

**REFLECTIONS ON FREEDOM OF EXPRESSION  
IN UGANDA'S FLEDGLING DEMOCRACY**

**SEDITION, "PORNOGRAPHY" AND HATE SPEECH**

**Henry Odimbe Ojambo**

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**ISBN 9970-511-17-0**

**HUR�PEC Working Paper No. 18**

**February, 2008**

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## **ACKNOWLEDGEMENTS**

Gratitude is extended to all those individuals who commented on the first draft of this paper and to the different scholars who attended and contributed at the presentation of the same at a workshop organized by HURIPEC under the Rights and Democratic Governance Project. Special thanks go to the Graham Fellowship for research support and to Sofia Candab for research assistance.

## **SUMMARY OF THE REPORT**

**Since the ascendancy of the National Resistance Movement (NRM) regime to power, Uganda has consistently been viewed and perceived by the international community as a source of hope for development and democratization in Africa. But Uganda can hardly boast of a strong economy, let alone strong democratic institutions. The country remains among the poorest on the continent with significant democratization challenges. In other words, one need not look at Uganda's current situation to agree with those who see so much hope in the country. Rather, Uganda's newly acquired international reputation is the consequence of her history, a history which has been characterized by anarchy, poverty and authoritarianism. Under the stewardship of President Yoweri Museveni, who has been president since 1986, the NRM government has registered notable success in restoring peace, promoting constitutionalism and democratization, initiating economic programs aimed at poverty alleviation, and promoting the rule of law, to mention but a few of its varied achievements. As part of its programs for the rejuvenation of the economy and democratic governance, the NRM regime has been at the forefront of promoting economic liberalization programs such as privatization and attraction of foreign investment, as well as enactment of new laws and the reformation of old ones.**

**It is within this context that the country has experienced the unprecedented proliferation of media houses -- both electronic and print -- over the past two decades. This development raises many issues relating to the enjoyment of the right to freedom of expression, a right that forms an integral and critical component of democratization and good governance. Against the above background, this paper examines the extent to which the right to freedom of expression is actually enjoyed in Uganda and whether the legal regime pertaining to that right is adequately developed in order to ensure its sustainability. While different accounts could be offered for the proliferation of media houses under the NRM regime, the paper concludes that freedom of expression lacks a sound legal foundation and is thus extremely vulnerable.**

**In particular, Uganda's legal regime respecting freedom of expression is characterized 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 democratization process and (b) weak and inappropriate regulatory mechanisms such as the Media Council. It is recommended that there is an urgent need to revisit the legal regime governing media freedom and among other things include provisions to address emerging challenges like racial intolerance.**

## INTRODUCTION

*Of the various rights enjoyed in a free society, freedom of expression may well be the most important. In Western democratic theory, it is often considered to be the fundamental freedom upon which all other rights depend. This is because it is primarily through the process of normal communication that rights are developed, defined and defended. 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>1</sup>*

Over the past two decades, Uganda has experienced an unprecedented proliferation of media houses in the form of both electronic and print media. However, questions linger as to whether a mere increase in the number of media houses necessarily translates into the meaningful enjoyment and exercise of the right to freedom of expression by Ugandans. In other words, does increased quantity invariably translate into enhanced quality? There is no doubt that the growth of the industry is reflective of a blooming of both the electronic and print industry in the country. In 1986, there was one radio station (Radio Uganda) and television broadcaster (The Uganda Television – UTV), both of which were state-owned. By March 2007, Uganda boasted of 103 parent radio stations, 41 booster stations, 24 licensed but inoperative radio stations, and 14 television stations plus another 10 television stations that had been granted licenses but were yet to commence operations. In contrast to the prior scenario, the overwhelming majority of current radio and television stations are privately run and funded. Twenty-one years ago, the *New Vision* was also the sole newspaper, and was likewise owned by the government, and remained the dominant newspaper until the revival of *Weekly Topic* in the early years of the NRM regime. A number of other newspapers also attempted to start up, ranging from the *Weekly Digest*, to the *Luganda Ngabo*, but most of these folded. It was in fact not until the establishment of the *Monitor*, that the *New Vision* received a credible competitor from the private sector. Today, there are at least 5 (five) additional newspapers.<sup>2</sup>

Different accounts are offered for the seemingly revolutionary developments in the media industry over the past two decades. According to Twinomugisha-Shokoro, the current near-explosion in the media industry in the form of the registration and publication of newspapers and the setting up of private radio and T.V. stations is a deliberate tactic employed by the NRM government to hoodwink the citizenry and the international community into believing that Ugandans truly enjoy freedom of expression.<sup>3</sup>

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<sup>1</sup> Dubick, 2001 at 1-2.

<sup>2</sup> All the statistical data for both the electronic and print media is based on information obtained from the Uganda Broadcasting Council as at 7 March 2007.

<sup>3</sup> Twinomugisha-Shokoro, 1998 at 172.

Economic factors could equally account for the proliferation of media houses under the NRM regime. The adoption of Structural Adjustment Programs (SAP) by Uganda could provide yet another explanation for the current blossoming of the media industry. One of the strong pillars of SAP was economic liberalization, which required governments to reduce their involvement in the market to only regulatory functions, while leaving the investment role to private investors/actors. To attract private investors into the media industry, extensive reforms were undertaken in the media legal regime. Among others, the archaic and restrictive Press Censorship and Correction Act of 1915 was repealed and replaced with a new, progressive regime under the Press and Journalists Act of 1995.<sup>4</sup> In the same connection, other media laws aimed at the liberalization of the sector were enacted, namely: (a) The Uganda Communications Act<sup>5</sup>, whose purpose was to restructure the communications industry and to promote competition; and, (b) The Electronic Media Act<sup>6</sup>, whose main objective was to establish a broadcasting council for the purpose of licensing and regulating the electronic media. Thus 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.

It is also highly arguable that globalization has played a significant role in the explosion of the media industry in Uganda. As is the case elsewhere in the world, Uganda's media industry has significantly benefited from the increased transnational interconnectedness of telecommunication networks due to advancements in science and technology. This process has enabled regional and international media networks to establish themselves in the country. For instance, a number of foreign telecommunication stations such as NTV (National Television) – from Kenya, Multichoice television – from South Africa, GTV (Gateway Television) – from the United Kingdom, and BBC Kampala FM radio-station have set up operations within the country.

Alongside the media explosion, there has been another seemingly commendable development in the form of a sustained, significant upsurge in constitutional litigation around media rights. Owing to such litigation, the legal regime governing the media is equally undergoing phenomenal transformation. For instance, the celebrated Supreme Court decision in *Charles Onyango Obbo & Anor v. Uganda*<sup>7</sup> held that the penal provision prohibiting the publication of false news was unconstitutional, a ruling whose positive implications on the exercise and enjoyment of freedom of expression in Uganda will remain of considerable historical value.

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<sup>4</sup> Cap 105 [1995]. Its main objective is to ensure freedom of the press and establish a council which is responsible for the regulation of mass media and the establishment of an institute of the journalists of Uganda.

<sup>5</sup> Cap 106, Laws of Uganda, 2000.

<sup>6</sup> Cap 104, Laws of Uganda, 2000.

<sup>7</sup> Const. App. No. 1 of 2000 [unreported].

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However, challenges still abound. In addition to the need for further purging of the statute books of unworthy limitations,<sup>8</sup> there are concerns about the level of commitment to freedom of expression by both the government<sup>9</sup> and the Media Council.<sup>10</sup> Moreover, if the events surrounding the Mabira Forest demonstrations are anything to go by, additional challenges are lurking. The varied expressions of hatred made against persons of Indian extraction during the demonstration seemed to suggest that there are hidden dangers to the current trend of what can only be described as a rather unprincipled liberalization of the media. The targeting of Ugandans of Asian (Indian) origin during the Mabira demonstrations speaks to a different need than purging of the statute books and the commitment to free expression. In displaying posters with expressions such as “Mehta, do you want another Amin?,” “Asians must go” and the like, Uganda exposed a soft underbelly of intolerance, which could be regarded as the flip side of the growth and flourishing of the freedom of expression. In equal measure, the strong reluctance by various sectors of society to the staging of the *Vagina Monologues* passed as a strong cry for the recognition of Uganda’s cultural (public policy) peculiarities, notwithstanding its growing commitment to democratic values.

Therefore, critical to Uganda’s reform of the media regime is a contextual constitutional appreciation of the justifiability of any limitation on fundamental freedoms. This is particularly critical to any debate on the justifiable limitations that can be placed on fundamental rights because of the cultural peculiarities that characterize and influence the public policy of every nation. In other words, the constitutional proviso in Article 43 of the Uganda Constitution, 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 taken for granted.

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<sup>8</sup> As noted by various scholars, Uganda’s laws are still remarkably characterised by unjustifiable limitations on freedom of expression. Examples of draconian limitations on freedom of expression include Sedition. See Shokoro supra., at 172.

<sup>9</sup> The Government continues to act repressively against critical media houses. For instance, in August 2005, soldiers stormed the Monitor offices allegedly because Andrew Mwenda, the talk show host at KFM Radio Station, had unfairly criticized the Government/president over the death of former Sudanese Vice President John Garang. Mwenda was subsequently arrested, detained and charged with the offence of sedition, among others.

<sup>10</sup> The Media Council’s execution of its regulatory role leaves a lot to be desired. Cases in point include the ban on the staging of the *Vagina Monologues* and the taking of disciplinary measures against Radio One for hosting gay activists.

This Working Paper addresses the above-noted multifaceted, seemingly contradictory issues facing freedom of expression in Uganda's democratization process. Its main objective is to contribute to the legal reform of media laws in Uganda. Through a case study of sedition law the paper will examine the justifiability/constitutionality of some of the existing limitations on free expression. In an attempt to ensure that the reforms are in step with social developments, the paper will also consider the adequacy of Uganda's legal regime in addressing new challenges such as racial intolerance/hate speech, and pornography. The *Vagina Monologues* and the Mabira demonstration shall respectively be employed as case studies in the discussion of these emerging social and legal challenges which are closely linked to the idea of freedom of expression.

Part II of the paper focuses on the conceptual origins and justification of the recognition of freedom of expression as a fundamental right deserving constitutional entrenchment. The section also examines the concept of "justifiable limitations" on fundamental rights in general but with particular attention paid to the issue of freedom of expression. While drawing insights from different theories and practice in other jurisdictions, Part III focuses on the principles that affect the regulation of fundamental rights in general. The part will specifically focus on the law of Sedition to illustrate some of the main challenges Uganda needs to address if a principled democratization process—that has free expression as a central attribute—is to be realized. In other words, whereas there are certainly other provisions in Uganda's laws that affect the full realization of freedom of expression, the law of Sedition will be employed as a case study to demonstrate the justification (or the lack thereof) of such limitation. The last part of the paper examines the emerging challenges in Uganda's law on freedom of expression. Issues of racial intolerance and pornography, which have lately manifested themselves as forms of expression in Uganda's social context deserve some comment. The Mabira forest demonstration, where Ugandans of Indian extraction were specifically targeted, and the *Vagina Monologues*, where the Media Council banned the staging of the play allegedly because of its pornographic and obscene content, shall be employed as case studies to illustrate the new challenges and the need for new regulatory measures on freedom of expression in Uganda.

## **II. FREEDOM OF EXPRESSION: A THEORETICAL OVERVIEW**

### **2.1 *Free Expression and Democratic Freedom: The Conceptual Origins***

Traditionally, freedom of expression has always been viewed from two theoretical perspectives: political process rationale (market place theory), and the intrinsic value rationale. According to the former, freedom of expression is perceived as a right which deserves to be protected for the purposes of advancing and achieving other social goals. In other words, the proponents of this school of thought do not view freedom of expression as an end in itself, but rather as a means for achieving other goals. According to this theory—which is premised on a free market economic model—government intervention for the purposes of promoting the truth is unnecessary if all ideas are allowed to compete for allegiance in the same way as goods within a free market structure compete for demand. In the same way as quality goods succeed and less competitive ones are discarded, the deliberative process in the market place of ideas will eventually see those ideas that are more truthful and accepted being more widely circulated and adopted while the false ones are abandoned and discarded along the way. Thus, among others, the theory assumes that the audience has the capacity to rationally evaluate and analyze any data received in search of the truth.<sup>11</sup> Consequently, the theory resists any external intervention, because that would amount to interference with the market forces which could either obstruct valuable information or lead to the promotion of falsity at the expense of truth.

On the other hand, the latter theory contends that freedom of expression deserves protection as an end in itself. Those who support this position insist that it ought to be perceived as such. According to this theory, “the proper end of man is the realization of his characters and potentialities as a human being.”<sup>12</sup> As a corollary, it is added, “all persons have the right to form their own beliefs and opinions, to express them.” Like the former, this theory equally resists intervention because such conduct could easily adversely affect character development and the full realization of one’s potential as a human being.<sup>13</sup> The proponents of the political process rationale argue that free expression should be protected and promoted for its instrumental role in promoting the free flow of ideas essential to the attainment and protection of political democracy and to the functioning of democratic institutions. In much the same vein, Justice Oliver Wendel Holmes of the US Supreme Court noted that freedom of expression is an element of the search for the truth.<sup>14</sup>

However, this view of freedom of expression has been criticized on a variety of grounds. According to MacLachlin J. of the Supreme Court of Canada, the theory is too narrow and limited to justify constitutional protection: “[T]he validity of the political process rationale

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<sup>11</sup> Bambauer, 2006 at 649.

<sup>12</sup> Emerson, 1963 at 879.

<sup>13</sup> Id. Also see *R. v. Keegstra*, [1990] 3 SCR 697 at 714.

<sup>14</sup> In *Abrams v. United States*, 250 US 616 (1919) and cited in *Keegstra, Id.*, at 714.

for freedom of expression is undeniable. It is, however, limited. It justifies only a relatively narrow sector of the free expression ...”<sup>15</sup> The market place model also apparently fails to make recognition of the fact that individuals interact with information with certain biases. Contrary to the assumptions of the market place model on the search for truth, studies “in cognitive psychology and behavioral economics indicate that individuals operate with significant, persistent perceptual biases.”<sup>16</sup> Simply stated, the theory cannot guarantee truth: “indeed, as history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.”<sup>17</sup>

The intrinsic value theory has also suffered serious criticism. First and foremost, the theory is rather vague:

*On its own, this justification for free expression is arguably too broad and amorphous to found constitutional principle... it does not answer the question of why expression should be deserving of special constitutional status, while other self-fulfilling activities are not. Nevertheless, an emphasis of the intrinsic value of freedom of expression provides a useful supplement to the more utilitarian rationales...*<sup>18</sup>

In conclusion, other than for recognition of freedom of expression as a fundamental right to society at both the individual and societal level, neither of the theories appears convincing enough in their respective attempts to resist governmental intervention. A person touring Luzira prison can grasp its reality with his or her own eyes and ears. But if a television reporter is to convey the jail’s sights and sounds to those who cannot personally visit the place, they must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unbearable as applied to journalists who are there to convey to the general public what the visitors see.<sup>19</sup>

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<sup>15</sup> [1990] 3 SCR 697.

<sup>16</sup> Bambauer, *supra.*, at 651 and part III at 673-696.

<sup>17</sup> *Keegstra*, *supra.*, at 714. A glaring example of how false ideas may prevail over truth is the U.S. campaign for the invasion of Iraq on grounds that Iraq had Weapons of Mass Destructions (WMD). As it later turned out, the compelling U.S. submissions were subsequently proven false but at a great cost both in terms of lives and resources. See also Bambauer, *supra.*, at 649-51.

<sup>18</sup> *Keegstra*, *Id.*, at 714.

<sup>19</sup> *Houchins*, *supra.*, at 19.

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In an earlier speech, Justice Stewart had advanced a related argument for enhanced constitutional protection of freedom of the press, as opposed to freedom of speech.<sup>20</sup> With reference to the press as the constitutionally recognized ‘Fourth Estate,’ Justice Stewart had previously contended that the press privilege does not protect the press as the ‘eyes and ears’ of the public; rather, its function is to insulate the press from the government to enable the press to perform its primary role of criticizing the three official branches of the government. So construed, the press is entitled to institutional protection not primarily because of its role of informing the public but because of its special capacity as an institution to criticize the three branches of the government. To the contrary therefore, individuals merit lesser speech protection because it is never their ordinary role to criticize the government in the exercise of their freedom of expression/speech.

But the definition accorded to the press according to American Jurisprudence raises some serious notable issues. In *Lowell v. Griffin*<sup>21</sup>, the Supreme Court of the United States of America, however, asserted: “the liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”<sup>22</sup> In *Branzburg v. Hayes*<sup>23</sup>, the same court argued that freedom of the press includes ‘the right of the lonely pamphleteer ... as much as the large metropolitan publisher.’<sup>24</sup> In the more recent case of *FCC V. League of Women Voters*<sup>25</sup>, the court stretched the press protection provided by the first amendment to the ‘soapbox operator.’<sup>26</sup>

Collectively construed, it is evident from the jurisprudence of the Supreme Court of the United States of America that whereas the often employed definition of ‘press’ includes both print and broadcast media, it fails to provide clear guidance as to what constitutes the press, as opposed to spoken forms of expression. For instance, the Court’s jurisprudence raises questions as to how a ‘soapbox orator’ or a lonely pamphleteer’ would constitute ‘press.’ Indeed, as Onorato rightly notes, “it is difficult to ascertain any distinction at all under the Supreme Court’s current first amendment jurisprudence; anyone able to speak, write, or otherwise communicate appears to be ‘press’.”<sup>27</sup>

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<sup>20</sup> Stewart, 1975.

<sup>21</sup> 303 U.S. 444 (1938).

<sup>22</sup> Id., 452.

<sup>23</sup> 408 U.S. 665 (1972).

<sup>24</sup> Id., 704.

<sup>25</sup> 468 U.S. 364 (1984).

<sup>26</sup> Id., 380.

<sup>27</sup> Onorato, 1986 at 374.

## **2.2 The Constitutional Regime**

Recognition and protection of fundamental freedoms in general and of freedom of expression in particular is hardly a new development in Uganda's constitutional history. At independence, Article 26 of the 1962 Constitution, as restated in Article 17 of the 1967 Constitution, freedom of expression was provided for 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 concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions, or public entertainments; or
- (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.

Though it is not within the scope of this paper to examine the historical development of the law of freedom of expression in Uganda, it will suffice to note that the protection provided for this freedom in the 1962 and 1967 Constitutions, was extremely narrow, if not misleading. 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. Closely considered, it would seem as though the 1962 and 1967 Constitutions gave with one hand and took away with the other.

The 1995 Uganda Constitution, however, parted ways with the 1962 intrinsically pretentious protection of freedom of expression in particular but fundamental rights in general. Article 29 (1) (a) of the Constitution provides: "Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media." However, if reasonable, the 1995 Constitution also provides for some limitations on the exercise and enjoyment of all freedoms, including freedom of expression. In Article 43,

which will shortly form the subject of closer analysis, the 1995 Constitution only conditions the enjoyment of every fundamental right– including freedom of expression- to non-prejudicial interference with other fundamental freedoms and the public interest.

### **2.3 *Assessing the Constitutionality of the Limitations on Freedom of Expression***

Having noted, as the Uganda Constitution equally recognizes, that freedom of expression is not an absolute right, a limitation on the exercise of that right cannot therefore be condemned as being unconstitutional merely because it is a limitation. To determine whether a given limitation is constitutionally defensible or not, regard must be had to the relevant Constitutional article as well as to the pertinent jurisprudence. In Uganda’s case, Article 43 of the Constitution, which generally applies to the entire bill of rights in Uganda’s Constitution, deserves quoting in extenso:

*(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, and*
- (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.*

Limitations on freedom of expression in Uganda can be fairly categorized into criminal and non criminal forms. Whereas the criminal ones are, strictly speaking, those provided in the Uganda Penal Code and form part of the criminal laws of the country, the non-criminal ones tend to take the form of statutory offences and civil claims based on different laws.<sup>28</sup> For the purposes of the present analysis, however, an emphasis will be laid on some of the notorious criminal limitations namely: Sedition, promoting sectarianism, and incitement to violence. But before the constitutionality of Uganda’s limitations on freedom of expression is closely examined, it is important to appreciate the varied approaches employed by different democracies in the advancement of this right with respect to the limitations noted above.

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<sup>28</sup> The legislation providing for non-criminal offenses include The Press and Journalists Act. Examples of civil claims which tend to affect freedom of expression include tort claims such as libel, defamation, slander, etc.

Generally considered, most democracies recognize that in order for any limitation of freedom of expression to be accepted as legitimate it must be precise, narrow, and with clear objectives. In the Canadian case of *R. v. Oakes*,<sup>29</sup> a two-test approach was adopted and has since been cited with approval both inside Canada and without. According to the first branch of the *Oakes* test, the Crown must establish that the limitation serves a pressing and substantial objective. In the second branch of the test, 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 *Obbo* Court went on to specifically adopt the approach stated in the Zimbabwean case of *Mark Gova & Another v. Minister of Home Affairs*,<sup>30</sup> which has a similar but differently stated criteria for the justification of any law imposing limitation on guaranteed rights, as follows:

- the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;
- the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations, and
- the means used to impair the right or freedom must be no more than necessary to accomplish the objective.<sup>31</sup>

Doctrine in the United States of America is equally generally quite averse to placing restrictions on free expression.

There is yet another principle advanced for the protection of freedom of expression: the principle of “equal liberty of expression,” as Kenneth Karst labeled it.<sup>32</sup> According to this principle, which is quite well recognized in U.S. jurisprudence, selective proscription of any form or type of expression is unacceptable. As Hartley notes, “the equal liberty of expression principle stands as a barrier against government ranking the social utility of speech. Among other things, this prevents law from distorting the public debate by proscribing speech only on one side of that debate.”<sup>33</sup>

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<sup>29</sup> [1986] 1 S.C.R. 103.

<sup>30</sup> S.C. 36/2000: Civil Application No. 156/99 – Supreme Court of Zimbabwe, cited at p. 27 of Mulenga J.S.C.’s judgment in *Obbo's* case. See *Obbo supra.*, at 20.

<sup>31</sup> *Obbo*, Id., at 28.

<sup>32</sup> Karst, 1975 at 20-21.

<sup>33</sup> Hartley, 2004 at 14.

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In Uganda, the standard against which these criterion is applicable finds expression in what Mulenga J.S.C. referred to as “the limitation on the limitation,”<sup>34</sup> as provided in Article 43 (2) (c). In making reference to this article and to the framers of the Constitution, Justice Mulenga noted:

*In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as “the limitation upon limitation.”<sup>35</sup>*

Justice Mulenga proceeded in further explanation of the point: “The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalized, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.”<sup>36</sup>

In its ruling in *Obbo’s case*, the Supreme Court of Uganda appears to have taken the meaning of what is “acceptable and demonstrably justifiable in a free and democratic society” as a given. Accordingly, it is only fair that regard must be had to the practice and interpretation of freedom of expression in older democracies to fill in the gap the court left. The subsequent section will thus closely examine the constitutionality of such penal limitations but with specific regard to the law of Sedition.

### **III. A CRITIQUE OF THE SEDITION LAW IN UGANDA**

Sedition is provided for as an offence under sections 39 and 40 of the Uganda Penal Code Act.<sup>37</sup> The provisions respectively provide for seditious intention and the offence of Sedition. Though largely notorious for its application as a tool for immunization of the person of the President against adverse/serious criticism, the law on Sedition is far broader than most people would seem to agree. According to section 39, seditious intentions include the intention to bring into hatred or contempt or to excite disaffection against the person of the President, the government or the constitution; to excite any person to unlawfully attempt the alteration of any matter in government possession; to bring into hatred or to excite disaffection against the administration of justice; and, to subvert or promote the subversion of the government or the administration of a district.

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<sup>34</sup> See judgment of Mulenga J. S.C. in *Obbo*, supra., at 16.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Cap. 120, Laws of Uganda, 2000 .

This formulation of the law raises serious legal issues in light of Article 43 (2) (c) of the Constitution. The challenges particularly arise when one considers the rather limited range of available defenses. According to section 39 (2), the defenses include instances where the publication or speech was intended to:

- (a) show that government was misled or mistaken in its measures;
- (b) point out errors or defects in various government organs with a view to remedying the same, and/or
- (c) persuade anyone to procure alteration of any matter in government's possession through lawful means.

The offence of Sedition is provided for in the following phraseology:

1. Any person who:-
  - (a) does or attempts to do or make any preparations 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, that it is seditious, commits an offence. . . .

In Uganda's experience, only a small part of the law on Sedition remains in use. As in many other countries where the provision remains alive, only the part relating to the causing of disaffection against the person of the President and the government continues to be commonly invoked for the purposes of prosecution. Even in the latest glaring, eye-brow-raising attack on the judiciary by some members of Forum for Democratic Change (FDC) who accused two prominent judges of taking bribes, the Director of Public Prosecutions (DPP) did nothing in the name of Sedition.<sup>38</sup> Indeed, one wonders what more would

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<sup>38</sup> The facts of this case revolved largely around repeated attempts by the lawyers of Dr. Kiiza Besigye, the leader of the Forum for Democratic Change, which is the leading opposition party in Uganda, to obtain bail for their client from the High Court of Uganda. Following a series of maneuvers by the prosecution to defeat the efforts of Besigye's lawyers, which at one time involved double charging of the accused in both the High Court and the General Court Martial, some members of FDC directed their anger at some judges of the High Court. In a rather unprecedented, outrageous and clearly demeaning attack on the judiciary, it was alleged that the government had bribed some of the judges on the High Court in an effort to defeat Besigye's chances of being granted bail. Though the affected judges filed an action against the FDC members who made such claims for defamation, the police never expressed any interest in the matter whatsoever.

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have been required to satisfy the seditious intention of bringing into hatred or excitement or disaffection against the administration of justice to justify some action from the DPP's office.

On the contrary, Uganda's history is rife with examples of swift action by the police, together with the DPP, to place charges in cases involving serious criticism of the person of the President.<sup>39</sup> Considered against the principles employed in the determination of the constitutionality of any limitation on freedom of expression, Uganda's Sedition provision leaves a lot to be desired. In order to determine whether Uganda's law on Sedition is actually constitutional or otherwise, regard must be had to the aforementioned standard. In particular, we must ask whether our Sedition law is based on a justifiable legislative objective for overriding other fundamental rights; whether it is overbroad in its statement; whether it is selective; and whether its effect on the right to freedom of expression is excessive and/or disproportionate.

### **3.1 Assessing the Legislative Objective of Sedition**

The co-existence of the protection and limitation of fundamental rights is a clear recognition of the competing interests that characterize the concept of fundamental rights in a democracy. However, as Mulenga J. rightly observes, "where there is a conflict between the two interests, the court resolves in having regard to the different objectives of the constitution."<sup>40</sup> Characterizing the competing constitutional objectives as either primary or secondary, Mulenga J. further rightly observes: "protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective."<sup>41</sup> Accordingly, the dominant primary objective can only justifiably be impaired or overridden in instances where there is a pressing social need.

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<sup>39</sup> Examples of fast action by the police in alleged cases of seditious libel against the executive are numerous. For instance, in 1995, Haruna Kanabi of the *Shariat* newspaper was arrested and prosecuted for committing the offence of sedition because his paper had published an article which alleged that the president of Uganda had gone to visit Rwanda, "the Uganda's 40<sup>th</sup> district". And further that Rwanda President was Uganda's Resident District Commissioner of the 40<sup>th</sup> district. See *Haruna Kanabi v. Attorney General* 977/95 (unreported).; Musa Njuki, a journalist with *Asallum* was also arrested for similar claims. He died in custody; in 1999, the senior editors of *The Monitor* newspaper were charged with sedition for having published a picture of a naked woman who was being shaved forcefully by a group of military men in uniforms which were believed to belong to the Uganda People's Defence Forces.

<sup>40</sup> *Id.*, at 16.

<sup>41</sup> *Id.*, at 17.

The objectives of Uganda's Sedition law are not quite clear but suffice it to note that the provision was first introduced into Uganda's laws during the colonial era. It will thus perhaps be helpful to consider the historical origins of the Sedition law to fairly establish what its underlying objectives, or rationale, could be. In the Nigerian authority of *Nwankwo v. The State*,<sup>42</sup> the Nigerian Supreme Court noted that the main objective for the law on seditious libel was to protect Kings/monarchs whose powers were deemed to be divine. The offence of Sedition was imported to most African states along with the advent of colonialism, which equally lacked notions of accountability on the part of the leadership to the subjects. In either case, whether under the colonial rule or the rule of monarchies, it would indeed seem plausible for one to contend that any form of criticism of the leadership by those they ruled/led must have been unacceptable.

Eric Barendt supports the view expressed in the *Nwankwo* case when he notes:

*The classic definition of Sedition reflects a traditional, conservative view of the correct relationship between the state and society. Governments and public 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>43</sup>

However, the world has since changed. In a democratic dispensation, accountability on the part of the leadership to its subjects is a critical requirement. It is through such accountability that the electorate can make informed decisions for purposes of casting their votes. It therefore follows without debate that leaders under a democratic dispensation cannot afford to shield themselves from adverse criticism. As a mechanism for immunization of the leadership to adverse criticism by their subjects, Sedition can therefore only be maintained where the goals of the leadership are to stifle accountability and promote graft, inefficiency, and all sorts of political decadence. Indeed, as was noted in the case of *Government of the Republic of South Africa v. The Sunday Times*:

*the role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest, mal and inept administration. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.*<sup>44</sup>

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<sup>42</sup> *Arthur Nwankwo v. The State* 1 NCR 336 (1983).

<sup>43</sup> Barendt, 2007 at 163.

<sup>44</sup> (1995) 1LRC 168, 175-6.

Harry Kalvern equally correctly joins in the criticism of the sedition law when he argues that the concept of seditious libel is inimical to democratic governance. As he puts it, “The concept of seditious libel strikes at the heart of democracy. Political Freedom ends when the government can use its powers and its courts to silence its critics.”<sup>45</sup> He rightly concludes:

*Defamation is an impossible notion for democracy. ... A society may or may not treat obscenity or contempt by publication as legal offences without altering its basic nature. If, however, it makes seditious libel an offence, it is not a free society, no matter what its other characteristics.*<sup>46</sup>

Owing to its well recognized inconsistency with democratic principles, many democracies, especially in Common Law jurisdictions, including Canada, England, Australia, India and Kenya, have either repealed their sedition laws, or have simply ceased to apply them.<sup>47</sup>

### **3.2 Depth and Breadth: Is Sedition Overly Broad?**

Pursuant to Article 43 of the Ugandan Constitution, a limitation of fundamental freedoms can only be justified if it infringes upon other fundamental rights or on the public interest. In any case, and as earlier noted, that requirement is qualified by what Mulenga J. referred to as the “limitation upon the limitation.” In other words, over and above the requirement to found a limitation on fundamental rights upon legitimate and compelling legislative objectives, it is critical that any such limitation does not unnecessarily diminish the enjoyment of the right in issue, as well as infringe upon other rights. According to the authoritative judgment in *Obbo*’s case, the standard to be met in ensuring that any limitation is not caught by the doctrine of overbreadth is one of proximity (causality) between the intended objective and the potential effect of the limitation.<sup>48</sup>

In *Gooding v. Wilson*,<sup>49</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.<sup>50</sup> The critical question would, as Professor Ely articulately states, “. . . therefore seem to be

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<sup>45</sup> Kalvern, 1964 at 205.

<sup>46</sup> Id.

<sup>47</sup> Dlab, 2002, at 227. Also reproduced by Lawyer’s Rights Watch Canada at Lawyer’s Rights Watch Canada, at [http://www.lrwc.org/news/news\\_rules4.php](http://www.lrwc.org/news/news_rules4.php). Last visited on September 20, 2007.

<sup>48</sup> *Obbo*, supra., at 22.

<sup>49</sup> [405] U.S. 518, 520 [1972].

<sup>50</sup> Id., at 520.

whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message.”<sup>51</sup> In accord with these authorities, the Indian Supreme Court decision in *Rangarajan v. Ram*<sup>52</sup> is worth quoting in part:

*Our commitment to 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 far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a ‘spark in a powder keg’.*<sup>53</sup>

The Ugandan law on Sedition would certainly fail this principle of constitutionality. In targeting the intention of the author of any communication and his or her message, the Sedition provision makes unfortunate assumptions that create a real and substantial risk of punishing constitutionally protected conduct, particularly in form of viewpoints. In the first place, the provision seems to assume a homogeneity of the audience in terms of how they interact and perceive any given communications. Secondly, the provision also seems to be premised on the rather unfortunate assumption that leaders must always be highly regarded by the public. To the contrary, as already stated, not only do studies “in cognitive psychology and behavioral economics indicate that individuals operate with significant, persistent perceptual biases,”<sup>54</sup> but it also deserves reiterating the point that the traditional, conservative view of the relationship between the governed and the governors has no place in a democracy.

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 (NRM) 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. In other words, even if the intended objective for the Sedition law were to be accepted, which of course cannot be, the law would still fail the constitutionality principle of overdreadth for as long it is incapable of

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<sup>51</sup> Ely, 1975 at 1496-97

<sup>52</sup> *S. Rangarajan v. P. J. Ram*, [1989] (2) SCR 204.

<sup>53</sup> *Id.*, at 226.

<sup>54</sup> Bambauer, 2006 *supra.*, at 649.

being applied or interpreted without unnecessarily implicating otherwise protected conduct of expressing unfavorable viewpoints. Moreover, as already noted, it is almost impossible to imagine how credulous the public would be in a democratic dispensation to necessarily believe whatever contemptuous communication they happen to interact with. It would therefore be dangerously misleading to argue that once one makes any contemptuous comment against the person of the President, for instance, then the public takes all that which is said for the truth.

In *Virginia v. Black*,<sup>55</sup> the U.S. Supreme Court also dealt with the issue of viewpoints in a democratic dispensation. In its ruling, the court made it clear that under the First Amendment, the U.S. Constitution extends its protection of speech to all forms of viewpoints by operation of “the bedrock principle” that government may never censor speech simply because of society’s abhorrence of the ideas expressed.<sup>56</sup> In particular, as Hartley rightly observes, *Black* is commendable for reaffirming the speech protective principle “that even when speech can be regulated because it creates substantial evil such as intimidation, the state may not suppress it merely because it has that tendency.”<sup>57</sup> Applied to the Ugandan law on Sedition, the foregoing analysis leads to the conclusion that the law lacks a legitimate legislative objective. Moreover, owing to its ambiguity, Uganda’s law on Sedition also extends its paws far beyond whatever the intended legislative objective by being capable of seeking to punish unfavorable viewpoints per se. The law would thus miserably fail the proximity/causality test.

### **3.3 The Question of Proportionality**

An assessment of the effect or proportionality of any limitation on freedom of expression must be undertaken in view of the effect such limitation would have on the proper functioning of the media. As a critical component of democratic governance with a recognized role of criticizing the government, among others, any measures taken by the government to restrict the media must be exercised with extreme restraint largely because of the power imbalance characteristic of the two. Indeed, as the European Court of Human Rights rightly ruled in the case of *Surek and Ozdemir v. Turkey*,<sup>58</sup> the government must always “exercise restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.”<sup>59</sup> In the same case, where Turkey had sought to vindicate the criminalization of publications about terrorist

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<sup>55</sup> 538 U.S. 343 (2003).

<sup>56</sup> *Id.*, at 359-360.

<sup>57</sup> Hartley, *supra.*, at 3-4 and 31.

<sup>58</sup> European Court of Human Rights, Nos 23927/94 and 24277/94, 8, July 1999.

<sup>59</sup> *Id.*, para 60.

organizations, including writings that undermined the “territorial integrity of the Republic of Turkey or the indivisible unity of the nation” as proportionate, the court further ruled that the public had a right to be informed of a different perspective on the political situation in south-east Turkey “irrespective of how unpalatable that perspective may be for them.”<sup>60</sup>

To ensure proportionality in the regulation of fundamental freedoms, both clarity in the law and justifiable objective regulation are as critical as the effect of the measures chosen to ensure such limitation/regulation. As already noted, the court in *R. v. Oakes*<sup>61</sup>, which was cited with approval by the Supreme Court of Uganda in *Obbo*'s case, elaborately articulated the test for determination of, among others, the proportionality of a limitation to fundamental freedoms:

*To establish that a limit is reasonable and demonstrably justifiable in a free and democratic society, two central criteria must be satisfied. First, the objective, ... Second... the party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: .. There are, three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question.... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”<sup>62</sup>*

In Uganda, there are quite a number of alternative remedies for protection of the reputation of public figures, which include suits in defamation and libel. However, the Ugandan government continues to invoke the seditious law in dealing with unfavorable comments or publications by the media. Only two years ago, Andrew Mwenda, a local journalist working with the Monitor Newspaper, was charged with Sedition for alleging that Sudanese Vice President Dr. John Garang's death was caused by Uganda's negligence.

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<sup>60</sup> Id., para 61.

<sup>61</sup> [1986] 1 S.C.R 103

<sup>62</sup> Id.

Besides the lack of restraint in invoking criminal measures for the regulation of freedom of expression in Uganda, the Sedition law also miserably fails the *Oake*'s standard. To begin with, there is actually no known objective with sufficient importance to justify the limitation of freedom expression that underlies the law on Sedition. Secondly, the provision on Sedition is too vague to warrant an examination of "minimal impairment" principle. 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>63</sup> The use of such subjective terms as 'hatred,' 'contempt,' 'discontent,' 'feelings of ill-will and disaffection,' without any definition, renders the law on Sedition too vague. Coupled with the chilling effect of criminal prosecution and penalties, the law on Sedition is thus extremely disproportionate.

### **3.4 Selectiveness and Discrimination**

Equal liberty of expression, as earlier noted, is a core principle of freedom of expression. Because the value or truthfulness of any speech cannot be ascertained in advance of it being expressed, the principle that all speech be accorded equal force at law does make perfect sense. It is, among others, against this background that any measures that might chill the exercise of freedom of expression is considered in much the same light as those that seek to ensure prior restraint of expression.<sup>64</sup>

Having noted the dangers of criminalizing certain forms of speech on the right to freedom of expression, it is equally important to examine whether any such measures are non-selective or biased. In *R.A.V. v. City of St Paul*,<sup>65</sup> an ordinance that banned certain symbolic conduct, including cross-burning, when done with the knowledge that such conduct would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, was found to be in violation of the principle of equal liberty of expression and thus declared unconstitutional.<sup>66</sup> According to the U.S. Supreme Court, the ordinance was unconstitutional because it targeted only individuals who "provoke violence by means of speech that conveys ideas specifically disapproved of in law but not "those who wish to use fighting words in connection with other ideas—to express hostility, for example on the basis of political affiliation, union membership, or homosexuality".<sup>67</sup>

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<sup>63</sup> *Boucher v. The King* [1951] SCR 265 at 294.

<sup>64</sup> See *The Observer and Guardian v. United Kingdom* (Spycatcher case) 26 November 1991, 14 EHRR 153 para 60 where the court noted that "the dangers inherent in prior consent are such that they call for the most careful scrutiny on the part of the Court."

<sup>65</sup> 505 U.S. 377.

<sup>66</sup> *Id.*, at 380.

<sup>67</sup> *Id.*, at 391.

A similar but different argument can be sustained against the provision on Sedition in the Uganda Penal Code Act. In seeking to protect only the government officers who are either part of the Judiciary, Parliament or the Executive, the provision appears to view the government from a perspective that runs contrary to a democratic dispensation. Notably missing from the ambit of the immunity from adverse criticism under Uganda's provision on Sedition are the leaders of the opposition, who equally play a significant role in a democratic system. It follows therefore that only members of the opposition and their sympathizers are the ones bound to be victimized by the law on Sedition, as they are the ones most likely to engage in adverse criticism of those in power. On the contrary, the members of the ruling party together with its sympathizers would hardly be affected by the same provision of the law if they chose to engage in adverse, contemptuous criticism of the members/leaders of the opposition. No wonder then that the law on Sedition has actually earned itself the notorious reputation of being regarded as a ready political tool of the ruling party for the purposes of oppressing the opposition. Against the background provided, it is now possible to turn to our case-studies, viz., the *Vagina Monologues* and the demonstration against the attempted giving away of Mabira Forest.

#### **IV. TWO CASE STUDIES ON FREE EXPRESSION IN UGANDA: THE VAGINA MONOLOGUES AND THE MABIRA FOREST DEMONSTRATION**

Whereas the foregoing discussion on the Sedition law in Uganda serves to illustrate the challenges posed by pre-existing legal provisions to legal reform efforts though with specific regard to media law, this section seeks to address a related but different type of challenge: the need for new legal rules to address emerging challenges. The wave of technological innovations in communication and information, together with the transformation of older technologies, which together have generated a functioning global infrastructure, has engendered complex cultural interactions with boundless legal challenges. Pornography and nude dancing, for instance, though hardly new developments in western cultures, are posing serious legal challenges to the developing world whose legal systems are traditionally more conservative. Likewise, the wave of economic liberalization that swept the developing world in the early nineties under the auspices of the IMF and World Bank Structural Adjustment Program policies has led to increased direct foreign investment which, in turn, has socially altered the demographic figures between the locals and foreigners. In the result, racial tensions which were perhaps hitherto at insignificant levels are only bound to emerge and increase as is the case in economies with significant cultural diversity such as the United States of America, Canada, the United Kingdom, and the like. In dealing with these new challenges, as will shortly be demonstrated, the need for some action with respect to the law regarding freedom of expression, whether in the form of further regulation, deregulation, or a general review, cannot be overemphasized.

Indeed, only two years ago, Uganda's commitment to the promotion of freedom of expression was seriously tested when some women activists attempted to stage the *Virgina Monologues*, a play that portrays women suffering but which was also said to glorify lesbianism and homosexuality. Not long after the banning of the staging of the play in its original form by the Media Council, yet another challenging test to Uganda's commitment to freedom of expression presented itself. In what has since earned itself the tag "Mabira Demo," environmentalists mobilized a massive demonstration on Kampala streets against the intended sale of Mabira forest to Sugar Corporation of Uganda Ltd (SCOUL). The company is co-owned by the government and the Metha family who were meant to destroy it and use the land for sugar cane cultivation. Suffice to note that the Metha family is of Indian origin. Although the Mabira issue has not received significant academic attention with respect to its link to freedom of expression, this part of the working paper examines whether some of the seemingly racially motivated hate speech expressed during the demo was within the acceptable forms of free expression. In the same connection, the discussion seeks to examine whether the ban of the *Vagina Monologues* by the Media Council could have been justifiable under any acceptable limitations to the freedom of expression.

#### **4.1    *The Vagina Monologues***

According to Apollo Makubuya, the Media Council was justified in banning the staging of the play because its message was offensive to Uganda's public interest:

*I form the considered view that the decision of the Media Council in asking the organizers to expunge offending material [particularly on lesbianism, prostitution, obscenity] was proper and lawful with the provisions of Article 43 (1) of the Constitution and the Press and Journalists Act. I consider the offending parts to fall within the acceptable legal exceptions of freedom of expression. This is essentially because every society has a threshold or a bottom line of acceptable standard/behaviour, values or morals.<sup>68</sup>*

Makubuya could well be right in his above-expressed view – especially in view of the fact that every country determines for itself the parameters of its public policy. Regrettably, his analysis fails to provide any guidance as to how such alleged threshold ought to be determined. As noted in the previous parts of this paper, there are fairly well settled principles for the determination of the constitutionality of any limitation on any fundamental right in a free and democratic society. The mere fact that "every society has a threshold or bottom line of acceptable standard/behaviour, values or morals" cannot per se warrant

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<sup>68</sup> Makubuya, 2005 at 170.

the limitation of fundamental freedoms under Article 43 (1) of the Ugandan Constitution.

The extent to which Makubuya would like us to allow intrusive regulation of freedom of expression in the promotion of national public policy/morality invites a number of questions. For instance, can mere speech, however abhorrent it may be, be the subject of a constitutional limitation? Or, differently put, as Counsel Cleary commenced his submissions in *R.A.V. v. City of St. Paul*: to what degree does abhorrence of anything justify banning free expression on it?<sup>69</sup>

To be precise, the argument that the staging of the *Vagina Monologues* posed a threat to Uganda's public policy/morality certainly fails to recognize the compelling proposition already noted herein above that human beings operate with significant, persistent perceptual biases that skew their interaction with information. In other words, it would be quite speculative to conclude that the mere granting of free expression on any 'abhorrent matters'—be it lesbianism or homosexuality—would necessarily promote such abhorrent practice. In any case, as Professor Jjuuko rightly observes, the Media Council's finding that the glorification and promotion of prostitution and lesbianism would be contrary to Uganda's law is not only wrong but also largely speculative. Thus, he states:

*the Media Council finds that the content promotes acts and ideas that offend Uganda's policies and laws, **without stating precisely what these "policies and laws" are and without demonstrating how the play actually promotes these acts and ideas.** The Council also mentions in the same breadth "cultural values" and "public morality." It also mentions the "glorification" and "promotion" of prostitution and lesbianism which is contrary to the laws of Uganda. **It is not clear whether it is the glorification and promotion of these activities that are contrary to the laws, or prostitution and lesbianism which are.***<sup>70</sup>

The claim that the granting of free expression on proscribed matters is likely to produce socially counterproductive results is a dangerous invitation to unjustifiable intrusion on freedom of expression. Suppose, for that matter, a law proscribing any debate on polygamy in the United Kingdom because polygamy is outlawed in that country. It would be a formidable stretching of the mind to imagine that the reason polygamy is not practiced in the UK is mainly because people do not know much about it? Or imagine a law proscribing any speech on terrorism in the United States because of the passionate resentment of the phenomenon by Americans as a consequence of the 9/11 attacks.

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<sup>69</sup> See Transcript of Oral Argument, *R.A.V.* (No. 90-7675), 1991 WL 636263, at p.3. Also cited in Hartley, at 1.

<sup>70</sup> Jjuuko, 2005 at 174. Emphasis added. Also see the ruling reproduced at 161 – 164.

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Proscription of free expression, as opposed to conduct, on any matters, however abhorrent, cannot be consistent with the values of a free and democratic society largely because so to do would likely have the effect of influencing public debate. The principle of equal liberty of speech, which precludes government from attempting to influence public debate on the basis of the presumed “social utility of speech”<sup>71</sup>, requires that all speech, whether favorable or not, abhorrent or popular, ought to be treated alike. Whatever the public policy or morality of Uganda, the Media Council needed to draw a nexus between the staging of the play and the likelihood of infringing the policy or morals in issue. Absent of a demonstration of proximity between the staging of the play and the infringement of such values, the conduct of the Media Council can only be described as arbitrary and constitutionally unjustifiable.

The fact that the Media Council would do such an incompetent job raises questions about the very justification for its establishment. Section 9 of the Press and Journalist Act, which provides for the functions of the Media Council states as follows:

The functions of the Council shall be:

- (a) to regulate the conduct of and promote good ethical standards and discipline of journalists;
- (b) to arbitrate disputes between
  - i) the public and the media; and
  - ii) the state and the media
- (c) to exercise disciplinary control over journalists, editors and publishers;
- (d) to promote, generally, the flow of information;
- (e) to censor films, video tapes, plays, and other related apparatuses for public consumption; and
- (f) to exercise any function that may be authorized or required by any law.

The second clause to the section, which grants the powers to ban, states:

“In carrying out its functions under subsection 1 (e) the Council may refuse a film, video tape or apparatus to be shown, exhibited or acted for public consumption”

The functions of the Media Council, as noted above, do not raise as much controversy as the nature of the entity itself. The issue is not really whether the media should be regulated or not. The issue, however, is how such regulation ought to be conducted. More specifically 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

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<sup>71</sup> Hartley, *supra.*, at 14.

another entity established by the government (Parliament). The problem with the notion of governmental regulation of the media, as Jjuuko instructively notes, is that “It tends to represent the authoritarian normative theory on media performance; it certainly rejects the social responsibility theory that entails self-regulation of the media.”<sup>72</sup> Indeed, as examples from other democracies suggest, media regulation is largely recognized as an exclusive responsibility of the media itself in the exercise of its right to self-regulation. Only about a year ago, the parliament of Swaziland successfully rejected government attempts to establish a media council for the regulation of that country’s media. In a report to attempts by the responsible ministry to establish a government controlled media council, the Portfolio Committee of the Public Service and Information Ministry warned the ministry against piloting such a law. Its report was aptly summed up: “In its report to Parliament submitted on 19 July, the committee felt that despite the 10-year delay in setting up the MCC, the media should still be allowed to establish the MCC on their own without government’s threats or interference, as per the recently adopted government media policy and the country’s constitution.”<sup>73</sup>

#### **4.2 *Hate Speech and the Mabira Forest Demonstration***

A demonstration that started peacefully soon erupted into running fights and confrontations between Police and demonstrators, and led to the loss of some lives. Most people who witnessed or read about the demonstration in the papers are likely to only recall the deaths that occurred, the targeting of Indians by the demonstrators, the closing of Indian shops and the arrest of some of the prominent mobilizers who included members of parliament. Critical but unlikely to be recalled was the nature of communication (the posters especially) which were shown alongside the stories. Words such as “Do you want another Amin?,” and “Amin was right!” will ring a poignant bell. In casting themselves as such, several among the demonstrators showed that they had directed their anger against Ugandans of Indian origin for the unrelenting desire by SCOUL (which is Indian owned) to take and destroy Mabira Forest for the sole purpose of sugar cane farming.

A number of the expressions made during the now infamous Mabira Demo call for close constitutionality scrutiny. The question to be asked is: would the expressions made against

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<sup>72</sup> Jjuuko, *supra.*, at 180. See accompanying text to footnote 14.

<sup>73</sup> International Freedom of Expression Exchange, “Parliament Rejects Government Move to Impose Media Regulation”. July 27, 2006. Accessed at: <http://www.ifex.org/fr/content/view/full/75952>. Last accessed on Sept. 24, 2007. Other jurisdictions have equally rejected notions of government interference/involvement in media regulation in favour of self-regulation by the media itself. Examples include Tanzania, Zambia and Costa Rica. See Jjuuko *op.cit.*

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the Indian community of Uganda such as “Mehta do you want another Amin”<sup>74</sup>, and “Asians should go”<sup>75</sup> constitute proscribable hate speech? The question is of importance both with respect to the domestic situation, but also on account of the heightened sensitivity of the International Community to this question in light of the genocide in Rwanda and the role of *Radio Television Libre des Mille Collines* (RTL). Indeed, the International Criminal Tribunal in the case of *The Prosecutor v. Nahimana et al* (2003) ruled that speech promoting ethnic hatred falls beyond protected speech and constitutes a crime against humanity of persecution.

Hate speech, as Orentlicher defines it, “connotes speech that incites its audience to racial discrimination or hatred, even when it does not entail incitement to violence.”<sup>76</sup> According to ICTR’s Trial Chamber’s judgment in *Nahimana*, “[Hate Speech] creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.” Hate speech, according to *Nahimana*, is not dangerous in the sense of inciting violence, but by virtue of its impact on the victims.

*... the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence.*<sup>77</sup>

The history of Indians in Uganda suffered a most unfortunate turn during the Amin regime when they were ruthlessly expelled from the country. In being targeted as Indians, Asians of Indian origin suffered extreme discrimination. With the overthrow of Amin, the government of Uganda took remedial measures which, among others, included the enactment of a law that provided for their right to return, compensation for property lost, and repossession of the existing properties.<sup>78</sup> Against that background, one wonders whether the utterance of threats reminiscent of the suffering when they were discriminated against, would not amount to proscribable hate speech.

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<sup>74</sup> See The Daily Monitor, Friday April 13, 2007 at p. 3.

<sup>75</sup> See The New Vision, Friday April 13, 2007 at p. 2.

<sup>76</sup> Orentlicher, at [http://www.wcl.american.edu/hrbrief/13/hate\\_speech.pdf?rd=1](http://www.wcl.american.edu/hrbrief/13/hate_speech.pdf?rd=1). Last accessed on September 20, 2007.

<sup>77</sup> *Nahimana*, ICTR-99-52-t at J. 1072. Also cited in Orentlicher, *ibid.* 3. However, it must be noted that for the crime against humanity of persecution to apply, the general social context/environment must be taken into account. The more volatile the social context is, the more likely hate speech will be viewed as a crime against humanity of persecution.

<sup>78</sup> The Expropriated Properties Act, Cap 87.

The Uganda Penal Code Act provides no clear provision for what would amount to hate speech in other jurisdictions. The closest to hate-speech proscription provision in the Uganda Penal Code is the offense of sectarianism, but it cannot suffice. The offence of sectarianism is committed when a person prints, publishes, makes or utters any statement or does any act which is likely to: a) degrade, revile, or expose to hatred or contempt; b) create alienation or despondency of; c) raise discontent or disaffection among; d) promote, in any other way, feelings of ill will or hostility among or against, any group or body of persons on account of religion, tribe or ethnic or regional origin. To begin with, the section is too broad to withstand a constitutionality scrutiny with particular respect to the principle of proportionality. Such terminology as “ill will”, “discontent”, “disaffection”, and “contempt” are too broad, vague and, indeed, flimsy to justify the limitation of a fundamental right. Secondly, the section recognizes only a limited range of categories of identifiable groups, which, for instance, excludes race, nationality *et cetera*.

In the United States, where the debate on hate speech has been common since the end of the slave trade, the jurisprudence on the matter is quite extensive. In *Virginia v. Black*,<sup>79</sup> where the court considered the constitutionality of the act of cross-burning, a form of expression historically associated with hatred against black people by sections of the white race, the U.S. Supreme Court reasoned that not all acts of cross-burning were unconstitutional, since to do so would be too broad and in violation of the equality principle. In rejecting the argument advanced by the State of Virginia that cross burning can have but one intent—the intent to intimidate, the court noted that cross burning is sometimes engaged in with other intentions such as the communication of an ideology, though an ideology of hate. Even upon the conclusion that cross-burning is a symbol of hate, the court carefully proceeded to rule that only when it is engaged in with the intent to intimidate should it be proscribed. On what amounts to that intent, the court noted:

*(i)ntimidation in the constitutionally proscribable sense of the word is a type of true threat requiring proof that the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.*<sup>80</sup>

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<sup>79</sup> [2003] 538 U.S. 343.

<sup>80</sup> *Id.*, at 359-60.

## *Freedom of Expression in Uganda*

Viewed differently, as Hartley rightly notes, *Black* is commendable “for its implicit reaffirmation of the speech-protective principle that even when speech can be regulated because it creates a substantial evil such as intimidation, the state may not suppress it merely because it has that tendency.”<sup>81</sup> In defence of its selective proscription of particular forms of cross-burning, the court hastened to add that that particular expression was singled out because of its historically established recognition as “a particularly virulent form of intimidation”.<sup>82</sup>

In Canada, section 319 (1) of the Criminal Code provides for incitement to hatred. The offence is committed when one incites hatred against any identifiable group by communicating statements in any public place, where such incitement is likely to lead to a breach of the peace, or (2) where one, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group. As explained by the Canadian Supreme Court in *Mugesera v. Canada (Minister of Citizenship and Immigration)*,<sup>83</sup> the section creates two distinct offences: “Under subsection (1), the offence is committed if such hatred is incited by communication, in a public place, of statements likely to lead to the breach of peace.”<sup>84</sup> On the other hand, the second offence under subsection (2) is committed only by willfully promoting hatred against an identifiable group through the communication of statements other than in private conversation.

Applied to the Mabira forest demonstration expressions, one wonders whether, especially in light of the already-noted unfortunate history of the people of Indian extraction in Uganda, such expressions did not offend the constitutionality principles of free expression in a free and democratic society. Whereas it is not within the scope of this paper to make free expression determination in respect of the Mabira forest demonstration, it will suffice to contend that the immediately foregoing exposition makes a compelling case for a review of the media laws of Uganda especially in the wave of the blossoming of the media industry.

### **4.3 A Case for New Regulations on Freedom of Expression**

The foregoing analysis has focused principally on three issues affecting freedom of expression in Uganda. First, the archaic provisions in our statute books that continue to defy and retard the democratization process in the country, an example of which is the Sedition law; second, as evidenced through the analysis of the performance of the Media Council, the weaknesses of the regulatory mechanisms employed in the regulation

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<sup>81</sup> Hartley, *supra.*, at 4.

<sup>82</sup> [2003] 538 U.S. 363.

<sup>83</sup> [2005] 2 S.C.R. 100.

<sup>84</sup> *Id.*, para. 100.

of the media; and, third, as examined through the analysis on the Mabira demo and the *Vagina Monologues*, the new and emerging challenges fuelled by globalization which call for corresponding new prescriptions. Whereas comprehensive purging of the statute books could redress the first challenge, revision of the relevant laws with a view to providing prescriptions for the new social challenges will be instrumental in redressing the second and third challenges. Most of all, ample regard to the Constitution, must form the baseline principle in the meaningful transformation of the legal regime on freedom of expression.

## V. CONCLUSION

The role of freedom of expression to the democratization process cannot be overemphasized. For fledgling democracies, the challenges remain high, as the principles that govern the proper regulation of the right to freedom of expression are subtle and ever difficult to exhaust. In Uganda, where the provisions of the Constitution and the legislative provisions affecting freedom of expression remain in tension, attainment of a reasonable standard of enjoyment of the right in issue is some distance from realization. The measure of the true enjoyment of freedom of expression is not the number of media houses in a given country, but the existence of an enabling legal regime and an appropriate political climate for free expression.

Moreover, while the campaign for the increased deregulation of the right to freedom of expression ought to continue unimpeded, note has to be taken that sight of acceptable limitations for the proper functioning of society ought not be lost. While the banning of the staging of the *Vagina Monologues* reminds us of how far we are prepared to embrace true freedom of expression, which should not be mistaken with the promotion of favorable views, the expressions targeted at the Indian community that were made during the Mabira Demo should awaken us to the lurking dangers of unbounded freedom of expression.

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