulations. The right to liberty was also violated by refusal of granting of the wont of habeas corpus. This was seen and violated as shown in ***Grace Ibingira and others v. Attorney General***[58]where the writ of habeas corpus was granted and they were transported to Buganda, set free, and then re-arrested under Section 165 of The Emergency Powers (Detention) Act[59]. When Ibingira appealed to the East African Court of Appeal, it upheld the Government side[60]. Persons detained without possibility of being produced in court for trial had no protection in court despite provisions of the constitution.

It should further be noted that during the oppressive and tyrannical rule of Idi Amin, all powers were vested in the military and the *Armed Forces (power to arrest) Decree*[61]which gave the military police and armed forces powers to arrest civilians.According to him, the purpose of this

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[53]**Act** No. 8/1963.
[54] (1966) EA
[55]*Act No.9 1963*
[56]**Act No.** 14 /1966
[57] (Ibingira 2)

[58]***(1966) E.A. 305/443***
[59] *Section 1, 65, of 1966.*
[60]KivuthaKibwana, *Constitutionalism in East Africa, pg44*
[61] Decree No. 13 of 1971

was to "discipline" them according to the *Armed Forces Acts and Regulations.*[62] These provisions were questioned in the case of ***EfulayimuBukenga v. Attorney General***[63],the police could arrest anyone or shoot at their own discretion thus violating the right to personal liberty.[64]

Further still in terms of the 1957 constitution on rights under chapter III, the prominent ouster clause was article 10(8) under which, detention orders made under article 10(5) were not challengeable before the court and this was reinforced by section 13 of the public order and Security Act which provided that detention orders issued under section 1 of the Act were not challengeable before any court of law. In ***Re Mukiibi***[65] it was held that, "*it is clear that under S.13 of the public order and Security Act 1967, no detention order made under that Act can be questioned in court.*" In *Re Sevumbi*, the court referred to article 10 (8) of the 1967 constitution that detention orders were unchallengeable before the court.

In Uganda, the State has established institutions with the mandate to promote and protect human rights, many of which influence policy and legal reforms. Although Human Rights Defenders are protected generally under different laws that promotes and protects the rights of everyone; there is need to enact a specific law on Human Rights Defenders in Uganda.

Enacting such a law will serve three primary purposes:

a) To show and strengthen Uganda's commitment towards respecting international standards on human rights. Objective XXVIII of the National Objectives and Directive Principles of State Policy of Uganda's Constitution provides foreign policy principles which include respect for international law and treaty obligations. It underscores the need

[62] Mamdani Mahmood; *Imperialism and Fascism in Uganda*
[63] (1972) H.C.B. pg87
[64] Akena Adoko; *From Obote to Obote, pg40*
[65] Supra

for the State to actively participate in international and regional organisations that stand for peace and for the well-being and progress of humanity[66]. The Declaration has not yet been adopted by any country as a national binding instrument; however, States are increasingly considering doing so.

Article 55 (c) of the United Nations Charter provides that:

"With a view to the creation of conditions of stability and well-being which are necessary, for peaceful and friendly relations among nations based on the respect for the principles of equal rights and self determination of the people, the United Nations shall promote universal respect for and, observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"[67]*. According to B.J Odoki, the chief Justice of Uganda, the Constitutional Court must promote international instruments81 which in this case would include the Declaration on Human Rights Defenders.*

b) To provide information to the public about who are Human Rights Defenders and what is expected of a Human Rights Defenders. The law would enable Human Rights Defenders to develop various networks depending on their thematic areas. Like most respondents around the country conceded, one in Kampala stated: "We are a human rights organisation but I have not yet heard of that declaration. In fact, if it is possible you should send us a copy or disseminate it to various organisations".

[66] Objective XXVIII of the National Objectives and Directive Principles of State Policy of the Constitution of the Republic Of Uganda 1995 79
[67] Article 55(c) United Nations Charter, 1945. 81

2.2 Implementation of the right to liberty.

Uganda as a State party is expected to develop and monitor programmes that will ensure the implementation of the principles laid down in the Declaration[68]. There are various institutions that have been established to promote and protect human rights such as UGANDA HUMAN RIGHTS COMMISSION. However, the implementation of the Declaration is not receiving due attention. As noted earlier, there is little awareness and knowledge in Uganda about the Declaration even after commitments by the international community, through numerous General Assembly resolutions, to promote awareness of its existence and the need for its adoption and implementation. The Declaration has not been made widely known to state agents, public officials or the general public. Human rights education programmes for the public and public institutions have not at all covered the Declaration.

Under Article 52(1) (c) of the Constitution[69], one of the functions of UGANDA HUMAN RIGHTS COMMISSION is to establish a continuing programme of research, education and information to enhance respect of human rights. UGANDA HUMAN RIGHTS COMMISSION has carried out human rights education for local council leaders to enhance their understanding of human rights among councillors in administering justice for their communities'[70]. Training of the local council leaders is important as they too are Human Rights Defenders who interact a lot with community members and make decisions through the Local Council Courts established under the Local Government Act.

However, the Local Council Courts are faced with many challenges including "the level of education of members sitting on LC Courts which is low and constitutes a major hindrance to the

[68] Human Rights Declaration: Protecting the Right to Defend Human Rights Factsheet No. 29, Office of the United Nations High Commissioner for Human Rights, p.30.
[69] Article 52(1) (c) of the Constitution of the Republic of Uganda 1995. 85
[70] 11th Annual Report of the Uganda Human Rights Commission to the Parliament of Uganda, 2008, p. 86

delivery of justice in a fair and equitable manner". For justice to be delivered through these courts and the right to a fair trial fully implemented, the Government of Uganda together with development agencies need "to provide relevant training and refresher courses to all LC Executive Committee members sitting on the courts"[71]. Human rights education is critical as it fosters "development of values and attitudes which can uphold human rights and encourage action aimed at preventing violations"88. The UGANDA HUMAN RIGHTS COMMISSION programme of training district councillors provides a good entry point for disseminating the content and values of the Declaration. Therefore, more training programmes that cover the Declaration should be offered to the district councilors.

2.3 Effective Judicial Protection of Right to Liberty.

States are required to ensure that Human Rights Defenders benefit from the full protection of the judiciary. The Declaration also enjoins States to ensure that violations committed against Human Rights Defenders are promptly and fully investigated, with appropriate redress provided[72]. Article 126(1) of the Constitution mandates the Judiciary to exercise judicial power in the name of the people and in conformity with law and with the values, norms and aspirations of the people[73]. Under Article 128 of the Constitution, the judiciary is to be independent in the exercise of judicial power and should not be interfered with by any person or authority[74]. In principle, the judiciary in Uganda is independent but there have been instances where its independence has been interfered with by some branches of government. For example, in November 2005 military

[71] Access to Justice in Northern Uganda, UN OHCHR, 2008, p. 13.
[72] Chris Maina Peter, ED (2008),The Protectors, Human Rights Commissions and Accountability in East Africa., Fountain Publishers Kampala, at p. 77 95
[73] Article 126(1) of the Constitution of the Republic of Uganda 1995.
[74] 7Article 128 of the Constitution of the Republic of Uganda 1995.

personnel (known as "the Black Mambas") raided the High Court to arrest treason suspects that had been granted bail[75].

Article 126 (2) of the Constitution provides for key principles in administration of justice. These include: justice shall be for all irrespective of status; justice shall not be delayed; [there shall be adequate compensation for victims of wrongs; promotion of reconciliation between parties; and administration of justice not to be affected substantially by technicalities. The judiciary acts as a mechanism through which other Human Rights Defenders can seek protection and redress when their rights are violated. Article 50 of the Constitution of Uganda[76] guarantees enforcement of rights and freedoms by the courts of law. Human Rights Defenders and their representatives can use this Article to seek redress from the courts of law in Uganda when their rights are violated. The current legal framework in principle guarantees access to justice in that the law guarantees protection of the rights of Human Rights Defenders. However, in practice challenges exist which negatively impact on access to justice especially for the poor, Human Rights Defenders inclusive. One of these barriers is corruption which "is a major problem facing Uganda today[77].

To address the problem of access to justice, the Government has taken initiatives to improve the situation. High Court circuits have been established in a couple of districts in Uganda[78]. These will improve on the number of sessions held a year. However, more circuits need to be established in other districts. In 1999, the Government adopted a Justice, Law and Order sector (JLOs) reform agenda to improve the administration of justice through coordinated planning and budgeting of all justice, law and order institutions. One of the objectives of JLOS is to foster a

[75] Article 50 of the Constitution of the Republic of Uganda 1995 10
[76] Article 50 of the Constitution of the Republic of Uganda 1995 10
[77] African Peer Review Mechanism, Republic of Uganda, APRM Country Peer Review Report No.7, January 2009 at p. 37.
[78] Access to Justice in Northern Uganda, UN OHCHR Uganda, at p. 15. 107

human rights culture across JLOS institutions. To achieve this end, JLOS has constructed and renovated police barracks and prisons to improve the welfare of users[79]. JLOS has also improved human rights awareness through training, awareness creation, partnerships with Local Governments and Development Partners, CSOs and the private sector.

JLOS is also utilising a Rights Based Approach in the delivery of its services. In 2004, the Strategic Investment Plan (SIPII) focused on the impact of poverty on accessing justice and thus, provided for the development of a pro-poor national legal aid policy and legal aid basket fund, and the promotion of pro- poor alternative dispute resolution mechanisms[80].

Article 21(1) of the Constitution guarantees equal protection to all before the law. Under Article 28(3) (e) free legal assistance has to be provided for capital offences in the interests of justice. However, there is no comprehensive legal, institutional and policy framework to guide the provision and regulation of legal aid-services provided for cases of non-capital offences. Legal representations through state briefs are not effective enough since lawyers are poorly paid and they have little contact with clients[81]. The provision of legal aid to indigent persons has been embarked on. The Legal Aid Project (LAP) helps to provide free legal services to people who cannot afford private lawyers due to their lack of financial resources, or when a case is deemed to be particularly complex[82].

[79] National Development Plan (2010/11 – 2014/15) – Uganda, National Planning Authority, Kampala, Uganda, pps 290, 291, 1081
[80] 0Access to Justice in Northern Uganda, UN OHCHR Uganda, at p. 41, 11
[81] Ibid pg. 45
[82] Ibid

2.4 Role of Local Governments in Promoting Right to Liberty.

The Declaration enjoins States to ensure that local Government authorities participate effectively in supporting and protecting Human Rights Defenders. Local Governments are, inter alia, expected to undertake promotion of human rights by providing human rights education[83]. They should also be encouraged by the national authorities to promote respect for and protection of human rights.

In Uganda, there are on-going efforts spearheaded by the Uganda Human Rights Commission to involve local Governments in the protection and promotion of human rights. Uganda Human Rights Commission conducts civic education aimed at creating awareness among local Government officials of the importance of respecting, upholding and observing human rights and freedoms. The focus of Uganda Human Rights Commission's civic education programme included the Concept of Human Rights and the Role of Local Government Councils in the Administration of Justice as well as applying a rights-based approach to planning and programming.

Uganda Human Rights Commission spearheaded the establishment of District Human Rights Committees /Desks since 2004 as a local government structure whose role is to ensure promotion and protection of human rights at the local government levels. In 2007, following a request by the Uganda Human Rights Commission, the Ministry of Local Government issued a directive to all local governments to establish human rights committees115. These committees/ desks have been established in some districts of Uganda. Through them Uganda Human Rights Commission will publish and disseminate information about the situation of human rights in the various districts of Uganda.

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[83] Supra

The establishment of these committees is a positive development.

However, there is a need to establish them in all districts and adequate resources should be provided to enable them carry out their mandate effectively. Human Rights Defenders should work with these committees / desks as a joint effort in improving the general environment in which they operate. A respondent in Gulu however observed:

"The Human Rights Committees have been established but so far we do not feel their impact. They should engage in serious work". Taking this concern into consideration, it is highly recommended that these committees / desks should be sensitised on the rights of Human Rights Defenders to enable them effectively carry out their activities.

The Uganda Human Rights Commission has also promoted a 'Rights Based Approach' to development (RBA) to district local governments. Specifically, the Uganda Human Rights Commission has carried out workshops for government officials and district planners on RBA guidelines, to "guide [the officials] on how to incorporate human rights principles in the planning and programming processes at district level"[84]. This aspect of Uganda Human Rights Commission's work illustrates its key role in empowering other Human Rights Defenders with skills in rights based planning and programming. States are implored to institute measures stipulated in the Declaration on Human Rights Defenders to ensure that defenders are protected as they carry out their work. The adoption of the rights and obligations contained in the Declaration would constitute a major breakthrough in the on-going struggle to strengthen universal respect for human rights and freedoms in Uganda.

[84] UHRC 10th report to the Parliament of Uganda2007 at p. 104 116

The Constitution of the Republic of Uganda 1995 as Amended enjoins the State to guarantee and respect state institutions charged with human rights mandates and to provide them with adequate resources to function effectively. It further provides that every Ugandan has a right to participate in peaceful activities to influence the policies of Government through civic organizations. Government policy regarding the work of civil society organisations should be derived from and influenced by these provisions. The Government in partnership with non-state actors has engaged in legal and policy reform processes that have resulted in the enactment of laws as well as establishment of agencies and institutions to ensure protection and promotion of fundamental and other human rights and freedoms. However, these institutions and agencies are still faced with challenges that greatly affect their effectiveness. Some of these challenges include inadequate resources, lack of capacity, corruption, and lack of commitment to the human rights caused by some state agents and public officials.

CHAPTER THREE

IDENTIFYING RELEVANT SECTIONS OF PUBLIC ORDER MANAGEMENT ACT 2013 THAT AFFECT CONSTITUTIONALISM & RULE OF LAW IN UGANDA

3.0 Introduction

This chapter covers the various provisions under the constitution[85] that are violated by POMA Act 201[86] in Uganda and hence affecting Constitutionalism and Rule of Law and Critical analysis of violated rights and freedomsto include;

According to Section 5(1) of POMA[87] 2013states that an organizer shall give notice in writing signed by the organizer or his/her agent to the authorized officer of the intention to hold a public meeting, at least three days but not more than fifteen days before the proposed date of the public hearing. According to POMA[88] 2013,Section 4(1) a public meeting means a gathering assembly, procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views of public interest. Section 5(1) of POMA[89] 2013 contravenes article 29(1) (d) of the Constitution[90] which provides that every person shall have the right to freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition. This therefore means that writing to the authorized officer or the Inspector General of Police, the organizer of the public meeting is requesting for permission to exercise his/her right to freedom of assembly and to demonstrate which is freely guaranteed by the

[85] The Constitution of the Republic of Uganda 1995 as Amended
[86] Public Order Management Act 2013

[87] Ibid
[88] Ibid
[89] Ibid
[90] The Constitution of the Republic of Uganda 1995 as Amended

constitution[91] and the Uganda police has used this as an opportunity to curtail the activities of opposition political parties and opposition activists. A case in a point can be witnessed in April 21st 2019 when the Uganda Police denied opposition activist and a musician Hon. Kyagulanyi Sentamu from staging a concert in Busabala beach as it was because that he uses music concerts as political rallies.

Therefore POMA[92] 2013 giving discretion to police to either allow a public meeting or not has led to the abuse of Constitutional right of freedom of assembly and peaceful demonstration in Uganda hence negatively affecting Constitutionalism and Rule of Law in Uganda.

The Special Rapporteur on the rights to freedom ofpeaceful assembly and of association has stressed that states should not impose prior authorisation requirements, but should at most require only notice of assemblies[93]. The notification procedure should be subject to a proportionality assessment, should not be unduly bureaucratic, and require a maximum of 48 hours prior to the day the assembly is planned to take place[94]. The need for notification only exists where there are a large number of demonstrators[95],44 in some countries, notification is only required for marches and parades, and not for static assemblies[96]. Moreover, absence of a notification should not be the basis for dispersing a peaceful assembly[97].

Articles 3 and 12 of Moldova's Law on Public Assemblies only requires notification where there are more than 50 participants. The Polish Law on Assemblies only requires notification on

[91] Ibid
[92] Ibid
[93] 2012 annual report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, op. cit, Para. 28
[94] Ibid
[95] Ibid
[96] See, e.g. UK Public Order Act, 7 November 1986, s.11.
[97] ECtHR, Bukta and others v. Hungary, Application No. 25691/04 (2007), para. 36., See also: 2012 annual report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, op,,,cit, para 29

assemblies of more than 15 people; the Croation Law on Public Assemblies only requires notification on assemblies of more than 20 people. See the Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States (2012). According to section 9 (2) (b) of POMA[98] 2013, the police shall ensure fairness and equal treatment of all parties by giving consistent responses to organisers of public meetings, or their agents in similar circumstances. According to what is being done, the Uganda Police has in most instances denied opportunities to opposition political meetings from taking place for example in 2015, the Uganda Police denied and blocked Hon. Amama Mbabazi of Go Forward opposition pressure group from holding a political meeting in Mbale and it was allowing National Resistance Movement (the political party in power) members to campaign freely. This shows selective application of the law and discrimination prohibited under article 21(1) of the constitution[99] which states that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.Therefore selective application of the law by the Uganda Police as explained above violates Constitutionalism and Rule of Law in Uganda.

In addition section 4(1),[100] it defines "public meeting" by reference to "public interest," potentially excluding critical meetings from the scope of the Act, since public interest is not defined by the Act it gives the right to police to curtail right to freedom of speech and expression guaranteed under Article 29(1) (a) of the constitution[101] hence negatively affecting constitutionalism in Uganda.

[98] Ibid
[99] The Constitution of the Republic of Uganda 1995 as Amended
[100] Public Order Management Act 2013
[101] Article 29(1) (a) of the constitution

Freedom of expression is also guaranteed in Article 19 of the Universal Declaration of Human Rights (UDHR) 3[102] and in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[103]. The International Convention on Civil and Political Rights protects the right of all people to seek. receive, and impart information of any form, including political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse[104]. Importantly, the right protects expression that others may find deeply offensive[105].

The right to freedom of expression is integral to the enjoyment of the right to freedom of assembly[106]. The UN Special Rapporteur on the right to freedom of opinion and expression described the right as a collective right that "endows social groups with the ability to seek and receive different types of information from a variety of sources and to voice their collective views. This freedom extends to mass demonstrations of various kinds. It is also a right of different peoples, who, by virtue of the effective exercise of this right, may develop, raise awareness of, and propagate their culture, language, traditions and values[107]."

At the regional level, both the African Charter on human and Peopels' Rights on Human and Peoples' Rights (the African Charter on human and Peopels' Rights) also protects the right to freedom of expression[108].

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[102] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[103] Uganda acceded to the International Convention on Civil and Political Rights on 21 June 1995
[104] General Comment No. 34, HR Committee, CCPR/C/GC/34, 12 September 2011, para. 11.
[105] Ibid
[106] General Comment No. 34, op. cit. , para. 4. General Comment No. 34 provides guidance with regard to elements of Article 21; see Kivenmaa v. Finland , Communication No. 412/1990, 31 March 1994, para 9.2.
[107] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, 20 April 2010, para. 29. General Comment No. 34, op. cit., para. 4.
[108] At Article 9. Uganda acceded to the African Charter on human and Peopels' Rights on 10 May 1986. 10

Article 19 provides: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers." .

According to section 9(2) (f) of Public Order Management Act 2013 allows Police to disperse public meetings and members on those meetings who are unruly and rowdy but this has been used by law enforcement authorities broadly to use force to disperse assemblies, with no guidance for alternative methods of managing public order disturbances for example on 16thOctober 2017, the Uganda Police unlawfully dispersed rallies of different opposition members of Parliament in Kasubi, Central region of Buganda who were consulting their constituent members about the Constitutional amendment of article 102(b) of the Constitution[109].The Rally was organized by Mr. Moses Kasibante, Lubaga North MP[110].Therefore this affects negatively the Rule of Law in Uganda.Dispersal of assemblies

The dispersal of any assembly should only ever be used as a measure of last resort and in exceptional circumstances; force should never be used against a peaceful assembly. It has been noted that where the right to freedom of peaceful assembly is suppressed, those demonstrations that do occur are more likely to become violent[111].

Any use of force by authorities against an assembly, whether peaceful or violent, must comply with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles) and the UN Code of Conduct for Law Enforcement Officials[112]. Regard

[109] The Constitution of the Republic of Uganda 1995 as Amended
[110] It was reported in The Daily Monitor, newspaper of 17th October 2017

[111] Annual Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28, 23 May 2011, para. 13.
[112] Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders Havana, Cuba, 27 August to 7 September 1990. In particular: Principles 5, 9, and 12 – 14.

must be paid to the right to life[113] and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment[114]. Each of these rights is non-derogable, even during emergencies[115].

[113] Adopted by the UN General Assembly in resolution 34/169 of 17 December 1979. [114] Article 6, ICCPR; Article 4, African Charter on human and Peopels' Rights.
[114] Article 7, International Convention on Civil and Political Rights; Article 5, African Charter on human and Peopels' Rights.
[115] Article 4(2), International Convention on Civil and Political Rights

CHAPTER FOUR

THE CHALLENGES AFFECTING DIFFERENT STAKE HOLDERS IN ENSURING THAT PUBLIC ORDER MANAGEMENT ACT 2013 DOES NOT VIOLATE CONSTITUTIONALISM & RULE OF LAW IN UGANDA

4.0 Introduction

This chapter presents the various challenges affecting Human Rights Defenders in protecting the abuse of Human Rights by Public Order Management Act 2013in Uganda.

4.1 Restrictive Legal and Policy framework

The liberty right developers that were interviewed expressed very strong sentiments against the policy and legal framework which they said generally restricts the space for civil society to carry out their activities. This is a trend similar to what is happening in other parts of the world, particularly in developing countries. It was reported that the Government has been introducing subtle measures to restrict the space in which activists promoting and defending democracy and human rights operate. Some of these measures relate to the introduction of new laws and regulations to control and restrict the operation of civil society in ways that can frustrate the very objectives for which they were formed.

Indeed, the Non-Governmental Organisations Act 2016[116] and its implementing regulations were particularly cited as they give the Government considerable control over the operations of Non Governmental Organizations, most of whom are fighters for the right to liberty. The Act prohibits any Non Governmental Organization from operating unless it is registered by the Non

[116] Non-Governmental Organisations Act 2016

Governmental Organization Board, which can impose conditions or directives as it deems fit. The law also requires annual renewal of licenses, the issuance of which is at the discretion of the Board.

An Non Governmental Organization in western Uganda, which works with the rural population, expressed frustration at having to seek permission from the Resident District Commissioner (RDC) every time they had to carry out activities. The Non Governmental Organization Regulations 2006 dictate that an Non Governmental Organization must give seven days' noticein writing to the Government to communicate its intention to make direct contact with the people in any part of the rural areas of Uganda. The effect of this requirement is that an Non Governmental Organization cannot make "contact" with rural residents without first notifying the Government and waiting for seven days for a response. This raises the question of what would happen if a disaster occurred which required an immediate response or intervention by Non Governmental organizations.

4.2 Accessing protection and remedies

Many organisations are by the nature of their work engaged actively in the task of promoting and protecting human rights. A typical example in the latter category is that of journalists. Many respondents lamented that there is no specific law to provide protective mechanisms for the right to liberty. While they pointed out that they sometimes go to the police, the courts or to the Uganda Human Rights Commission in cases where their rights are violated, these mechanisms were not effective enough to address their unique problems as rights developers[117]. It was

[117] Interview from the right to liberty developers and human rights enforcers in Uganda.

claimed that the police do not give serious consideration to their complaints, while accessing the court system is expensive if one is to use legal experts to effectively present a case.

One journalist in Kampala underscored the fact that when journalists get into trouble with the authorities and are charged in court for an alleged crime related to their work, their employers do not provide the necessary legal assistance[118]. Another said that generally journalists fight for themselves when their rights are violated and that no institution comes to the aid of journalists in such situations. In particular Human Rights Defenders who are journalists feel that penal laws are being used disproportionately to prosecute journalists with a view to intimidating them and exercising undue control on what they can express publicly. These testimonies showed that at the time of research Human Rights Defenders in Uganda felt very vulnerable. While the Constitution is quite clear that one can seek redress in cases where one's rights or freedoms are violated, the general feeling was that the constitutional provision does not offer sufficient protection. The respondents called for the establishment of a solidarity forum for Human Rights Defenders to facilitate access to the protective measures that are available under the law. Such a forum, it was argued, would bring defenders together regularly to strategise on how to protect themselves. The need for an effective local forum for Human Rights Defenders becomes even more necessary in view of some limitations that constrain organisations currently engaged in defending Human Rights Defenders.

4.3 Security threats

By the nature of their work, Human Rights Defenders all over the world are not very popular with the authorities. In less democratic states, views expressed by defenders can expose them to

[118] Ibid

the risk of being arrested, harassed, and threatened or even being attacked or killed. For example, the President of Gambia made statements on 21 September 2009 publicly threatening to kill Human Rights Defenders and those that cooperate with them[119]. A number of Human Rights Defenders interviewed expressed a sense of vulnerability because of their work. Other than those who reported being arrested, detained and prosecuted, many others interviewed stated that threats against defenders were largely covert or subtle. Respondents reported that threats include anonymous telephone calls in which they were warned and threatened with danger on account of their work; surveillance by unknown persons; as well as burglary of property, documents, and laptops from office premises or vehicles.

A defender in Kampala had this to say: "When the organisation I work for exposed some Government authorities on corruption we received anonymous phone calls with threats and intimidation, security people roamed around my office. My family and I had to leave our home for some few weeks". Other than covert and subtle threats, some respondents reported overt threats, mainly from the police, soldiers, military intelligence, RDCs and District Internal Security Officers. It was reported that such conduct was carried out by state officials with impunity; such threats would be reported to relevant authorities but they would not be investigated or the police would not charge the persons concerned.

These security threats have had a negative impact on the work of Human Rights Defenders who reported that they act with caution in whatever they do, due to fear for their security and their jobs. In particular, it was the general view that many Human Rights Defenders in Uganda are practicing self-censorship in the exercise of freedom of association, assembly and expression for

[119] Ibid

fear of treading on 'dangerous grounds.' Some of them, as a matter of precaution, have chosen to concentrate on 'soft' human rights issues that are unlikely to annoy the authorities.

4.4 Inadequate Knowledge about the right to liberty protective mechanisms

Particular groups of human rights were seriously concerned about their vulnerability, compounded by the lack of awareness regarding the existing regional and international mechanisms that could be utilised in the event of violations or to pre-empt impending violations of the right to personal liberty. Media practitioners were particularly very candid about their lack of knowledge about the existence of such mechanisms and how to utilise them. For example, they were not aware of the United Nations Special Reporter on the situation of Human Rights Defenders. A quick search on the website of the OHCHR revealed that Human Rights Defenders in Uganda are not making frequent use of the UN Special Procedures system. When asked why, Human Rights Defenders generally conceded that they lacked knowledge about the procedures. Only HURINET had in 2007 lodged a case with the African Commission on Human and Peoples' Rights[120].

Related to this, many defenders do not even know that they are Human Rights Defenders. Many admitted having inadequate knowledge about human rights. They were not aware that human rights knowledge was so vital in empowering citizens through increasing their civic competence to contribute to good governance in the country. This knowledge gap among some Human Rights Defenders needs to be plugged through targeted sensitisation and training of various groups of Human Rights Defenders. It was the view that an effective network of Human Rights Defenders or Organizations such as the Centre could help plug the knowledge gap.

[120] Patrick Okiring & Agupio Samson v. Uganda ACHPR/LPROT/COMM/339/07/SO.

4.5 Financial Challenges

Most respondents mentioned fundraising as a major challenge. The survey found that inability to fundraise greatly affected the work of Human Rights Defenders. At the time of the survey, three local organisations in eastern Uganda intimated that they were in a state of limbo as their funding had been exhausted and they were yet to receive more funds from their donors. The head of one major local human rights organisation, in a moment of candid introspection, decried the near total dependency of almost all Non Governmental Organizations and CBOs on foreign funding. The respondent suggested that this situation needs to be reversed by starting local income generating investments and / or endowments.

In Lira district, an interviewee stated that "there is a wide scope of work to be done. The people are too many and yet the funds are insufficient". Another in Gulu stated: "Most international organisations and donors are currently phasing out their operations and support to the organisations here. This is because of the relative peace. Since most Non Governmental Organizations and CBOs depend on foreign funds, many of them are worried about how they will continue doing their work but the donors are planning to transition some of the oNon Governmental Organizationing programs to Non Governmental Organizations, CBOs and the district to enable them cope after they have left." A respondent in Kampala stated: "Most defenders lack fundraising skills. They need to get more information about where the funds are; they need to exchange more information about fundraising tactics. They should collectively meet with donors to discuss this."

As a consequence of the challenges related to fundraising, most organisations lack adequate funds to implement specific projects. Local sources of funds for Human Rights Defenders are insufficient and thus there is heavy reliance on foreign donors, such as international Non

Governmental Organizations, intergovernmental agencies, embassies and foreign governments. A respondent from a well-known Non Governmental Organization in Kampala lamented, "Sustainability of human rights work is never assured as our organisations have no local sources of funding." The extent of absence of local sources of funding is illustrated by the fact that even governmental bodies mandated to promote and protect human rights are inadequately funded. A respondent in western Uganda working for a governmental human rights body pointed out that all its funding to run its activities come from international donors.

4.6 Challenges Related to Particular Professions

Media practitioners face challenges which are unique to their profession. They regularly disseminate their opinions on various topics. Some of these opinions do not go down well with state authorities and non-state actors. Media practitioners allege that they face challenges caused by State authorities that are agitated by their news pieces, as well as non-state authorities who sometimes lack support for media practitioners.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

This scope of the study was principally undertaken to get up-to-date information about the situation of Constitutionalism and Rule of Law in Uganda and how the Public Order Management Act 2013 has been implemented in line with the Constitution of the Republic of Uganda 1995 as Amended.. It provides the researchers with the opportunity to visit different human rights reports both nationally and internationally and the reports of the Human rights defenders in all regions of the country. This research brings about several challenges and obstacles the organisers of public meetings face and the challenges faced by the Uganda Police in implementation of the Public Order Management Act 2013 course of their work. Most of these challenges come about because of the legal, policy and institutional framework.

Within this fairly positive legal framework, In general, the Human Rights Defenders in Uganda have played a vital role in protecting human rights as important for peace, security and development of Constitutionalism and rule of Law in Uganda. Many of them have in spite of challenges been instrumental in exposing human rights violations by releasing researched reports, making pronouncements, issuing press releases and working together with the authorities to create awareness on human rights principles, norms and standards, providing alternative mechanisms for fair interpretation and implementation of Public Order Management Act 2013 in Uganda.

Human Rights Defenders in Uganda, like their counterparts within East Africa and elsewhere in the world are faced with several challenges as have been discussed in detail in chapter 4 of this report. In summary, these challenges are caused by Uganda's restrictive legal framework, financial inadequacy, lack of skills in human rights work, resistance to human rights ideas, vulnerability to insecurity and many others including cultural chauvinism. A key challenge identified was that Human Rights Defenders and other Human Rights organisations in Uganda typically depend on foreign donations making it difficult for them to sustain their programmes on their own. In some instances they are unable to carry out programmes of their preference especially when their programmes are reactive to donor demands. Dependency on donor funds affects choice of activities as well as terms and conditions of service for staff.

The study also shows that Human Rights Defenders and other international Human Rights Organisations have appreciated the relatively good legal framework for their work even though in some aspects it was restrictive. However, there were concerns that since the 2011 general elections there has been an increasing trend of harassing Human Rights Defenders, especially those working in the media and the organisations that work in promoting and protecting civil and political rights being violated by Public Order Management Act 2013. The Non-Governmental Organisations Act 2016 is said to have introduced what is considered to be Government efforts to control Human Rights Defenders activities.

5.2 Recommendations

Taking into account the nature of the challenges affecting the implementation of POMA 2013 as identified by the study, the following recommendations are made.

Absence of a notification required under section 5(1) of POMA 2013 should not be the basis for prohibiting or dispersing a peaceful assembly, since in many circumstances notification may not be practical or possible and shouldn't be the basis for restricting the enjoyment of the right. This was stressed by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association in his first and second thematic reports.[121] The European Court of Human Rights (European Court) has also articulated this principle in the case of **Bukta and others v. Hungary**[122]

The notification requirement applies irrespective of the number of expected participants in the assembly. However, where there the number of participants is small, State facilitation will not be necessary and therefore the basis for requiring notification is absent. By way of comparison, in Moldova, any assembly of fewer than 50 persons can take place without prior notification and in the United Kingdom there is no requirement of notification for static assemblies at all.

The requirement that organisers specify the purpose of a public meeting to the State is not legitimate, as this information does not assist law enforcement in making arrangements to facilitate the assembly.[123] Rather, it opens the system of notification to abuse on the basis of the viewpoints of the assembly participants, and may have a chilling effect on assemblies, particularly those that are critical of the State. By way of comparison, the European Court has stated that it is "unacceptable... that an interference with the right to freedom of assembly could

[121] A/HRC/23/39, at para. 51.
[122] Bukta and others v. Hungary , Application No. 25691/04, 2007.
[123] UN Special Rapporteur on the right to freedom of peaceful assembly and of association, A/HRC/23/39, 24 April 2013, at para. 53

be justified simply on the basis of the authorities' own view of the merits of a particular protest."[124]

The notification procedure remains overly bureaucratic and burdensome, constituting a disproportionate restriction on the right to freedom of peaceful assembly. To facilitate any assembly, the authorities should only require basic information, such as identifying information for one organiser, the start time and location, the route of the assembly if it is mobile, and the expected number of participants. This information should only be gathered for the purpose of facilitating assemblies and should not be retained otherwise. Notification should also be provided for by numerous means, including by writing, telephone, email, or in person, and not according to a specified form that may not be readily available to large sections of the population, particularly for people who have difficulty writing or getting to a police station.[125]

The coincidence of two demonstrations at the same location and time should not be the basis for rejecting a notification (Article 6(1). The Act should establish that it is a responsibility of the State to facilitate peaceful simultaneous demonstrations, including counter-demonstrations. Where this is not possible, the law enforcement authorities should provide a suitable alternative in agreement with the organisers.

Any regulation on the manner of an assembly must comply with the three-part test of Article 19(3) and Article 21 of the ICCPR.

The provisions regarding the use of force to disperse assemblies (Sections 8 and 9(2)(f) of POMA must be revised to ensure consistency, and must clearly establish that force may only be

[124] Hyde Park & Others v. Moldova No.1 , Application Nos. 33482/06, 45094/06, 45095/06, 31/03/2009, para. 26.

[125] Ibid

used as a last resort and only where necessary and proportionate, where alternative methods of public order management, which should also be specified in the Law or regulations, have been exhausted. There must be a clear command authority and provision for subsequent review of the use of force.

However, ARTICLE 19 is concerned that the Act has not replaced these problematic provisions with specific guidance on the use of force that comply with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990 and the UN Code of Conduct for Law Enforcement Officials (General Assembly 34/169, 17 December 1979). This guidance should prevent against the arbitrary and abusive use of force, and comprehensively set out the circumstances under which force may be used, the range of means that may be used to ensure a differentiated and proportionate response, and adequate review mechanisms where the use of force has been used.

The POMA Act 2013 should establish the principles governing the use of firearms during and at the time of dispersing assemblies and public meetings in compliance with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and UN Code of Conduct for Law Enforcement Officials.

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