

**THE PROBLEMATIQUE OF ECONOMIC,  
SOCIAL AND CULTURAL RIGHT IN  
GLOBALIZED UGANDA:**

*A CONCEPTUAL REVIEW*

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**ISBN 9970-511-02-4**

**HUR�PEC Working Paper No. 3**

**March, 2007**

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## ACKNOWLEDGMENTS

This working paper—the first under HURIPPEC’s Economic, Social and Cultural Rights Project—is the product of several reviews, including a number of in-house workshops, culminating in the November 16 and 17, 2006 conference attended by several scholars, activists and policy makers. I am grateful to the Ford Foundation for providing the financial assistance to the project, and particularly to Dr. Willy Mutunga for his enthusiastic support. Rose Ssendendo provided the research background to the study.

We also thank the Uganda National Council for Science and Technology for providing the research permissions.

## SUMMARY OF THE REPORT

Uganda is largely considered a trailblazer in the debate about poverty eradication. Indeed, one of the most striking features of contemporary Ugandan society is the considerable rhetoric devoted to social and economic issues. However, the rhetoric is not matched by a deep-rooted and engaged policy framework within which questions such as the persistence of poverty, the consequences of socio-economic marginalization and the improvement of equality of opportunity can be comprehensively tackled. That absence is clear in the lack of sensitivity to the human rights dimensions of the phenomenon—whether in the Poverty Eradication Action Plan (PEAP) or in the approach to the realization of the UN Millennium Development Goals (MDGs). The implications of this mismatch between rhetoric and practice are obvious. Among them, one could cite the absence of a culture of accountability, coupled with the perception that government actions in terms of providing safe water, education for all, or appropriate health facilities are gifts or privileges and not rights.

This study—the first of nine in the HURIPPEC Economic, Social & Cultural Rights (ESCRs) Project—provides a broad overview to the current situation of these rights in Uganda. It argues that the problem is not merely the fact that this category of rights is largely neglected in comparison to the attention that has been given to civil and political rights (CPRs), but also that when economic, social and cultural rights issues are addressed, there is an absence of a critical focus on questions such as access, accountability or appropriate mechanisms of redress. The study takes the issue of gender equality as the ‘mother of all rights’ in order to demonstrate that despite the considerable legislative and other reforms that have been pursued over the last two decades, there is an acute policy and implementation vacuum in this particular area of social concern. An assessment is also made of the key institutional mechanism involved in the formulation of policy on ESCRs, namely the legislature. Further assessments are made of the Uganda Human Rights Commission (UHRC) as well as of the Inspectorate of Government.

The paper concludes that attention to ESCRs in Uganda is still rudimentary and in need of radical reformulation. In particular it argues that:

- (i) There is a need to revisit present approaches to the attainment of the MDGs and to the eradication of poverty which are lacking in sensitivity to core human rights principles and to transform them into mechanisms that will effectively address issues such as discrimination, inequality and social vulnerability;
- (ii) An opportunity has been opened through the amendment to the 1995 Constitution which stipulates that the National Objectives and Directive Principles of State Policy shall bind the state. The amendment has effectively transformed guiding principles on medical services, access to water, the provision of adequate shelter and housing and the right to food, among others, into binding obligations on the part of the state;

- (iii) Despite the positive achievements enshrined in the 1995 Constitution on Gender Equality, there remain several impediments at the national and local levels to its effective implementation, and with specific regard to the economic, social and cultural rights of women. New strategies addressed to the achievement of gender equality need to be adopted at all levels of state action;
- (iv) All government ministries and related state agencies involved in the provision of basic social and economic services need to study the Human Rights Based Approach to Development (HRBAD) and to begin a process of consciously applying it to their various activities, at both the policy level and at the stage of implementation;
- (v) Parliament and its various committees must conduct human rights audits of the bills, resolutions and other measures introduced by the state in order to ensure that they do not violate economic, social and cultural rights;
- (vi) The arena of decentralization is particularly crucial to the implementation of ESCRs, and as such, there is a need for the design of appropriate mechanisms to ensure that this category of rights is given serious attention;
- (vii) Public Interest Litigation (PIL) needs to be pursued in earnest in order to address the many negative consequences of unchecked economic reform, and to ensure that ESCRs are transformed from the status of 'gifts' of the state to basic entitlements for the population;
- (viii) Steps should be taken to compel the government to meet its international reporting obligations, and specifically to submit its first report to the Committee on Economic, Social and Cultural Rights, which is long overdue, particularly in light of the fact that the government ratified the International Convention on Economic, Social and Cultural Rights (ICESCR) in 1987;
- (ix) Human Rights and development groups need to become more intimately involved in pursuing rights-based approaches to the realization of ESCRs, and in the design of activist and empowering strategies for civil society at large;
- (x) Different strategies need to be adopted with respect to different categories of rights, i.e. strategies taken for the implementation of the right to adequate shelter and housing need not be the same as those employed with respect to the realization of the right to water, and,
- (xi) Public institutions such as the Uganda Human Rights Commission (UHRC) and the Inspectorate of Government (IG) need to boost and improve their strategies in relation to the realization of ESCRs and particularly to ensure that they engage with districts and local councils in promoting their effective realization.

## LIST OF ACRONYMS/ABBREVIATIONS

ACHPR	African Charter on Human & Peoples' Rights
CA	Constituent Assembly
CEDAW	Convention on the Elimination of All Forms Discrimination against Women
CESCR	Committee on the Covenant on Economic, Social and Cultural Rights
CLMAs	Community Land Management Associations
CRC	Convention on the Rights of the Child
CSIs	Capable States Indicators
DANIDA	Danish Agency for International Development Assistance
DDGG	Donor Democracy & Governance Group
DFID	Department for International Development (UK)
DRB	Domestic Relations Bill
ESCRs	Economic, Social and Cultural Rights
GDI	Gender Development Index
GDP	Gross Domestic Product
GNI	Gross National Income
GoU	Government of Uganda
HDI	Human Development Index
HIPC	Highly Indebted Poor Countries Initiative
HRBAD	Human Rights Based Approach to Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFIs	International Financial Institutions
IG	Inspectorate of Government
IMF	International Monetary Fund
JLOS	Justice, Law & Order Sector
JSC	Judicial Service Commission
LCCs	Local Council Courts
MDGs	Millennium Development Goals
MOJCA	Ministry of Justice and Constitutional Affairs
MOLG	Ministry of Local Government
MWLE	Ministry of Water, Lands & Environment
NEMA	National Environment Management Agency
NFA	National Forestry Authority
NOPSP	National Objectives and Principles of State Policy
NRM/A	National Resistance Movement/Army
NSSF	National Social Security Fund
PEAP	Poverty Eradication Action Plan
PLWHAs	People Living with HIV/AIDS
RTD	Right to Development
SCLCs	Sub-county Land Committees

SDIP	Social Development Sector Strategic Investment Plan
SSA	Sub-Saharan Africa
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UPE	Universal Primary Education
UPPAP	Uganda Participatory Poverty Assessment Process
UNDP	United Nations Development Program
UNICEF	United Nations Children's Fund
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
WHO	World Health Organization

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## I. INTRODUCTION

One does not have to read very far in order to grasp the celebratory note in the recent report that Uganda is well on its way to reaching the first Millennium Development Goal (MDG) of halving poverty by the year 2015.<sup>1</sup> Uganda is listed among Africa's 14 'high performers'<sup>2</sup> and the most recent development indicators released by the World Bank paint an interesting picture of the status of economic growth in the country.<sup>3</sup> GDP growth stands at 5.6%, compared to a Sub-Saharan African (SSA) average of 5.1%, while GDP per capita growth stands at 2%, in comparison to the 2.9% registered for SSA as a whole. On the other hand, GNI per capita stands at US\$250, against a SSA average of US\$600.<sup>4</sup> In comparison to other African countries, Uganda's performance could be described as good, albeit unspectacular, especially when placed against countries such as Mozambique, Angola, Liberia, Rwanda and Sierra Leone, all of which have experienced momentous social and political upheavals in a similar manner to Uganda, but have nevertheless registered significantly higher rates of growth over a similar period of time.<sup>5</sup> At the same time, Uganda has a total external debt (as a percentage of GDP) of 71, which far exceeds the SSA average of 45, and is telling testimony to the influence of external sources of financing on this 'boom.'<sup>6</sup> The evolution of Uganda's human and gender development over the last 16 years is summarized in the following table:

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<sup>1</sup> See, 'Uganda to Halve Poverty,' *New Vision*, November 1, 2006, at 1. Also see, 'Uganda Progressing in Millennium Goals,' *New Vision*, October 17, 2006 at 43.

<sup>2</sup> The continent's 'high performers'—countries which have registered growth rates of above 5 percent since the late 1990s—are listed as: Angola, Botswana, Cape Verde, Chad, Equatorial Guinea, Liberia, Mali, Mauritania, Mozambique, Rwanda, Sierra Leone, Sudan, Tanzania and Uganda. See World Bank (2006) at 1 and 20.

<sup>3</sup> *Id.* at 25.

<sup>4</sup> If South Africa and Nigeria are excluded from the data-set, the average drops to US\$390.

<sup>5</sup> Annual growth rates for each of these countries since the late 1990s stood at 6.4%, 8.4%, 8%, 6.2% and 6.7% respectively, in comparison to Uganda's 5.7% over the same period. Of course, oil counts for a greater percentage of the performance of countries like Chad and Angola, but neither Rwanda nor Mozambique are yet oil-producing countries.

<sup>6</sup> It is also important to note that in 2005, for the first time since they were introduced, Uganda entered the category of middle human development countries, with an index of 0.508 and at a rank of 144 (UNDP, 2005). On the influence of aid, see Hesselbein, *et al.* 2006, at 12-13.

*The proportion of the population living in poverty is also much higher in some areas of the country than in others, suggesting that the process of poverty alleviation has been highly uneven, both geographically and sectorally.<sup>8</sup>*

Chronic poverty—the condition that afflicts 20% of the population and represents a situation in which one is born into poverty and is most likely to pass it on to one’s successors—has also not witnessed significant change, with 7 million people falling into this category. Vulnerability, which means suffering a decline in wellbeing, is likewise a resilient problem. Inequality has correspondingly worsened.<sup>9</sup> In other words, despite the impressive economic reforms that have taken place over the last several years, the situation regarding poverty alleviation is problematic. Several groups in Uganda fall completely under the radar and live an existence that starkly contrasts with even that of the majority poor. To compound matters, Barkan points out that there is an insidious pattern to Uganda’s poverty situation:

*Thus, while the proportion of the population living in poverty across the South and in the West is now roughly 27 percent, the percentage across the North is 63 percent, while the percentage in the East is 46. Fifty percent of all agriculturalists, the largest single occupational group that accounts for 74 percent of the population live in poverty. These figures suggest that Uganda’s economic “miracle” has benefited some ethnic groups far more than others, a fact that sows the seeds of potential conflict along ethno-regional lines.<sup>10</sup>*

A number of communities are particularly afflicted by the prevailing socioeconomic environment. For example, the Batwa of south-western Uganda have suffered marginalization, discrimination and neglect under successive regimes of governance. Their right to education is non-existent. According to Eunice Musiime, *et al*, as of 2004, there were only seven Batwa students in school.<sup>11</sup> The right to health care is an illusion for most Batwa.<sup>12</sup> Karamoja region has been the focus of special neglect since the colonial era, and as such is in the lowest category with respect to poverty levels, access to health, literacy rates

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<sup>8</sup> Barkan, 2005 at 10.

<sup>9</sup> Ssewakiryanga points out that the Gini coefficient rose markedly from 0.39 to 0.43 between 2000 and 2003. See Ssewakiryanga 2005 at 30.

<sup>10</sup> Barkan, *op.cit.*, at 10. See also Shaw & Mbabazi 2004, at 17-21.

<sup>11</sup> Musiime, *et al.*, 2005.

<sup>12</sup> *Id.*

## TABLE ONE

### UGANDA'S HUMAN & GENDER DEVELOPMENT PERFORMANCE (1989-2005)

YEAR	HDI*	RANK***	GDI**	RANK***
1989	0.354		N/A	N/A
1990	0.204	134/160	N/A	N/A
1991	0.192	133/160	N/A	N/A
1992	0.194	146/173	N/A	N/A
1993	0.272	154/173	N/A	N/A
1994	0.329	158/174	N/A	N/A
1995	0.327	155/174	0.318	119/174
1996	0.328	159/175	0.318	132/175
1997	0.340	160/174	0.331	145/174
1998	0.404	158/174	0.397	131/174
1999	0.409	158/174	0.431	130/174
2000	0.435	141/162	0.428	125/162
2001	0.444	150/173	0.437	125/173
2002	0.489	147/177	0.483	117/177
2003	0.493	146/177	0.487	113/177
2004	0.508	144/177	0.502	109/177
2005	0.502	146/177	0.479	114/177

**Source: UNDP** Human Development Reports, 1990-2005

\*HDI = Human Development Index

\*\*GDI = Gender Development Index, applied since 1995

\*\*\*Ranking = out of all countries surveyed

What does all this have to do with human rights? The fact is that despite the many strides that have been made in Uganda since the rise to power of the National Resistance Movement/Army (NRM/A) twenty years ago, the experience since 1986 confirms the point that while a country may indeed be growing at a tremendous pace, a significant proportion of the population may not, as a matter of fact, share in the benefits of such growth.

A number of indicators demonstrate that despite the rosy picture portrayed in the statistics, serious problems still abound. For example, although the number of persons living under the poverty line in Uganda is progressively decreasing,<sup>7</sup> the state of inequality in the country, i.e. the difference between rich and poor, as well as regional differences in poverty statistics, have been on the rise. In the words of Joel Barkan,

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<sup>7</sup>The World Bank confirms the poverty headcount ratio at national poverty line as 38%, which is a drop from the 34% reached in the late 1990s. See World Bank 2006a at 109. Latest figures indicate that the number has dropped to 31.1%. See Peter Kauju & Alice Kiingi, 'Ugandans Less Poor—Report,' *New Vision*, December 5, 2006 at 1.

## **1.1 Globalization and the Paradoxes of Economic Reform**

Since the end of the Cold War, Globalization has been in triumphant mood. It has vanquished Communism and is making advances in rendering the state irrelevant, or to put it in 'global-speak,' to achieve the total *villagization* of the world. Globalization consists of the breaking down of state borders in order to allow the free movement of finance, trade, production and certain categories of labour.<sup>19</sup> But the flow of these new forces has been uneven, just as the benefits have not been equally shared. While western industrial countries and a few newly-industrialized states such as Brazil, China and India are witnessing a spurt in growth, many others—particularly on the African continent—are stagnating even further. Such stagnation has many consequences for both the attempts at poverty reduction as well as for the overall improvement in economic, social and cultural rights.

Despite being one of the main proponents of the idea that growth spurs poverty reduction, even the World Bank is aware that economic growth alone is not enough:

*The poor have been ill equipped to participate in and benefit from the growth that has taken place in the (African) region. Women in particular have suffered from the inability to own assets and from discrimination in economic activity. In short, growth alone will not be enough to achieve the MDGs in Africa.*<sup>20</sup>

The Bank report pinpoints five key factors that need to be combined with positive economic growth in order to achieve the United Nations MDGs,<sup>21</sup> viz., making agriculture more productive and sustainable; connecting poor people to markets; enhancing human development; getting services to poor rural populations, especially to women, and using natural resource rents well.<sup>22</sup> There is no doubt that all these factors are crucial to both the achievement of the MDGs as well as to the realization of a higher level of more sustainable economic development. Nevertheless, with the possible exception of the reference to human development and to services, the list is tellingly silent on the obvious human rights dimensions to each of the key factors given. Moreover, even as it speaks to issues of health and education as component parts of the focus on human development, the report does not see these as rights as such, nor does it refer to the key elements of a rights approach (an appropriate legal framework, non-discrimination, and equality of treatment) that would make such an approach different from those which have dominated development policy and practice since the 1960s.

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<sup>19</sup> De Feyter, 2005 at 7.

<sup>20</sup> World Bank, 2006, at 11.

<sup>21</sup> See section 2.2, *infra*.

<sup>22</sup> *Id.*

and access to clean water and housing,<sup>13</sup> not to mention the other well-known problems relating to conflict and dispossession.<sup>14</sup>

The Benet of Kapchorwa<sup>15</sup> who were forcibly resettled from their traditional homelands in what was once Bugisu district have likewise been the subject of continuous marginalization and bureaucratic maladministration. According to Moses Muanga—chairman of the Benet lobby group—Universal Primary Education (UPE) is unheard of. The chairman lamented that his people were too poor to construct their own schools. The resettlement process left them without any compensation.<sup>16</sup> Native Benet lament that during the resettlement, the majority Sabinu dominated the process at the expense of the targeted historical inhabitants. As a further consequence of this marginalization, non-Benet now outnumber the Benet and during elections take up most of the powerful and influential positions.<sup>17</sup> In all, the Benet feel marginalized; they need permanent structures to call home, social services to compliment their hard work and recognition of their existence as a distinct people. Women at risk, refugees, internally displaced persons and street children are also groups that suffer considerable neglect and exploitation.

The point is that just as the return to democracy in a country does not unavoidably improve the promotion and protection of civil and political rights, neither does economic growth *per se* automatically improve the status of economic, social and cultural rights, such as the right to an adequate standard of living, the right to health, the protection of the rights of ethnic minorities, or the right to clean water. The automatic correlate between the eradication of poverty and the respect for human rights is disproved by countries as different as China and the United States of America.<sup>18</sup> It is this paradox which lies at the heart of the investigation in this study.

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<sup>13</sup> UHRC, 2004 at 100-104. The UHRC states, “Poverty as we know it pervades Karamoja in all dimensions, manifesting itself by indicators like insecurity, high mortality and morbidity rates, poor diet and nutrition, lack of access to health services, inadequate housing, low literacy levels and food insecurity, and generally inadequate standard of living.” *Id.*, at 100.

<sup>14</sup> The most recent attempt to solve the so-called Karamoja Question, which involved forcible disarmament by the UPDF, has ended in catastrophe. See YatMan Cheng, ‘Karamoja: Aiming Wide Off the Mark,’ *Daily Monitor*, November 24, 2005 at 12.

<sup>15</sup> The area occupied by the Benet lies in the South of Kapchorwa District mostly in Kween, in present day Benet Sub-county and Kwoti parish of Kaptanya Sub-county of Tingey County between Rivers Kere and Kaptokwoy in the East and West respectively. It borders the Mt. Elgon National Park in the South, which was originally a forest reserve but was upgraded to a national park in 1992/1993. See, Uganda Land Alliance, “Stand Up for the Land Rights of the Benet Community,” *Daily Monitor*, September 25, 2006, at 16.

<sup>16</sup> Contrary to the provisions of even the 1967 Constitution and the situation has not been remedied to date.

<sup>17</sup> *Id.* For example, there is no Benet on the Executive Council.

<sup>18</sup> China’s spectacular growth rate of more than 10% per annum over the last several decades, has not markedly improved the human rights situation in the country, while the United States—boasting the world’s largest economy—has the highest human poverty among the 17 high income OECD countries in the Human Poverty Index. See HDR 2004.

the highly indebted poor countries (HIPC) initiative, which conditioned debt relief on the application of the monies saved to these areas. It is a twist on the assumption that by improving conditions for economic growth, not only will poverty be reduced, but the promotion and protection of human rights will also be secured. While it is possible to agree that investing in these sectors will certainly help in the achievement of the MDGs, they will do little to fully empower the poor in order to ensure that they escape poverty, or that (even as they grapple with the poverty in which they are mired) their rights are not trampled underfoot on account of their social status.

Although Uganda's HIPC program is often lauded "...as an international flagship for participatory governance, economic, growth, and approved debt disbursement,"<sup>29</sup> many lacunae still remain. For example, since the introduction of the policy of Universal Primary Education (UPE) in 1997 and the considerable increase in resources directed to this sector, the government is yet to fully articulate what rights parents, students, teachers and the Community have with regard to both their influence over and participation in the execution of the policy.<sup>30</sup> The same applies to the health sector. With particular respect to the area of HIV/AIDS—which has arguably received the highest amount of government and donor resources next to UPE—the rights of people living with HIV/AIDS (PLWHAs) are yet to be comprehensively addressed and enshrined within a cogent policy framework.<sup>31</sup> Uganda receives considerable praise for its position on the rights of women and other social minorities, and yet the legal framework to cover the equal opportunities guaranteed in the Constitution has been the slowest in evolution.<sup>32</sup> In a nutshell, there is still a great deal of distance to walk in order to match the rhetoric of the government in actually creating conditions in which economic, social and cultural rights are given due respect and enforcement.

## **1.2 The Scope and Content of the Study.**

This study sets out to answer a number of questions regarding the problematique of economic, social and cultural rights in Uganda. It is largely concerned with the conceptual dimensions of this issue, given that the series of working papers under this project will specifically examine the practical dimensions of the protection of the individual rights of concern.<sup>33</sup>

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<sup>29</sup> Somerville, 2005 at 217.

<sup>30</sup> The recent announcement that UPE is to be made compulsory may be a step in that direction, but we are yet to see the policy itself.

<sup>31</sup> See Kuper, 2005; de Waal, 2006.

<sup>32</sup> The Equal Opportunities Bill was reported to not be ready for the next session of Parliament. See Richard Mutumba & Emmanuel Mulondo, 'House Extends Recess,' *The Monitor*, November 3, 2006, at 5.

<sup>33</sup> The eight working papers in this series cover: UPE and the right to education; the right to water; culture and language rights; land and property rights in Northern Uganda, the right to shelter and housing; the right to food; the associational rights of workers, and the right to health.

Also of interest in the Bank report is what it refers to as the ‘Capable States’ indicators (CSIs). These cover various administrative and political capacities of a country. Uganda’s scores in this regard are all low. For example, the Corruption Perceptions Index (CPI) gives Uganda a score of 2 on a scale ranging from 0 (corrupt) to 10 (clean).<sup>23</sup> On what it describes as ‘voice and accountability,’ Uganda again scores a 2 out of a possible 5; on political stability, government effectiveness, regulatory law, and the rule of law, the scores are respectively: 1, 2, 3 and 2 out of a maximum of 5.<sup>24</sup> The indicators are a subtle reminder that development is not only about statistical data. Indeed the CSIs clearly point to the fact—without the Bank directly admitting it—that civil and political rights are fundamental to the development debate.

Of course, as Rosemary McGee points out in a study of politics, voice and legitimacy in the debate about poverty, issues that are more overtly political are often downplayed by both the government and by donor agencies.<sup>25</sup> McGee points out that the findings of the Uganda Participatory Poverty Assessment Process (UPPAP)—an advocacy vehicle aimed at enhancing knowledge about poverty—are treated selectively. The government is particularly wary about potentially embarrassing and controversial findings on bad governance and corruption.<sup>26</sup> Needless to say, the silence of the report on critical civil and political rights is a telling indictment of both the government and of the Bank.

The silence of the report over issues of human rights is not inadvertent. The Bank—and its Bretton Woods twin, the International Monetary Fund (IMF)—has been rather shy to fully embrace the application of human rights standards to economic development. To the extent that there has been an embrace of human rights, it has taken place within the framework of concern about ‘good governance,’ improving observance of the rule of law, and in the fight against corruption, leading to the evolution of a glossary of technical words such as ‘transparency,’ ‘accountability,’ and ‘participation.’<sup>27</sup> Although these terms are certainly appealing, at core they are nebulous and easily manipulated. As Philip Alston has observed, unless they are rooted in identified standards, their meaning is conveniently open-ended, contingent and too often subjective.<sup>28</sup>

There is also a prevalent belief among the IFIs that by dint of the fact that they are directing increasing finances into sectors such as health and education—coupled with the policies of privatization, liberalization and deregulation—they are actually fostering the realization of these rights. This explains the design of

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<sup>23</sup> The index was developed by Transparency International (TI).

<sup>24</sup> Uganda’s relatively higher score on ‘regulatory law’ reflects the bias in the policies of government since 1986 in pursuing a regulatory framework favourable to investment.

<sup>25</sup> McGee, 2004, at 124.

<sup>26</sup> *Id.*, at 125.

<sup>27</sup> The notion of ‘participation’ in particular has been the subject of gross abuse and misapplication. See Mathews, 2004.

<sup>28</sup> Alston, *op. cit.*, at 760 and 782

The situation is compounded by the fact that the levels of patronage, graft and outright corruption in Uganda are excessively high, while the scourge of presidentialism is particularly acute.<sup>37</sup> The issue of presidentialism is especially important to this analysis because it has numerous implications for the struggle for the realization of human rights in the country—civil and political, and economic, social and cultural.<sup>38</sup> President Yoweri Kaguta Museveni has become the *alpha* and the *omega* of all things governmental in the country. Uganda today exemplifies the situation in pre-revolutionary France, albeit with a little less conspicuous consumption: *l'état c'est M7*. President Museveni has become one of the main obstacles to the more comprehensive enforcement of all categories of rights.<sup>39</sup>

There are many different ways in which the scourge of presidentialism is manifesting itself. With particular respect to the enforcement of economic, social and cultural rights, the President suffers from an unhealthy obsession with 'investors,' whose rights in the existing political context have been raised onto a pedestal where they can do no wrong. At the same time, many investors are responsible for serious human rights violations, ranging from near-slave like conditions of employment, to preventing the unionization of their employees.<sup>40</sup> Several recent scandals—among them the misallocation of public land,<sup>41</sup> the Tristar debacle, the extension of loans to businessman Hassan Basajjalaba, and even the recruitment of former German ambassador Klaus Holderbaum as an 'advisor' on tourism who, although he toured a lot, literally gave no advice—demonstrate the more noxious aspects of this phenomenon. Indeed, the obsession with 'investors' is an offshoot of the phenomenon of globalization which gives pride of place to private initiative and enterprise and balks at any attempts to control or regulate its operation. At the local level, the scourge of presidentialism has manifested itself in the upsurge in expenditure on public administration, ranging from the bureaucracies at the ever-burgeoning districts to the personnel at State House.<sup>42</sup>

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<sup>37</sup> 'Presidentialism' is the phenomenon of the inordinate influence of the person of the President over all matters of governance—economic, social and political—to the extent of eclipsing other state agencies and institutions.

<sup>38</sup> See, inter alia, Carbone, 2005; Oloka-Onyango, 2004. The phenomenon has become so debilitating, it has led to a protest from the Prime Minister, Apolo Nsibambi, even though he attacks the wrong target, i.e. those who turn to the President for solutions, rather than the President who has interjected himself into every sector. See 'Nsibambi Unhappy,' *The New Vision*, November 10, 2006, at 12.

<sup>39</sup> Barkan, op.cit., at.

<sup>40</sup> The SDIP, for example describes as one of "the greatest challenges" the protection of workers. See SDIP, para. 2.19 at 8.

<sup>41</sup> Among the controversial allocations have been the leasing of several thousand acres of the pristine Mabira Forest to the Mehta Group, as well as the island forests of Kalangala to Bidco, not to mention the allocations of Shimoni PTC and Primary School as well as the premises of the Uganda Broadcasting Corporation (UBC) to hoteliers.

<sup>42</sup> For a critique, see Mwenda, 2006a and 2006b.

The following are the broad issues with which this study is most concerned:

- *What is the scope, content and implication of economic, social and cultural rights, particularly in relation to the Ugandan situation?*
- *With particular attention to the issue of equality, to what degree has the equal right of men and women to the enjoyment of all economic, social and cultural rights, actually been achieved?, and*
- *To what extent is the government in Uganda (including the Legislature, the Judiciary and affiliated state organs) committed to the enhanced promotion and protection of economic, social and cultural rights (ESCRs)?*

In answering these questions, it is important to preface the analysis with the point that rights issues of whatever category, are at core a matter of politics, and consequently of relations of power. As such, human rights will often be used selectively and opportunistically. In other words, understanding whether or not and why particular human rights are considered as such and the approach to them is essentially a matter of understanding the political framework within which they are allowed to exist and to operate, or not to.

Uganda's political framework—despite the recent transition to a multiparty system of governance—can best be described as an authoritarian democracy. While on the face of it there are several elements of a democratic regime in place,<sup>34</sup> autocratic and dictatorial behaviour lurks just beneath the surface. The two-faced (or 'Janus') character of the Ugandan state is coupled with what can only be described as an opportunistic approach to legal and institutional mechanisms designed to promote democratic governance in the country. Taken together, these lead to a lack of adherence to many of the basic tenets of constitutionalism, among them respect for the authority of alternative centres of power such as the Legislature and the Judiciary, support to enforceable mechanisms of accountability and the development of effective systems of redress.<sup>35</sup> This has serious implications for the state of economic, social and cultural rights because the link between the political context and the quest for economic development is obvious. In the words of Amartya Sen, "Our conceptualization of economic needs depends crucially on open public debates and discussions, the guaranteeing of which requires insistence on basic political liberty and civil rights."<sup>36</sup> Where these are absent, then it is obvious that the nature of development that follows will be truncated and incomplete.

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<sup>34</sup> Uganda has a relatively free press, there are few restrictions on the rights of organization, expression and association, and there is a fairly robust judiciary.

<sup>35</sup> See Barkan, 2005.

<sup>36</sup> Sen, 1999 at 148.

Privatization—which has been one of the core elements in Uganda’s economic policy over the last two decades—has had a particular impact on the extent to which the rights listed above can be realized and enjoyed by the vast majority of the populace.<sup>49</sup> There can be little doubt that privatization resulted in improved technologies in some sectors, the infusion of investment capital into the country, as well as the increased availability of new products.<sup>50</sup> The downside—a complete audit of which is yet to be conducted—nevertheless led to local industries being wiped out and strategic services being ceded to foreign control (among them electricity, transportation and telecommunications).<sup>51</sup> At the same time, the processes of privatization were accompanied by graft, insider-trading, nepotism and asset-stripping. Corruption was a major vice of the process, reflective of the overall situation in the country.<sup>52</sup>

According to Nyamugasira and Rowden, not only was the process of privatization rushed, but it also increased informal sector activity, led to the employment of expatriates for high-level jobs in preference to indigenous Ugandans and resulted in several violations of a whole panoply of labour rights.<sup>53</sup> At the end of the day, ideology seems to have reigned supreme:

*The total lack of issues pertaining to labour rights and worker security in the design of the PRSC and PRGF suggests that the World Bank and IMF appear ideologically driven in the formation of the labour policy for countries such as Uganda. As with the efficacy of trade protection, domestic subsidies, public transportation, public education, public health care and public utilities, the lending institutions are intent on neglecting the successful history of the industrialization of the First World countries, as well as the Four Tigers of East Asia, as it relates to labour.<sup>54</sup>*

With respect to what were previously regarded as public goods (such as health services, utilities and education), the role and obligation of the state has witnessed considerable retraction. The issue of electricity tariffs represents the most recent manifestation of a problem with far-reaching implications for the enjoyment of economic, social and cultural rights.<sup>55</sup> Not only did the private electricity supplier (*Umeme*) raise its rates by a factor of 40%, they ignored a presidential directive to reduce them. What this means is that in an environment where social

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<sup>49</sup> See Nyamugasira & Rowden, 2002 at 27-42.

<sup>50</sup> For a critical analysis of the process of privatization, see Roberts, 2004, esp., 125-132.

<sup>51</sup> The most recent privatization has been of the railways, although, there are still questions as to what has been gained from it. See, ‘South Africans Take Over at Kenya-Uganda Railway Without Paying,’ *The East African* November 6-12, 2006 at 1.

<sup>52</sup> The most stark example of graft and influence-peddling in Uganda’s recent history has been with the Global Fund. See, ROU, 2006.

<sup>53</sup> Nyamugasira & Rowden, 2003 at 62.

<sup>54</sup> *Id.*, at 63.

<sup>55</sup> Despite a caution from the President, the main electricity provider raised its tariffs by a factor of 40%.

At the same time, the overt presence and omnipotence of the international financial community presents an acute problem for rights struggles, in part because human rights outputs in such a context, including health care, education, food, housing, land and even personal security, have become increasingly commoditized. Furthermore, human rights are used opportunistically. For example, although civil and political rights are ostensibly off-limits to these organizations, this has not prevented extensive engagement in the governance debate. Nevertheless, many donors (especially the IFIs) are extremely selective in what governance issues they choose to engage with, when and with whom. Contrast the different responses of the World Bank to Kenya's Daniel arap Moi or Malawi's Bakili Muluzi when there were indications in both countries that the constitutional provisions on term limits would not be followed, in comparison to the kid-gloves treatment received by President Museveni throughout his 20 years in power.<sup>43</sup> Not even the US government—notoriously vocal on these kinds of issues—exerted any significant pressure on Museveni not to stand for a third term. At most, the Donor Democracy and Governance Group (DDGG) only expressed a vague concern about the 'political transition' in a letter to the Prime Minister.<sup>44</sup>

In such a context, despite the extensive pervasion of the state by the international community, all blame for policy failure is shifted to the state, while the IFIs invoke the cloak of legal immunity in order to avoid liability.<sup>45</sup> Moreover, despite a sometimes testy relationship, the two sides continue to move along in a marriage of convenience. Why is this so? Uganda—as is the case with Ghana and several others of the African economic stories labeled a 'success'—has become a victim of the phenomenon of 'policy rent,' described by Eboe Hutchful as where a government has turned conditionality to its advantage, but in the process becomes addicted to donor finance for its very survival.<sup>46</sup>

It is quite clear that the engagement with the international community, coupled with the several initiatives taken in the early days of the NRM, contributed significantly to enhancing the government's legitimacy and thus its ability to avoid many of the pressures exerted on other African states with respect to their governance records.<sup>47</sup> Significantly, the reluctance of most donors to criticize the Movement system of government critically impacted on the process of democratic transition, while shaping the course of economic reform in the image dictated by the IFIs.<sup>48</sup>

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<sup>43</sup> Tangri, 2006 at 194-195.

<sup>44</sup> Id., at 195.

<sup>45</sup> For a critical analysis of how the international financial institutions (IFIs) do this, see Tsikata, 2004.

<sup>46</sup> Hutchful 2002, at 240-248; see also Whitfield, op.cit., at 648.

<sup>47</sup> Most notably, the difference between Kenya and the treatment of Uganda. Also see Parkhurst 2005, who links the legitimacy the Museveni government gained in part to its response to the HIV/AIDS pandemic.

<sup>48</sup> Opolot, 2004.

## II. THE HUMAN RIGHTS-BASED APPROACH, MDGs AND THE PHENOMENON OF POVERTY REDUCTION.

Contemporary discussions on issues of development centre to a large degree on what has been described as a human rights-based approach to development (HRBAD).<sup>59</sup> This approach seeks to surface human rights issues and to place them at the core of any attempt to promote growth and development. It focuses on five principles, namely,

- (i) Securing and improving the legal and policy framework with respect to the area of intervention, and the rights related thereto;
- (ii) Whether the processes of intervention lead to the empowerment of the beneficiaries, as opposed to their dispossession;
- (iii) The participation of the people affected by the development process in the various stages of its evolution and execution;
- (iv) Non-discrimination on the basis of race, religion, gender, ethnicity or other distinguishing, but immutable feature, and
- (v) The situation of vulnerable groups in the community.

From an analysis of both the policy frameworks and the practices of the main actors who lay claim to using this approach, a number of points become clear. In the first instance, the HR-BAD has largely been confined to international actors such as UNICEF, UNDP and the World Health Organization (WHO), as well as bilateral agencies such as DFID and DANIDA. There are thus a plurality of approaches (some purely opportunistic and superficial), and all with different starting points and rather different implications for development theory and practice.<sup>60</sup> They are nevertheless all characterized, in the assessment of Cornwall and Nyamu, essentially by three justifications for the value of rights to development, namely, the normative, the pragmatic and the ethical.

The normative puts values and politics at the heart of development practice, and thereby brings an ethical and moral dimension to the topic of development assistance. The normative value also provides a stronger basis for citizens to make claims on their states and to hold states accountable for their duties to enhance citizen's access to the realization of their rights. It contrasts with a needs-based (or charitable) approach, as it is grounded in legal obligation, and as such heightens the potential of holding the state and other actors accountable.<sup>61</sup> There is also the pragmatic value, which is designed to increase the sensitivity (and accountability) of the various actors, and also expand the notion of accountability for rights to non-state actors. Finally the *ethical* value allows for a reflection on the *dynamic of power* in any relationship, and to "...make

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<sup>59</sup> This is not to say that other approaches are not in use. See, for example, ECA/EPRC, 2003, especially 25-30.

<sup>60</sup> See Cornwall & Nyamu-Musembi 2004 at 1415-1437, and Tsikata, 2004 at 2.

<sup>61</sup> For the application of the approach to the fairly new area of energy services, see Bradbrook & Gardam 2006.

differentials are acute such as they are in present day Uganda, the nature, extent and quality of human rights enjoyment is subject more and more to the purchasing power, race and class of the individual.<sup>56</sup> When public services are privatized, they provide services to those best able to afford them.<sup>57</sup> In other words, considerations of social equity have given way to concerns about efficiency and profitability. In the process, discriminatory and unequal relations become more firmly embedded in the whole fabric of social development. The lack of World Bank and IMF commentary on the vices that abounded in the processes of privatization (and focusing instead on the (slow) pace at which it took place) raised further queries as to the actual intent behind the divestitures: who was really to benefit?

There are a number of human rights issues surfaced by the phenomenon of privatization. The first is that privatization does not affect the role of the state as the primary duty-bearer of human rights; the state remains duty-bound to respect, protect, promote and fulfill human rights.<sup>58</sup> Secondly, where non-state actors have increasingly taken over functions traditionally performed by the state, they assume the obligations the state has traditionally executed, particularly in ensuring that the right to an adequate standard of living is not jeopardized. Thirdly, it is not that the human rights issues raised when a service is provided privately change, i.e. adequacy, access, quality, etc. However, the issue of the legal obligation of the private (as opposed to the public) actor is crucial.

Against the preceding background, the analysis in this paper is divided into four additional parts. Part II examines the Human Rights-Based Approach to Development (HR-BAD), the influence of the Millennium Development Goals (MDGs) on them, and their link to the phenomenon of poverty reduction as it has played itself out in Uganda over the past several years. In Part III, we explore what I regard as the most critical issue in the debate about economic, social and cultural rights, namely the question of equality between men and women, or what I have referred to as the “mother of all rights.” Using the two case-studies of the debate over the abortive Domestic Relations Bill (DRB) and the issue of land rights, I explore the manner in which the issue of equality between women and men lies at the heart of many of the struggles to achieve the full realization of ESCRs, and offers some reflections on why the advances in this regard are correspondingly miniscule. Indeed, the tools of gender analysis are essential for surfacing the role and place of politics in denying the full realization of this category of rights. Part IV looks at some of the critical issues that arise when the lens is shifted to the local community level, particularly within the context of the issue of dispute resolution. The study concludes in Part V with a consideration of the institutional mechanisms that are in place to ensure that ESCRs are given full realization in this country.

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<sup>56</sup> For a catalogue of the negatives of privatization in the case of Uganda, see Tangri, 1999, at 58-61.

<sup>57</sup> Cavallaro, 2003 at 5.

<sup>58</sup> See Chirwa 2005.

*been imposed by donors on grassroots organizations and partners. Moreover a rights-based approach will leave all gender and development organizations and activities vulnerable to being 'mainstreamed,' and thus reducing the capacity to advocate, organize and intervene in terms of gender and class-based disadvantages.<sup>66</sup>*

The above analysis leads to one key question: *Does the HRBAD have the potential to actually transform power relations among development actors?*<sup>67</sup> Or put another way, to what extent can the main actors involved in development be held more *accountable*? Part of the answer is provided by Cornwall and Nyamu-Musembi,

*It seems fair to suggest that international development agencies—to varying degrees—use the language of rights-based approach to development largely to invoke the discursive power of the concept of rights, without intending to bear the weight of the entirety of consequences that flow from it.<sup>68</sup>*

As it presently operates, the HRBAD principally applies to the obligations of states, while omitting that of international development actors, introducing a lop-sided element to the relationship, which itself is a mirror reflection of relations between north and south in the era of globalization. As Dzodzi Tsikata has argued, the manner in which powerful players have adopted and pushed for the HRBAD, "... has meant that a programme touted as ensuring grassroots participation is being imposed top down on governments, civil society organizations and communities in much the same way as the results based management (RBM) approach was."<sup>69</sup> At the same time, HRBAD is sometimes undermined by the fact that the IFIs do not take into account or acknowledge any contradictions between their external loan conditions and the abilities of borrowing governments to fulfill their stated obligations under the ICESCR.<sup>70</sup>

Ironically, despite the considerable rhetoric that has laid claim to the 'new paradigm' presented by the HRBAD, it is yet to be effectively and comprehensively applied to the situation of socioeconomic development planning and practice in Uganda, and despite the fact that the United Nation's most recent framework for support to the country clearly lays an emphasis on the approach.<sup>71</sup> The understanding of most technocrats, bureaucrats and politicians is not that a right is the assertion of a power relationship and that a rights-holder can actually demand or lay claim to the enjoyment of their rights. Rather, the attitude is one

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<sup>66</sup> Pearson, 2005, at 173.

<sup>67</sup> See Cornwall & Nyamu-Musembi, op.cit., at 1432.

<sup>68</sup> Id., at 1433.

<sup>69</sup> Tsikata, at 5.

<sup>70</sup> ActionAid, op.cit., at 41.

<sup>71</sup> United Nations (2006).

critical linkages between participation, accountability and citizenship.”<sup>62</sup> In conclusion, “Rights talk brings with it the reciprocal notion of obligation, requiring those who use the language of rights to reflect on their own location.”<sup>63</sup>

There is no doubt, however, that the HRBAD has certain limitations. The most prominent in a country like Uganda is the conceptual and practical distance of and access by the people to the international instruments and standards on which the approach is based. Furthermore, even when those standards have been domesticated—as many have with regard to their incorporation in the Bill of Rights of the Constitution—knowledge about them, as well as practical access to them is greatly limited by social factors such as literacy, civic awareness and the resources required to access the institutions which can provide a remedy for their violation, if at all a remedy has indeed been provided. In a country like Uganda with its highly militarized methods of dispute resolution and governance, there is another factor; fear and intimidation, even in urban centres like Kampala, where there is a greater awareness of one’s rights.

The second problem with the HRBAD as currently conceptualized is that it shifts the obligation to realize the rights almost wholly to the state and largely omits international and private actors from the ambit of responsibility. Thus, despite the critical interventions that international and private actors have made on the social and economic (and by necessary implication, the political) scene, there are no mechanisms by which to either enforce greater transparency from them, or by which to hold them accountable. The dominant practice of the HRBAD has thus come to substitute for and therefore differ from the approach outlined in the Declaration on the Right to Development (RTD) of 1986 which held international actors accountable alongside states.<sup>64</sup> Finally, there is a kind of bandwagon effect to the HRBAD, in that it is a useful rhetorical tool, used by everybody in the formulation of policies and strategies, but evaded by most when issues of concrete accountability are brought into play.<sup>65</sup> In the words of Ruth Pearson,

*The RBA has been taken up enthusiastically by development agencies since it seems to offer a non-conflictual and inclusive statement of entitlement of all to development benefits. Potential conflicts of interest, however, between, for example, individuals and ‘peoples’ in the field of customary disadvantage against women are ignored. Many gender and development practitioners argue that little has changed apart from the language used, and that the ‘new’ approach has*

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<sup>62</sup> Id., at 1418.

<sup>63</sup> Id., at 1419.

<sup>64</sup> Id., at 1424-1425.

<sup>65</sup> A principal culprit in this regard is the World Bank, which evades any kind of discussion about its own liability and accountability, under the cover of being an institution that enjoys diplomatic immunity. See Tomasevski.

or entitlements, is that people have a right to demand that the State undertake certain obligations with respect to these items. Among them are the following:

- **Recognition** (acknowledging that the right exists in the first instance, particularly by ascribing to international and regional instruments that incorporate it);
- **Respect** (ascertaining that the state actually takes steps to enforce the right);
- **Promotion** (placing an obligation on the state to publicize the right);
- **Protection** (guaranteeing that the right is not violated), and
- **Fulfillment** (ensuring that the State meets its obligations to make certain that the right is realized).

The primary legal obligation of States which are party to the main international instruments is the implementation of its major provisions at the national level, and to ensure the availability of effective remedies for victims of the violation of their rights by all appropriate means. These would include policy, legislative, administrative, judicial, economic, social and educational measures.

A number of scholars of human rights focus on the idea that the rights in the ICESCR must be “progressively realized” within the context of available resources, implying both that these rights are contingent on finances, and secondly, that they are not immediately enforceable in the same way as civil and political rights. Many states have used the excuse of this formulation in order to argue that they are too poor to afford the realization of these rights, although, paradoxically, they argue that such rights must be given a priority over civil and political rights. The Maastricht Guidelines have noted that,

*The fact that the full realization of most economic, social and cultural rights can only be achieved progressively ... does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress towards the full realization of the rights in question.<sup>76</sup>*

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<sup>76</sup> See para. 8 of the Maastricht Guidelines, 1997

of benevolence, charity or control. Irrespective of the proclamation in the Constitution declaring rights as ‘inherent,’ the dominant perception of them is that they are a gift from the state.

This approach is especially evident in the area of Social Services. Out of the most recent (2003-2008) frameworks developed for the PEAP and the MDGs, one of the overall sector targets is to mainstream two major social development concerns of Gender and Rights in at least five (5) priority sectors, viz., Education, health, water, agriculture and roads, all of which are crucial as economic, social and cultural rights in and of themselves, or as part of the wider context of the realization of the right to an adequate standard of living, which is an overarching human right, and under which the infrastructural elements of development (such as roads) would fall. A casual glance at the Social Development Sector Strategic Investment Plan (SDIP), which was developed as a response to the need for a more effective coordination of operations within the sector, demonstrates that human rights considerations have not been fully integrated into its framework.<sup>72</sup> The term ‘human rights’ is perfunctorily mentioned a total of seven times in a 53-page report. In many respects, this is reflective of the general position of development in the country, which is marked essentially by considerable non-state (NGO) service delivery, and an attitude to the accessing of development ‘goods’ oscillating between charity and the market. Moreover, even when used, it is clear that the concept has neither been internalized nor linked to the tasks laid out in the plan.

## **2.1 *Improving the Application of Economic, Social and Cultural Rights.***

Economic, Social and Cultural Rights (ESCRs) can be retraced to the Universal Declaration of Human Rights (UDHR), but received more precise formulation in the International Covenant on Economic, Social and Cultural Rights (ICESCR) that came into force in 1976.<sup>73</sup> The government of Uganda ratified the instrument on 21 January, 1987, signifying its willingness to be bound by the provisions of the instrument. ESCRs guarantee the well-being of all peoples and cover issues such as food, shelter/housing, healthcare, water, education and the right to an adequate standard of living.<sup>74</sup> ESCRs can also be found in regional instruments such as the African Charter on Human & Peoples’ Rights (ACHPR), and the more recent Maputo Protocol to the ACHPR on the Rights of Women.<sup>75</sup> The key difference in a rights-based approach, as opposed to an approach based on needs

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<sup>72</sup> ROU 2003. The SDIP emerges from the sector wide approach (SWAP) to development which is a major outcome of the PEAP. The report defines ‘human rights’ as “Inherent claims to social arrangements that protect each and every person from abuses and deprivation that would prevent them from attaining their full potential.” *Id.*, at iv.

<sup>73</sup> A number of scholars point to the regime of worker’s rights—captured in the 1919 formation of the International Labour Organization—as the real origin of this category of rights.

<sup>74</sup> Mbazira, 2006 at 1.

<sup>75</sup> Accessed at: [http://www.achpr.org/english/info/women\\_en.html](http://www.achpr.org/english/info/women_en.html)

- ◆ Combating HIV/AIDS, malaria and other diseases;
- ◆ Ensuring environmental sustainability, and
- ◆ Developing a global partnership for development.

How do the MDGs differ from previous global pronouncements and aspirations on development? The MDGs are significant for several reasons, among them the following:

- (i) they are limited and selective and set particular priorities;
- (ii) they are deliberately designed to be measured;
- (iii) they are time-bound, and,
- (iv) there is an extensive institutional apparatus established to promote them.

There is no doubt that each of the MDGs have a link to the aspirations enshrined in the international human rights instruments from which ESCRs are derived.<sup>81</sup> Indeed, in many respects they are reflective of the ‘minimum core’ approach to ESCRs favoured by a number of scholars and activists, although the time-lines are rather long.<sup>82</sup> However, as Philip Alston has argued, so far, MDGs and human rights are like two ships ‘passing in the night,’<sup>83</sup> in that there is not only very little coherence in conceptual evolution between the two, but also, the community of development practitioners and that of human rights activists are yet to fully engage with each other on the best strategies to attain the goals, on the one hand, while also according human rights the necessary attention they require, on the other.

MDGs make a significant advance on the development debate because in contrast to the legal framework for ESCRs, they provide a basis for accountability, and they also contrast from the goal of ‘progressive realization’ that characterizes the achievement of ESCRs as laid out in the ICESCR. At the same time, although human rights considerations featured in the Millennium Declaration, they were not transferred to the goals, even though there is an obvious overlap between the two. Thus, the MDG targets for education are cautiously phrased. They omit mention of the term ‘free and compulsory’ primary schooling,’ which is the language of the ICESCR and the CRC.<sup>84</sup> At the same time there is some worry that the MDGs have over-shadowed (in a negative sense) many achievements—especially in gender equality—that were made through the 1990s:

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<sup>81</sup> See OHCHR 2006.

<sup>82</sup> According to Russell, “Minimum core is often defined as the nature or essence of a right. That is, it is the essential element or elements without which a right loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations.” Russell, 2002 at 15. Also see CESCR General Comment No.3, particularly para.10, Blichitz, 2006 at 3, and OHCHR 2004 at 27-28.

<sup>83</sup> Alston, at 755.

<sup>84</sup> See, EFA, 2003 at 27, and Tomasevski, 2005, notes 6 and 11

However, there are certain rights declared by the CESCR to “be capable of immediate application by judicial and other organs in many national legal systems,”<sup>77</sup> or they are, in the words of Mauritian Chief Justice A.G. Pillay, “plainly and currently justiciable.”<sup>78</sup> Among them the most clear-cut is the right of individuals not to suffer discrimination (whether on the basis of race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status). The catalogue of other rights that are both enforceable and justiciable includes:

- a) Equal rights for men and women;
- b) Equal pay for equal work;
- c) The right to form and join trade unions and the right to strike;
- d) The right of children to special protection and assistance in respect of economic, social or other form of exploitation;
- e) The right to free compulsory primary education;
- f) The right to choose a private school for the education of one’s children;
- g) The right to establish schools of an appropriate minimum standard, and,
- h) The freedom for scientific research and creative activity.

It is also important to point out that the approach to ESCRs does not necessarily have to be uniform. A strategy that works with respect to enforcing the right of access to essential drugs may be found not to be useful when seeking to realize the right to shelter. In other words, one size does not always fit all situations. Furthermore, despite the often stated refrain about the indivisibility, interconnectedness, interrelatedness and inviolability of all human rights, this does not mean that you cannot set a priority of them.<sup>79</sup> That is precisely why there is a need to revisit the link between the progressive realization of ESCRs and the more-recently formulated United Nations Millennium Development Goals (MDGs).

## ***2.2 Exploring the Link Between Rights and MDGs.***

There is a close link between the quest to achieve the MDGs and the struggle to realize human rights. The MDGs comprise eight targeted goals that have a deadline of 2015 and which most governments in the world have signed on to.<sup>80</sup> More specifically, the MDGs consist of:

- ◆ Eradication of extreme hunger and poverty;
- ◆ Universal Primary Education;
- ◆ Promotion of Gender Equality and the Empowerment of women;
- ◆ Reduction of Child Mortality;
- ◆ Improvement of maternal health;

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<sup>77</sup> Pillay, 2003 at 1.

<sup>78</sup> Id.

<sup>79</sup> See Cornwall & Nyamu-Musembi, op.cit.

<sup>80</sup> See UNMDGs website, <http://www.un.org/millenniumgoals/goals.html>

The response of different countries to the MDGs has varied, with some adopting an overtly human rights-based approach to their conceptualization and realization, while others barely make mention of human rights. Along this spectrum, Uganda leans much more towards the side of neglect. Uganda's first progress report on the MDGs published in 2003 has many conceptual problems. In the first instance, it is co-authored (or at least endorsed) by both the UNDP and the Government (represented by the Minister of Finance), reinforcing the idea that the MDGs are not home-grown and are thus imposed.<sup>89</sup> Even if that (self) criticism was not to hold much water, the more telling concern is the obvious reluctance to criticize the performance of either the Government or of its development partners. Thus, the report is written in rather laudatory terms, without a hint of criticism. The slap-on-the-wrist approach is apparent from the assessment of what is referred to as the 'supportive environment' made by the report, outlined in Table 2 below:

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<sup>89</sup> UNDP & GoU, 2003.

*This is because they (MDGs) represent a ruthless distillation of undertakings, done in a way, which takes the essence out of the rich analysis and detailed commitments of the various platforms. The 8 goals, 15 targets and 48 indicators of the MDG document are so selective that achieving them would not significantly take the development and gender and development agenda forward. It is also doubtful if rights are the best analytical tools for understanding the challenges of globalization, militarism, the rise of the trans-nationals, the impacts of neo-liberal policies, class, gender, race, kinship and other social relations?*<sup>85</sup>

A critical examination of the MDGs demonstrates that they largely overlook civil and political rights, while the references to economic, social and cultural rights are minimal. Moreover, there are no precise formulations of this category of rights, with only occasional reference being made to the Universal Declaration of Human Rights or to the Declaration on the Right to Development. The conclusion that follows, is that the MDGs are narrowly focused, they are essentially quantitative in orientation, and they are more pragmatic than idealistic. Prof. Jeffrey Sachs' millennium villages project is interesting in this respect, offering, "... a scalable model for fighting poverty at the village level, enabling the achievement of the MDGs on a much broader scale, expanding from the village to district level, and eventually to nations across Africa."<sup>86</sup> While laying claim to being a 'bottom-up' approach, one is nevertheless struck by the traditional reliance on aid to achieve the goals. In other words, it is questionable how sustainable the Sachs experiment is in the absence of external assistance, a point Sachs emphasizes at every opportunity.<sup>87</sup>

As a matter of fact, the MDGs reflect only a partial human rights agenda and a clear challenge exists to ensure that there is more compatibility between the two. However, as Alston points out, merely wishing for such compatibility will not make them so. While an ideal version of the MDGs is certainly compatible, the barebones version that is sometimes put forward might accord only a token role to civil and political rights and endorse a very limited portion of the overall economic, social and cultural rights agenda.<sup>88</sup> This places a particular obligation on those monitoring the implementation of the MDGs—civil society groups, scholars and activists—to ensure that there is a greater degree of compatibility between the MDGs and the goals laid out in the human rights instruments.

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<sup>85</sup> Tsikata, at 6.

<sup>86</sup> See UN Millennium Villages Project, "A New Bottom-Up Approach to Food Security and Poverty Eradication," *Daily Monitor*, October 23, 2006 at 29.

<sup>87</sup> See John Odyek, 'Ex-UN Expert Warns on Development Goals,' *New Vision*, January 16, 2007 at 3.

<sup>88</sup> See Alston, op.cit., at 760.

the purposes of the present report—the term ‘human rights’ does not appear throughout the 23 pages of the report.<sup>94</sup>

Civil Society actors have a different perspective on the progress and challenges of attaining the MDGs in Uganda. According to a recent assessment, Uganda still has ‘a long way to go.’<sup>95</sup> The report by the NGO Forum acknowledges *inter alia*, a positive change in the enrollment of pupils in schools, girl/boy parity in lower primary classes, and the decline in HIV/AIDS prevalence. However, it points out that indicators such as child mortality and maternal health show a grim picture, which raises questions about the otherwise positive trends on dealing with poverty.<sup>96</sup> At the end of the day, the point is that while there has been significant progress in the struggle to achieve the MDGs, much still remains to be done. Furthermore, it is important to emphasize that MDGs represent a minimum. Moreover, they do not necessarily engage with the many dimensions of the human rights issues with which we are concerned in this study. To appreciate why this is so, it is necessary to turn to the broader context within which the MDGs were formulated, namely the struggle to eradicate poverty.

### **2.3 Reappraising the Poverty Eradication Struggle**

Central to the debate about the realization of ESCRs, is of course the attempt to reduce (or eradicate) poverty, which has evolved as a core strategy of the Bretton Woods Institutions since the 1980s.<sup>97</sup> As former High Commissioner for Human Rights, Mary Robinson has argued, poverty constitutes the most serious violation of human rights. According to OHCHR, a human rights based approach towards the goal of reducing poverty would include *inter alia* empowering the poor, explicit recognition of the international human rights normative framework, and an emphasis on accountability, non-discrimination, equality and participation.

The Poverty Eradication Action Plan (PEAP)<sup>98</sup> was developed in order to actualize the citizen’s social and economic rights and eradicate poverty, pursuing a process that is said to be country-driven, results focused, long-term, comprehensive and partnership-oriented.<sup>99</sup> Although a number of scholars have questioned whether the PEAP (and PRSP) processes have actually lived up to the billing,<sup>100</sup> the critical question for the purposes of this study is whether or not the PEAP adopts a human rights based approach. Some scholars have pointed out that the PEAP has different objectives, mainly to address the demands of the donor community, and it is thus a thinly-veiled reformulation of the structural adjustment policies

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<sup>94</sup> UNDP & GoU (2003).

<sup>95</sup> Uganda National NGO Forum, 2005.

<sup>96</sup> *Id.*, at 11-12 and 15.

<sup>97</sup> Whitfield, 2005.

<sup>98</sup> The PEAP was first developed in 1997, revised in 2001 and again in 2004, and will be revised again in 2008. Five pillars form the framework around which the Plan is designed, and these include: Economic Management; Enhancing Production Competitiveness and Incomes; Security, Conflict Resolution and Disaster Management; Good Governance and Human Development.

<sup>99</sup> Whitfield, *op.cit.*, at 641.

<sup>100</sup> *Id.*, at 660.

## TABLE TWO

### STATUS OF UGANDA'S MDG GOALS/TARGETS AT END 2003

GOALS/TARGETS	WILL THE GOAL/ TARGET BE MET	STATE OF SUPPORTIVE ENVIRONMENT
1. EXTREME POVERTY	POTENTIALLY	STRONG
2. HUNGER	POTENTIALLY	FAIR
3. UNIVERSAL PRIMARY EDUCATION	PROBABLY	STRONG
4. GENDER EQUALITY	POTENTIALLY	STRONG
5. CHILD MORTALITY	UNLIKELY	FAIR
6. MATERNAL HEALTH	UNLIKELY	FAIR
7. HIV/AIDS REVERSAL	TARGET ALREADY MET	STRONG
8. ENVIRONMENTAL STABILITY		
* Reverse loss of environmental resources	POTENTIALLY	FAIR
* Halve proportion of people without access to safe drinking water	PROBABLY	STRONG
Source: UNDP & GoU (2003) <i>Millennium Development Goals Progress Report for Uganda, at 5</i>		

Thus, out of the 8 goals, a 'strong' supportive environment is judged to be present for five, and a 'fair' one for the remaining 3. The categories of 'weak but improving' and 'weak' do not feature at all. A closer look at the report itself demonstrates a considerable disconnection between what is presented in the report and on-the-ground practicalities. For example, in discussing the goal of halving the proportion of underweight under-five year olds, the report points out that Uganda's high population growth rate is, "... also an increasing concern."<sup>90</sup> And yet, President Museveni has consistently argued that Uganda's population growth is an advantage to the country's development.<sup>91</sup> Twice in recent months, public officials have been forced to retract previous statements regarding the state of Uganda's population because they had earlier contradicted the President's position on the matter.<sup>92</sup> With regard to the issue of environmental stability, not only has the President intervened with questionable policy decisions on key environmental matters, but the key institutions of environmental governance—among them the National Environment Management Agency (NEMA) and the National Forestry Authority (NFA)—find their decisions and actions countermanded at each point.<sup>93</sup> Finally—and most importantly for

<sup>90</sup> MDG Report at 9. The same point is repeated with regard to the MDG on Environment, where 'high population density' is one of the factors blamed for the deterioration in the environment. See MDG Report, at 19.

<sup>91</sup> President Museveni's favourite example is the case of China, but his analysis confuses economic growth with the struggle against poverty, which, as I have already pointed out are not necessarily the same.

<sup>92</sup> See Richard Kavuma, 'Population: Museveni Finally Getting His Way?' *The Weekly Observer*, November 9, 2006, accessed at: <http://www.ugandaobserver.com>.

<sup>93</sup> The degree of executive interference in the NFA reached such a scale that several directors of the Authority recently resigned, rather than support a policy decision that effectively overturned the body's views on the matter. The NFA Board has now been re-constituted in questionable circumstances. See Charles Mwanguhya & Kelvin Nsangi, 'NFA Gets New Board,' *Daily Monitor*, November 10, 2006 at 3.

to promote,” really do not mean much. Furthermore, there are no clear guidelines or standards incorporated into the statement by which the government can be held. The implications of this are that the government could impose a highly restrictive law governing the operations of civil society or the Media and be able to get away with it because there are no binding obligations to which they have committed themselves not to do so. Indeed, in the course of the evolution of the PEAP, the government has taken several actions against both the Media and civil society which are inimical to their effective operation.<sup>107</sup>

The other parts of the Plan are devoted to human rights issues as they cover the security of the people and their property and the Administration of Law and Justice, as well as in relation to creating a framework for economic growth and transformation and as a means of increasing the ability of the poor to raise their incomes.<sup>108</sup> Many cross-cutting issues, such as Education, also fall in this category, and indeed there are extensive references to the achievements heralded by UPE.<sup>109</sup> Taken together, the statements certainly reflected some awareness on the part of the government on the link between poverty eradication and human rights, but they did not go far enough. In the first instance, no reference is made to the Government’s international or domestic human rights obligations even where (as in the case of the Right to Education) these are enshrined in local constitutional law. Secondly, this reinforces the view that government obligations in this regard are gifts.

Furthermore, the Plan did not link up the Institutional framework within which the issue of human rights was situated to either the policy framework or to the measures suggested to improve the quality of life of the poor which are the subjects of the next two chapters of the Plan. Indeed, the term ‘human rights’ does not make another appearance throughout the rest of the Plan, when there are obvious instances, e.g. on land, employment and labour, health care services, and water, where human rights issues would be most pertinent.<sup>110</sup> Finally, although the Plan makes reference to vulnerable groups, the ambit is not exhaustive, nor is the focus comprehensive.

Subsequent revisions of the PEAP have sought to address the rather lacklustre approach of the initial Plan and to incorporate more binding standards into the instrument. The 2001 revision engaged with the human rights issue in a more extensive manner:

*On the whole, poor people and other marginalized groups such as women, children and the elderly are more vulnerable to having their rights violated. In particular, their social and*

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<sup>107</sup> The most recent with regard to civil society is the NGO (Amendment) Act, 2006, which imposes several restrictions

<sup>108</sup> *Id.*, paras. 3.7.1 and 3.7.2 at 23.

<sup>109</sup> For a critical analysis of the PEAP approach to UPE, see Hunt *et al*, 2002, esp. 22-29.

<sup>110</sup> See especially Chapter Five, at 36-44. See also UHRC, 2005 at 89-97.

of old. According to this argument, the PEAP is therefore not a reliable and legitimate policy framework for the realization of ESCRs, especially when one analyses the rights to health and education in relation to the policy<sup>101</sup> The critical question is whether, as a practical matter, it is actually possible to actively engage the poor in these processes in a genuinely participatory manner.<sup>102</sup>

Criticism of the PEAP has centred on the argument that its foundations are rooted in SAP-era neo-liberal theory, making the Plan inappropriate to address poverty from a rights-based perspective.<sup>103</sup> The PEAP also faced the criticism that it did not include the poor as active actors in its formulation.<sup>104</sup>

What does the PEAP actually say about human rights? Reference to human rights first appeared in the 1997 chapter on the 'Institutional Framework for Poverty Eradication.' The words of the Report are succinct:

*Article 20 of the 1995 Constitution establishes the standards of governance as well as protection and promotion of fundamental and other human rights and freedoms. Strict adherence to these standards creates a basic appreciation of the inherent dignity and worth of the individual, regardless of his/her race, colour, sex, language, religion, political or any other circumstances of his/her birth.*<sup>105</sup>

Although rather bland and platitudinous, the statement reiterates the fundamentals of non-discrimination and equality on which respect for human rights is based. The second paragraph in the section is more telling:

*Government will continue to promote initiatives to promote advocacy and sensitization of human rights and civic education; capacity building of the Commission and selected agencies for reputable Human Rights Activists; and dissemination of information in areas of peace building, conflict resolution and national reconciliation with a view to improving observance of human rights.*<sup>106</sup>

The statement is interesting in that it refers much more to the obligations and functioning of agencies other than the government itself ('the Commission; 'reputable human rights activists), which reflects an externalization of the way in which the government viewed the issue. Moreover, the language and phraseology of the section is general and non-binding. Phrases such as "continue

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<sup>101</sup> See Barya 2004, Wood 2004 and CIDSE/Caritas 2004.

<sup>102</sup> Putzel, 2004, at 8-9.

<sup>103</sup> Charles Lwanga- Ntale, *Linking Poverty and Rights, Is PEAP Rights-Sensitive? Can it be?*

<sup>104</sup> Mukasa & Butegwa, 2001. The UHRC has conducted a human rights audit of the PEAP and made some valuable observations. See UHRC 2004, at 29.

<sup>105</sup> Para. 3.6.1, PEAP 1997, at 22

<sup>106</sup> Id., para. 3.6.2 at 23.

is not the subject of discussion.<sup>116</sup> Even the much touted element of participation is largely a chimera; there is a clear difference between participation (or 'being participated') and exercising influence on not only the process, but also on the outcome.<sup>117</sup> Thus, when the Government points to the abolition of user fees, and the subsequent increased use of public health facilities by the poor as achievements,<sup>118</sup> it treats them as the benevolent action of a 'caring' State, rather than as a response to the rights of access to which the poor are entitled. The implications of such an approach to developmental issues are obvious.

But aside from the PEAP and the other formal plans, there is also a need to consider the wider political context in which the policies of poverty eradication are being pursued in Uganda, especially because the question of poverty is grist for the mill of political competition. Thus, President Museveni has always maintained a strong claim to being an advocate for poverty reduction, even before the IFIs jumped onto the bandwagon. In this respect, both the policies of *Entandikwa*, and the more recent *Bonna Baggawale*, were introduced in the heat of elections, and have thus been regarded as rewards for political support.<sup>119</sup> Why are such policies doomed to fail? In the first instance, they are 'pork barrel' politics taken to the extreme. Secondly, they are the epitome of a top-down, non-inclusive and populist approach to social engineering. Thirdly, within the context of Uganda's general methodology of corrupt practices, these policies are a boon to the bureaucrats and politicians who control them. As Mamei has pointed out in contrasting the failure of President Lyndon Johnson's 'War on Poverty' to the success of the Civil Rights Movement in the United States, the key issue is whether you do something bureaucratically, or you move social and political forces in order to create it.<sup>120</sup>

An approach to poverty eradication that is grounded in an holistic appreciation and application of human rights, will go a much longer way than one based on the market, or on a strategy that panders to the political pressures of the day. In revisiting the issue of a rights-based approach and applying it to the eradication of poverty, there is a need for a re-emphasis on the role of the state as the actor with ultimate responsibility for ensuring respect for human rights. In other words there is a need to protect individuals "not just against violations of Covenant rights by [state] agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."<sup>121</sup> This implies a

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<sup>116</sup> ActionAid, 2004, 23-26.

<sup>117</sup> See Wood, 2004 for an analysis of the issue of the continuing influence of conditionalities and its impact on the 'ownership' of the PRSPs.

<sup>118</sup> MFPED, 'Progress in Implementing the PEAP,' *Daily Monitor*, October 19, 2006 at 17.

<sup>119</sup> Augustus Nuwagaba, 'Mustering Stages of Wealth Creation,' *The Monitor*, October 4, 2006 at 12.

<sup>120</sup> Mamei, at 154.

<sup>121</sup> See, General Comment No.31 on Art. 2 of the Covenant: The Nature of the General Obligation Imposed on States Parties to the Covenant; adopted 29 Mar. 2004, Hum. Rts. Comm., 80<sup>th</sup> Sess., 2187<sup>th</sup>mtg. ¶ 8, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004).

*economic rights such as the right to health, education, shelter and an adequate standard of living have not been realized.*<sup>111</sup>

However, the self-congratulatory tone wasn't far away as the Plan went on to list several "improvements in the awareness and enjoyment of certain rights and freedoms." The list of areas on which "further progress" was required was short: the atrocities perpetrated by rebels, the living conditions of internally displaced people and of prisoners.<sup>112</sup> The irony of the 'to do' list is that it does not make mention of a single ESCR, which are the rights that the Plan pointed out were particularly violated. Out of the actions necessary to be taken, top of the list is an action to be taken by a non-state actor ('rebels') over which the state had little control. There is nothing about what the government will actually do to promote and protect human rights of either category. The 2004 revision did not substantially or even conceptually move away from the approach adopted in the 2001 version of the Plan.<sup>113</sup>

As a matter of fact, running through virtually all the strategies of poverty eradication in application today, is a degree of paternalism, from the design of the programs to their execution. They are largely a complete inversion on the idea that the poor may have an active contribution to make:

*The poor are not victims, but active agents in securing their own livelihoods. They exploit whatever economic opportunities are available in order to survive and improve their condition. They pursue strategies designed to legitimize claims, to place others under moral obligations to provide benefits, to accumulate for investment to draw on family, friends and acquaintances, to manipulate discourses to their own advantage, to side with leaders and organizations who may turn out to be useful, to gain access to resources whose ownership is disputed, and so on. In short, the poor are constantly seeking to manoeuvre within given conditions and to generate room for profitable activities.*<sup>114</sup>

The dominant approach of the PEAP is a market-based one, in which an emphasis is placed, for example on micro-financial services for the poor, and an increase of cash-crop production (even if it is 'non-traditional'). There is no political commitment to equality, nor is there a recognition of the other important and related rights, such as the right to information, the right of association and the improvement of institutional mechanisms and the right of access.<sup>115</sup> Furthermore, the macroeconomic frameworks within which these policies are being pursued

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<sup>111</sup> PEAP 2001 at 23.

<sup>112</sup> Id, at 24.

<sup>113</sup> PEAP 2004, chapters 6 and 7, at 115-184.

<sup>114</sup> See UNOHCHR, 2004, at 20-21. Engberg-Pedersen & Webster 2002, at 255.

<sup>115</sup> See UNOHCHR, 2004, at 20-21.

expression of human rights should not go beyond what is “demonstrably justifiable in a free and democratic society.” The use of the terms ‘dignity’ and ‘welfare’ in Article 33 import into the protection of the rights of women the whole range of ESCRs.

Apart from the rights in the ICESCR already referred to, Uganda is also bound by the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and the African Charter on Human and Peoples’ Rights, together with its recent protocol. Among the social, economic and cultural rights in CEDAW are equal rights to property; to financial credit and assistance; to training; to choice of a marriage partner; to family benefits; to equal rights on dissolution of marriage; to reproductive health care; and to maternity leave and benefits among others. The 1993 Vienna Declaration recognised and consolidated the human rights of women and the girl-child as an inalienable, integral and indivisible part of universal human rights, and this was followed by the Beijing Platform for Action together with the documents adopted at the UN Special Session of the General Assembly on Women 2000: gender equality, development and peace for the 21st century later reaffirmed the same principle.<sup>125</sup>

It is not by accident that Uganda has arrived at a significant point in the struggle for gender equality. The positive provisions in the 1995 Constitution came from extensive research by the Odoki Commission and debate in the Constituent Assembly (CA). They also arose against the backdrop of a strong women’s movement that struggled relentlessly to ensure that their needs and concerns were incorporated into the new constitutional dispensation.<sup>126</sup> It must also be pointed out that the CA broadly reflected the diverse political, social, cultural and religious mosaic of the country. The essence of the Constitution was to make sure that discriminatory practices were relegated to history. Viewed together, these provisions established a firm rights foundation for the protection of women’s rights. The women’s movement considered them especially important for the reform of the institutions of marriage, divorce and succession which are the essence of family life and thus the protection of ESCRs in Uganda, while at the same time they are the focus for most discriminatory practices.

If we take ourselves out of the arena of legal reform and into the context of development debates, the case of Uganda demonstrates that since the enactment of the 1995 Constitution there has been a surplus of binding legal standards, which helped in pushing political, social and economic equality further along. Even a critical civil society report on Uganda’s performance with respect to the MDGs points to the issue of gender equality as one of the more positive achievements made over the last few years.<sup>127</sup> Despite these developments, considerable damage has been done by the promotion of gender equality or

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<sup>125</sup> Byamukama, 2006.

<sup>126</sup> Tamale, 1999, at 17-19,

<sup>127</sup> NGO Forum, op.cit., at 17.

reinforcement of the mechanisms and regimes for holding non-state actors accountable. In the words of Chris Jochnick, “The real potential of human rights lies in its ability to change the way people perceive themselves *vis-à-vis* the government and other actors. Rights rhetoric (and practice—JOO) provides a mechanism for reanalyzing and renaming ‘problems’ as ‘violations,’ and, as such, something that need not and should not be tolerated.”<sup>122</sup> Nowhere is this approach more necessary than in relation to the issue of gender equality in the context of the struggle for economic, social and cultural rights, a point to which I now turn.

### **III. GENDER EQUALITY AS THE ‘MOTHER OF ALL RIGHTS’**

The equal right of men and women appears in both the ICCPR and the ICESCR, and is also incorporated in the MDGs, reflecting the importance with which the issue of equality is regarded in the international arena. Beyond a prohibition of discrimination, the Committee on Economic, Social and Cultural Rights has stated that, “... the same rights should be expressly recognized for men and women on an equal footing.”<sup>123</sup> The 2005 UNDP Human Development Report estimates Uganda’s Gender Development Index (GDI) at 0.502, ranking it at 109<sup>th</sup> out of 177 countries, and also representing a steady improvement in this respect.<sup>124</sup> That improvement is largely reflective of the reformulation effected to gender relations by virtue of the provisions of the 1995 Constitution which introduced several new principles regarding the application of human rights and their relationship to the situation of women. Article 2 confirmed the supremacy of the Constitution and declared any custom inconsistent with any of the provisions of the Constitution void to the extent of the inconsistency. Secondly, Article 20(2) states that the rights and freedoms in the Bill of Rights shall be *respected, upheld and promoted* by all organs and agencies of Government and *by all persons*. Consequently, it is not just public or quasi-public bodies bound by the Constitution, but also private individuals, families, clans, communities, traditional entities and religious bodies, to mention only a few. Article 21 incorporated the term ‘sex’ among the grounds on which discrimination was prohibited, overturning the permissive stipulation in earlier instruments which allowed for exceptions that targeted women in particular. Article 31 deals with rights of and within the family, while Article 32 stipulates that the state shall take affirmative action in favour of groups marginalized on account of gender, age, disability or any other reason created by history, tradition or custom.

Article 33 is the most important provision on equality as it extensively covers the rights of women. Specifically, clause 6 states that, “Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.” Article 43 reformulated the circumstances in which human rights could be restricted and particularly stipulated that any restrictions or limitations imposed on the

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<sup>122</sup> Jochnick, 2001 at 161.

<sup>123</sup> General Comment No.16 2005 at 1.

<sup>124</sup> Interestingly, the 2006 report reflects a downturn to 0.479 and a ranking of 114.

activists began to exert pressure for the reform of the diverse statutes governing marriage, divorce and succession, culminating in the DRB at the end of 2003.<sup>132</sup>

Somewhat paradoxically, the first line of resistance against the promulgation of the DRB was derived from the 1995 Constitution. In particular Article 29 (on the freedoms of conscience, expression and religion), Article 36 (on the rights of minorities) and Article 37 (on the right to culture), were the main provisions around which the resistance crystallized. In sum, the debate over the reform of family law brought into bold relief a tension between the various provisions of the Constitution, especially with regard to the observation and implementation of human rights. Underpinning this tension in many respects was the applicability of Customary Law, although to be fair, organized resistance emanated much more from the religious sector than it did from those describing themselves as 'traditionalists.'<sup>133</sup>

The DRB canvassed several issues that had implications for the realization of economic, social and cultural rights in contemporary Uganda. Among them were the issue of Marriage Gifts (read 'bride wealth'), Marital Property Co-ownership and Widow Inheritance.<sup>134</sup> The Bill managed to get through the first and second 'readings' (or stages) of debate in Parliament Committee. Before the third reading it was submitted as per procedure to the Committee on Legal and Parliamentary Affairs (comprising three women and nineteen men) for a clause-by-clause scrutiny and to receive public input. After receiving testimony and conducting its analysis of the issues, the Committee issued its report.

The response of the Parliamentary Committee spoke volumes of the difficulties confronted by the advocates for a reform of the law. In relation to customary marriage and divorce, the Committee stated,

*To outlaw marriage gifts, which might be an essential requirement for the marriage is a contribution in terms. What would then amount to a customary marriage if the gifts as proposed by the Bill amount be demanded back; what would then amount to a divorce under the custom, which originally required the gift?*<sup>135</sup>

However, it is quite clear that the point of the DRB was not to 'outlaw' customary marriages. Indeed, the Committee caricatured those very marriages by asserting that the only thing necessary to make them legal was the exchange of gifts. Rather, the point of the DRB was that customary marriages have evolved from

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<sup>132</sup> See Bills Supplement to the Uganda Gazette No. 60, Volume XCVI; dated December 3, 2003.

<sup>133</sup> This is not to say that the traditionalists were any less opposed to the bill. It is also important to point out that there is often an overlap between matters religious and matters cultural.

<sup>134</sup> See clauses 16, 20, 61, 65, 66, and 67 of the DRB.

<sup>135</sup> Republic of Uganda, 2003b.

equity for reasons other than the better protection of women as citizens with rights.<sup>128</sup> In other words, the struggle for gender equality in general and for women's rights in particular, has often been used opportunistically. It is necessary to recall the caution that,

*...even when there is a more thorough incorporation of women's disadvantage into development policy and discourse, this generally represents an instrumental approach to gender and development; that is, an acknowledgement that gender is a primary issue or entry point in development policy and strategy not because it is a desirable end in itself, but because it represents a route by which to achieve other objectives.*<sup>129</sup>

In hindsight, achieving the reforms relating to the situation of women was only the first step. Indeed the relative ease with which they were secured temporarily masked the underlying tensions of inequality and gender discrimination that had been in place since the colonial era. Those tensions came to the fore once the debate moved from the lofty generic principles of the Constitution, to the applied stipulations of parliamentary legislation. In relation to both the issue of land rights, as well as with respect to the reform of the laws governing family life, the tensions emerged in bold relief, and we can now turn to an analysis of why this happened in the sections that follow.

### **3.1 Revisiting the Debate over the Domestic Relations Bill (DRB).**

Few issues in post-colonial Uganda have either taken as long to be debated or been as contentious as the discussion over the reform of the laws relating to the family.<sup>130</sup> Indeed, the length of time it took for the DRB to reach Parliament is testimony to the convoluted, intricate and tension-riddled issues with which it was concerned. The history of the DRB is retraceable to the time the first Obote government set up a Commission on Marriage, Divorce and the Status of Women in January 1964.<sup>131</sup> Although many of its findings and recommendations reinforced several of the patriarchal biases extant in Ugandan society at the time, it endeavoured to suggest several progressive measures for the reform of the marriage and family institutions. Needless to say, these recommendations fell on deaf ears. Law reform through the years of turmoil made little headway in general, but also with particular respect to the area of domestic relations. Armed with the new provisions of the Constitution, human and women's rights

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<sup>128</sup> Tsikata, at 3.

<sup>129</sup> *Id.*, at 174.

<sup>130</sup> As a sampling see Hussna Zziwa, "Fellow Muslims Totally Misunderstood DRB Concept," *The Daily Monitor*, November 11, 2004; Miriam Nalunkuuma, "Women MPs Split over DRB," *New Vision*, April 27, 2005, and Yasin Mugerwa, "DRB A Coup Against Family Decency," *The Daily Monitor*, May 7, 2005.

<sup>131</sup> See RoU (1965).

### **3.2 Women, Land, Succession and Property Rights.**

As is evident from the preceding analysis, the issue of women's human rights was far from resolved by enactment of what many regard as the progressive elements of the 1995 Constitution. One of the most contentious areas of concern is the formal and substantive content of land rights established by the 1995 Constitution, and which will be the subject of the following analysis. One could say that rather than bringing closure to an issue which had for long been at the core of many of the social disputes in Uganda, the 1995 Constitution simply transformed them. The situation was not made any better by the Land Act of 1998 which was designed to translate the broad constitutional provisions into specific legislative enactments, and specifically to provide a system for the tenure, ownership and management of land, and to improve the delivery of land services to the population by decentralizing land administration.<sup>138</sup>

In the first instance, Parliamentary debate over matters relating to customary land was extremely heated, not least when the discussion focused on the position of women.<sup>139</sup> More controversy and tension centred over a clause designed to create a situation of co-ownership over matrimonial land, the idea being to provide for equal ownership between the spouses of the land on which the family's principal place of residence rests, or from which the family derives its principal source of income.<sup>140</sup> Although it was narrowly passed during the various stages of debate in the House, when the final Act was gazetted, the clause on co-ownership had mysteriously disappeared.<sup>141</sup>

There are other provisions of the Act which were controversial. The Act provides for the establishment of Community Land Management Associations (CLMAs) to enable the corporate holding of customary land, with at least one-third of their membership comprising women. Although the Act provides that any community holding land under customary tenure on former public land may acquire a certificate of customary ownership of that land,<sup>142</sup> or convert that tenure into freehold,<sup>143</sup> there are several problems with the practical enforcement of this provision, including those of a definitional nature. For example, what exactly does 'membership' mean and how are decisions over use of the land by the associations arrived at?

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<sup>138</sup> Cap.227 of the 2000 Volume of the Laws of Uganda.

<sup>139</sup> See Adoko, 1997. Among the several other provisions of the bill that were highly contested were the issue of the status of land being brought into a marriage; the co-ownership of home and land in a monogamous marriage, and the position of polygamous wives *vis a vis* land use and ownership. See also Tripp, *op.cit.*

<sup>140</sup> Asimwe, 2001.

<sup>141</sup> The main architect of the clause (Hon. Miria Matembe) gives an interesting account of the 'disappearance' of the clause and the stages this went through. See Matembe, 2002.

<sup>142</sup> Section 5

<sup>143</sup> Section 10.<sup>1</sup>

the earlier court decision which held marriage gifts to be an essential requirement for a valid customary marriage.<sup>136</sup> Hence, the Bill proposed that the absence of marriage gifts—which happens in a good number of them—should not render the marriage void. But more importantly, the DRB also made it an offence to demand the gifts back on divorce, basing itself on the experience of thousands of women stuck in repressive customary marriages because their families could not afford to refund the gifts. In its assault on the DRB, the Committee also attacked the conditionalities attached to polygamy, the concept of cohabitation and the use of the phrase ‘widow inheritance.’ On polygamy, the DRB proposed that the permission of the first or existing wives be sought prior to a man taking another wife. On cohabitation, it was suggested that cohabitees be given legal rights, particularly on separation, and finally, it proposed the abolition of the practice of widow inheritance. The Committee described use of the term ‘widow inheritance’ as,

*.... a deliberate coining to make this cultural form of re-marriage derogatory. For as long as there is free consent of the widow this should be a form of recognized marriage. The reason for supporting this is that it gives protection and dignity to the children according to the customs of clan. As long as we have patrimonial system, re-marriage within the clan provides a way of maintaining the lineage.*

Again, the Committee missed the point which was that the custom operated independent of the consent of the widow, and even where consent has been secured, in many instances, the context in which this is done is highly suspect. Furthermore, neither statute law nor Customary Law prevents a widow from voluntarily re-marrying, while the whole idea of widow inheritance is that one is constrained to do so in apparent homage to a customary norm.

But the response of the committee was merely reflective of the views of the proponents of the continued dominance of patriarchy, and of the strong hold that traditional views held on it despite the constitutional developments heralded by the 1995 constitution. The final nail in the coffin was driven in by demonstrations against the Bill by both Moslem and Christian ‘activists.’ President Museveni stepped in to declare that continued discussion of the Bill be postponed ‘for further consultation.’ In another display of presidentialism, President Museveni added that the Bill was in any case ‘not urgently needed.’<sup>137</sup>

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<sup>136</sup> See *Uganda v. Eduka* [1975] HCB 359.

<sup>137</sup> See William Rwebembera, “Home Bill May Wait – Museveni,” *New Vision*, April 28, 2005. See Janet Walsh, “The Hidden Costs of the DRB,” accessed at: <http://hew.org/English/docs/2005/06/07/uganda11092.htm>

In a bid to decentralize land sector services in accordance with the spirit of the Constitution and the idea of extending services closer to the people, section 75(1) establishes District Land Tribunals (comprising of a chair with a legal background and 2 members) in each sub-county. The three are appointed by the Chief Justice on the advice of the Judicial Service Commission. The idea behind the creation of decentralized Tribunals was that they would quicken the settlement of cases, reduce the Magistrates' overload, trim costs, and ease the bureaucracy of the formal court system.

Although they have only been in operation for a few years, it is quite clear that there are still many problems affecting these bodies. The first, and one that is a significant barrier in a society with high levels of poverty, is with the cost of instituting a suit with the Tribunal. Secondly, many of the tribunals are plagued by delays caused mainly by the part time membership of the additional two members of the Tribunals. Their absence becomes a problem because it is sometimes difficult to form the required quorum for the deliberation on the disputes brought to the tribunal. There is also a serious problem of staffing and most of the tribunals run on shoe-string budgets. Jo Bosworth also highlights the question of reportage and oversight,

*The accountability mechanisms for these institutions are not always clear. While the Tribunals are quasi-judicial in the sense that appointments are made by the Chief Justice on the advice of the Judicial Service Commission and cases can be appealed to the High Court, they are not fully integrated into the judiciary.*<sup>146</sup>

Finally, because land matters happen to be technical, there is a problem for most litigants because they do not have access to legal counsel, and as a result can have their cases dismissed on simple technicalities.<sup>147</sup> This aspect of the problem is compounded by the transfer of supervision of the tribunals from the Ministry of Justice and Constitutional Affairs (MOJCA) to the Ministry of Water, Lands and Environment (MWLE) because although the subject-matter of deliberation is land, the framework within which that issue is considered is essentially legal. In the final analysis the Act created a greatly enlarged bureaucracy for the administration of land and the resolution of land disputes with unclear controls and mechanisms of accountability. Also it, "... made no interim provisions to deal with the consequences of changing roles and jurisdictions. In the case of dispute resolution this was a serious oversight, necessitating an amendment to the Act to restore the jurisdiction of local council courts over land cases as an interim measure."<sup>148</sup>

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<sup>146</sup> Bosworth, 2002, at 18.

<sup>147</sup> The above reflections are drawn from personal experience with a land case, but many of the problems are general.

<sup>148</sup> Bosworth, op.cit. at 18.

Section 20 stipulates that no person shall sell, mortgage or give away land on which he or she ordinarily resides with his or her spouse and from which they derive sustenance except with the prior written consent of the spouse. The provision is further strengthened by providing for the lodgment of a caveat on a certificate of title indicating the requirement for consent by the spouse claiming protection. Section 28 makes it an offence to deny women, children or people with disabilities access to ownership, occupation or use of any land held individually or communally under customary tenure, or to impose conditions which violate Articles 33 (on the rights of women), 34 (on the rights of children) and 35 (on the rights of persons with disabilities) of the Constitution. Finally, section 39 imposes restrictions on the sale, mortgage, or transfer of land by spouses and other transactions in respect of family land, and requires the written consent of the resident spouse, without which the transaction is void.

On paper, these provisions are laudable, especially to the extent that they seek to ensure an equitable treatment of women and other traditionally marginalized persons. However, the fact is that in practice, they offer only limited protections. First of all, it is most probable that those who should ideally take advantage of these provisions (rural women) are unable to do so either on account of a lack of awareness, or because advantage can be taken of their illiteracy, or simply because the relationships of power and dominance in which they are enmeshed impose insurmountable hurdles for them. 'Consent' can be extracted by intimidation, fraud or chicanery. There is no link between marriage and land registration, and the registries of both are not computerized. There are also no photographs, even for those who might try to be more diligent in their cross-checking. Moreover, as Rugadya *et al* points out, "...consent, where there is no ownership is relatively meaningless, since it is not clear on what basis a person who is not a registered proprietor derives the right to consent or deny consent."<sup>144</sup>

There are additional limitations embedded in real life. The provision that empowers parties to lodge a caveat on the title deed is not that effective in practice. Apart from the prohibitive legal and registration fees that a party would require to lodge such caveat, the nature of the caveat envisaged by the law is problematic. It is an ordinary caveat, which, if challenged, would lapse within sixty days of the challenge unless the person who lodged the caveat justifies its continued lodgment through a court order.<sup>145</sup> It would have been more effective to stipulate that a beneficiary's caveat cannot be challenged in the same manner as a normal one. The conclusion that flows from the preceding analysis is that while the reforms introduced are important first steps, there is a need to take further measures to ensure that the protections outlined in the Act are actually effective on the ground.

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<sup>144</sup> Rugadya, *et al*, op.cit., at 12.

<sup>145</sup> See section 148, Registration of Titles Act, Cap.230, Vol.IX, Laws of Uganda 2000.

There are nevertheless still limitations in the realization of the desired effect of the amendment. Section 38A(5) undermines this provision by stipulating that security of occupancy is conditional on an existing marriage, eliminating a woman rendered landless by virtue of separation or divorce, or even by the fact that the law does not recognize a situation of cohabitation. The problem is with the definition of the term 'legally separated' under Customary Law because of the wide range of interpretations that abound, creating a likelihood that a spouse may decide to separate where consent is denied and sell off the land. Secondly, consent cannot be 'withheld unreasonably,' a phrase which is interpreted at the discretion of the District Land Tribunal and thus subject to a variety of influences and prejudices. Finally, the spouse is protected only in relation to the land defined, while any other land acquired during marriage is not protected.<sup>151</sup> In the final analysis, although the reformed legislation takes significant steps in improving access for traditionally marginalized groups, access to land as such, may in fact turn out not to be the most critical issue insofar as the enhanced protection of the property rights of marginalized groups is concerned. What is most important in my considered opinion is ownership, control and transfer. And this undoubtedly makes the succession to land under customary regimes, versus the stipulations in statute law the most contentious issue. According to Jacqueline Asiimwe,

*Land in Uganda is normally passed on through inheritance, traditionally through the male line from father to son. Traditional patrilineal descent remains especially dominant in the rural areas of Uganda, and is characterized by male control of decision-making about who will inherit and administer the estate, and preference for male over female heirs..... Where women do inherit land, they typically receive only a fraction of their brothers' shares and often have to share a single parcel with other female heirs. Women are regarded as being unable to own property in their own right, and as mere trustees for male kin.*<sup>152</sup>

If one looks at the regime of succession in Uganda, there are a number of problems that compound this situation. As Tamale points out, property-grabbing and widow harassment is commonplace.<sup>153</sup> Secondly, the definition section of the Succession Act defines the term "legal heir" as the living relative nearest in degree to an intestate, but goes on to clarify that "...a male shall be preferred to a female...", when there is equality between kindred of the same degree.<sup>154</sup> Most importantly, section 26 of the Succession Act<sup>155</sup> provides that residential

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<sup>151</sup> See Nicole Leisitikow, 'Women Gain Inch in Push for Land Rights in Uganda,' Women's e-News, July 20, 2003, accessed at:

<http://www.womensenews.org/article.cfm/dyn/aid/1456/context/cover/>

<sup>152</sup> Asiimwe, at 175-176.

<sup>153</sup> See Tamale, 1993 at 175.

<sup>154</sup> Section 2, Succession Act, Cap.162, Laws of Uganda, 2000.

<sup>155</sup> This section is a reproduction of Section 7(1) of the Succession (Amendment) Decree No.27/1972.

The Land Act gave Sub-County Land Committees (SCLCs) the power to judge land cases and to act as mediators in the case of disputes, although in this respect most of the SCLCs are not yet functional. A recent amendment also abolished Parish Land Committees and transferred their responsibilities to SCLCs. Again, there are problems here, in so far as these Committees lack adequate knowledge of the law and procedures and are often oblivious to the many changes which take place in this arena, thus being unable to really help litigants. Secondly, there is the issue of the payment of money to file cases, which in some instances can be prohibitive. Thirdly, although there are rights of appeal against the decisions of these committees, there is some confusion over the route that the appeal should take, or even of the preliminary point of whether or not one has a right of appeal in the first instance. All of these problems present considerable obstacles to the largely ordinary and impoverished peasants who seek to access these bodies. The problems are worsened with respect to the situation of women, who also face the entrenched institution of patriarchy, traditional bias among Committee members, and problems arising from their own socialization.

Once again, there are issues of vested interest, of bias, and even of fear among the Committee members who, being politicians may be averse to making decisions against persons who are effectively their constituents. The solution that is sometimes arrived at is to “sit on the file,” meaning that the problem of delay is once again added to the process. As part of the on-going effort to address these problems, the MWLE has recently devised guidelines for LC courts in the settlement of land disputes, arguing that they were necessary because, “... members of Local Council Court(s) lack technical experience and knowledge and there is no procedural framework to guide courts on how to carry out their functions.”<sup>149</sup> However, the problem is certainly larger than simply a lack of knowledge. In the attempt to increase access, fundamental questions relating to the practicalities of doing so have not been sufficiently addressed.

The *Land (Amendment) Act* of 2004 was a first attempt to try to address some of the anomalies in the systems established by the original legislation. In particular, given the outcry by women’s groups over the loss of the co-ownership clause, the amendment was an attempt to arrive at a halfway house on the issue. Thus, section 38A gives spouses a guaranteed security of occupancy on family land, which confers rights of access and use and the right to give or withhold consent in relation to transactions that affect the spouse’s rights on the land. In the words of Rugadya *et al*, the amendment is, “... a sober attempt to provide “veiled co-ownership” for limited land rights in the manner of consent to the disposal of family land.”<sup>150</sup>

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<sup>149</sup> MWLE, 2005 at i.

<sup>150</sup> Rugadya *et al*, op.cit., at 13-14.

At the same time, it is important to recall that the substantive law does not operate in a vacuum, but is mediated through specified arrangements, whether LC Courts, land tribunals or even more informal (i.e. not legally recognized) structures such as elder's forum's or clan groupings. Thus it is important to focus more specifically on those structures and to consider both their strengths and their weaknesses insofar as ensuring enhanced access to justice and the realization of ESCRs is concerned. Before doing that it is necessary to consider the nature and content of the institutional mechanisms that exist to give effect to the protection and realization of ESCRs, especially those relating to women.

#### **IV. INSTITUTIONAL MECHANISMS IN THE PROTECTION OF ESCRs.**

A great deal of discussion has taken place about the impact of Uganda's 1995 Constitution, with particular regard paid to the mechanisms of enforcement and implementation which it put in place. Aside from seeking to curtail the often-unbridled exercise of executive power which has plagued Uganda since even before independence, the Constitution sought to strengthen the institutions of oversight and rights-enforcement in order to ensure that rights were adequately protected and justice was made accessible to all. It is against this background that provisions allowing for virtually anybody to access the courts (so-called 'busy-body' suits) and for the minimization of technicalities were inserted into the instrument. Despite a few early hiccups, the courts in Uganda responded to the call for a more accessible judiciary with a growing acceptance of the legitimacy and necessity of public interest litigation (PIL) suits.<sup>157</sup> Unsurprisingly, lawyers and human rights activists have increasingly used PIL to give life to the progressive rights outlined in the Constitution.

However, a mid-term review of the Justice Law & Order Sector (JLOS) revealed that while many advances had been made in the area, there were still numerous limitations in the administration of justice and in the ability of the larger populace—especially the rural poor—to effectively access the institution of the judiciary. Correspondingly, the attempts at eliminating poverty, which is largely a rural phenomenon, are hampered by the lack of the effective enforcement of rights. This means, in effect, that socioeconomic discrimination remains an embedded problem requiring urgent attention, implying not only that there is a need to revisit the legal and constitutional framework within which constitutional rights were designed, but also to examine the limitations of that framework. This is especially the case with respect to economic, social and cultural rights, among which are the right to food, the right to an adequate standard of living, the right to adequate shelter/housing and healthcare, to mention only a handful. For example, the 1995 Constitution only includes three socio-economic rights in the Bill of Rights section of the instrument. These are the right to education, the

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<sup>157</sup> The turning-point came with the cases of *Greenwatch v. Attorney General & Anor.*, [2003] 1 EA 87, and *BAT Ltd., v. Environmental Action Network*, [2003] 2 EA 377 in which the court stated that the 1995 Constitution allows for public interest litigation.

holdings normally occupied by an intestate person prior to his or her death, as his or her official residence or owned by him or her as a principle residence (including the household chattels) shall be held by the personal representative upon trust for the legal heir. Note should be made of the fact that the original decree which made this stipulation used the terms 'his' and 'him,' which continues to be a reflection of social reality—most women do not own property, and thus are not considered capable of either bequeathing or inheriting it.<sup>156</sup> Although the data are not available, it is highly unlikely that most personal representatives are women.

However, as Rugadya *et al* point out, this provision contradicts Article 31(2) of the 1995 Constitution that stipulates that appropriate laws will be made for the protection of the rights of widows and widowers to inherit the property of their deceased spouses. Another problem relates to the rather widespread view in many customary regimes that women cannot own or inherit land. This means that a widow lives on the land at the sufferance of its owners (which in rural areas is the clan, that in light of Uganda's patrilocal system usually translates as the male members) and can be evicted from it, for example, in the event she remarries. Once again, the legal protections introduced into the law may not sufficiently address the social situation especially since the sanctions for their breach are not effective deterrents to some of the negative practices that abound. Obviously, improving access *per se* is only the first step.

### **3.3 The Question of Gender, Status and Access.**

The preceding analysis allowed us to consider only two of the substantive political obstacles that advocates for gender equality in Uganda have confronted in seeking to ensure that a move was made from the pious pronouncements of the Constitution to concrete legislative reform. In part, the struggle over reforming the family law and the loopholes in the land legislation that was passed, demonstrate the significant continuing influence of patriarchy on contemporary social structures in Uganda, and the tensions brought into play through any attempts to reform that law via statute. For a good number of Ugandans, the local context is the primary one in which they seek to realize their rights, hence it makes sense that most emphasis is placed on seeking to decentralize both administrative and judicial power. However, to the extent that the local context may remain insensitive to the concrete situation of significant sectors of the population such as women and other marginalized groups, then there are serious issues of access that arise simply from the content of the substantive (statute or customary) law sought to be applied. Paradoxically, while family law has not been reformed in contrast to land law, both still run into many problems with a similar root. That root is the resilience of the structures of patriarchy, tradition and established practices of discrimination, which serve to militate against the more effective realization of ESCRs

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<sup>156</sup> It should be pointed out that since promulgation of a new constitution, the use of gender neutral terms and of both 'he' and 'she' have become standard practice with all laws.

controversial matters (privatization, electricity tariffs, etc.) that may also adversely impact on them. Finally, Parliament is constitutionally mandated under Article 159 to regulate and oversee the powers of government to borrow or lend money, which is a critical function in light of Uganda's current status in the international economy.<sup>158</sup>

In execution of the above functions, Members of the house have played a critical role in ensuring that the Executive pays attention to the social consequences of any intervention. In the words of Tukwasibwe,

*Parliaments are the primary institutions that should connect people to their governments, the most effective mechanisms to ensure the genuine participation of citizens in the formulation of decisions and policies that affect their lives. Parliaments are the watchdogs to demand respect for human rights, honesty and integrity of bureaucrats and the accountability and transparency of governance.*<sup>159</sup>

There are nevertheless several structural impediments that stand in the way of Parliament carrying out its designated role effectively. First of all, its lawmaking function is constrained by constitutional provisions proscribing its ability to introduce laws dealing with finances.<sup>160</sup> Secondly, the legislative agenda, which is the key factor in determining what parliament debates and when, is largely determined by the Executive in collaboration with the Speaker who discusses it with the Business Committee.<sup>161</sup> Thirdly, Uganda's parliament was initially bypassed in the crucial discussions that led to the evolution of Uganda's Poverty Eradication strategy encapsulated in the PEAP.<sup>162</sup>

A great deal more can be done within the framework of the numerous committees (on public accounts, local government, statutory corporations, etc.). These have been established to do the more detailed work of the legislature and in the process has exposed many instances of corruption and abuse of office. The Parliamentary Standing Committee on HIV/AIDS produced a 'Tool Kit' as both an instrument of advocacy, as well as to influence policy in the area.<sup>163</sup> Unfortunately, such interventions are in a minority, and the great deal of parliamentary work (with the exception of the scrutiny of parliamentary bills) is post-mortem, and well after the fact.<sup>164</sup> But even in the scrutiny of bills, Parliament has not proven itself particularly adept at conducting a human rights audit in order to ascertain

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<sup>158</sup> But see Mukubwa and Mugisha (n.d.) for a contrary view.

<sup>159</sup> Tukwasibwe, 2004 at 26.

<sup>160</sup> See Art.93, 1995 Constitution (as amended).

<sup>161</sup> See Ssewanyana 2004, at 40, and Tukwasibwe, op.cit., at 42-44.

<sup>162</sup> ActionAid, op.cit., at 9.

<sup>163</sup> Kuper, op.cit., at 23.

<sup>164</sup> For example, at the time of writing this report, the Public Accounts Committee is only reviewing the Auditor General's report of 2001/02.

right to a clean and healthy environment and a truncated recognition of worker's rights. Rights such as those to food, shelter or housing and health care are confined to that part of the Constitution on National Objectives and Principles of State Policy (NOPSP).

Against the above background, it is my contention that the impediments that continue to exist in Uganda's justice system with particular respect to the recognition and enforcement of economic, social and cultural rights can be classified into the procedural, the substantive and the conceptual. Although several steps have been taken regarding the improvement of access of poor people to the courts, limitations continue to operate at the structural level, including the most basic (knowledge of the law) to the more complex issues that continue to dog the debate about these rights, i.e. that they are only aspirational and as such, they are non-justiciable, which, in effect means that court action on the basis of these rights is not possible.

What are the actual impediments to the realization of socio-economic rights, particularly those which are only contained in the National Objectives section of the Constitution? Such an inquiry must be viewed against the backdrop of the fact that Uganda is signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which imposes certain obligations on a state to ensure the progressive realization of this category of rights. Obviously, if there is a problem with their judicial enforcement, there is a need to address the different ways in which the strictures at this level can be addressed. Put another way, what are the structural limits that prevent those adversely affected by the non-realization of this category of rights, and how can they be removed? Secondly, there is a need to consider the extent to which mechanisms that the judiciary is already familiar with (equality before the law; due process, and non-discrimination, to name a few) can be deployed in the struggle to achieve this category of rights. Finally, there is a need to examine those measures which have been pursued under the JLOS with particular respect to the reform, for example of Commercial and Criminal Law, and to consider whether these can be applied to the realization of the wide range of economic, social and cultural rights. Before turning to a more detailed examination of these issues, it is necessary to consider the institutional framework within which ESCRs are to be enforced. These are the legislature, institutions like the Uganda Human Rights Commission and the Inspectorate of Government, and of course, the courts of judicature.

#### **4.1 Law, Policy and the Role of the Legislature.**

The role of Parliament within the context of the debate on ESCRs is obviously crucial. In the first instance, Parliament is designated with the function of overseeing the enactment of the crucial laws which govern social policy—whether in the arena of health care, or with respect to labour rights and standards. Secondly, even though a majority of the legislators come from the ruling party, they need to take more consideration of the views of the public with regard to matters affecting daily livelihoods, and indeed over several

**TABLE THREE**  
**PRIVATE MEMBER'S BILLS INTRODUCED IN PARLIAMENT**

TITLE AND DATE OF BILL	MEMBER INTRODUCING BILL	OUTCOME
Amendment to the Public Enterprises Reform & Divestiture [PERD] Statute, to exclude UCB from enterprises to be privatised (1997)	Hon. Manzi Tumubeine	Motion initially passed, but reversed in subsequent vote after meeting with President.
Administration of Parliament Bill to set up a Parliamentary Committee in order to secure independence from the Executive. (1997)	Hon. Dan Ogalo Wandera	Passed into Law (CAP.257, 2000 Laws of Uganda)
Administration of Parliament (Amendment) Act. (1997)	Hon. Dan Ogalo Wandera	Passed into Law (CAP.257, 2000 Laws of Uganda)
The National Honors and wards Bill, intended to provide for the creation of the Awards Committee and Conferment of titles of honor. (1999)		Passed into Law as Act No. 14 of 2001
Constitutional Amendment Bill designed to cause Cabinet Ministers to resign their seats as Members of Parliament (MP). (1999)	Hon. Onapito Ekomoloit and Hon. Mugisha Muntu	Leave of Parliament refused
Access to Information Bill, designed to give effect to Art.41 of the 1995 Constitution (2004)	Hon. Beatrice Kiraso	Passed into Law as Act No. 6 of 2001
The Budget Bill, intended to establish a Budget Committee and Office in Parliament. (2000)	Hon. Abdu Katuntu	No leave of Parliament; bill taken up and watered down by the Executive. Passed as Act No. 6 of 2005
The Local Security Forces Bill no 19/04 intended to <i>inter alia</i> establish local forces at grass root such as <i>inter alia</i> Amuka boys under a united force and regulated and guided by law and one body (2004)	Hon. Muzoora Amon- Reeves Kabarebe	Pending. Received Parliamentary approval to proceed with the Bill. The relevant Ministries were still handling the bill before the expiry of the 7th Parliament
The Copyrights and Neighbouring Rights Bill, intended to <i>inter alia</i> update the Law on copyright and bring it into line with international standards (2005)	Hon. Jacob Oulanyah	Bill passed into Law and is today Act No.19 of 2006
The PERD Statute(Amendment) Bill (2004)	Hon. Martin Wandera	Bill passed into Law and is today Act No.
Occupational Safety Bill, intended to reform the law relating to occupational health and safety of employees at (2005)	Hon. Dr. Sam Lyomoki	First introduced in 6 <sup>th</sup> parliament; re-introduced by Govt. in 7 <sup>th</sup> parliament and passed into law as Act No. 9 of 2006
The People with Disabilities Bill, with the intention of <i>inter alia</i> providing a clear and comprehensive legal protection for persons with disabilities in accordance with article 32 and 35 of the constitution (2005)	Hon. Dora Byamukama and Hon. Alex Ndeezi	Pending
<b>SOURCE:</b>	<b>Uganda Gazette (1997-2006)</b>	

the degree to which there is compatibility between the contents of a bill and the government's human rights obligations, whether domestic or international.<sup>165</sup> There is an additional problem. Parliament has not demonstrated that it has a fundamental commitment to the goals of social justice, illustrated in part by the recent demand for UGX.60 million as facilitation for the purchase of motor vehicles for every member of the House. Add to this the ability of the executive to bamboozle members of the House into submission, and you are left with a body that has only a marginal impact on the rights-sensitivity of the laws which come to govern society. Even the much-applauded 6<sup>th</sup> Parliament—in place under the no-party Movement system from 1996 until 2001—was associated with several problems.<sup>166</sup>

Against the preceding analysis, if one were to conduct a critical audit of the various parliaments that have been in existence since 1986 (the 4<sup>th</sup> to the 8<sup>th</sup>), one would have to say they have been much more pliant than inquisitorial to the demands of the Executive. They have acted less as check-and-balance than they have operated as facilitator. At the end of the day, because of Parliament's dependence on the Executive in the allocation of resources and in the introduction of policies, its oversight function is greatly weakened, leaving it mostly with the function of deliberation. Moreover, in one crucial arena of policy formulation and execution—the discourse with donors—Parliament is largely left out. In this regard, the role of Parliament is essentially one of approval, not formulation. Even with respect to motions and private members' bills, the numbers have been few and far between, as the table that follows shows.<sup>167</sup>

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<sup>165</sup> A case in point is the UPDF Bill, as well as with respect to the amendments to the Constitution in 2005.

<sup>166</sup> See Kayunga, 2001 at 15.

<sup>167</sup> Tukwasibwe, *op.cit.*, at 41 points out that the procedural requirements for the introduction of a Private Member's Bill impose a limitation on the number of such bills that can be presented to the House.

### **4.2.1 UHRC and ESCRs.**

The UHRC is mandated to ensure the promotion and protection of human rights in accordance with its founding statute.<sup>170</sup> The law makes no distinction between ESCRs and civil and political rights, although the bulk of the Commission's work has tended to focus on the latter. The Commission has nevertheless paid some attention to ESCRs, although it was not until its 2001/2002 report that it used a methodology which incorporated attention to this category of rights throughout the report.<sup>171</sup> The 6<sup>th</sup> annual report focused on the right to health, while the 7<sup>th</sup> extensively examined the right to education.<sup>172</sup> Furthermore, the Commission claims that it employs the HR-BAD to all of its programming.<sup>173</sup> On the other hand, the number of complaints relating to ESCRs is rather small, especially in comparison to those on civil and political rights, but the Commission has made a number of interesting decisions in the area.<sup>174</sup>

In its most recent report—the eighth since it was established—the first chapter is devoted to human rights education, which focuses particularly on the work done by the Commission with the UPDF, Civil Military Cooperation Centres (CMCCs), Special Police Constables (SPCs) and Local Councils.<sup>175</sup> The report also devotes a whole chapter to the issue of planning for vulnerable persons which includes an assessment of selected government policies in relation to vulnerability. It points out that the Ugandan policy environment is replete with policies at different stages of evolution, but that as far as those which are meant to solve the problems of the vulnerable, are concerned “... most of them tend to suffer target deficits. Other policies exist without legal back up, while others conflict with the law in place largely because they were drawn after the law had been in operation.”<sup>176</sup>

According to the report, the PEAP approach to the vulnerable is “... rather general and lacks specificity, and therefore it may be difficult to benefit the poorest of the poor.”<sup>177</sup> Indeed, the report criticizes the PEAP for failing to demonstrate that recognition of vulnerability has been translated into various measures of intervention which would be necessary to assist the most vulnerable. Moreover, the PEAP equates vulnerability with disadvantage.<sup>178</sup> Finally, the caseload of UHRC has not been significant, and since a major decision on the issue of pensions, there has not been much by way of litigation in the area of ESCRs.<sup>179</sup>

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<sup>170</sup> Cap.24, Vol.II, Laws of Uganda, 2000.

<sup>171</sup> For a comment on the UHRC and its evolution with respect to ESCRs, see Oloka-Onyango, 2004, esp. 40-45.

<sup>172</sup> UHRC 2004, chapter nine.

<sup>173</sup> *Id.*, at 42.

<sup>174</sup> *Id.*, at 43-45.

<sup>175</sup> UHRC, 2005, Chapter 1.

<sup>176</sup> *Id.*, at 88.

<sup>177</sup> *Id.*, at 89.

<sup>178</sup> *Id.*, at 89.

<sup>179</sup> For a discussion of *Kalyango Mutesasira v. Kunsu Kiwanuka et al* (Complaint No.501 of 2000, see Oloka-Onyango, 2004 at 44.

The above table paints an interesting picture. None of the many Parliamentary Committees that carry out the body's legislative function initiated a bill; the majority of bills in fact came from the Executive. Secondly, although the Constitution mandated that a law should be enacted to put in place an Equal Opportunities Commission (EOC), no member felt it their duty to bring the bill to the house. Regarding the issue of graft and transparency, Parliament could have been more pro-active on laws such as the Leadership Code and the powers of the IG. A number of the bills introduced privately (such as the People with Disabilities Bill; and the Access to Information Bill) were clearly related to the expansion of the parameters of the rights framework, but a majority focused on the legislator's welfare.

As is the case with the other organs of the state, Parliament is also heavily dependent on the donor community, not only for infrastructural support, but also with respect to capacity building and other items key to the functioning of the body. Of course, this means that a certain degree of pressure can be exerted, as was done with respect to several bills that had implications for social and economic conditions in the country. Among them were the Foreign Exchange Bill, the Establishment of a Large Taxpayer Unit, and (perhaps most controversially) the review of the Power Purchase Agreement relating to the Bujagali Dam contract.<sup>168</sup> At the end of the day however, the scepter of presidentialism referred to at the beginning of this paper greatly limits the extent to which Parliament can effectively promote or protect ESCRs. This limitation is compounded by the extensive integration of the Executive into the Legislature (nearly one-third of the House consists of members of Cabinet), the use of inducements and threats to secure the Executive will, and the lack of a consistent and all-encompassing approach to matters that may implicate human rights, such as audits or impact assessments. Consequently, despite some fairly rigorous efforts, Parliament is yet to firmly place its stamp on the processes of policy formulation that most critically affect the realization of ESCRs in Uganda.

#### **4.2 The Case of Non-Legislative Institutions: UHRC and the IG.**

There is no doubt that the legislative and oversight function of Parliament can only be the first step towards addressing the improved promotion and protection of ESCRs. Auxiliary agencies such as National Human Rights Institutions (NHRIs) of which the Uganda Human Rights Commission (UHRC) is one, ombudspersons, and of course civil society actors of various kinds, have a crucial role to play in this regard. Although much of the work of NHRIs has focused on civil and political rights, there is a growing recognition that they need to shift focus in order to bring more attention to bear on violations of ESCRs.<sup>169</sup> Such attention would not only be part of their logical promotional and protection work, it would provide a check and balance to the fixation of government's with neo-liberal economic orthodoxy which has had a mixed impact on the better protection and enforcement of ESCRs.

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<sup>168</sup> Kayunga, at 22.

<sup>169</sup> Kumar, 2006.

Although technically correct, the *Odoi* judgment seriously crippled the operations of the IG, necessitating a wholesale review of the powers of the office vis a vis other government departments.

### **4.3 Courts as a Bastion of ‘Last Resort’?**

The idea that judicial power can be deployed in favour of the defenceless and disadvantaged is one that is usually met with skepticism.<sup>183</sup> Court process is long and expensive. The procedures and jargon are convoluted and alienating. With particular respect to the enforcement of economic, social and cultural rights through judicial process, Ugandan courts are still to come round to accepting that this category of rights are indeed justiciable, i.e. that they can be the subject of court process in the same way as civil and political rights are often the focus of civil adjudication.

Needless to say, there has been some marked progress in terms of both the number of cases brought in the public interest, as well as in the response of the courts to these kinds of cases. For example, there have a number of cases relating to environmental rights, which are a specie of ESCRs. Several other cases have dealt with issues that have implications for the use of court process in order to enforce ESCRs. Among the first is the case of *Salvatori Abuki & another v. A.G*<sup>184</sup> which dealt with the right to life through the deprivation of shelter, food and essential sustenance and the right to property. The petitioner and another (since deceased and therefore no longer a party to the petition) were charged with practicing witchcraft contrary to Section 3(3) of the Witchcraft Act, Cap. 108, and pleaded guilty and was accordingly sentenced to twenty-two months imprisonment and banished from his home for 10 years after serving the prison sentence. His appeal against the sentence to the Chief Magistrate was dismissed. The petitioner brought this petition challenging his conviction, sentence and Exclusion Order which was made pursuant to section 7 of the Act as being inconsistent and in contravention of Articles 21 (1) & (2), 24, 25, 28 (1) & 2, 29 (1), (b) & (c) & (2) and 29 (2) of the Constitution. He particularly attacked the Exclusion Order as depriving him of his right to property and the right to reside and settle in any part of Uganda. The respondent denied that the Witchcraft Act was inconsistent with any provision of the Constitution or that the Exclusion Order was in contravention of Articles 26 (2) and 29 (2) of the Constitution and contended that the Exclusion Order was actually consistent with Article 28 (12) of the Constitution being part of a penalty prescribed by law.

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<sup>183</sup> See, for example, Peter 2005.

<sup>184</sup> Constitutional Petition, 2/97.

#### **4.2.2 The office of the Inspectorate of Government (IG)**

Designated as the chief governmental office to tackle administrative vices such as abuse of office and corruption, there is no doubt that the IG is a critical institution in ensuring that ESCRs are realized. The IG has a critical role to play in ensuring that the realization of ESCRs is not frustrated by corruption and similar ailments. In the words of Raj Kumar, “Transparency in governance and accountability of administration are key issues in human rights approaches that target poverty, as corruption and maladministration affect the implementation of sustainable policies aimed at eradicating poverty.”<sup>180</sup> Over the years, the IG has grown to become a respected state institution that has played a prominent role in addressing corruption, particularly in the arena of social services. For example, a recent newspaper pullout detailed the work of the IG with respect to tackling corruption in the area of UPE, a sector that has been dogged by large-scale corrupt practices. The IG was also instrumental in surfacing the scandal relating to the lack of transparency in handling the National Social Security Funds (NSSF) contract with a housing contractor.

In several respects, however, the IG could be regarded as a victim of its own success, and has consequently witnessed several important challenges in its evolution and growth. Those challenges extend mainly from parties aggrieved by the IG’s investigations and findings. Most recently, the challenge has emanated from within the ruling clique, with particular respect to the jurisdictional power and authority of the office.<sup>181</sup> A litany of cases brought challenging the IG demonstrate that there are serious attempts to effectively render the office toothless. The situation is not helped by the position of the Attorney General, who has consistently countermanded the watchdog’s advice, as recently happened with the Energoprojekt case (concerning the purchase of generators) and the role of the Board and management of the Electricity Regulatory Authority (ERA), who were recommended for dismissal by the IG and whose recommendation was countermanded by the Attorney General.

As a matter of fact, the tensions in the office date back much further. They first surfaced in the case of *Fox Odoi & another v. A.G.*,<sup>182</sup> in which the petitioner sought to challenge various sections of the Leadership Code Act No. 17/2002 as being inconsistent with certain articles of the Constitution. The Constitutional Court held *inter alia* that only a tribunal can remove from a judicial officer under Article 144 (2) of the Constitution. Furthermore, the question of appointment of the investigating tribunal must be referred to the President by a specific body. It is only when the tribunal recommends a removal that the President can proceed to effect removal of the judicial officer. In essence, this meant that the Constitution gave the President certain powers over the appointment or dismissal of an officer, and despite their transgressions, the IG had no power to order their removal.

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<sup>180</sup> Kumar, *op.cit.*, at 775.

<sup>181</sup> See, for example, Emma Mutaizibwa, ‘IGG, Attorney General Row Clouds ID Tender Report,’ *Daily Monitor*, September 13, 2006 at 25.

<sup>182</sup> Constitutional Court Constitutional Petition, 8/2003.

to be capable of being compulsorily acquired and taken possession of by anybody.

The High Court case of *A.G v. Osotraco Ltd*<sup>187</sup> sought to protect an individual's right to property against government, while at the same time making a significant ruling regarding the immunity of government from court process in the aftermath of the 1995 Constitution. The respondent claimed to be the registered proprietor of the suit property, which at the time of acquisition and thereafter was occupied by the Ministry of Information that had refused to vacate despite the request to do so, claiming the property as its own.<sup>188</sup> The High Court held that since enactment of the 1995 Constitution, the rights, powers and immunities of the State were no longer immutable. Article 20 enjoins everybody—including Government agencies—to protect and respect individual fundamental human rights. Justice Egonda Ntende stated that the Constitution had primacy over all other laws and the historic Common Law doctrines. Restricting the liability of the State would not be allowed to stand in the way of the constitutional protection of fundamental rights. Finally, the court held that Article 26 protected the respondent's right to own property, and that the respondent was clearly entitled to a meaningful form of redress under Article 50 of the Constitution.

A more recent case concerned the Benet, referred to in the opening sections of this study. In the case of *Uganda Wildlife Authority (UWA) v. The Attorney General*,<sup>189</sup> the court found the Benet to be the historical and indigenous inhabitants of the lands from which they had been evicted and which had been declared part of the Mt. Elgon National Park. Apart from declaring their eviction to have been illegal, Justice Katusti directed that affirmative action had to be taken to redress, "... the imbalance which presently exists in the Benet area in terms of education, infrastructure, health and social services...."<sup>190</sup>

What the above brief survey demonstrates is that there are different ways in which ESCRs can be enforced through the courts, either directly where there is an explicit provision such as on the right to education or property, or indirectly through the right to life provision. Needless to say, it also points to the fact that there is need for much more action by persons who may have been aggrieved with respect to the realization and enforcement of their economic, social and cultural rights. Public Interest Litigation may not be successful (as it wasn't in the *Nakachwa* case, for example). Needless to say, the publicity value, or the pressure brought to bear on the institutions to take a second look at the rules and regulations that may serve to inhibit the realization of effective justice, in the long run will be of great benefit to society at large. Thus, even though the recent suit by Makerere University students against the Council for the closure of the university appears to be a long shot, it forces the judiciary to consider the

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<sup>187</sup> Civil Appeal No. 32/2002.

<sup>188</sup> Government was taking advantage of the Government Proceedings Act that protects it against eviction.

<sup>189</sup> Misc. Cause No.0001 of 2004.

<sup>190</sup> *Id.*, at 1.

The Constitutional Court held *inter alia* that a statute which purports to encroach on a personal or proprietary right of a citizen must be construed strictly. The effect of the Exclusion Order was that Section 7 of the Witchcraft Act was in conflict with Articles 24 and 44 of the Constitution. Secondly, the court pointed out that the validity of any law or custom depends on its passing the test laid down by Article 2 of the Constitution. Article 28 (12) requires the definition of an offence and its prescription by law. Any vague interpretation fails to satisfy the requirement. Section 3 of the Act fails to adequately define what it holds as amounting to witchcraft. Thus, in the eyes of the court the process employed lacked definiteness and could end up netting people who are vaguely undesirable in the eyes of the law. The Exclusion Order was voided for offending Article 26 (2) of the Constitution in that it denied the convicted person access to his property. It also offended Article 24 by subjecting the convicted person to a form of torture which was cruel, inhuman and degrading. On the right to life, the Court held that the right to life is only deprived upon a sentence of death imposed after a fair trial by a court of competent jurisdiction in respect of criminal offence. The Constitution therefore does not permit the sentence of an Exclusion Order to threaten the right to life or to lead to the loss of the right to life through deprivation of shelter, food and essential sustenance. In this way, the court invoked what were clearly economic and social rights and linked them to the right to life.

On the other hand, in the case of *Joyce Nakacwa v. A.G & Others*,<sup>185</sup> the overriding issue touched on the health rights of the petitioner who claimed that her rights had been violated when she was denied maternity care and was forced to walk while still bleeding and weak from the delivery. The petitioner delivered a baby girl by the roadside near Naguru Kampala City Council Clinic and with the baby still attached to the after birth, proceeded to the Clinic to complete the birth process. She did not receive any medical/maternity care but was referred to Mulago Hospital with no referral letter. She was later arrested and imprisoned and her baby taken away from her. Days later, she learnt that her child had died. When the petition came up for hearing, counsel for the respondent raised preliminary objections touching on the jurisdiction of the court to entertain the petition and the competency of the petition. The Constitutional Court had to deal with these first before proceeding to entertain the Petition. The Court dismissed all the preliminary objections but unfortunately, before it could proceed with the substantive hearing of the Petition, the petitioner passed away. Consequently, the petition abated under Rule 15 of the Rules of the Constitutional Court (Petition for Declarations under article 137 of the Constitution Directions, 1996). The counsel for the deceased petitioner, Philip Karugaba, challenged the constitutionality of Rule 15 in as far as it extinguished the petitioner's right of action thus depriving her estate of property without compensation contrary to Article 26 (6) of the Constitution.<sup>186</sup> The Constitutional Court upheld the rule and held the right of a petitioner to bring a Constitutional Petition as personal and incapable of assignment. Such right, they observed was not property so as

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<sup>185</sup> Constitutional Court Constitutional Petition, 2/2001.

<sup>186</sup> Constitutional Petition 11 of 2002.

of men.<sup>192</sup> A World Bank/Ministry of Gender, Labour and Social Development (MGLSD) study conducted around the same time found that the decentralized legal and political environment in Uganda had increased women's access to legal and judicial services, since 84 percent of the women interviewed who filed legal claims had achieved justice.<sup>193</sup>

But there are still many problems. One of the first and most obvious tensions between form and substance is the fact that despite the fact that LCs exercise judicial power, they are not, strictly speaking, courts. Indeed, this is reflected both in the primary legislation which governs their operation, as well as in the specific legislation that outlines the extent of the judicial power that they do exercise. Consequently, the provisions of the Constitution that affect their operation will be found in both the chapters on Local Government (Chapter Eleven) and that on the Judiciary (Chapter Eight). But moving further down, the primary legislative instrument that governs the formation of LC courts is in the first instance the *Local Government Act*,<sup>194</sup> while their judicial functions are found in the *Executive Committees (Judicial Powers) Act (JPA)*,<sup>195</sup> which law has only recently been amended.<sup>196</sup> LC courts are not mentioned in the *Judicature Act*<sup>197</sup>—the principle legislation governing the operation and structural relationships of the courts in Uganda—despite the fact that this law was revised in 1997. This relates back to the debacle of the initial attempts at reform attempted in the early 1990s.

Hence, LCs were originally constituted primarily as organs of local governance and only secondarily as judicial bodies. To add more tension to the arrangement, rather than falling under the supervision of the higher courts, the Judicial Service Commission (JSC) or even the Ministry of Justice & Constitutional Affairs (MOJCA), LC courts (until the recent amendment) fall under the oversight of the Ministry of Local Government (MOLG), underlining their essentially administrative/executive function, rather than their operation as courts of law.<sup>198</sup> The same is true of the structures created under the Land Act such as the Land Tribunals, and of the LC Courts in their operation as bodies concerned with land matters, which are supervised by the Ministry of Water, Lands and Environment (MWLE).<sup>199</sup> These arrangements import significant issues with respect to the separation of powers, and also the violation of certain basic principles of natural justice, such as whether it is correct to both make the law,

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<sup>192</sup> See Ahikire, 2001 at 1.

<sup>193</sup> Quoted in CTA, 2002 at 42-43.

<sup>194</sup> Cap.243, Vol.X, Laws of Uganda, 2000, especially Part III and IV. However, Section 30, which outlines the functions, powers and services of a council does not mention judicial powers.

<sup>195</sup> Cap.8, Vol.II, Laws of Uganda, 2000.

<sup>196</sup> See Act No.13 of 2006.

<sup>197</sup> Cap.13, Vol.II, Laws of Uganda, 2000.

<sup>198</sup> Supervisory power is now vested in the Chief Magistrate on behalf of the High Court. See section 40, Local Council Courts Act, No.13 of 2006.

<sup>199</sup> The supervisory body of these courts has also recently end 2006 been shifted to the Judiciary.

merits of an action grounded in the claim of a violation to the right to education. For example, a group of senators in the Philippines challenged the prioritizing of debt repayments over education. Although they lost the suit, the case demonstrated that these matters could be the subject of adjudication.<sup>191</sup> The South African case has demonstrated, through cases on the right to shelter, health and water, to mention a few, that these matters can be made the subject of successful court action.

## **V. ESCRs IN A DECENTRALIZED CONTEXT**

Constitutions and central governments are important arenas within which the struggle for ESCRs should focus. Nevertheless, for the majority of the population, it is the local level of governance which has the most significant impact on one's livelihood. The issue that gains in prominence both from a procedural and a substantive level is the question of access; *what means of redress are available to the populations that are most affected by the non-realization or the failure in the enforcement of economic, social and cultural rights?* Since 1986, a great deal of attention has been paid to the issue of the devolution of power to lower levels of governance. The resistance councils and committees ('RCs') were the product of the attempt to not only deal with the local tyranny of the village chief, but also to expand the parameters of representation and access to larger social groups.

In the section which follows, I examine the degree to which local council courts have been sensitive to the 'mother' of all rights, the issue of gender equality, and its links to the further protection of ESCRs in the local context. The analysis surfaces the most apparent tensions in the arrangements under examination in a bid to present a more nuanced and holistic context. Of particular concern is the manner in which the application of the substantive law is influenced by the structural frameworks created to accomplish the task of improving access to justice. On the whole these have been positive and it is important to point to the strengths of the system, and particularly to highlight the benefits that have accrued in terms of access to justice, while also pointing to the limitations encountered.

### **5.1 Women's ESCRs within LC Courts**

Aside from the obvious benefits of the system such as the use of local languages rather than English, the simplicity of the proceedings in these courts, and the absence of lawyers, LC structures altered not simply the shape but also the character and content of local governance. Thus, by virtue of the stipulations in terms of participation regarding women, people with disabilities, youth and other disadvantaged groups the monopoly of the process of local adjudication was removed from the traditional dominant actors, namely (elderly) men, with a particular social or historical status in society. Josephine Ahikire, for example argues that the immediate effect of these measures in Uganda was to introduce 10,000 women into a local government system previously the exclusive preserve

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<sup>191</sup> See Tomasevski's analysis of the case of *Gunifona Jr., v. Carague*, Supreme Court of the Philippines, GR No 94571, April 22, 1991. Tomasevski, op.cit., note 13.

the system felt constrained by their positions in the system. A choice would have to be made between (selfless) service in the LC structures, working in their fields, or seeking alternative employment elsewhere. This explains why demands that these offices be remunerated have grown over the years, culminating in the most recent constitutional amendment in 2005, stipulating that LC officers should in fact be paid.

But the issue of remuneration is only one side of the coin. The other is that as these institutions gained more social currency and acceptability, their workload also increased substantively. Questions such as commitment and availability became more critical, and often the raising of quorum for the meetings of the committees became a problem. Moreover, aside from the judicial load that the courts carry, there is also an administrative burden imposed on account of their dual function. What had been one of the major criticisms against the system of case handling under the Magistrates—namely that cases took years to be concluded—has also begun to affect the operation of the LC courts. A third point to be made is that it is necessary to consider that in many respects the tensions that have germinated in attempting to apply the provisions of the 1995 Constitution to all facets of social life, but in particular to the personal, evokes the most dramatic tensions between not only the personal and the political, but also between inherited human rights norms and standards, and deeply ingrained beliefs and practices. Appreciating this point will allow us to better understand some of the paradoxes in Uganda's experiment in new forms of local governance and in the implementation of the overall constitutional framework of governance. It raises particular conceptual problems with regard to ESCRs.

Despite the conceptual and rhetorical lip-service paid to the many concepts enshrined in the 1995 Constitution, the breach with practice is striking, as is the absence of a grounded understanding of the precise manner in which these concepts should be translated on the ground.<sup>201</sup> It is quite astounding, for example, that the Constitution provides for at least a one-third representation of women in all local councils. Furthermore, there are no bars to women standing for any of the other seats on the LCs aside from those traditionally reserved for them. Women can stand for the chairperson's seat, and for any of the other positions in the nine-person committees. But, anecdotal evidence suggests that the one-third quota has not actually been filled. In sum, there is a *quantitative* transformation in the local government structures, without a corresponding *qualitative* transformation.

Why then is there a marked distinction between what is stated within the legal framework and what obtains on the ground? What explains the literal flood of women into the system of local governance versus the minimal impact their presence in the system has been able to make? How is it that many of these structures can still operate in seeming oblivion to the various other reforms enshrined in the new constitutional dispensation? Why, in other words, has there not been as dramatic *qualitative* change to match the growth in numbers?

and to sit in judgment of it. While in both the instance of the LC courts and the structures of land adjudication, the system of appeals leads back to the traditional Judiciary, it is necessary to ask how effective such a system can be, or indeed, the extent to which the system is utilized at all in light of constraints such as knowledge, cost or even familiarity.<sup>200</sup>

There are several other implications of the arrangements that have been designed to deliver primary justice in contemporary Uganda. First of all, it is important to recall that LC courts merely operate within the wider context of the society in which they were established. That context is one where—as the debate on the DRB demonstrated—there continue to be many deeply rooted sublime and overt prejudices that invariably surface in the discussion of issues to do with increasing the scope of people’s rights, particularly in the arena of personal law. It must also be recalled that LCs originated within the framework of the experience of civil war, and came to maturity under the so-called ‘Movement’ system of government. That system proscribed multi-party political activity. One of the main criticisms of local government structures before 1986 was that they were closely affiliated to (and thus did the bidding of) political parties.

However, even in the context of the Movement system where open political affiliations were actively discouraged and proscribed (especially in electoral contests), there is no doubt that LCs came to play a role closely linked to the retention of the governing regime in power. Thus, LCs (which overlapped with the Movement structures at the local level) were expected to mobilize support for the ‘Movement’ presidential candidate, and to execute other centrally-determined functions on behalf of the government of the day. Indeed, it is not uncommon for the Village LC chairperson to double as the Village Movement chairperson without blinking an eyelid. Moreover, it needs to be recalled that in the pre-1986 period local government structures did not exercise judicial functions. Again, this means we must ask a related question: *what kind of justice will they deliver, and to whom?*

Second, is the issue of logistics and effective operation. Once again, because LCs began as a response to state-inspired repression, the motives for their operation were clearly linked to the very existence and survival of the local people; the activities they carried out were essentially voluntary, but nevertheless vital to the continued survival and social cohesion of the community. Most importantly, LCs were not created by the government of the day as an extension of the Public Service. Once LCs became state organs, however, motivations clearly changed. For some, these offices were merely used as a stepping-stone to higher office within the context of a new political dispensation. For others it was simply a job. Needless to say, as these structures became more rooted and regularized, their functions too expanded, implying that those who operated

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<sup>200</sup> Okumu-Wengi 1992 makes the point that even though the higher courts are supposed to provide some supervision to the LC courts, the sheer number (coupled with the heavy workload the courts have) renders this impossible.

men and women harder to identify and deal with....”<sup>207</sup> As a consequence, gender mainstreaming has “... effectively drowned out the project of equality between women and men.”

### **5.3 Women and Rights in the Poverty Paradigm**

From the issues traversed in this study, it is fairly obvious that any approach to the resolution of the barriers to improved access to justice and the realization of the rights with which we are concerned cannot primarily be a legal one. While the legal environment forms the formal framework of access and is thus critical to address, the nature of that environment combined with the social framework in which it operates determines the real access that marginalized persons will actually have to effective justice. As Nyamu-Musembi points out, “...working towards the incorporation and enforcement of formal guarantees of rights in legislation could be self-defeating if it fails to contend with the force of local institutions whose norms and practices have the potential to complement or contradict the intended goals.”<sup>208</sup> Additionally, the issue of poverty assumes even more prominence in this context.

Aside from the substantive content of the law whether in the statute books or in existing customs, and the structural (or formal) context such as the courts and other institutions which are created to enforce it, there is a third area (or force) to contend with. This is an area we can describe as the socio-cultural and which encompasses community attitudes and behaviour towards the law (statutory or customary), which is also fundamentally important to this discussion. The importance of this Third Force cannot be under-estimated. Insofar as the legal framework in Uganda is concerned, and as the case study of the developments relating to the reform of land law has demonstrated, there have been significant progress and successes that have reduced the barriers to access. However, while there still remain some barriers (such as the recognition of co-ownership between spouses), seeking further legal reform may be futile or an exercise in overkill.<sup>209</sup> That is the lesson of the case-study on the DRB, which, at a minimum, requires a review of the approach to the achievement of an improved family law. For the time being at least, it is necessary to work with what we have got. Working with what we have means that we need to re-engage and reinvigorate the positive constitutional framework, but also to contend with the laws on the statute books that are not necessarily very sensitive to the situation of marginalization in which a good percentage of the population (particularly women) is mired.

There are additional limitations such as the educational standards of both those seeking access and those with the power to grant it, the occupations of those affected by the discriminatory regimes, and the question of marital status, for

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<sup>207</sup> Charlesworth, 2005 at 2.

<sup>208</sup> Nyamu-Musembi, *op.cit.*, at 287.

<sup>209</sup> Indeed, in a bid to resurrect the ‘lost’ co-ownership clause, it was moved to the DRB, but confronted even more resistance there.

Ahikire offers some explanation, contrasting the fact that you can have a woman Vice President like Specioza Wandira Kazibwe or several women MPs selected on the non-affirmative action seats because these are remote to daily lived reality, and arguing that matters are different in the sphere of local government because this is "... where power was exercised directly in people's daily lives. Power at local level was likened to a household, where women holding power were seen symbolically to rule over men—as wives ruling over husbands."<sup>202</sup> In a nutshell, the struggle is as much about reforming the substantive law as it is about dealing with the more subtle conditions of dominance, patriarchy, and the exercise of domestic power that abound in Ugandan society.

## **5.2 A Second Look at the Question of Access**

There are a number of points that arise from the preceding examination of LC courts that require us to look more critically at the issue of access and its relation to the realization of economic, social and cultural rights, with particular regard to the more marginalized and vulnerable members of society. First, is that post-conflict Uganda has made several significant strides in achieving a transformation of the constitutional and legal regimes governing the twin issues of the substantive content of the law as well as in relation to its procedural operation. For all its limitations (and there are several), the 1995 Constitution should be regarded as having traversed new conceptual terrain with respect to forging a closer link between formal law and its informal counterpart. It has also made significant conceptual advances regarding the issue of access, whether with respect to seeking and gaining entry to the formal courts of law, or with regard to recognizing and facilitating access to non-state justice systems such as the LC courts. How else could we have had a decision such as that in the recent case of *Uganda Association of Women Lawyers (FIDA—U) & Ors. v. AG?*<sup>203</sup> The *FIDA* case declared the Divorce Act unconstitutional because of the differential way in which it treated men and women seeking a divorce.<sup>204</sup>

But implicit in this progressive judgment is the recognition that obstacles still remain, that "...the old ideas and patterns persist," and that these have had a deleterious impact on promoting enhanced rights and better access to justice. According to Lynn Khadiagala in several studies she has conducted on women's property rights in the Kigezi district of south-western Uganda, in fact, even when new ideas and structures have been introduced (such as LC courts), the results have been questionable.<sup>205</sup> Indeed, she argues that LC courts have proven more expensive, gender-biased and essentially limited in the access they do provide.<sup>206</sup> This could be regarded as a result of the processes of gender-mainstreaming, which have effectively, "... made issues of inequality between

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<sup>201</sup> See McGee *et al* 2003, at 56.

<sup>202</sup> Ahikire, 2004 at 44.

<sup>203</sup> Const. Pet. No.3 of 2003.

<sup>204</sup> See especially, judgment of Justice Mpagi Bahegeine at 7.

<sup>205</sup> See Khadiagala, 1999, 2001 and 2002.

<sup>206</sup> Khadiagala, 2001 at 55-56. But for a contrasting view, see Bosworth, 1995.

## VI. HOW MUCH IS STILL LEFT TO BE DONE?

Human rights activists in Uganda were both astonished and greatly dismayed by the comprehensive amendments to the 1995 Constitution that abolished presidential term limits, paving the way for the re-introduction of a life presidency.<sup>215</sup> Needless, to say, and in line with the old saying “every dark cloud has a silver lining,” the amendments have perhaps presented the greatest opportunity for positive action on economic, social and cultural rights that Uganda has ever had. This has come via the provisions of Article 8A of the revised constitution. Referring to the ‘National Interest’, the article stipulates as follows: “Uganda *shall* be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.”<sup>216</sup>

What is so important about this provision, one may ask, after all it makes no reference to any human rights, nor does it deal with issues of enforcement or implementation. The fact is that as a normative matter ESCRs have faced numerous conceptual and practical obstacles to their realization.<sup>217</sup> The new amendment buttresses the rights enshrined in the National Objectives and Principles of State Policy (NOPSP).<sup>218</sup> The new provision makes it mandatory (rather than merely obligatory) for the State to take into account *all* the principles of national interest and common good enshrined in the NONPSP. The issues that arise here are numerous.

For example, ‘protection of the aged,’<sup>219</sup> ‘recognition of the role of women in society,’<sup>220</sup> ‘recognition of the dignity of persons with disabilities’<sup>221</sup> and the provision enjoining the State to take ‘*all practical measures to ensure the provision of basic medical services to the population,*’ have more flesh. By way of conclusion, it is my argument that by virtue of Article 8A, the State is now under a legal and mandatory duty to *observe, respect, promote and protect* all the rights enshrined in the NOPSP in much the same way as if they had been incorporated in the Bill of Rights of the Constitution.<sup>222</sup> What does this opportunity present to those of us interested in the enhanced promotion and protection of ESCRs?

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<sup>215</sup> For a comprehensive review of the so-called ‘kisanja’ debate, see Okuku, 2005.

<sup>216</sup> The amendment was introduced by section 4 of Act 11/2005.

<sup>217</sup> Save for the right to a healthy environment, the health rights are not provided for in the Bill of Rights of the 1995 Uganda Constitution. However, the position before the new amendment was that the state was under an obligation to *only* take practical measures to ensure the provision of basic medical services. Moreover, the National Objectives and Directive Principles of State Policy were only ‘Guiding Principles’ and therefore not enforceable in a court of law. The only remedial provision of the Constitution to the enforcement of the right to health was article 45 that was inclusive of rights specifically excluded in the Bill of Rights. But this position was also problematic enough because of the procedure one has to pass through to prove that despite of the fact the infringed right was not specifically mentioned in the Bill of Rights, it is fundamental in nature and warrants enforcement under article 45.

<sup>218</sup> See principle VII.

<sup>219</sup> See Principle XV.

<sup>220</sup> See Principle XX.

<sup>221</sup> See Chapter Four of the 1995 Constitution.

<sup>222</sup> See Article 8A, 1995 Constitution (as amended on February 15,2006).

both women and men, to mention only a few.<sup>210</sup> Simply put, knowledge that the law has changed to provide enhanced access does not necessarily mean that marginalized groups will actually be able to overcome the attitudinal and social barriers that stand in the way of access. This means that we need to consider other means of overcoming these barriers beyond both law reform and the reformulation of the institutions of primary justice that have been set up such as LC courts. In other words, how do we confront this ‘Third Force?’

Florence Butegwa provides a useful framework within which we can begin thinking about the most appropriate action for the transformation of the arena in which social and cultural attitudes that stand in the way of achieving effective access to justice can be tackled.<sup>211</sup> Butegwa argues that we need to begin from the assumption that approaches working inside the cultural or religious context are more likely to succeed than those working from without. Obviously no person wants to commit social or religious *hara kiri*, or ritual suicide, since all persons are social and religious beings.<sup>212</sup>

But while an insider can claim *prima facie* legitimacy, the message they bear can be found unpalatable. Simply because you are a daughter or son of the soil, this does not confer a license to support the ‘desecration’ of strongly held beliefs. In fact, in some cultures, the ‘traitor’ from within is much worse than the doom-sayer from without. Thus, there is also a need to legitimize conduct that is otherwise considered deviant, such as a woman claiming the right to inherit property in those cultures where this is considered anathema. This is both a strategic as well as a practical issue that requires careful analysis before application.<sup>213</sup>

Finally, it is necessary to adopt less adversarial or conflictual approaches that are both bottom-up and inter-active. Going back to the customary norm of denying women and girls the right to inherit land, the approach to be adopted would be to show that the premises of that custom—that such persons would be taken care of by their male relatives—no longer holds in the contemporary situation. It is also clear that examples abound of instances in which customary institutions have modified these norms. Adopting these strategies in a well-conceptualized and comprehensively thought-through process will ultimately move the struggle to improve access to another level. As Sarah Nott argues, “Legislation outlawing discrimination on the grounds of sex is undoubtedly worthwhile, but it is limited in what it can achieve. How such laws define discrimination, what areas of activity such measures cover and the mechanisms for pursuing claims of sex discrimination are vital in guaranteeing effectiveness.”<sup>214</sup>

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<sup>210</sup> Single women, youth and even unmarried older men are often regarded with disdain in many local contexts.

<sup>211</sup> Butegwa, 2002, 118-123.

<sup>212</sup> *Id.*, at 120.

<sup>213</sup> ICHRP, 2004 at 53.

<sup>214</sup> Nott, *op.cit.*, at 211.

- It is the responsibility of the State to show that the resources are not available;
- In allocating resources the State has an obligation to give priority to ensuring the widest possible enjoyment of the right, having regard to the prevailing circumstances, including the vulnerability of the groups or individuals claiming the violation of their right;
- A court, tribunal or a commission on human rights and administrative justice may not interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that the court, tribunal, forum or the Commission would have reached a different contribution.<sup>226</sup>

These guidelines provide a useful reference point from which Ugandan courts can begin to engage with ESCRs in a more meaningful manner, without being seen to invade the arena of legislation. But, the most important factor must invariably be the willingness of civil society actors to bring actions of various kinds—on the right to health, shelter/housing or food—to compel the courts to comprehensively engage with these rights. This is because PIL is case-responsive, in that courts can only react to issues which are properly before them and where the set of facts involved can be successfully adjudicated.

## **6.2. *The Issue of Reporting***

Although the current Government of Uganda ratified the ICESCR soon after it assumed power, it is among only a handful of instruments that it has not complied with. Overall, Uganda's reporting record is good. But, there is nevertheless an ambivalent approach of the government to the issue of reporting.<sup>227</sup> For example, in the revised PEAP, the government takes note of the complaint by the Uganda Human Rights Commission, that "...Uganda has not been able to fulfill its reporting requirements on some of the international conventions to which it is a signatory."<sup>228</sup> Furthermore, when outlining priority actions to be taken, the government pledges to fulfill "...all its reporting requirements under international conventions."<sup>229</sup> In relation to the Convention on the Rights of the Child (CRC) and that on women (CEDAW), the government's reporting has been exemplary, despite the fact that both instruments are replete with provisions on the state's treatment of ESCRs. With respect even to the ICCPR—what could arguably be regarded as the most controversial of areas—the government has submitted its report and was even subjected to an alternative ('shadow') report by a coalition of NGOs. The following table gives an indication of Uganda's record in terms of meeting its treaty reporting obligations.

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<sup>226</sup> See draft Section 29(5) of the draft Constitution.

<sup>227</sup> For a comprehensive analysis on the status of Ugandas reports, see UHRC, 2005 at 123-127.

<sup>228</sup> PEAP 2004 at 120.

<sup>229</sup> *Id.*, at 121.

## **6.1 Public Interest Litigation (PIL)**

As I have already pointed out, one of the most prominent methods utilized by advocates of ESCRs is the use of Public Interest Litigation (PIL) as a strategy to persuade courts to compel governments to meet the obligations that have been undertaken, whether internationally, or within the framework of their own constitutions. Countries such as India and South Africa have been particularly prominent in this regard. The argument is that once a right has been incorporated into the Constitution or the Bill of Rights, it should be used to compel the state to address critical problems in the particular sector subject to the action. More importantly, rights discourse and public appreciation should become the focus of local and national political action and agitation among those who lack resources or face repression.<sup>223</sup>

The success or otherwise of the PIL strategy is contingent on a number of factors. As Antonella Mameli has argued:

*... any evaluation of the use of litigation as a tool for combating poverty must take into account two elements: a 'legal' one, i.e. the role of judicial review and the judiciary in a specific country, and a 'social' element, i.e. the social structure and the mechanisms of social antagonism developed within that historical tradition—the conflicts among social groups or classes of that particular society.*<sup>224</sup>

There is of course some reluctance for courts to become involved in actions which may arguably properly belong in the province of the legislature. And yet, the 1995 Constitution has already imposed an activist role on the part of the Courts by compelling them to declare any legislation, policy or action *by any person* unconstitutional if such act doesn't conform to the provisions of the instrument. In this respect the courts are enjoined, "... to be the conscience of the country and to guarantee change and yet continuity within a democratic process."<sup>225</sup>

Certain guidelines for courts can be put in place in order to assist them establish the actual methodology of assessing how to deal with ESCRs. There is much good jurisprudence to be utilized from the South African example. The draft Kenyan Constitution—which although defeated in a referendum—contained a model provision for applying the 'progressive realization' principle in line with the available resources. Among the guiding principles it prescribed in the case of a court challenge involving ESCRs were the following:

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<sup>223</sup> Alston & Bhuta 2005.

<sup>224</sup> Mameli, 2003 at 139.

<sup>225</sup> *Id.*, at 146.

Reporting on the situation of ESCRs allows for a critical engagement with this aspect of the issue. With the exception of the situation of children and women, Uganda has nevertheless been rather shy in comprehensively and directly addressing the status of ESCRs in the country. That reluctance was clearly reflected in its most recent report to the African Commission, which is notable because the African Charter covers both civil and political rights, as well as ESCRs.<sup>231</sup> What this means is that civil society should compel government to meet its reporting obligation under the ICESCR, and if it fails to do so, to initiate a process of shadow reportage even in the absence of a state report.

### **6.3 One-Size-Can't-Fit-All.**

Although I have argued that issues such as equality of treatment, non-discrimination and several rights in the workplace share similarities with enforcement and protection issues that arise with civil and political rights, there are nevertheless some differences between the two. As was demonstrated in relation to a study on social rights litigation in India, the manner of recognition of each right, and the remedies granted by the Supreme Court in each case, "...takes shape against the backdrop of the litigating parties, their motivations and the quality of empirical research in support of the Court's intervention."<sup>232</sup> Rights activists have been prominent critics of the idea that the same economic policy (structural adjustment) can be designed to cover all countries, regardless of their peculiar economic, social or political circumstances.

However, in many respects, activists for ESCRs are guilty of the same by assuming not only that strategies adopted in other countries will work in our own, but also that what has worked with respect to attempts to enforce the right to education can be utilized in securing the right to shelter or housing. There is consequently a need for civil society activists and researchers in each of the ESCRs areas to come together and review the range of different strategies that could possibly be deployed in a bid to secure their better enforcement. It is also important for ESCRs advocates not to make the mistake of imagining that human rights legislation (and litigation) are the panacea to every social or political problem. In this regard, it is particularly important to underline the point that human rights are the product of struggles. These struggles have taken various forms, and it is necessary to be open to the different possibilities that can be utilized in order to achieve the ultimate objective of better enforcement of this category of rights. Thus, activists also need to be open to options such as mediation, advocacy, budget analysis and social mobilization, all of which have been only used scantily in present-day Uganda.

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<sup>231</sup> RoU 2006. Ironically, even the response of civil society did not embrace ESCRs as comprehensively as could have been done. See FHRI 2006.

<sup>232</sup> Kothari 2005.

**TABLE FOUR**  
**THE STATUS OF UGANDA’S REPORTING UNDER MAJOR**  
**INTERNATIONAL AND REGIONAL TREATIES**

<b>TREATY</b>	<b>REPORTING STATUS</b>
1. Convention on the Rights of the Child (CRC)	<ul style="list-style-type: none"> <li>◆ Initial report examined on October 26, 1997</li> <li>◆ Supplementary report examined on May 31, 2005</li> <li>◆ 2<sup>nd</sup> periodic report examined in September, 2005</li> </ul>
2. Convention Against Torture (CAT)	◆ Initial Report examined in May, 2005
3. Convention on the Elimination of Racial Discrimination (ICERD)	<ul style="list-style-type: none"> <li>◆ Initial Report examined on _____</li> <li>◆ 2<sup>nd</sup>-10<sup>th</sup> periodic report examined on 7<sup>th</sup> and 10<sup>th</sup> March, 2003</li> </ul>
4. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	<ul style="list-style-type: none"> <li>◆ Initial and 2<sup>nd</sup> Reports examined in 1995</li> <li>◆ 3<sup>rd</sup> report examined in 2002</li> </ul>
5. International Covenant on Civil and Political Rights (ICCPR)	◆ Initial Report examined in May, 2004
6. International Covenant on Economic, Social and Cultural Rights (ICESCR)	Five (5) years overdue by the end of 2004
7. African Charter on Human & Peoples’ Rights (ACHPR)	◆ Initial and 1 <sup>st</sup> Report examined in November, 2006
<b>SOURCE:</b>	<b>UHRC (2006), 8<sup>th</sup> Annual Report at 123-127</b>

The issue of reporting may seem unimportant, even irrelevant, but there are several reasons why there is a need to focus some of our attention on this issue. In the first instance, reporting is a form of monitoring governmental transparency and accountability with regard to a specific category of rights. Secondly, it allows for a more nuanced approach to the issues of economic development that are not given prominence through avenues such as the annual budgetary processes or in dealings with the IFIs. Finally, it allows for a focus on the causes of the rights violations, rather than merely on their occurrence. As Sarah Nott has pointed out, “To achieve greater success, the law must address the causes of poverty and more generally there is a need for all proposed laws and policies to be audited for their potential impact on the lives of those who are disadvantaged.”<sup>230</sup>

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<sup>230</sup> Nott, 2003 at 208.

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#### **6.4 Enhanced Action by the UHRC on ESCRs.**

There is no doubt about the crucial role of the UHRC in the struggle for the enhanced protection of ESCRs, and it is important to recognize and applaud the work that has already been done in this regard. However, there are several additional strategies that the UHRC can pursue in order to place the issue of ESCRs more firmly on the agenda, including:

- Comprehensive monitoring of implementation of the PEAP/PRSP;
- Addressing policy proposals designed to improved livelihoods and combat poverty, e.g. *bonna bagagawale*, through a human rights lens;
- Monitoring budget variance, including using a gender perspective;
- Establishing benchmarks/core obligations for the provision of/ realization of various ESCRs (Education, health, water etc.), and establishing a framework for their monitoring;
- Reviewing Labour standards and government and corporate adherence to them;
- Conducting Human Rights Audits/Accountabilities, especially among local government agencies, and of legislation in particular areas, e.g. Public Health, water sanitation, electricity charges and services and other areas which affect the protection of ESCRs.<sup>233</sup>

In conclusion, it is necessary to point out that crucially lacking in the context of Uganda's struggles for the realization of ESCRs is a rights culture, which gives primacy of place to respect for the better protection of this category of rights. In this regard, the self-empowerment of local, community and national actors is crucial. Some external agents may have played a positive role in achieving a certain degree of political liberalization, but by remaining in the political sphere they become another set of political actors jockeying for influence over policy. What is required is recognition that development is political, policymaking is a political process, and politicization of the technical and economic domains is the only way to generate long-term ownership and stability of whatever reforms prove possible.<sup>234</sup> In the same manner, ESCRs will remain beyond reach unless we make a concerted attempt to ground the struggle in people's daily lives.

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<sup>233</sup> For a comprehensive review of the role of NHRIs such as the UHRC in relation to the promotion and protection of ESCRs, see OCHCHR 2005, esp. 43-93.

<sup>234</sup> Whitfield, op.cit., at 660.

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