

1140779

**JUDICIAL REVIEW: AN EFFECTIVE TOOL FOR  
PROTECTING THE FREEDOM OF EXPRESSION IN UGANDA**

**DISSERTATION SUBMITTED ON FULFILLMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF LLM IN ADVANCED  
LEGISLATIVE STUDIES OF THE UNIVERSITY OF LONDON**

**AUGUST, 2013.**

## **STUDENT'S DECLARATION**

I confirm that this dissertation is entirely my own work. All sources and quotations have been acknowledged. The main works consulted are listed in the bibliography.

The total length of the dissertation is 15067 words.

**Signed .....**

**Student ID: 1140779**

**Signed .....**

**Dr. Helen Xanthaki**

**Supervisor**

## **DEDICATION**

*To my Mother (RIP), Father (RIP) and Maria and to the Hon. Mr. Justice V.C.R.A.C Crabbe who is the inspiration in my legislative drafting career.*

## **ACKNOWLEDGEMENT**

I would like to thank God for continuing to bless me abundantly.

To my special friend and mentor, the Hon. Mr. Justice V.C.R.A.C Crabbe, thank you for the invaluable advice, time, encouragement and words of wisdom throughout my legislative drafting career. He is the greatest guiding principal in my endeavors.

In a special way, I am thankful to my special friend and colleague Denis Kawooya Kibirige (aka KDK) for his time, advice and comments that helped me tremendously in my career and in developing this dissertation.

I would also like to thank L. J. Chinery-Hesse for his words of encouragement during the period of study and always.

Special thanks go to my friends the Hon. Mr. Justice V.C.R.A.C Crabbe, Justine Aliba, Sarah Nambasa, Patience Kabeije and Robinah Rwakoojo for the financial support that enabled me to attend the crucial “Residential Week” of the program in London.

Finally, I would like to thank my family for all the prayers and support.

## CONTENTS

	<u>PAGE</u>
<i>Student's Declaration</i> .....	<i>i</i>
<i>Dedication</i> .....	<i>ii</i>
<i>Acknowledgement</i> .....	<i>iii</i>
<i>Table of Contents</i> .....	<i>iv</i>
<i>List of Statutes</i> .....	<i>vi</i>
<i>List of Cases</i> .....	<i>vii</i>
 <b>CHAPTER ONE</b>	
INTRODUCTION .....	1
METHODOLOGY .....	1
HYPOTHESIS .....	2
 <b>CHAPTER TWO</b>	
JUDICIAL REVIEW: CONSTITUTIONAL PERSPECTIVE	
(a) Introduction .....	3
(b) Constitutional Foundations of Judicial Review in Uganda .....	3
(c) Purpose of Judicial Review .....	5
 <b>CHAPTER THREE</b>	
CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION .....	6
 <b>CHAPTER FOUR</b>	
WHY JUDICIAL REVIEW IS AN EFFECTIVE TOOL FOR THE PROTECTION OF FREEDOM OF EXPRESSION IN UGANDA	
(a) Introduction .....	8
(b) Analysis: .....	8
(i) Charles Onyango Obbo and Andrew Mwenda v Attorney General, Constitutional Petition No. 15 of 1997 .....	8

(ii) Muwanga Kivumbi v Attorney General, Constitutional Petition No. 9 of 2005.....	16
(iii) Andrew Mwenda and Another v Attorney General, Constitutional Petition No. 12 of 2005.....	22

## **CHAPTER FIVE**

### **OVERVIEW OF LEGISLATIVE REFORMS RELATING TO THE FREEDOM OF EXPRESSION**

(a) Historical background .....	28
(b) Policy considerations .....	28
(c) The development of the proposed law .....	29
(d) Parliamentary stage .....	31
(e) Analysis of reform efforts .....	34

## **CHAPTER SIX**

LESSONS FOR THE DRAFTER, GOVERNMENT AND PARLIAMENT .....	38
--	----

## **CHAPTER SEVEN**

CONCLUSION AND RECOMMENDATIONS .....	42
--------------------------------------	----

BIBLIOGRAPHY .....	47
--------------------	----

### **TEXT BOOKS**

### **PAPERS**

## **LIST OF STATUTES**

1. The 1995 Constitution of Uganda.
2. The Acts of Parliament Act, Chapter 2.
3. The Electronic Media Act, Chapter 104
4. The Judicature Act, Chapter 13.
5. The Judicature (Court of Appeals Rules) Directions, S.I. 13-10.
6. The Judicature (Supreme Court Rules) Directions, S.I. 13-11.
7. The Judicature (Judicial Review) Rules, 2009. No. 11/2009.
8. The Penal Code Act, Cap 120.
9. The Police Act, Chapter 303.
10. The Public Order Management Bill, 2011. Bill No. 3 of 2013.
11. The Press and Journalists Act, Chapter 105.
12. The Uganda Human Rights Commission Act, Chapter 24.
13. The Uganda Public Service Standing Orders, January, 2010.

## **LIST OF CASES**

1. Andrew Mwenda and Another v Attorney General. Constitutional Petition No. 12 of 2005.
2. Charles Onyango Obbo and Andrew Mwenda v Attorney General, Constitutional Petition No. 15 of 1997 (2000) UGCC 4 (21 July 2000).
3. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
4. Edmonton Journal v Alberta (A.G.) (1989) 2 SCR 1326.
5. Muwanga Kivumbi v Attorney General, Constitutional Petition No. 9 of 2005.
6. M v Home Office [1994] 1 AC 377.
7. Miria Matembe and Others v Attorney General (Constitutional Petition No.2 of 2005).
8. Ndyanabo v Attorney General East Africa Law Reports (2001)2 EA 485 (CAT)
9. R v Oakes [1986] 1 S.C.R. 103.
10. R v Zundel (1992) 10 C.C.R (2<sup>nd</sup>) 193.
11. Rangarajan v P. J. Ram, [1989] (2) SCR 204.
12. R. A. V. v City of St Paul 505 U.S. 377.
13. Ridge v Baldwin [1964] AC 40.

# CHAPTER ONE

## 1.0. INTRODUCTION

Judicial review describes the process by which the courts exercise a supervisory jurisdiction over the activities of the public authorities in the field of public law. The primary method by which this control is exercised is through the application for judicial review.<sup>1</sup>

The system of judicial review applies principles of administrative law to all areas of government activities.<sup>2</sup> It helps to ensure that decisions of public authorities conform to legal principles and observe fair procedures. The grounds for seeking judicial review were reformulated by Lord Diplock<sup>3</sup> under three heads namely, illegality, irrationality and procedural impropriety.

In many countries including Uganda, judicial review is a key means of protecting fundamental rights and liberties and ensuring that citizens are not unjustifiably denied of these rights. It is asserted that “an Act of Parliament which seeks to restrict or eliminate judicial review will not find favor with the courts.”<sup>4</sup> Techniques of judicial review are often used to enforce the constitution.<sup>5</sup>

## 1.1. METHODOLOGY

In this paper, I shall argue that judicial review is an effective safeguard for protecting the freedom of expression in Uganda. I shall briefly describe the concept of judicial review as understood in administrative law. I shall then analyse, judicial review in the constitutional perspective, the constitutional foundations of judicial

---

<sup>1</sup> Clive Lewis, *Judicial Remedies in Public Law*, 4<sup>th</sup> edn. Sweet and Maxwell. 2009, Pg 9 and Lord Denning: *The Closing Chapter*, Oxford University Press. Pg. 117- 124

<sup>2</sup> The system was inherited from Britain. I.I Massey: *Administrative Law* 6<sup>th</sup> Edition. Pg. 238.

<sup>3</sup> *Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service* (1985) AC 374, HL and Jonathan Manning, *Judicial Review Proceedings, A Practitioner's Guide to Advice and Representation*. 2<sup>nd</sup> Edn. LAG Education and Service Trust Limited. Pg. 119.

<sup>4</sup> *R v Medical Appeal Tribunal ex p. Gilmore* 1957 1 Q. B. 574. Pg. 583.

<sup>5</sup> Anthony Bradley, *Judicial Review Human Rights and their Protection in Public Law*, 2011, Lecture Notes, Themes in Legislative Studies Week 12- Judicial Review <http://studyonline.sas.ac.uk/course/view.php?id.> Pg. 1 and id. Manning, pg. 121.

review in Uganda as well as the constitutional protection of freedom of expression in Uganda.

I shall analyse three cases decided by the constitutional and Supreme courts to illustrate, the effectiveness of judicial review in safeguarding the protection of the freedom of expression in Uganda. Analysis of each case begins with the brief facts of the case, a discussion of the fundamental right, the measure employed by the court to protect the right, a determination of whether the measure was effective and the effect of the decision of the court on legislative reform in Uganda.

I shall also analyse the status of legislative reform of laws affecting the freedom of expression in Uganda to illustrate the government efforts in ensuring that freedom of expression is enjoyed by all citizens according to the Constitution and determine whether or not the laws conform to the Constitution and what the government needs to do to ensure the laws are in conformity with the Constitution.

Lessons for drafters, Government and Parliament shall be drawn from the cases discussed and recommendations made for developing the legal regime on freedom of expression without breaching the constitutional protection of the freedom.

I shall review primary and secondary literature, websites, case law and information gathered from interviews with experts on the subject.

## **1.2. HYPOTHESIS**

The substance of this paper is that in view of the unconstitutionality of laws relating to freedom of expression in Uganda, judicial review has served as a safeguard for protecting that freedom.

Judicial review is approached in this paper, from the constitutional perspective, as a remedy for breach of constitutionally protected rights and freedoms with special focus on the freedom of expression.

## CHAPTER TWO

### 2.0. JUDICIAL REVIEW: CONSTITUTIONAL PERSPECTIVE

#### *(a) Introduction*

The duty to check the executive, both the political arm of the executive and the bureaucratic arm, and make it accountable for each of the acts taken by a member of the executive arm was the responsibility of Parliament.<sup>6</sup> This however changed with the emergence of organised political parties.<sup>7</sup>

Accordingly, Parliament became dominated by the political parties and this diminished its power to effectively check the executive since more often than not the head of the executive is one of the most influential members of the dominant party in Parliament. “Judicial review was therefore born to give power to the courts to examine executive acts to counter the declining ability of Parliament to effectively check the executive.”<sup>8</sup>

#### *(b) Constitutional Foundations of Judicial Review in Uganda*

The power of the courts in Uganda before 1995 was “strictly limited to the interpretation of the law as enacted by Parliament.”<sup>9</sup> There was no special court charged with the duty to interpret either the constitution or to review legislation.

During the constitution making process, special considerations arose in respect of the interpretation and application of the Constitution. These considerations included a wide range of potential matters including “relations between organs of the State, questions about the constitutionality of laws passed by Parliament and actions taken by the executive and the officers who serve it.”<sup>10</sup> The views of the

---

<sup>6</sup> Report of the Uganda Constitutional Commission: Analysis and Recommendations, (Odoki Report) 1992 pg. 252. [www.constitutionnet.org/node/10749](http://www.constitutionnet.org/node/10749).

<sup>7</sup> Id Chapter Eight, pg. 181 and the 1995 Uganda Constitution (the “Constitution”) Laws of Uganda Volume 1. [www.ugandaonlinelawlibrary.net/file/constitution-1995.pdf](http://www.ugandaonlinelawlibrary.net/file/constitution-1995.pdf). Articles 69 -76 pgs. 65-68.

<sup>8</sup> Denis Kibirige Kawooya, Judicial Review by the Constitutional Court in Uganda: Lessons for the Drafter. Essay Submitted in partial fulfillment of the requirements for the degree in Advanced Legislative Studies of the University of London 2008-2009. (Unreported) [www.studyonline.sas.ac.uk](http://www.studyonline.sas.ac.uk)

<sup>9</sup> Peter Walubiri ‘Towards a New Judicature in Uganda: From Reluctant Guards to Centurions of Justice’ Peter M. Walubiri (ed) Uganda: Constitutionalism at Cross Roads (Uganda Law Watch Kampala 1998) 135-208 at 138.

<sup>10</sup> Id. Odoki Report pg. 426.

people were such that the role of interpreting the Constitution would best be served by the courts given the history of political turmoil in Uganda.

In 1995, with the advent of a new constitutional order, provision was made within the constitution and the existing court structure for a constitutional court to interpret the constitution. Accordingly, article 137<sup>11</sup> of the Constitution establishes the Court of Appeal as the constitutional court and gives it jurisdiction to deal with questions relating to the interpretation of the constitution.

According to Elliot, the constitutional foundations of judicial review may be traced to “the requirement that the executive exercises its power fairly, reasonably and consistently with the scheme which Parliament in the first place prescribed in the enabling legislation.”<sup>12</sup>

Wolfe argues that “judicial review is firmly rooted in the obligation of the judge to prefer the constitution to an ordinary statute in cases where the two conflict.”<sup>13</sup>

In terms of judicial review therefore, a person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution may petition the constitutional court for a declaration to that effect and for redress where appropriate.

Therefore in the constitutional context, judicial review refers to the power of the courts to control the compatibility of legislation and executive acts with the terms of the constitution.<sup>14</sup> This power is now contained in article 137. The advantage of having a specialised and centralised court dealing with constitutional matters can be found in the ability of such a court to distinguish constitutional issues from the “technical legalisms they often come wrapped within.”<sup>15</sup>

Over the last few years, the constitutional court in Uganda has made use of this power to check the legislative authority of Parliament. Since 1995, the

---

<sup>11</sup> Pg. 109.

<sup>12</sup> Mark Elliot, *The Constitutional Foundations of Judicial Review* (Hart Publishing Oxford 2001) 2.

<sup>13</sup> Christopher Wolfe *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge made Law* (Littlefield Adams Quality Paperbacks, London 1994) at 76.

<sup>14</sup> Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press London 1998) 17.

<sup>15</sup> Christopher F. Zurn *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, New York, 2007) at 85.

constitutional court has judicially struck down Acts of Parliament in exercise of this power for being in contravention of the Constitution.<sup>16</sup>

Accordingly, in the constitutional setting of Uganda, the constitutional court is entrusted with the duty to test the constitutional validity of Acts of Parliament.

*(c) Purpose of Judicial Review:*

The purpose of judicial review in a constitutional system such as Uganda is to ensure that the Constitution prevails over legislative enactments which are contrary to it in such a way that any legislative enactment contrary to the Constitution cannot be law “otherwise the Constitution would be reduced to a worthless attempt to limit a power which is by its very nature illimitable.”<sup>17</sup>

It should be noted however that the powers of judicial review “are given not with a view to make the judiciary a supreme body superior to the other arms of the constitutional framework”<sup>18</sup> but to ensure a system of checks and balances between the legislative and the executive on the one hand and the judiciary on the other hand. The mechanism has been devised to function in such a way that the unconstitutional actions of one of the wings are corrected by the other.

The purpose of judicial review is however “not to criticise legislative or executive actions as the opposition is expected to fulfill this function in a democratic polity.” On the contrary, the judiciary’s role is to review executive and legislative actions and declare whether those actions conform to the dictates of the Constitution.<sup>19</sup>

---

<sup>16</sup> Ssemogerere and Others v Attorney General, Constitutional Petition No. 3 of 1999(2000) UGA J No. 1 Constitutional Court. [www.safilii.org/ug/cases/UGCC/recent.html](http://www.safilii.org/ug/cases/UGCC/recent.html) (*Semwogerere case*) It explains elaborately the import of article 137.

<sup>17</sup> Per Marshall CJ in *Marbury v Madison* 1 Cranch 137 (1803) at 177.

<sup>18</sup> Amicus Curiae Issue no. 2007. Judicial Activism and Overreach in India R. Shunmugasundaram. Article taken from Lecture at the Institute of Advanced Legal Studies in 2007. Pg. 22. <http://studyonline.sas.ac.uk/course/view.php?id>

<sup>19</sup> Id.

## CHAPTER THREE

### 3.0. CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION

According to Dubick, “of the various rights enjoyed in a free society, freedom of expression may well be the most important. To dispense with the freedom of expression is to invite incursions on other rights and the authoritarian system of government. It is in this sense that the constitutional guarantee of freedom of expression has no equal”.<sup>20</sup>

The recognition and protection of the freedom of expression is not a new development in Uganda’s constitutional history. Article 26 of the 1962 independence Constitution<sup>21</sup> provided for the protection of freedom of expression.

This same article was restated in article 17 of the 1967 Constitution.<sup>22</sup> Article 26 provided for the freedom of expression as follows:

*“26. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*

*(2) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision,*

*(a) that is reasonably required in the interests of national economy, the running of essential services, defence, public safety, public order, public morality or public health; or*

*(b) that is reasonably required for the purpose of protecting the reputations, right and freedoms of other persons or the private lives of persons .....; or*

---

<sup>20</sup>Dubick, Keith, “The Theoretical Foundations for Protecting Freedom of Expression” (2001) Journal of Constitutional Law, vol 13 at 1-2.

<sup>21</sup>Laws of Uganda, vol 1 1964, SI 1962 No. 2175 pg. 54.

<sup>22</sup>Id, pg. 16.

*(c) that imposes restrictions upon public officers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”*

A reading of this provision suggests that what is perceived as freedom of expression is limited hence making the protection of this freedom extremely restrictive. Ojambo<sup>23</sup> has rightly observed that “the extensive, imprecise drawbacks that formed part of the relevant article would have left very little room for meaningful enjoyment of the right in issue.” It appears therefore that the 1962 and 1967 Constitutions gave the freedom of expression with one hand (26 (1)) and at the same time took it away with the other hand (26 (2)).

It will be observed that the Constitution<sup>24</sup> departed from the 1962 and 1967 Constitution provisions of protection of freedom of expression in particular but fundamental rights in general. Article 29 of the Constitution<sup>25</sup> provides for the protection of freedom of conscience, expression, movement, religion, assembly and association. Sub article (1) (a) provides for the right to the enjoyment of the freedom of speech and expression by everyone and this freedom includes the freedom of the press and other media. The freedoms of speech or of the press are a special freedom within the scope of freedom of expression.<sup>26</sup>

The Constitution like the 1962 and 1967 Constitutions also provides for limitations on the exercise and enjoyment of all freedoms, including freedom of expression in article 43. As shall be discussed, the limitation in article 43 is restricted to non prejudicial interference with other fundamental freedoms and the public interest.

---

<sup>23</sup>Henry Odimbe Ojambo, Reflections on Freedom of Expression in Uganda’s Fledgling Democracy. Sedition, “Pornography” and Hate Speech. Human Rights and Peace Centre Working Paper No. 18, 2008. [huripec.mak.ac.ug/pdfs/working\\_paper\\_18.pdf](http://huripec.mak.ac.ug/pdfs/working_paper_18.pdf)

<sup>24</sup> Chapter Four, pg. 39.

<sup>25</sup> Id. pg. 46.

<sup>26</sup> Per US Supreme Court decision in *Thornhill v Alabama* (310 US 88, Pgs. 101-102).

## CHAPTER FOUR

### 4.0. WHY JUDICIAL REVIEW IS AN EFFECTIVE TOOL FOR THE PROTECTION OF FREEDOM OF EXPRESSION IN UGANDA

#### *(a) Introduction*

In as far as interpreting the constitution is concerned, judicial review is the power of judges to interpret the constitution and to refuse to acknowledge and therefore enforce those measures that in the opinion of court conflict with the spirit of the Constitution.

In light of the fundamental right in question, the Constitution now empowers a person to challenge the constitutionality of an Act of Parliament where the person believes that the Act is in breach of a constitutional right. A claim for judicial review under article 137 (3) will usually be an appropriate procedure for enabling a person to enforce his constitutional right to freedom of expression.

It will be shown that the application for judicial review is not only relevant but it has been effective by ensuring that Acts of Parliament do not infringe on the enjoyment of the freedom of expression.

#### *(b) Analysis:*

##### ***(i) Charles Onyango Obbo and Andrew Mwenda v Attorney General, Constitutional Petition No. 15 of 1997<sup>27</sup>***

In this case, the Editor and reporters of the Monitor Newspaper were prosecuted under section 50 of the Penal Code Act<sup>28</sup> for publishing false news when they published an article alleging that the President of the Democratic Republic of Congo paid Uganda in gold for services Uganda rendered to the struggle to oust Mobutu Sese Seko, a former military dictator of Congo. The journalists petitioned the constitutional court under article 137 challenging the constitutionality of section 50 which made it a criminal offence to publish false news. They lost the

---

<sup>27</sup> [www.ulii.org/ug/judgment/constitutional-court/2000/4](http://www.ulii.org/ug/judgment/constitutional-court/2000/4) (*Obbo case*)

<sup>28</sup> Laws of Uganda, vol 8 Chapter 120. [www.ugandaonlinelawlibrary.net](http://www.ugandaonlinelawlibrary.net)

case because the constitutional court decided unanimously that the Director of Public Prosecution's (DPP) action in prosecuting the appellants was not inconsistent with the Constitution, and by majority of four to one, that section 50 was not inconsistent with article 29 (1) (a) of the Constitution and accordingly dismissed the petition.

The petitioners then appealed to the Supreme Court<sup>29</sup> seeking among other things declarations-

- (a) That the action of the DPP in prosecuting them under section 50 was inconsistent with articles 29 (1) (a) and (e), 40 (2) and 43 (2) (c) of the Constitution; and
- (b) That section 50 was inconsistent with articles 29 (1) (a) and (b), 40 (2) and 43 (2) (c) of the Constitution.

The fundamental freedom that was alleged to have been breached was the right to freedom of expression....<sup>30</sup> This freedom is declared in article 29 as follows:

***“29. Protection of freedom of..... expression, .....***

*(1) Every person shall have the right to—*

- (a) freedom of speech and expression which shall include freedom of the press and other media;.....”*

This freedom is also recognised and protected by many international conventions and declarations.<sup>31</sup>

The freedom of expression is important in a democratic society. It is one of the fundamental freedoms pertaining to the citizen as a human being. Cassin R said in *Man and Modern State* that “no one has the power to control his internal thoughts and feelings or to prevent him from outwardly expressing his thoughts and feelings. Moreover freedom of objection and discussion is the one surest sources of truth.”<sup>32</sup>

---

<sup>29</sup> Constitutional Appeal No. 2 of 2002. [www.ulii.org/ug/judgement/supreme-court/2004/1](http://www.ulii.org/ug/judgement/supreme-court/2004/1).

<sup>30</sup> as well as the freedom of association and economic rights.

<sup>31</sup> European Convention on Human Rights. <http://www.hri.org/docs/ECHR.50.html>

<sup>32</sup> Judgment of Odoki JSC pg. 2.

Although the Constitution does not define what constitutes the freedom of expression, it is generally accepted that “the freedom of expression entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art or through other chosen media without interference by public authority and regardless of frontiers.”<sup>33</sup>

Indeed the Constitution requires the State, in its National Objectives and Directive Principles of State Policy No. V, to guarantee and respect institutions which are charged by the State with responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively.

This freedom enables the public to receive information and ideas which are essential for them to participate in their governance and protect the values of democratic government on the basis of the decisions. It further promotes a market place of ideas and it enables those in government or authority to be brought to public scrutiny and thereby hold them accountable.<sup>34</sup>

The sole ground of appeal to the Supreme Court was against the majority decision of the constitutional court that section 50 was not inconsistent with article 29(1) (a) of the Constitution. It should be noted that the power vested in the constitutional court by article 137 (3) to review the constitutionality of an Act of Parliament is intended to ensure that the court can intervene to correct any excess or abuse that may be occasioned by Parliament in the exercise of its legislative power. However, that power is restricted to reviewing legislation and does not include review of legislative proposals before they become law. The constitutional court has a number of times refused to exercise this power when it has been asked to review bills before Parliament.<sup>35</sup>

Section 50 provided that:

---

<sup>33</sup>Id article 19 of the International Convention on Civil and Political Rights ([www.ohcr.org/en/professionalinterest/pages/ccpr.aspx](http://www.ohcr.org/en/professionalinterest/pages/ccpr.aspx)) and article 10 of the European Convention on Human Rights.

<sup>34</sup> The Supreme Court of Zimbabwe emphasised the special objectives that freedom of expression serves in democracy in *Mark Gova Chavunduka and Another v The Minister of Home Affairs and Another*, Supreme Court Civil Application No. 156 of 1999.

<sup>35</sup> *Matembe and others v Attorney General*, Constitutional Petition No. 2 of 2005 East African Law Reports, 2005 Volume 2. The constitutional court was asked to stop Parliament from debating the Constitution (Amendment) Bill, No.2 of 2005. LawAfrica Publishing (U) Ltd. Accessed on 14/06/2013.

*“(1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace commits a misdemeanour.*

*(2) It shall be a defence to a charge under subsection (1) if the accused proves that prior to publication, he or she took such measures to verify the accuracy of such statement, rumour or report as to lead him or her reasonably to believe that it was true.”*

The Supreme Court declared that section 50 was unconstitutional because it was too vague, wide, making it difficult to determine its scope and conjectural to provide the necessary certainty required to impose a restriction on freedom of expression.

Mulenga JSC stated that the objective and effect of section 50 was, from the wording of the provision, “to provide a legal safeguard against the spreading of news, rumours or reports that could destabilize the populace with the probable effect of undermining the authority of the colonial regime.”<sup>36</sup> Therefore a person who publishes a statement, rumour or report, which the prosecution holds out to be false or likely to cause public fear or alarm, or a disturbance of public peace, is liable to criminal prosecution and to imprisonment if convicted.

The substance of the criticism of section 50 by the Supreme Court was that section was too vague and imprecise for a penal legislation. The learned Justices agreed with the appellants that the criticism was valid.

The court observed that the section contains many words which are so vague that it is difficult to assign them any precise meaning. The court pointed out that:

1. The word “publish” is not defined in the Act. Yet the word is capable of a variety of meanings.
2. The word “false” has no definite meaning attached to it.
3. “Statement”- what amounts to a statement? Is it a phrase, paragraph or sentence?

---

<sup>36</sup> Judgment of Mulenga JSC pg. 20.

4. “Public” - what does the word refer to? Is it a community, a section of the community or a handful of it? Is it as perceived by government or does it have an objective assessment?
5. “Fear” and “alarm” to the public - How does fear manifest itself?
6. “Likely” to cause fear. How is the likelihood of causing fear to be determined?

This criticism raises the issues of clarity and precision and the drafting of penal provisions, in legislation. G.C. Thornton<sup>37</sup> states that clarity in the legislative context requires simplicity and precision. He warns that neither concept must be sacrificed at the altar of the other. “What is simple will often be precise, and what is precise will often be simple but that one does not follow from the other.”

Furthermore, Thornton states that the purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood, in other words to communicate successfully, requires the unremitting pursuit of clarity by drafters.

Mulenga JSC<sup>38</sup> echoed the warning by Thornton when he stated that “precision and clarity in the definition of a criminal offence is essential, if a person accused of the offence is to have a fair trial”. The court observed that in defining any derogation of a right guaranteed by the Constitution, precision and clarity are of essence. Therefore for a drafter to succeed in communicating law to its audience he must have the quality of precision. He must have precision in thought, so as to be able to see all legal implications of the policy to be given effect and he must have precision in language so as to be able to express the policy accurately.

Thornton<sup>39</sup> states that “penal provisions never stand alone; they form part of the wider criminal law and that must never be disregarded. They are subject to

---

<sup>37</sup> Legislative Drafting 4<sup>th</sup> edn Butterworths London 1996, pg. 52.

<sup>38</sup> Id at pg. 4.

<sup>39</sup> Ibid pg. 349

restrictive construction and the benefit of doubt in case of possible alternative construction will be given to the accused.”

There are three elements in a penal provision.<sup>40</sup> For all the three elements to be communicated effectively for a penal provision, they should be drafted in clear, precise and unambiguous terms. With these attributes in mind, certainty in legislation will be achieved.<sup>41</sup> The learned Justices observed correctly that section 50 was, according to these requirements not drafted with clarity and precision in mind.

The court, in deciding the case as it did, considered the issue of limitation of the exercise of the freedom of expression and noted that although the Constitution guarantees the freedom of expression, that freedom is not absolute; it is therefore subject to certain restrictions to ensure that it is exercised responsibly. Limitations may be imposed on the freedom which strike a balance between State involvement in the press and media autonomy as well as between freedom of expression and the press and other basic rights and social interests protected by law.

Article 43<sup>42</sup> provides for the general limitation on fundamental and other human rights and freedoms. It stipulates that:

*“(1) 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.*

*(2) Public interest under this article shall not permit—*

*(a) political persecution;*

*(b) detention without trial;*

*(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.”*

One of the questions that the court had to consider was whether the limitation imposed by section 50 fell within the ambit of article 43. For this to be determined,

---

<sup>40</sup> V. C. R. A. C Crabbe, Legislative Drafting, Cavendish Publishing Limited pg. 171.

<sup>41</sup>Helen Xanthaki, Legislative Drafting Lecture Notes on Penal Provisions. Week 14. <http://studyonline.sas.ac.uk/course/view.php?id->

<sup>42</sup> Id the Constitution pg. 52.

two conditions would have had to be fulfilled namely: the limitation must be directed to prevent or remove “prejudice to the public interest” (sub article 1) and it must be a measure that is “acceptable and demonstrably justifiable in a free and democratic society” (sub article 2). The court stated that protection of guaranteed rights is the primary objective of the Constitution and that limiting their enjoyment is the exception to their protection.

The Supreme Court of India, elaborating on the issue of limitation on the freedom of expression, held<sup>43</sup> that

*“There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to the freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and have direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest.....”*

In other words the constitutional proviso in article 43 which sets the standard for the justifiability of any limitation on fundamental rights as being “acceptable and demonstrably justifiable in a free and democratic society,” cannot be abused. The Canadian case of *R v Oakes*<sup>44</sup> illustrates that in order for any limitation of freedom of expression to be accepted as legitimate it must be precise, narrow, and with clear objectives. Accordingly, the Crown must establish that the limitation serves a pressing and substantial objective and that the Crown must show a rational connection between the provision and its objective, that the section minimally impairs the right of the freedom concerned and that the effects of the section are proportional to its underlying objective.

The *Oakes* test was cited in *Obbo’s* case with approval. The court in the *Obbo* case went on to specifically adopt the approach stated in the Zimbabwean case of *Mark Gova & Another v Minister of Home Affairs*,<sup>45</sup> which has a similar but differently stated criteria for the justification of any law imposing limitation on guaranteed rights, as follows:

---

<sup>43</sup> in *Rangarajan v Jagjivan Ram and Others; Union of India and Others v Jagvan Ram and Other* (1990) LRC (Const.) 412 at pg 427.

<sup>44</sup> 26, D. L. R (4<sup>th</sup>) 200 (*Oakes* case).

<sup>45</sup> SC 36/200: Civil Application No. 156/99- Supreme Court of Zimbabwe, cited at pg. 27 Judgment of Mulenga JSC.

- “(a) the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;
- (b) the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations, and
- (c) the means used to impair the right or freedom must be no more than necessary to accomplish the objective.”

Accordingly, the Supreme Court declared that section 50 did not fall within the ambit of article 43 and was therefore null and void.

The declaration illustrates the effectiveness of judicial review as a safeguard for protecting the freedom of expression because section 50 which created the offence of publishing false news was struck out by the Supreme Court as being inconsistent with the right to freedom of expression under the Constitution.

The Supreme Court observed that constitutional declaration of the freedom of expression in article 29 has a wide scope and yet the statute, namely the Penal Code Act is narrow in its definition of the offence.

The effect of the declaration by the court speaks to the need to reform the laws affecting the freedom of expression in Uganda including the Penal Code Act in order to bring them into conformity with the Constitution. The court stated that section 50

- (a) does not stipulate or specify what a person is free to say or express;
- (b) does not provide a definition of “freedom of expression” or of the “press”;
- (c) the offence does not also describe the scope of the freedom. The court declared that the “right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information.”<sup>46</sup>

The court provided a wider definition of the freedom of expression and declared that the freedom is not confined to categories, such as correct opinions, sound ideas or truthful information. A persons’ expression or statement is not precluded from

---

<sup>46</sup> Id pg. 10.

the constitutional protection simply because it is thought by another to be false, erroneous, controversial or unpleasant.

Mulenga JSC<sup>47</sup> stated that the probable reason for the retention of the Penal Code Act, particularly section 50 subsequent to the colonial administration is that the process of law reform has not been vigorous or extensive enough to review the relevance of laws in the changed circumstances. It was not clear why such a provision was still on the statute book at the time of making this decision.

Since section 50 did not fall within the description of the purposes for which limitation on enjoyment of rights is permissible under article 43 (1) the effect of this decision is that the provision ought to be repealed from the statute book. The repeal of such a provision and many others is the role of the Uganda Law Reform Commission.<sup>48</sup>

According to Chinery-Hesse,<sup>49</sup> “following the enactment of the 1995 Constitution and indeed the declaration by the Supreme Court in 2004, the government should have undertaken a comprehensive reform of the laws of Uganda including laws affecting the enjoyment of the freedom of expression in order to bring them into conformity with the Constitution however progress on reform of laws is very slow”. The slow progress might be caused by the cost implications of reform and different government priorities.

**(ii) *Muwanga Kivumbi v Attorney General, Constitutional Petition No. 9 of 2005.*<sup>50</sup> (Kivumbi case)**

The petitioner was a member and coordinator of an organisation called the Popular Resistance against Life Presidency. In 2005, the organisation wrote letters to the authority namely the Minister of Internal Affairs and the Police seeking permission to hold political rallies in different parts of the country. In all these letters the police responded in the negative stating that the organisation was not registered

---

<sup>47</sup> Id pg. 20

<sup>48</sup>The Uganda Law Reform Commission Act, Chapter 25 Laws of Uganda. Section 10(a) [www.ugandaonlinelawlibrary.net](http://www.ugandaonlinelawlibrary.net)

<sup>49</sup> Legislative Drafting Consultant, Ministry of Justice and Constitutional Affairs, Interviewed on 8 June, 2013.

<sup>50</sup> [www.ulii.org/judgement/constitutional-court/2008/4](http://www.ulii.org/judgement/constitutional-court/2008/4)

and that the planned rallies were illegal and indeed during one of the rallies, the police dispersed it and arrested the organisations members.

The police justified the decision not to grant permission to conduct the rallies by relying on sections 32, 34 and 35 of the Police Act<sup>51</sup> and the now repealed article 73 of the Constitution.

A petition was filed under article 137 (3) of the Constitution challenging the constitutionality of section 32 of the Police Act. The petitioner's case was that section 32 (2) contravened articles 20 (1), (2), 21 (1), (2), 29 (1) (a) (b) (d) (e), 38 (2), 42 (1) and 43 (2) (a) and (c) of the Constitution.<sup>52</sup>

The fundamental rights that were alleged to have been breached were the freedom of expression and assembly. It will be observed that these freedoms were dealt with in the same petition because they are related. The petitioners intended to assemble by conducting rallies in order to express themselves on matters that they believed were unconstitutional. Article 29 (1) (d) specifically provides for the “freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition”.

Like the freedom of expression, the freedom of assembly was protected under the 1962 independence Constitution<sup>53</sup> and the 1967 Constitution<sup>54</sup> as well as the current Constitution.

In this case, the measure employed by the court was to declare that section 32 (2) of the Police Act was inconsistent with and contravened articles 20 (1) and (2) and 29 (1) (d) of the Constitution and were therefore null and void.

In employing the measure, the court determined the following issues in the petition-

- (a) Whether section 32 of the Police Act contravenes articles 20 (1), (2), 21 (1), (2), 29 (1) (a) (b) (d) (e), 38 (2), 42 (1), 43 (2) (a) and (c);

---

<sup>51</sup> Laws of Uganda, vol 12, Chapter 303. [www.ugandaonlinelawlibrary.net](http://www.ugandaonlinelawlibrary.net)

<sup>52</sup> Id.

<sup>53</sup> Id article 27 pg. 55.

<sup>54</sup> Id article 18 pg. 16.

(b) Whether the police under section 32 have power to disperse lawful assemblies.

Section 32 of the Police Act provided that:

*“(1) Any officer in charge of police may issue orders for the purpose of—*

*(a) regulating the extent to which music, drumming or a public address system may be used on public roads or streets or at occasion of festivals or ceremonies;*

*(b) directing the conduct of assemblies and processions on public roads or streets or at places of public resort and the route by which and the times at which any procession may pass.*

*(2) If it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road or street or at any place of public resort, and the inspector general has reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace, the inspector general may, ..... prohibit the convening of the assembly or forming of the procession.”*

Subsection (2) poses questions on clarity and ambiguity in legislative provisions. For example, the court determined that the operative word in this subsection was “prohibit”. The ordinary meaning of the word is to forbid someone from doing something.<sup>55</sup> The context in which the word “prohibit” was used is contrary to the purposes of article 29 (1) (d). Also, how the likelihood of causing a breach of the peace is to be determined is not provided.

For the petitioner to have succeeded in his petition, he had to prove that the powers given to the Inspector General of Police contravened the articles of the Constitution mentioned above and the respondent had to prove that the prohibition was demonstrably justifiable in a democratic society.<sup>56</sup>

---

<sup>55</sup>Francis Bennion states that the starting point in statutory interpretation must always be the ordinary linguistic meaning of the words used, that is their grammatical signification apart from legal considerations.

Understanding Legislation, Document No. 1998.007 162 JPN (1998) 516. Pg. 2.  
[www.francisbennion.com/topic/understandinglegislation.htm](http://www.francisbennion.com/topic/understandinglegislation.htm).

<sup>56</sup> Id article 43(2).

The right to freedom of assembly and to demonstrate together with others in a peaceful manner is a fundamental right guaranteed under article 29 (1) (d) of the Constitution. As long as there is no contravention of article 43 of the Constitution and the rights are exercised within the confines of the law. The court found that there was no justification for invoking the powers under section 32 (2) of the Police Act. Therefore there was no convincing reason for restricting or stopping convening rallies or assembly or demonstration. Thus to uphold section 32 (2) as authorising the police to prohibit assemblies including public rallies or demonstration would be unconstitutional.

The declaration that section 32 (2) is null and void was effective in that it enables the citizens to enjoy their fundamental freedoms under the said article without state intrusion.

The effect of the declaration on legislative reform is that the ruling created a legislative gap in the management of assemblies and public gatherings, making it difficult for the police to maintain law and order and to preserve peace at public gatherings and events. The gap created by the annulment has consequently given rise to the need to analyse the Penal Code Act and the Police Act on the right to assemble in light of the need to regulate the conduct of public assemblies or meetings.

Section 32(1) (b) gives the police the powers mentioned in that subsection but the provision does not require an organizer of an assembly or procession to notify the police of the intention to hold the assembly or procession. This is a challenge to maintaining law and order because without the information an intended assembly or procession or its location, the police will not have the opportunity to exercise the power given under that section. This therefore renders the section redundant.

The powers given the under section 32 are prohibitive and not regulatory. They cannot, as was pointed out<sup>57</sup> be justifiable in the circumstances of the petition. While it is the constitutional duty of the police to maintain law and order, with the annulment of section 32 (2) the police no longer has the power to regulate the conduct of assemblies or processions in public places where-

---

<sup>57</sup> Judgment of Byamugisha J.A pg. 14.

- (a) Two meetings are scheduled by the organizers to take place on the same date, at the same time and at the same venue, which is likely to cause disorder or pose a breach of peace; or
- (b) The venue is considered unsuitable for the purposes of crowd and traffic control or will interfere with other lawful business of non participants.

The section is silent on-

- (a) The procedure that the police should follow in the exercise of its powers under section 32 (1) (b);
- (b) The procedure that the organiser of an assembly should follow, such as notification by the organiser to the police of the intention to hold an assembly or procession; and
- (c) The procedure that the participants in assemblies and processions should follow, in order to ensure that processions and assemblies do not take place in a lawless manner.

The section is silent on duties and responsibilities of the police, the organiser and the participant at an assembly or procession. From the foregoing, there are no specific guidelines or procedure to help the police, organisers and participants in ensuring that assemblies take place in as disciplined a manner as possible and in accordance with reasonable standards.

The declaration by the court forced the government to review section 35 (1) of the Police Act, which is another attempt at providing for regulation of assemblies under the law. The section empowers the Minister of Internal Affairs to declare an area a gazette area, where the Minister is of the opinion that it is desirable to do so in the interest of tranquility.

A reading of the section suggests that it is too restrictive and does not facilitate the exercise of the freedom given under article 29 (1) (d). Similar to section 32 (1) (b), section 35 is inadequate in terms of procedural requirements that have to be fulfilled in order to conduct a public meeting, the duties and responsibilities of the police, the organiser and participant at an assembly or procession.

In relation to the Police (Amendment) Act, 2006<sup>58</sup> there is still inadequacy in those provisions regarding the managing of public order under the Police Act. The provisions relate to criminalising unpeaceful and unlawful gatherings rather than govern peaceful demonstrations or gatherings.

Sections 65 - 74 of the Penal Code Act prohibit and criminalise unlawful assemblies and riots. While holding an unlawful assembly attracts one year's imprisonment, participation in a riot is a misdemeanor punishable by two years' imprisonment.

These provisions are punitive and purposely prohibit unlawful assemblies and processions in public places. The adversarial and punitive nature of the provisions of the Penal Code Act does not facilitate the exercise of the right under article 29 (1) (d).

In view of the declaration of the court, the First Parliamentary Counsel advised that amending the Penal Code Act to cater for procedural matters would not be the appropriate way of facilitating the exercise of the freedom to assemble and demonstrate together with others peacefully and unarmed and to petition under article 29 (1) (d). Cabinet then approved the drafting of an independent legislation to regulate the conduct of public meetings and manage public order.<sup>59</sup>

As such, the Public Order Management Bill, 2011<sup>60</sup> was drafted and is awaiting presidential assent. The purpose of this Bill is to prescribe measures for safeguarding public order without compromising the principles of democracy and freedom of expression and association in accordance with article 43. It is intended that the proposed Bill will provide for the procedure to be followed in conducting peaceful demonstration, assembly or holding a public meeting, supplement the existing law and regulate public meetings. It would also facilitate peace and tranquility in society at all times. The Bill apportions responsibility to organisers of assemblies, participants and the police before, during and after assembly so that there is accountability for every commission and omission by all persons envisaged by the Bill. This will promote unfettered enjoyment of the participant's fundamental rights without compromising the public interest or interfering with the rights of third parties unconnected with the event.

---

<sup>58</sup> Act No. 16 of 2006. [www.ugandaonlinelawlibrary.net](http://www.ugandaonlinelawlibrary.net)

<sup>59</sup> Cabinet Minute 348(CT 2008) 6<sup>th</sup> August, 2008.

<sup>60</sup> Bill No. 3 of 2013. [www.uppc.go.ug](http://www.uppc.go.ug) and proceedings of Parliament dated 3 April, 2013. [www.parliament.go.ug/new/index.php/parliamentary-business/recent-bills](http://www.parliament.go.ug/new/index.php/parliamentary-business/recent-bills)

Consequently, where individuals assemble, if the police entertain a reasonable belief that some disturbance might occur during the assembly, the Bill requires provision of security and supervision in anticipation of the disturbances. This is in line with the spirit of the articles of the Constitution that guarantee a right to peaceful demonstration, the Bill merely requires of the conveners of the assemblies an undertaking of good behavior at the processions.

**(iii) *Andrew Mwenda and Another v Attorney General, Constitutional Petition No. 12 of 2005.***<sup>61</sup>

In this case, the first petitioner, a journalist by profession and a former manager of K.FM Radio 93.3 and political editor of the Monitor Newspaper petitioned the constitutional court under article 137 (3) seeking declarations of nullification of offences of sedition and promoting sectarianism preferred against him in the Chief Magistrates Court contending that the offences were unconstitutional. The second petitioner on its own in public interest also petitioned this court seeking declarations of nullification of the abovementioned offences as well as criminal defamation.<sup>62</sup>

The fundamental freedom that was alleged to have been breached, like in the cases discussed above was the right to freedom of expression. The petitioners contended that criminally prosecuting the first petitioner under sections 39 and 40 of the Penal Code Act constituted inconsistencies with the Constitution under article 29 (1) and 43 (2) (c).

Section 39 and 40 speak about seditious intentions and the offence of sedition respectively. Ojambo<sup>63</sup> states that “the objectives of Uganda’s sedition law are not quite clear” but that the provision was introduced into Uganda’s laws during the colonial era.

Barendt<sup>64</sup> in supporting the view in *Arthur Nwankwo v The State*<sup>65</sup> noted that “The classic definition of sedition reflects a traditional, conservative view of the correct relationship between the state and society. Governments and public

---

<sup>61</sup> [www.ulii.org/ug/judgment/constitutional-court/2010/5](http://www.ulii.org/ug/judgment/constitutional-court/2010/5)

<sup>62</sup> The court granted leave to consolidate the two petitions considering that the issues and prayers of both petitioners were similar.

<sup>63</sup> Id pg. 14.

<sup>64</sup> Eric Barendt “Freedom of Speech” 2007 2<sup>nd</sup> Edn. Oxford University Press. Pg. 163.

<sup>65</sup> 1 NCR 336 (1983).

institutions are not to be regarded as responsible to the people, but in some mystical way, as under the doctrine of the Divine Right of Kings, are entitled to the respect of their subjects.”<sup>66</sup> Ojambo<sup>67</sup> rightly observes that the world has since changed. “In a democratic dispensation, accountability on the part of the leadership to its subjects is a critical requirement.” He states that “it is through such accountability that the electorate can make informed decisions for purposes of casting their votes..... leaders under a democratic dispensation cannot afford to shield themselves from adverse criticisms.”

In *Gooding v Wilson*,<sup>68</sup> the United States Supreme Court ruled that a criminal statute proscribing speech suffers unconstitutional overbreadth when the standards employed to convict create a real and substantial risk of punishing constitutionally protected conduct. Therefore sedition laws are not necessary in a democratic society if they stifle the constitutionally protected right to free expression.<sup>69</sup>

The constitutional court declared that sections 39 and 40 were inconsistent with article 29 (1) (a) and 43 (2) (c) of the Constitution.

Section 39 provides that:

“(1) *A seditious intention shall be an intention—*

- (a) to bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution;*
- (b) to excite any person to attempt to procure the alteration, otherwise than by lawful means, of any matter in state as by law established;*
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice;*
- (d) to subvert or promote the subversion of the Government or the administration of a district.*

---

<sup>66</sup> Id Barendt at 163.

<sup>67</sup> Id. pg. 14

<sup>68</sup> 405 US 518, 520 (1972).

<sup>69</sup> Republic of South Africa v The Sunday Times (1995) 1 LRC 168, 175. This case speaks about the role of the press as being in the front line of the battle to maintain democracy.

*(2) For the purposes of this section, an act, speech or publication shall not be deemed to be seditious by reason only that it intends—*

*(a) to show that the Government has been misled or mistaken in any of its measures;*

*(b) to point out errors or defects in the Government or the Constitution or in legislation or in the administration of justice ..... ;*

*(c) to persuade any person to attempt to procure by lawful means the alteration of any matter as by law established.*

*(3) ..... , in determining whether the intention with which any act was done, any words were spoken or any document was published was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his or her conduct at the time and in the circumstances in which he or she was conducting himself or herself.”*

Section 40 provides that:

*“(1) Any person who—*

*(a) does or attempts to do or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;*

*(b) utters any words with a seditious intention;*

*(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;*

*(d) imports any seditious publication, unless he or she has no reason to believe, the proof of which shall lie on him or her, that it is seditious,*

*commits an offence .....*

*(2) Any person who, without lawful excuse, has in his or her possession any seditious publication commits an offence .....*

*(3).....*

*(4) It shall be a defence to a charge under subsection (2) that if the person charged did not know that the publication was seditious .....* ”

A reading of the decision in the *Oake's case* suggests that section 40 does not present a known objective for limiting the freedom of expression.

Counsel for the respondent argued that the law of sedition has the objective of maintaining the security of the state and so section 39 and 40 are intended to protect that objective. As such the limitations on the enjoyment of that freedom are justified. Although counsel argued that restrictions under such laws are not only in Uganda<sup>70</sup> the question as was discussed in the *Obbo case* is whether the restrictions are demonstrably justifiable in a democratic society. The fact that many countries which are considered free and democratic are still retaining these sedition laws does not make them justifiable in a democratic society neither does it place them within the ambit of section 43(2).

The petitioner is also said to have uttered words intended to bring into hatred or contempt or to excite disaffection against the person of the President, the Government as follows:

*“You see these African Presidents. This man went to University, why can't he behave like an educated person? Why does he behave like a villager?”*

*Museveni can never intimidate me. He can only intimidate himself..... the President is becoming more of a coward ..... moving in tanks and mambas, you know hiding with a mountain of soldiers .....*”

Without a clear objective for limiting the freedom of expression, it is not clear if the utterances indeed breach the sections. Ojambo<sup>71</sup> notes that “it is, for instance, dangerously misleading for one to assume that the public is readily willing to agree to any viewpoints expressed by people who are believed or known to identify with particular political ideologies or parties. For example, it would be foolhardy of anyone to expect the supporters of the ruling National Resistance Movement, to readily believe and take for the truth any claims made by those who are known or believed to belong to the different opposition parties.”

---

<sup>70</sup> Ibid article 10- European Convention on Human Rights.

<sup>71</sup> Ibid at pg. 16.

One of the fundamental criticisms that led to the declaration was that the wording creating the offence of sedition was so vague that one would not have known the boundary to stop at while exercising the right under article 29 (1) (a). The use of subjective terms such as ‘hatred,’ ‘contempt,’ ‘discontent,’ ‘feelings of ill-will and disaffection,’ without any definition, renders the provision too vague. This criticism like in the first case also raises the issue of uncertainty in legislation and in particular, penal provisions.

Section 39 was said to be too vague to warrant an examination of “minimal impairment” principle.<sup>72</sup> Speaking to the characteristic vagueness on the law of sedition, the Supreme Court of Canada articulately observed “as is frequently mentioned in the authorities, probably no crime has been left in such vagueness of definition as that with which we are here concerned.”<sup>73</sup>

Furthermore on limiting the freedom of expression, section 40 is extremely disproportionate. The *Oake’s case*, cited with approval in the *Obbo case*<sup>74</sup> articulates the test for determination of the proportionality of a limitation to fundamental freedoms.

The measure adopted by the court was effective in that sections 39 and 40 of the Penal Code Act were declared to be inconsistent with provisions of the articles 29 (1) (a) and 43 (2) (c) of the Constitution and were therefore null and void. They were thus struck out of that Act.

The measure highlights the issue of penal provisions in legislation and legislative objective discussed earlier. A penal provision should state the objective and subjective elements of the offence including the act, omission, conduct and factual element and intent and fault respectively.<sup>75</sup> Therefore without a known legislative objective for sections 39 and 40, the penal provisions could not have achieved the certainty required of such provisions.

---

<sup>72</sup> Supra *Oakes case* at 43.

<sup>73</sup> *Boucher v The King* [1951] SCR 265 at 294.

<sup>74</sup> Mulenga at pg. 20.

<sup>75</sup> Helen Xanthaki, Legislative Drafting Lecture Notes Week- Penal Provisions. <http://studyonline.sas.ac.uk/course/view.php?id> Pg. 5.

As far as legislative reform is concerned, it is apparent that following the enactment of the Constitution in 1995, several laws or provisions particularly those that affected fundamental rights and freedoms including the Penal Code Act would either be inconsistent or in contravention with the Constitution. As such the framers of the Constitution thought it necessary to make provision for existing law to the effect that existing law would be “construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity”<sup>76</sup> with the Constitution.

Another effect of the decision of the court on legislative reform relates to proportionality in regulation of fundamental freedoms. Clarity in the law and justifiable objective regulation are as critical as the effect of measures chosen to ensure such limitation or regulation.<sup>77</sup> The statute books therefore need to be reformed to reflect the decision of the court namely to expunge the null and void and redundant provisions.

As a result of the declaration, sections 42, 43 and 44 of the Penal Code which related to sedition were declared redundant.

In *Surek and Ozdemir v. Turkey*<sup>78</sup> the European Court of Human Rights ruled that the government must always exercise restraint in resorting to criminal proceedings particularly where other means are available for replying to unjustified attacks and criticisms of its adversaries.” Accordingly, any measure taken by a government to restrict freedom of expression must be exercised with extreme restraint largely because of the power imbalance characteristic of the two.

The cases above illustrate the challenges with the existing legal provisions in the laws affecting the freedom of expression namely the Penal Code Act and the Police Act to legal reform. However with the declarations by the courts, legal reform efforts should now be vigorously pursued.

---

<sup>76</sup> Articles 274 and 292.

<sup>77</sup> *Id Oakes case.*

<sup>78</sup> European Court of Human Rights, Numbers 23927/94 and 24277/94, 8 July 1999 para 60.

## CHAPTER FIVE

### 5.0. OVERVIEW OF LEGISLATIVE REFORMS RELATING TO THE FREEDOM OF EXPRESSION

#### *(a) Historical background*

Pre-colonial Uganda indicates that the right to freedom of expression was restricted. The political systems then in place did not and in the circumstances could not leave such a freedom unrestricted.<sup>79</sup> Indeed the courts in the colonial days were strict and called the press regularly to order.<sup>80</sup> Since then however especially beginning with the case of *Uganda v Rajat Neogy*,<sup>81</sup> the Uganda courts have been hostile to the government in sedition cases.

The reform of the laws affecting the freedom of expression under the current Government was conceived in 1987 on the basis that there was need to update the various media laws in Uganda to reflect the political, economic and social conditions of the time and consolidate the laws into one comprehensive law.

The media laws that affected the freedom of expression and in force at the time were (a) the Newspaper and Publications Act<sup>82</sup>, (b) the Newspaper and Publications (Amendment) Decree;<sup>83</sup> (c) the Television (Licensing) Act<sup>84</sup>; (d) the Press Censorship and Correction Act,<sup>85</sup> (e) the Penal Code Statute<sup>86</sup>; (f) the Cinematograph Act,<sup>87</sup> and (g) the Stage Plays and Public Entertainments Act.<sup>88</sup>

---

<sup>79</sup> Odoki Report, Pg. 131.

<sup>80</sup> Wallace - Johnson v R (1940)1 ALL E.R. 241 (P.C. and Rex V. M. G. Luima and Others (1949) EACA 128.

<sup>81</sup> Buganda Road Chief Magistrates Court reported in Transition No.38 (1972) 47. <http://www.tcd.ie/Law/AfricanHumanRightsJudgements/FreedomofExpression.php>

<sup>82</sup> Laws of Uganda, 1964 edn, Chapter 266.

<sup>83</sup> Decree 35 of 1972.

<sup>84</sup> Laws of Uganda, 1964 edn, Chapter 268.

<sup>85</sup> Id Chapter 306.

<sup>86</sup> Id Statute No. 9 of 1988.

<sup>87</sup> Ibid Chapter. 266

<sup>88</sup> Supra Chapter. 266.

*(b) Policy Considerations*

The laws in force at the time suggest that the government's policy considerations for reforming the laws were to streamline, update and consolidate all the laws hitherto related to mass media. There was a need to provide an acceptable balance between the freedom of the media and protection of the public against defamation, libel and sedition. Recognition of journalism as a profession was also considered. The government thought it necessary to ensure that Uganda's moral attitudes and values are respected and conformed to the media and provide an institutional framework for the supervision of the press namely, to establish a regulatory body.

*(c) The development of the proposed law*

A draft Bill was produced in July 1989, entitled the "Press and Publication Bill". Under this Bill the requirement for registration of newspapers was maintained as contained in the Newspapers and Publications Act.<sup>89</sup> In clause 1(1) of the Bill, an application for registration of a newspaper was required to contain the particulars of the editor, proprietor, publisher and printer, the title of the newspaper, the editorial policy of the newspaper and location of its head office.

A registrar of newspapers was provided for, whose main duty was to maintain a register of newspapers in order to enter the particulars of all registered newspapers.

The requirement for the compulsory registration of newspapers and their proprietorship was adopted from England where compulsory registration of newspapers was provided under the Newspaper Libel and Registration Act, 1881<sup>90</sup> except for a newspaper owned by a company incorporated under the Companies Acts 1862-79. This requirement was imported into law under the Newspaper and Publications Act and retained in the Bill.

The rationale for the registration of all types of media was to ensure accountability and to regulate ownership of media and its distribution in Uganda.

The main features of this Bill included-

---

<sup>89</sup> Id.

<sup>90</sup> Under the Newspaper Libel and Registration Act 1881 as amended by the Statute Law Revision Act, 1894 a register of newspaper proprietors is established and it is the duty of the printer and publisher of every newspaper to make annual returns containing the name of the newspaper, the name of all the proprietors of such newspaper together with their respective occupations, places of business (if any).

- (a) prohibition of publications relating to the defence of Uganda (as previously provided under the Penal Code (Amendment) Act, 1988;
- (b) press control through the Press Control Board<sup>91</sup>;
- (c) establishment of a National Press Council;
- (d) registration of and issuance of practicing certificates to journalists; and
- (e) disciplinary measures to be taken against journalists in the enhancement of professionalism amongst journalists and disciplinary proceedings.

It will be observed that the Bill was an extension to the Newspaper and Publication Act<sup>92</sup> and mainly regulated print media. The novelty in the Bill was the institutional framework for the regulation of the press and its professionalism through the establishment of the Press Control Board and the National Press Council.

*The draft Press and Publication Bill, 1991*

The Bill sought to repeal and replace the Newspaper and Publication Act and the Press Censorship and Correction Act<sup>93</sup> and to consolidate the various media laws into one Bill. It improved the zero draft Bill by-

- (a) reproducing in verbatim the Cinematograph Act under Parts VIII to XII of the Bill;
- (b) reproducing in Parts II to IV of the Bill, the Newspapers and Publications Act;
- (c) reproducing in Part V, the Press Censorship and Correction Act;
- (d) reproducing in Part VII the penal provisions relating to the press in the Penal Code (Amendment) Act, 1988; and

---

<sup>91</sup> Clause 26 - a newspaper could not be published unless the contents of such newspaper were approved by the Board.

<sup>92</sup> Supra.

<sup>93</sup> Ibid.

(e) reproducing in Part XIII, the Television (Licensing) Act.

*The draft Mass Media and Journalists Bill, 1992*

This Bill sought to amend and consolidate the law relating to mass media with a view to streamlining and bringing it in line with Uganda's political, economic and cultural and social conditions by, in part, repealing the Newspaper and Publications Act, the Press Censorship and Correction Act, the Cinematograph Act and the Television (Licensing) Act.

Following the recommendations of the Uganda Journalists' Association on the proposed Bill in 1991, most of the provisions on the payment of bonds, press control and censorship, penal provisions on publication of information prejudicial to security and publication of false news were removed. The basis of their removal was that the provisions were inconsistent with the development of a free press and with the right to freedom of expression.

In 1993, Cabinet adopted and approved the Mass Media and Journalists Bill, 1993 subject to adjustments made by Cabinet Minute 185 (CT 1993) 21 July 1993. The Bill was then published in the *Gazette* as Bill No. 23 of 1993.

Subsequently, in supplement No. 3 of the *Gazette* dated 25<sup>th</sup> February 1994, the Bill was republished with the insertion of a new provision on district censorship committees.

*(d) Parliamentary Stage.*

The Bill was formally tabled before the National Resistance Council (N.R.C) on the 1<sup>st</sup> April 1994. The 7<sup>th</sup> N.R.C session was prorogued before the Bill was read a second and third time. From April to September 1994, the Committee on Social Affairs of the N.R.C deliberated on the draft Bill and massively amended it on the basis of consultations it had with interested parties.

The Bill was again tabled for the first reading in September 1994. However, the Bill that was re-tabled was essentially the product of the Social Affairs Standing Committee of the N.R.C. During the second reading of the Bill in November 1994, the N.R.C referred the Bill to a special Select Committee of the House after rejecting it on grounds that the Bill was "draconian".

The Special Select Committee produced a report together with a redrafted Bill which was adopted by Parliament on 17<sup>th</sup> May 1995.<sup>94</sup> Among the various resolutions, recommendations and amendments made to the Bill were-

- (a) a resolution that the entire Bill be redrafted in order to realise the principle of freedom of the press, the recognition of journalism as a profession and provision of a free and responsible press;<sup>95</sup>
- (b) the Bill was refined to provide for the wider regulation of mass media rather than newspapers only and for the recognition of journalism as a profession;
- (c) it was recommended that a separate Bill establishing a coordinating body be provided specifically to cater for the fast changing technology in electronic media as well as to coordinate all aspects for broadcasting such as ethics and various international conventions to which Uganda is a signatory.

The outcome of the report formed the basis for the formulation and subsequent enactment of the Electronic Media Statute of 1996<sup>96</sup> which repealed the Cinematograph Act, and the Television Licensing Act, the enactment of the Press and Journalist Statute 1995<sup>97</sup> catering for freedom of press and media council responsible for the regulation of mass media and the establishment of the National Institute of Journalists of Uganda. The Act repealed the Newspaper and Publications Act and the Press Censorship and Correction Act.

### *Penal Code Act*<sup>98</sup>

The Penal Code Act, a law of general application, is one of those laws that has been vigorously enforced by the Government. For example, under section 34, the Minister of Internal Affairs has the power to prohibit the importation of publications in public interest. Publication of information prejudicial to security is prohibited under section 37. The publication of seditious matter was a criminal

---

<sup>94</sup> The Press and Journalists Bill, 1995. Parliamentary Debates (Hansard) National Assembly 8<sup>th</sup> Session 1994-1995, Second Meeting Issue No.39, 19 April-24<sup>th</sup> May 1995 at pp. 147-250. Available at [www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard](http://www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard)

<sup>95</sup> Therefore clauses namely 3, 4, 5, 6, 7 and 8, that required the registration of newspapers were deleted. Also deleted were clauses 9 and 10, which provided for the Registrar of newspapers.

<sup>96</sup> Laws of Uganda, Revised Edn, Chapter 104.

<sup>97</sup> Id Chapter 105.

<sup>98</sup> Supra.

offence under sections 39 and 40 discussed above. Section 41 prohibits any person from printing or publishing sectarian material. Under section 42, the courts have power to authorise confiscation of offending printing presses and to prohibit seditious publications.

Chapter XVII- creates the offences of criminal defamation and libel against private persons.

### *The Press and Journalist Act*<sup>99</sup>

This Act extended article 29 (1) of the Constitution to the print media. It created the Media Council, the National Institute of Journalists of Uganda and a disciplinary committee within the media council. The council is responsible for regulating eligibility for media ownership and requires journalists to register with the National Institute of Journalists of Uganda.

Section 3 of the Act requires compliance with other laws and prohibits any publication which improperly infringes on the privacy of an individual or which contains false information.

As a regulatory measure, a proprietor of mass media organisation is required, under section 5, on appointing an editor, to register with the council the particulars of the editor as spelt out in sections 6 and 7.

To promote mutual co-existence between the State and the press, the council is empowered under section 9 (1) (b) (ii) to arbitrate disputes between the State and the media. The council is also empowered to censor films, videotapes, plays and other related apparatus for public consumption and to promote morality.

### *The Electronic Media Act*<sup>100</sup>

The objective of this Act was to establish a broadcasting council for the purpose of licensing and regulating the electronic media.

The Act provided for the registration of television and radio stations and established the Broadcasting Council to co-ordinate and exercise control over and supervise broadcasting activities, among other things.

---

<sup>99</sup> Laws of Uganda, Revised Edn, Chapter 105.

<sup>100</sup> Id Chapter 104.

The legal provisions in the Penal Code Act, the Press and Journalists Act and the Electronic Media Act provide a mechanism for controlling the press freedom. The law of defamation<sup>101</sup> is available for individuals to institute criminal or civil suits for the publication of defamatory matter. There is no express right for the State to directly proscribe the publication of any matter by the media save for imported publications.

*The Uganda Communications Act, 2013*<sup>102</sup>

This Act consolidates and harmonises the Uganda Communications Act<sup>103</sup> and the Electronic media Act.<sup>104</sup> It dissolves the Uganda Communications Commission and the Broadcasting Council and reconstitutes them as one body known as the Uganda Communications Commission. The main objective of this Act is to develop the communications sector by establishing a regulatory body for communications.

*(e) Analysis of reform efforts*

While Uganda has endeavored to reform its media laws mainly to give effect to the Constitution, it is apparent that some laws still infringe on the freedom of expression as seen by the numerous petitions to the constitutional court seeking declarations that Acts of Parliament including the Penal Code Act and the Police Act infringe on the enjoyment of the freedom as declared under article 29.

Government had argued that one of the effects of Electronic Media Act, now repealed and the Press and Journalist Act was to seriously weaken government as a regulatory arm over the media. These two laws repealed the media laws mentioned earlier except the Penal Code Act. Consequently in relation to newspapers, there is no requirement to register anywhere, the office of the Registrar of newspapers was abolished, government deprived itself of the power to proscribe or ban offensive newspapers, an administrative media council was set up with the power to issue practicing certificates to journalists but not to licence newspapers and a mild code of conduct for journalists and a feeble sanctions regime is in place.

The issue under the Electronic Media Act was that although the broadcasting council was established to coordinate, control and supervise radio stations,

---

<sup>101</sup> Supra Penal Code Act, Chapter XVII.

<sup>102</sup> Act No. 1 of 2013.

<sup>103</sup> Laws of Uganda, Revised Edn. Chapter 106.

<sup>104</sup> Id.

television stations and any broadcasting apparatus, its main role, namely of issuing licenses was lacking because the council could issue operating licences to electronic media however there was no power stipulated to revoke these licenses.

According to B. Jones and K. Thompson<sup>105</sup> “specified activities are subjected to some form of governmental control. This is usually, but not always, primarily in order to enforce or maintain standards.” Conditions may exist both as to standards that must be satisfied before a licence is issued and as to the manner in which the particular activity may subsequently be carried under the terms of the licence.<sup>106</sup> This problem has now been resolved by the enactment of the Uganda Communications Act.<sup>107</sup>

Some critics argue that “it is highly possible that the apparent blossoming of the media industry is largely driven by economic considerations rather than the true and legitimate objective of the media – the advancement of social goals through the sharing of information.”<sup>108</sup>

What the above overview means in terms of judicial review as a safeguard for protecting the freedom of expression is:

1. Ample regard to the Constitution must be the paramount factor for achieving a meaningful transformation of the legal regime on freedom of expression.
2. Democratic societies uphold and protect fundamental rights and freedoms essentially on principles that are in line with JJ Rousseau’s version of the Social Contract theory.<sup>109</sup> Uganda acknowledges this theory in article 20 of the Constitution which speaks about fundamental and other human rights and freedoms. However the decisions of the courts provide a stark reminder to the government to effectively fulfill its obligations to its citizens particularly with regard to protection and promotion of fundamental rights and freedoms.
3. A number of archaic and restrictive media laws have been repealed and replaced with progressive ones including the Press and Journalists Act. It will be recalled that provisions that were inconsistent with the development of a free press and with the right to freedom of expression were removed from the Press

---

<sup>105</sup> Garner’s Administrative Law, 8th Edn. Oxford University Press pg. 42

<sup>106</sup> Ibid Electronic Media Act, section 6(1)- Granting a licence.

<sup>107</sup> Id.

<sup>108</sup> Id. Ojambo pg 2.

<sup>109</sup> This theory is to the effect that pre-social humans agreed to surrender their respective individual freedoms of action, in order to secure mutual protection.....” Id Mulenga pg. 9.

and Journalist Act but not in the Penal Code Act. This led to the petitions for judicial review to the constitutional court and the decision of the Supreme Court which declared those provisions null and void and redundant.

The power vested in the constitutional court to review the constitutionality of an Act of Parliament ensures that the court can intervene to correct any excess or abuse that may be occasioned by Parliament in the exercise of its legislative power. The analysis of the cases above however suggests that the laws in question particularly the Penal Code Act and the Police Act need to be reformed in accordance with the Constitution. The constitutional court can only intervene to invoke its powers under article 137 if a person alleges that his fundamental right or freedom is breached.

4. While the decisions of the constitutional court in its judicial review role are critical in assessing the constitutionality and legitimacy of legislation, the court is not a very effective yardstick for the executive and especially for the drafter because not every Act of Parliament is subjected to review by the constitutional court. Indeed while in Uganda the volume of legislation as described above has been increasing, the constitutional cases relating to those laws have not been moving in tandem.<sup>110</sup>
5. The new and emerging challenges fuelled by globalisation call for corresponding new prescriptions which have been partially addressed. A comprehensive reform of the statute books and revision of the relevant laws should be conducted with a view to providing prescriptions for the new social challenges relating to free expression without infringing on the constitutional protection. For example in the *Kivumbi case*, the proposal to licence newspapers is on all fours with the case against section 32(2) of the Police Act. Consequently, in all likelihood, the constitutional court will strike down and declare null and void any provisions inserted in the Press and Journalist Act requiring licensing for newspapers, the press and other media.
6. Some scholars argue in relation to the functions of the media council<sup>111</sup> that it is not a question of regulation of the media but how this regulation will be conducted.<sup>112</sup> It is argued that the media council leaves a lot to be desired in the performance of its regulatory functions. The problem stems from the fact that

---

<sup>110</sup> Id Kawooya pg. 11.

<sup>111</sup> Section 8 and 9 of the Press and Journalists Act provides for the establishment of the Media Council and its functions respectively.

<sup>112</sup> Ojambo at pg.23

“the nature of the Uganda media council, for being an establishment of parliament, raises a question as to whether the media should regulate itself or be subjected to regulation by another entity established by Parliament.

Governmental regulation is problematic because “the notion of governmental regulation of the media is that it tends to represent the authoritarian normative theory on media performance. It certainly rejects the social contract theory that entails self-regulation of the media.”<sup>113</sup> Therefore Uganda can borrow a leaf from other democracies including Tanzania, Swaziland and Zambia where media regulation is largely recognised as an exclusive responsibility of the media itself in the exercise of its right to self regulation. In Swaziland, the Parliament rejected government attempts to establish a media council for the regulation of that country’s media.<sup>114</sup>

---

<sup>113</sup> Jjuuko, F.W. (2005) “To Ban or Not to Ban” A Critique of the Media Council Ruling” 11 EAJPHR at 174 and cited in Ojambo pg. 24.

<sup>114</sup> International Freedom of Expression Exchange, “Parliament Rejects Government Move to Impose Media Regulation” July 27, 2006. <http://www.ifex.org/fr/content/view/full/75952>.

## CHAPTER SIX

### 6.0. LESSONS FOR THE DRAFTER, GOVERNMENT AND PARLIAMENT

Unconstitutional laws or provisions in those laws create uncertainty in law. They are a legal anomaly as they oppose major principles of the law although they are subject to judicial review. Indeed they reflect the failure of the drafter in identifying the problem, the government in failing to prevent the draft from reaching Parliament and the Parliament from stopping the provision from becoming law. The rule of law requires certainty in law in respect of legitimacy and constitutionality.<sup>115</sup>

The above discussion presents lessons as follows:

(a) Drafter:

It is well known that legislation is the main instrument by which many of the government policies are implemented. This is particularly so in developing countries such as Uganda which inherited colonial laws which have to be modernised to suit the changed circumstances including the need to promote the economy, legal and other developments requiring the regulation of rights and obligations of citizens. This obligation of government restates the importance of the role of the drafter in translating policy into legislation.

The first lesson for the drafter is that constitutional questions are likely to arise from legislation concerned with fundamental rights and freedoms as civil rights standards. As such “all statutes should be drafted with a close reading of the constitution to ensure that a statute is not inconsistent with, or in contravention of, a provision of the constitution. Failure to do so will render the statute void ab initio.”<sup>116</sup> Chapter Four of the Constitution contains “rigidly entrenched provisions for the recognition, protection and promotion of fundamental and other human

---

<sup>115</sup> The Predominance of the Constitution: Helen Xanthaki, Lecture Notes, Course: Comparative Legislative Studies for students of the LLM in Advanced Legal Studies, University of London. <http://studyonline.sas.ac.uk/course/view.php?id>

<sup>116</sup> Custom and the Statute Law: A Case Study. V.C.R.A.C Crabbe. Paper presented at the first Faculty Seminar by the Faculty of Law, University of West Indies and Seidman A, R. Seidman and M. Abeyesekere *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001) pg. 281-283.

rights and freedoms including the protection of freedom of conscience, expression, ..... ”<sup>117</sup> Section Q-b of the Uganda Public Service Standing Orders, 2010<sup>118</sup> requires the drafter to notify the law officers, namely the Solicitor General and the Attorney General if a proposed legislation infringes on the fundamental rights and freedoms of individuals. Accordingly, the drafter should ensure that legislation promotes and upholds these rights and requires agencies of government to also respect, uphold and promote these rights.

Secondly, the drafter should concern himself with aspects of judicial review that must be remembered when for example, legislation is drafted to confer new powers on the government such as regulating the media.<sup>119</sup>

Thirdly, a drafter should draft legislation in language that is clear and precise. The court in the *Obbo case* criticised the construction of section 50 as imprecise for a penal legislation. The court stated that precision and clarity in the definition of a criminal offence is essential, if a person accused of the offence is to have a fair trial. “Clarity and precision in drafting require specificity” and to achieve this, a drafter should learn to “devote special attention to writing their Bill’s detail in clearly stated legislative sentences that use words accurately”.<sup>120</sup>

*(b) Government:*

The first lesson for government is that the Executive authority is required to be exercised in accordance with the Constitution<sup>121</sup> because it is the supreme law of the land.<sup>122</sup> Therefore as a critical component of democratic governance, measures to restrict the media must be exercised with extreme restraint<sup>123</sup> and that this right is constitutionally protected. Policies that affect fundamental rights and freedoms must be concisely written so that the rights of individuals are reconciled with the authority of the state.

---

<sup>117</sup> Kanyeihamba’s Commentaries on Law, Politics and Governance. LawAfrica Publishing (T) Ltd. G.W. Kanyeihamba. Pg. 23

<sup>118</sup> [www.ugandaonlinelawlibrary.net](http://www.ugandaonlinelawlibrary.net)

<sup>119</sup> Id.

<sup>120</sup> Seidman et al pg. 256.

<sup>121</sup> Article 99.

<sup>122</sup> Article 2.

<sup>123</sup> Id Surek and Ozdemir v Turkey.

Uganda like any other democratic society is committed to upholding the right to freedom of expression. That commitment and indeed adherence to democratic practices may not be as long standing as in the older democracies, but it is as real and it is for that reason that it is entrenched in the most binding instrument of the land. The Constitution guarantees to everyone in Uganda the right to freedom to hold opinions and to receive and impart ideas and information without interference. This commitment is stipulated not only in the Constitution but in the Press and Journalist Act which was enacted to ensure press freedom.

Secondly, Government should employ alternative remedies for the protection of the reputation of public figures including suits in defamation and libel rather than invoking provisions of the law such as section 39 and 40 to deal with unfavorable comments or publications by the media. Although unconstitutional provisions are subject to judicial review and may be rectified, there is bound to be transitional issues to deal with thus resulting into a waste of resources.

Thirdly with the media explosion and significant upsurge in constitutional litigation around media rights, the Government should put in place legislative mechanisms for protecting the freedom of expression rather than to suppress it.

Although the legal regime is undergoing reform, Government has yet to learn from the constitutional and Supreme courts' decisions and international best practices. A proposal by Cabinet in 2010<sup>124</sup> to amend the Press and Journalist Act met with legal road blocks because it raises matters of constitutionality of the proposals for drafting of the Bill. One of the major proposals is to require a licence for anybody who wishes to operate a newspaper. It is intended that a person who publishes a newspaper without the necessary licence commits a criminal offence. This proposal certainly affects the constitutionally protected freedom of expression under article 29.

Fourthly, the Government ought to devise a mechanism against the difficult act of balancing the public interest and individual rights. The starting point may well be the celebrated Supreme Court decision in the Obbo case "a ruling whose positive implications on the exercise and enjoyment of freedom of expression in Uganda will remain of considerable historical value."<sup>125</sup>

---

<sup>124</sup> Cabinet Minute 32(CT 2010) and Cabinet Minute No. 284 (CT 2009) (which approved the drafting of a Bill to amend the Press and Journalist Act)

<sup>125</sup> Id Ojambo at pg. 2.

*(c) Parliament:*

The principle of conformity with the Constitution is found in the written constitutions of many countries. In Uganda, as the supreme law, the Constitution “specifies the limits to which powers are confined in order to protect individual rights and prevent the abusive exercise of arbitrary power.”<sup>126</sup> The first lesson drawn for Parliament is that while the Constitution confers the legislative power of the state on a Legislature and empowers the legislature to make laws for the good order and good governance, it still remains the supreme law.<sup>127</sup> Therefore, “a law passed by a Legislature which is not in consonance with the spirit and letter of the Constitution will be declared unconstitutional.”<sup>128</sup>

Secondly, judicial review of legislation on constitutional grounds is now practiced in many countries. In the US constitutional case of *Marbury v. Madison*, Chief Justice Marshall rejected the idea that the courts must close their eyes to the Constitution when upholding the doctrine of Parliamentary supremacy.<sup>129</sup> It will be observed in this case that the opinion of Chief Justice Marshall, while examining parliamentary supremacy and judicial review against the US Constitution, holds true for countries with a written constitution that imposes limitations on the power of Parliament and allows the courts to examine all legislative acts to ensure their compatibility with the Constitution. The constitutional court has powers under article 137 to judicially strike down Acts of Parliament or provisions under those Acts as being inconsistent with the Constitution.

Thirdly, while enacting legislation, Parliament should in relation to the *Obbo case* and with reference to section 50 address the question of substantial concern, which justifies a limiting legislation; to identify the strict objective of the legislation and to design the minimum measure and means for achieving that objective.

---

<sup>126</sup> Crabbe “Understanding Statutes”. Cavendish Publishing Limited. Pg. 129.

<sup>127</sup> Article 79 and Id pg. 129.

<sup>128</sup> *Marbury v Madison* 57 1 Cranch 137, 2 L Ed 60 (1803). The Supreme Court concluded that a legislative act contrary to the Constitution is not law”

<sup>129</sup> 5 US p.178.

## CHAPTER SEVEN

### 7.0. CONCLUSION AND RECOMMENDATIONS

Judicial review is not only an integral part of the Constitution but is also a basic structure of the Constitution which cannot be whittled down by an amendment of the Constitution and the judiciary is the best placed government organ to implement judicial review. It is, as illustrated, a fundamental right in law.

The 1962 and the 1967 Constitutions guaranteed fundamental rights and freedoms. Therefore, violation of human rights in post-independence Uganda was not solely due to weaknesses or absence of constitutional and other legal guarantees of those rights. It is because of the political turmoil that characterised Uganda that the Constitution was enacted to protect fundamental and other rights among other things.

The fundamental task of the Constitution was to strengthen the enforcement institutions of human rights and to establish new ones which have been empowered to defend human rights.<sup>130</sup> It guarantees all the rights as contained in major international declarations and covenants on the human rights to which Uganda is signatory including the African Charter on Human and People's Rights.<sup>131</sup>

In order to ensure that Acts of Parliament are enacted within the confines of the Constitution and specifically to ensure that fundamental rights and freedoms are protected, judicial review was entrenched in article 137 and as illustrated has been effectively applied to protect the freedom of expression.

Accordingly, in exercising its legislative duty under article 79, Parliament should ensure that Acts which contravene fundamental rights and freedoms of individuals including the freedom of expression are not passed because the constitutional court shall invoke its power under article 137 to check the constitutionality of those Acts.

---

<sup>130</sup> Odoki Report, pg. 169.

<sup>131</sup> OAU Document CM-1149 (XXXVI) 2 (1981), Addis Ababa, Ethiopia.

The government has consistently argued, in light of the several legislation enacted to regulate the media, that if the machinery of information has no guidance, security will be undermined, society will not be properly guided, government programmes will be derailed and development will not occur.

In terms of protecting the freedom of expression in Uganda, the power of Government to regulate or control the media was not greatly diminished by the decisions of the courts or in the reformed legal framework including the repealed Electronic Media Act and the Press and Journalist Act. The reason for this is that protection of the fundamental human rights is a primary objective of every democratic constitution and as such is an essential characteristic of democracy. In particular, protection of the right of freedom of expression is of great significance to democracy. “It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hall mark of democracy, is only assured through optimal exercise of freedom of expression”.<sup>132</sup>

The fundamental rights and freedoms are entrenched in the Constitution and the enjoyment of those rights and freedoms can only be limited if they infringe on the rights of others or if they are justifiable in a free and democratic society. The proposal by government to require registration of newspapers for example would certainly be declared unconstitutional if it were to be enacted into law.

To ensure that the freedom of expression is protected according to the Constitution and from a drafters’ perspective, the government should revisit the media laws and media policy. The government is enjoined to uphold the Constitution including the Bill of Rights in Chapter Four and in particular article 29. It is recommended therefore that the government policy on the media needs to be concisely stated. A clear statement of the legislative objective would ensure questions discussed in the cases above do not arise. Further action with respect to the legal regime ought to be undertaken whether in the form of further regulation, deregulation, or a general review. The weaknesses of the regulatory mechanisms employed in the regulation of the media needs to be resolved.

The above cases pose policy considerations which the government should clearly address including-

- (a) Does the government want a self-regulating media or not?

---

<sup>132</sup> R v Zundel (1992) 10 C.C.R (2<sup>nd</sup>) 193 and Edmonton Journal v Alberta (AG) (1982) 2 SCR 1326.

(b) What is the role of government in the control and regulation of the media?

(c) Is the government proposing to reclaim the power to control and regulate the media?

The current media laws are weak but there is room for improvement. The proposal by Cabinet to amend the Press and Journalists Act is not a call for draconian laws to control the media but it is necessary for clear indications on the duties and responsibilities of the media amidst weak state institutions to be stated such as those stipulated in the Public Order Management Bill, 2013.

The government also needs to repeal the archaic and redundant laws such as sedition or cease to apply them as has been done in many other Common Law jurisdictions including Canada, England, Australia, India and Kenya. Uganda's legal regime respecting freedom of expression is characterised by; (a) archaic and outdated restrictions (such as sedition) which only serve to undermine the enjoyment of the rights and in effect lead to a retardation of the democratisation process and (b) weak and inappropriate regulatory mechanisms such as the media council.

It is recommended that the current legal regime governing media freedom needs to be reformed taking into account the decisions of the constitutional and Supreme courts and to address emerging challenges including effects of globalisation. The effect of amendment or repeal is that the laws will be brought into conformity with the Constitution.

The government has acknowledged the effects of globalisation on the freedom of expression e.g. by enacting the Uganda Communications Act<sup>133</sup> but developments in the media need to be watched on a permanent basis and require rapid and coordinated responses. Having in place archaic laws are not the means of achieving such objectives. New legal rules to address emerging challenges need to be developed. Specifically, further development of the legal regime pertaining to the freedom of expression in order to ensure its sustainability is paramount. The existence of an enabling legal regime and an appropriate political climate for free expression will ensure maximum enjoyment of that right.

---

<sup>133</sup> Id.

It is reported that human rights are political by nature and therefore, they require the political will to implement and public scrutiny to maintain them. Thus, Uganda Commission of Inquiry into violations of human rights has observed

*“A country may have the best written Bill of Rights, but if the state organs and institutions, leaders at all levels, and every individual in the country are not committed and do not pay serious attention to them, human rights as so guaranteed are not worth the papers they are written on”.*<sup>134</sup>

Government is well aware of the inherent nature of the freedom of expression under article 29 (1) (d) and the duty of government agencies to respect, promote and uphold this freedom. However, government also notes that this right is not absolute and where the right poses a threat to peace and public safety, then the right must be regulated accordingly within the ambit of article 43.

Judicial review is however not the only remedy available for enforcement of fundamental rights and freedoms under the Constitution. Under article 50 if any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, he is entitled to apply to a competent court for redress which may include compensation. However this depends on strengthening of the institutions that are charged by the state to promote these rights and freedoms including the Uganda Human Rights Commission.<sup>135</sup>

Although the role of the constitutional court in determining the constitutionality of every Act of Parliament is lauded, this might not necessarily be effective because not all the Acts enacted by Parliament are subjected to judicial review.

Scholars have also warned that the “interpretation of the Constitution is primarily concerned with the recognition and application of constitutional values and not with a search to find the internal meaning of statutes.”<sup>136</sup>

The judicial review role of the constitutional court is important because it prevents Constitution from being amended or overtaken by a legislative enactment of Parliament.

---

<sup>134</sup> Id Kanyeihamba pg. 85.

<sup>135</sup> Id the Constitution articles 51 and 52.

<sup>136</sup> Tumwine-Mukubwa G. P. ‘Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa’ in J. Oloka-Onyango (ed) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (Fountain Publishers, Kampala, 2001) pp 287-307.

Whereas judicial review is not the only safeguard for protecting the freedom of expression, it is an important feature for the development of constitutionalism in Uganda and as discussed above, it has played a prominent part in ensuring that freedom of expression is enjoyed by citizens according to the Constitution.

## **BIBLIOGRAPHY**

### Text Books

1. Bussey E. 'Constitutional Dialogue in Uganda' *Journal of African Law* 49, 1-3 (2005) Cohn M 'Judicial Activism in the House of Lords: a Composite Constitutionalist Approach' *Public Law* (2007) 95-115.
2. Dubick, Keith, (2001) "The Theoretical Foundations for Protecting Freedom of Expression" *Journal of Constitutional Law*, Vol. 13.
3. Eric Barendt *An Introduction to Constitutional Law* (Oxford University Press London 1998)17.
4. Eric Barendt (2007) "Freedom of Speech" 2<sup>nd</sup> Edn. Oxford University Press.
5. G.C. Thornton *Legislative Drafting* 4<sup>th</sup> edn Butterworths London 1996.
6. Gloppen S, R. Gangarella & E Skaar (eds) *Democratisation and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass London 2004) Laws S. 'Drawing the Line' C. Stefanou & H. Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Ashgate Hampshire 2008).
7. Ian McLeod *Judicial Review* (2<sup>nd</sup> edn) (Barry Rose Law Publishers Chichester 1998) at 1.
8. I.I Massey: *Administrative Law* 6<sup>th</sup> Edition. Pg. 238.
9. Jonathan Manning, *Judicial Review Proceedings, A Practitioner's Guide to Advice and Representation*. Second Edition. Published in Great Britain 2004 by the LAG Education and Service Trust Limited.
10. Clive Lewis, *Judicial Remedies in Public Law* 2009. Sweet and Maxwell.
11. *Judicial Review and the Legislative Process: Some Empirical and Normative Aspects of Due Process of Lawmaking*. Frickey, Philip P., University of California, Berkeley. Publication Date: 09-01-2001.

12. Judicial Review and the Protection of Human Rights, 2007- 2008. Anthony Bradley. <http://studyonline.sas.ac.uk/course/view.php?id=18>
13. Judicial Review and the Protection of Human Rights, 2009. Anthony Bradley. <http://studyonline.sas.ac.uk/course/view.php?id=18>
14. Judicial Review, Human Rights and their Protection in Public Law, 2011. Anthony Bradley. <http://studyonline.sas.ac.uk/course/view.php?id=18>
15. Lord Denning, The Closing Chapter, Oxford University Press.
16. Mtshaulana M. P. 'The History of the Constitutional Court of South Africa' in P. Andrews & S. Ellman (eds) (2001) (Witwatersand University Press Johannesburg) 525-555.
17. Tumwine-Mukubwa G. P. 'Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa' in J. Oloka-Onyango (ed) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (Fountain Publishers, Kampala, 2001) pp 287-307.
18. Seidman A, R. Seidman and M. Abeyesekere *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, London 2001).
19. The Report of the Uganda Constitutional Commission, Analysis and Recommendations, 1992. The Uganda Constitutional Commission P.O. Box 7206, Kampala Uganda. [www.constitutionnet.org/node/10749](http://www.constitutionnet.org/node/10749).
20. V.C.R.A.C Crabbe, Legislative Drafting, Cavendish Publishing Limited, 1993.
21. V.C.R.A.C. Crabbe "The Role of Parliamentary Counsel in Legislative Drafting" Document No.11 UNITAR Training Programmes in the legal Aspects of Debt and Financial Management (Geneva, 2000) Pgs. 6-16.
22. V.C.R.A.C. Crabbe "Understanding Statutes. Cavendish Publishing, 1994.
23. Walubiri P. 'Towards a New Judicature in Uganda: From Reluctant Guards to Centurions of Justice' Peter M. Walubiri (ed) *Uganda: Constitutionalism at Cross Roads* (Uganda Law Watch Kampala 1998) 135-208.

24. G.C. Thornton, *Legislative Drafting* 4<sup>th</sup> edn Butterworths London 1996.
25. V.C.R.A.C Crabbe, “The Role of Parliamentary Counsel in Legislative Drafting” Paper written following a UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers-Kampala, Uganda 20-31 March 2000.
26. E. A. Driedger, *The Composition of Legislation*, 2<sup>nd</sup> Edition, 1976.
27. Wolfe C. *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Littlefield Adams Quality Paperbacks, London 1994).
28. Woolf H, J. Jowell and A. Le Sueur *De Smith’s Judicial Review* (6<sup>th</sup> edn) (Sweet & Maxwell London 2007).
29. Zurn C. F. *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, New York, 2007)
30. Dubick, Keith, (2001) “The Theoretical Foundations for Protecting Freedom of Expression” *Journal of Constitutional Law*, Vol. 13.

## **PAPERS**

1. Henry Odimbe Ojambo, *Reflections on Freedom of Expression in Uganda’s Fledgling Democracy. Sedition, “Pornography” and Hate Speech*. Human Rights & Peace Centre, 2008 ISBN 9970-511-17-0 HURIPEC Working Paper No. 18 February, 2008.
2. *Judicial Review by the Constitutional Court in Uganda: Lessons for the Drafter*. Denis Kibirige Kawooya. Essay Submitted in partial fulfillment of the requirements for the degree in Advanced Legislative Studies of the University of London 2008-2009. <http://studyonline.sas.ac.uk/course/view.php?id>
3. Helen Xanthaki, *The Predominance of the Constitution*. Lecture Notes, Course: Comparative Legislative Studies for students of the LLM in Advanced Legal Studies, University of London. <http://studyonline.sas.ac.uk/course/view.php?id>

4. Helen Xanthaki, The Legislative Sentence: Words, Expression, Syntax and Punctuation. Lecture Notes: Legislative Drafting for students of the LLM in Advanced Legal Studies. Week 7. <http://studyonline.sas.ac.uk/course/view.php?id>