THE UGANDA LIVING LAW JOURNAL

Articles

Appendices

Volume 6 No. 1 June 2008

ISSN 1729-4672

Published by Uganda Law Reform Commission

THE UGANDA LIVING LAW JOURNAL

Journal of the Uganda Law Reform Commission

Volume 6 No. 1 June 2008

THE UGANDA LIVING LAW JOURNAL

Volume 6, Number 1 **June 2008**

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THE CONCEPT OF RULE OF LAW AND PROTECTION OF HUMAN RIGHTS: THE UGANDAN EXPERIENCE: 1986 TO THE PRESENT

By George W.K.L.Kasozi*

I. INTRODUCTION

Although this article focuses on Uganda, it starts by revisiting eminent scholars' contribution to the concept of rule of law generally. This is deemed necessary in order to provide a background, including the historical development and philosophical aspects regarding the concept of rule of law. It would have been useful to analyse the jurisprudence of the courts on the rule of law in Uganda and compare it with jurisprudence of courts elsewhere, but this was not possible due to time constraints. It is therefore suggested that further research should be undertaken in the future to address that concern.

The concept of rule of law or its absence has occupied the minds of lawyers, philosophers and political scientists for centuries. The debate becomes livelier when reference is made to issues of good governance, accountable and transparent leadership, in society. It is increasingly becoming imperative that for these ideals and aspirations to be realised a rule of law must prevail as a condition precedent.

While there may be many texts, where issues pertaining to the rule of law are discussed, the decisions of courts become critical, particularly for countries such as Uganda, which follow the common law tradition, as opposed to the European continental or civil law jurisdiction. We will therefore refer to some judgments from the superior courts in Uganda.

The importance of the jurisprudence that emanates from the superior courts in Uganda is vital in the process of refining and fine-tuning the law to meet the needs of society. These refinements are intended to bring about prevalence of the rule of law. Professor Kakooza underscores

the importance of these judgments when he says:

> *Judgments of the superior courts, in particular, are the mirror through which the status and operation of law are reliably appreciated by the public. They, being the indication of law in action, identify the merits and demerits in the law, thereby facilitating law revision and reform.*[1]

Nature and Scope of the Article

To some extent the article relies on jurisprudence from outside Uganda. In particular it draws on the rich Anglo-American jurisprudence on the subject. It provides a background, conceptualisation, meaning and content of the rule of law and its historical development. It discusses the role of ideology, philosophical orientation and provides a general conceptual framework of the rule of law; it focuses on the theoretical basis of the rule of law and investigates whether this concept has universal application. It also examines political models that may guarantee the realisation of the rule of law. Finally, the article attempts to look at the rule of law and protection of human rights in Uganda since 1986 to the present. It is clear that politics, world-wide, always contributes to the prevalence or absence of the rule of law at any given time. Therefore, we should not over-look politics in this discussion. In this regard, the article refers to executive and administrative actions with ramifications for the rule of law and protection of human rights.

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* **LL.M**, University of Hull, England, UK; **B. A [Law],** National University of Lesotho, Roma, Lesotho, Southern Africa; **Diploma in Law and Judicial Practice,** (LDC), Makerere, Uganda; **Formerly:** Magistrate, District Court, Entebbe, Uganda; Assistant General Development Officer, USAID/Lesotho; Senior Legal Officer, Ministry of Justice Human Rights and Rehabilitation, Lesotho; Part-time Lecturer, Institute of Extra Mural Studies, National University of Lesotho, Roma, Lesotho, Southern Africa; Guest Researcher/Research Partner, Danish Centre for Human Rights, Copenhagen, Denmark; **Lately:** Danish Institute for Human Rights Programme Consultant, Programme Manager, Haki–Afrika; Also Part time Lecturer, M.A Human Rights Programme, Department of Philosophy, Faculty of Arts, Makerere University. **Currently:** Senior Lecturer and Dean, Faculty of Law, Uganda Christian University; email>gkasozi@law.ucu.ac.ug < 0772770832, 0772315004.

[1] See, Editor-in-Chief's Note, The Uganda Living Law Journal, Law Reform Commission, Vol. 5. No.1, June 2007, p.vi.

The period in question is singled out because it is the longest political dispensation in independent Uganda. It is also a period, which offers human rights and constitutional law scholars the opportunity to critically examine the rule of law in Uganda, particularly because the architects of the 1986 revolution characterised it as a period of *fundamental change*. The question that may be posed at this stage is: how fundamental has the change been for the rule of law and promotion and protection of human rights?

As we attempt to discuss this important topic, we may ask ourselves a few questions viz: What does the term rule of law mean? Does rule of law mean the same thing everywhere and at all times? Or, putting it in another way: Is the rule of law capable of manipulation by political actors or is it a notion which is constant? Does the rule of law always ensure fairness? What are the benchmarks of a pure rule of law? Are certain political models more suited to guarantee the rule of law and enhance enjoyment of human rights than others? How do we assess adherence to the rule of law in Uganda during the political period under discussion? What are the challenges faced in pursuit of the rule of law in Uganda? It is our sincere hope that we will attempt to provide answers in this article.

2. Methodology

The article relies mainly on both library and electronic sources on the subject under discussion. An attempt is made to examine the jurisprudence of the superior courts in Uganda, and gauge the extent to which the said courts interpret the law, and uphold the rule of law, which in turn enhances the realisation of human rights.

In order to put the subject under discussion in its proper perspective, the article revisits the views of selected key scholars articulating ideas about the rule of law. It endeavours to provide a critical restatement of the existing views informing the rule of law and the relevant principles that reinforce rule of law in the Ugandan context.

II. THE IDEA OF THE RULE OF LAW: BACKGROUND AND CONCEPTUALISATION

1 . What does the term Rule of Law mean?

The concept of the rule of law has been a concern for humanity ever since societies started to organise themselves politically. The interplay of governance and the rule of law has served as fertile ground for political philosophy throughout history. We may cite a few examples: Plato is generally regarded as the first European philosopher who put forward the concept of rule of law. Plato posited that the rule of law is embedded in divine reason, and inbuilt in natural order.[2] In his work *Statesmen* and *Laws*[3], Plato distinguishes the rule of men from the rule of law.

Aristotle[4] through his contribution to the understanding of the rule of law makes reference to the rule of the aristoi. This is where political rights were assigned to persons in the city, with virtue, as well as property and freedom, and who in turn made full contribution to the political community. Aristotle throws more light on the concept when he says:

> *...it is argued that those who are by nature equals must have the same natural right and worth, and that for unequals to have an equal share, or for equals to have uneven share, in the offices of state, is as bad as for different bodily constitutions to have the same food and clothing. Wherefore it is thought to be just that among equals every one be ruled as well as rule... We thus arrive at law; for an order of succession implies law. And the rule of law, it is argued,*

[2] Plato lived around 427 - 347 B.C. and see, http://en.wikipedia.org/wiki/Rule_of_law accessed 2/13/2008. For further reading on definition and attributes of the rule of law, See also Brian Z. Tamanaha, *On Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004; See also Paul Tiyamba Zelesa and Philip J. McConnoughty, *Human Rights, the Rule of Law, and Development in Africa*, (ISBN 978-0-8122-3783-2)

[3] See, http://en.wikipedia.org/wiki/Rule_of_law accessed 2/13/2008.

[4] Aristotle lived around 384 – 322 BC. He was a Greek philosopher, logician and scientist. Along with Plato, his teacher, he grappled with the issues of governance. See, Fred Miller, *Stanford Encyclopedia of Philosophy, Aristotle's Political Theory* >fmiller@bgnet.bgsu.edu< also available >http://plato.stanford.edu/entries/Aristotle-politics/<accessed 2/14/2008

> *is preferable to that of any individual. On the same principle, even if it is better for certain individuals to govern, they should be made only guardians and ministers of the law ... Therefore he who bids the law rule may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.*[5]

What Aristotle seems to emphasise as being cardinal to the rule of law are the characteristics, namely, equality of all subjects, including equality before the law. He also points out an important aspect of the rule of law, which is subordination of all people under the law. This appears to be the foundation on which all other philosophers have premised their expositions.

Many authors have come up with benchmarks of rule of law. In this regard Korab-Karpowicz, a critic of the Platonic school of thought on democracy, argues that Plato's view may not be applicable to the contemporary situation as it was mainly premised on considerations of freedom and equality. He observes that there are other elements today, such as multiparty systems, periodic elections and a professional public service, which may be considered essential for the rule of law to prevail.[6]

Thomas Paine in explaining the concept makes an interesting observation. He says:

> *The world may know that so far as we approve of monarchy that in America the law is King. For as absolute governments the King is law, so in free countries the law ought to be King: and there ought to be no other.* [7]

Writing on the rule of law in Uganda, Professor Kanyeihamba is of the view that:

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[5] See, *Politics* by Aristotle, written 350 BCE, Translated by Benjamin Jowett, Book Three. It may be accessed >classics.mit.edu/Aristotle/nicomachaen.3.iiihtm< Plato's quotation is also reproduced in Ishmael Mahomed, S.C, "Preventive Detention and the Rule of Law", *Lesotho Law Journal*, Faculty of Law, National University of Lesotho, Vol. 5. No. 1, 1989, p.2.

[6] See, W.J. Korab- Karpowicz, *Plato's Political Philosophy* [Internet Encyclopedia of Philosophy] >http://www.iep.utm.edu/p/platopol.htm< accessed 2/14/2008.

[7] See Thomas Paine, Common Sense (1776) http://en.wikipedia.org/wiki/rule_of law (accessed 6/17/2008)

> *The rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principles propagated in the so called free societies to guide lawmakers, administrators, judges, and law enforcement agencies. The overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law.*[8]

According to *Legal Theory Lexicon,* the rule of law may not be a single concept. It is thus correct to say that the rule of law is a set of ideas connected more by what has been termed family resemblance, than a unifying conceptual structure. Rawls looks at the idea of rule of law as *the regular, impartial, and in this sense fair administration of public rules.* [9]

Taiwo, while echoing other writers on the subject, recognises the challenges posed by the rule of law, in the quest for political order, which is popular and acceptable to many. He points out that:

> *The concept of rule of law is founded upon theories of early philosophers dating from the Aristotelian period. The concept can be summarised as the principle of the supremacy of law. This means the subordination of the acts of government officials to the discipline of law. In other words, official acts must strictly comply with the procedure and requirements of established law.*[10]

There are other scholars, who may not agree with Aristotle's submission, particularly his assertion that law is unaffected by desires. They argue that law is not impartial, and that it reflects the political and social biases of the legislators and judges who make it.[11]

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[8] See G.W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, Renaissance Media Ltd., Kampala, Uganda, 2006, p.14.

[9] See, Legal Theory Lexicon 017: The Rule of Law , This may be accessed at http://1solum.typed.com/legal_theory_lexicon/2004/01/legal_theory_le_3.html

[10] See L.O Taiwo "Democracy, Courts and Rule of Law in Nigeria: Problems and Prospects", East *African Journal of Peace and Human Rights*, Vo. 13. No. 2, pp.270 – 293 at p.274.

[11] See Doug Hammerstrom, The Rule of Law versus Democracy, By What Authority (Vol.5, No.1 –winter 2002); See also http://www.ratical.org/corporations/RoLvDem.html<accessed 2/14/2008. This article discusses interesting issues and observations on dynamism of law. The author notes that to the idealist law is about justice, but to

According to modern Anglo-American reasoning, adherence to the rule of law commonly include a clear separation of powers, certainty, the principle of legitimate expectation and equality of all before the law.[12]

Black's Law Dictionary defines the rule of law as:

> *A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a "rule", because in doubtful or unforeseen cases it is a guide or norm for their decision. The rule of law sometimes called "the supremacy of law," provides that decisions should be made by the application of known principles of laws without the intervention of discretion in their application.*[13]

From this definition it is apparent that the rule of law connotes guidance on the part of the law maker, the judge or the administrator to arrive at a legally sound solution through the instrumentality of established principles of law, without invoking personal whims, but rather what the law dictates. The word administrator in this article is used in a wide sense to include all those who wield executive power. In other words, if the rule of law is to be upheld, there must as of essence be total and unwavering adherence to law.

The present writer, also in defining law, underscores the equalising attribute of rule of law, when he mentions equality of the law maker with the ordinary citizens. He says that law is:

> *A set of rules of conduct determined and enforced by the government (state), in the general administration, and administration of justice as well as defining rights and duties of the members of the community. If such rules are observed by both the rulers and the ruled, there is*

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progressive lawyers law is a business and justice is the commodity sold to the highest bidder. He further asserts that whatever position their clients' desire is the interpretation of the law argued by most lawyers in court, and as a result the law changes to provide for the needs of those who can afford to be clients.

[12] See http://en.wikipedia.org/wiki/Rule_of _law (accessed 6/17/2008)

[13] *Black's Law Dictionary*, Henry Campbell Black (editor), St. Paul Minn., West Publishing Co., 1979, p.1196.

order in a country and we can boldly say that there is rule of law.[14]

These views not only show that law is important, but that all people should subjugate themselves under the law for the rule of law to prevail.

Now that we have defined and attempted to offer a conceptualisation of rule of law, let us move to the next level of discussion.

2. The Rule of Law: Historical Development

The concept of the rule of law has developed and evolved over the years. It was elaborated at the Delhi Congress in 1959 by a gathering of 185 judges, lawyers and law professors from 53 countries, under the auspices of the International Commission of Jurists. The conference came up with an important pronouncement on the rule of law, which is sometimes referred to as the Declaration of Delhi.[15] Thereafter, many jurists and scholars of countries of the Commonwealth and beyond have attempted to articulate this concept.[16]

The initial efforts on the African continent to address issues of the rule of law are traceable to the first African conference on the rule of law held in Lagos, Nigeria, in 1961. This conference was attended by 194 judges, practising lawyers and law lecturers from 23 countries. There were also participants from 9 countries from outside the African continent. The conference put together a document, which came to be known as the Law of Lagos.[17] The said Law of Lagos provides as follows:

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[14] See, George W.K.L.Kasozi, (editor) Introduction to the Law of Lesotho: *A Basic Text on Law and Aspects of Judicial Conduct and Practice,* Vol. 1, Ministry of Justice, Human Rights and Rehabilitation, Lesotho, Printed by Morija Printing Works, November 1999, p.3.

[15] See, http://en.wikipedia.org/wiki/Rule_of_law accessed 2/13/2008.

[16] See, for example, O.D. Schriner, *The Contribution of English Law to South African Law and the Rule of Law in South Africa,* London, Stevens and Sons, 1967, p. 83; K.K. Mohau, Due Process and Delays in Criminal Trials, A paper Presented to a Commonwealth Judicial Colloquium, Lesotho Sun Hotel, 24 – 28 February, 1997, pp.1-3; Ishmael Mahomed, President of the Court of Appeal of Lesotho, in *Attorney General and Another v Swissbrough Diamond Mines (Pty) Ltd and Others 1997 (8) BCLR 1112 (Lesotho_Court of Appeal)* p.1128 paragraph_G.; Ishmael Mahomed, "Preventive Detention and the Rule of Law", *Lesotho Law Journal,* Vol.5, 1989, p.1.

[17] The Law of Lagos is contained in: M. Hamalengwa et al, *The International Law of Human Rights in_Africa,* 1988. For additional documentation see www.up.ac.za/ch

Having discussed freely and frankly the rule of law with particular reference to Africa, and having reached conclusions regarding human rights in relation to government security, human rights in relation to aspects of criminal and administrative law, and the responsibility of the judiciary, and of the Bar for the protection of the rights of individuals in society, Now solemnly recognises that the rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realise his legitimate aspirations in all countries, whether dependent or independent, Reaffirms the Act of Athens and the Declaration of Delhi with special reference to Africa, and Declares:

1. *That the principles embodied in the Conclusions of the Conference which are annexed hereto should apply to any society, whether free or otherwise, but the rule of law cannot be fully realised unless legislative bodies have been established in accordance with the will of the people who have adopted their constitution freely;*
2. *That in order to maintain adequately the rule of law all governments should adhere to the principle of democratic representation in their legislatures;*
3. *That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the constitutions of all countries and that such personal liberty should not in peacetime be*

The conference, which was organised under the auspices of the African Congress, was scheduled for 3 – 7 January 1961. It was financed by Ford Foundation and The Nigerian Federal Government. It was chaired by the Chief Justice of the Federal Republic of Nigeria Sir Adetokunbo Ademola. Other eminent persons who attended included the Chief Justices of the Regions of Nigeria, The Chief Justices of Ghana, Liberia, the Sudan, The Ministers of Justice of Senegal, Cameroon, and Federation of Rhodesia and Nyasaland. Leading lawyers from African countries, UK, USA, France and elsewhere also attended. The conference dealt with the relationship between the executive and legislature, the power to delegate legislative power, bail, preventive detention, judicial review of administrative action, the role of the judiciary and the legal profession in the maintenance of rule of law. See Notes and News *Journal of African Law* Vol. 5 No.1 p1. (http://mc1litvip.jostor.org/stable/745088 accessed 6/19/2008.

restricted without trial in a court of law;

4. *That in order to give full effect to the Universal Declaration of Human Rights 1948, this Conference invites the African governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safe guarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states;*
5. *That in order to promote the principles and practical application of the rule of law, the judges, practicing lawyers and teachers of law in African countries should take steps to establish branches of the International Commission of Jurists.*

The conference is credited with many positive developments regarding the rule of law; particularly the bills of rights incorporated in many African countries' constitutions, as well as the establishment of the African Charter on Human and Peoples Rights.[18]

Subsequent conferences in Africa have made reference to the above-mentioned Law of Lagos. For example, at the international conference held in Cape Town, South Africa, in 2004, while deliberating on the rule of law. Dato' Param Cumaraswamy, reiterated its importance thus,

> *There cannot be democracy and peace and prosperity without the rule of law being firmly embedded in nations everywhere ... In addressing human rights, democracy and good governance the Millennium Declaration resolved that the UN will spare no efforts to promote democracy, and strengthen the rule of law, as well as respect for all internationally recognised human rights and fundamental freedoms including the right to development.* [19]

3. Ideology, Philosophical Orientation and the Rule of Law

The ruling in the American case of Lexington and Ohio Rail Road v

[18] This Charter was adopted in 1981 in Nairobi, Kenya.

[19] See, Dato' Param Cumaraswamy, Rule of Law in Africa, World Conference of Barristers and Advocates, Cape town, South Africa, 12 -14 April 2004. Cumaraswamy is a former UN Special Rapporteur on Independence of Judges and Lawyers.

Applegate[20] may assist us to understand how ideology influenced the Kentucky Court of Appeal. In this case, the municipal authorities of Louisville acknowledged the problem posed by train sparks, as a nuisance to the residents and applied to the Louisville court for an injunction, which was granted. The proprietors of the rail transport appealed and the Kentucky Court of Appeal held, *inter alia*: The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be modified by them, therefore, rail roads should not, in themselves, be considered a nuisance, although in ages that are gone, they might have been so held. This is because the trains would have been comparatively useless, and, therefore mischievous.

Upon examination of the jurisprudence emanating from the Kentucky Court of Appeal judgement, in the *Lexington and Ohio Rail Road v Applegate* case, one notes that the court took a stance, which was pro capital and economic development at the expense of the ordinary people of Louisville, whose property, including dwellings, were adversely affected by the sparks from trains. The court in their wisdom had to interpret the law so as to advance economic development irrespective of the damage the trains would occasion to the citizens. The judges seem to have been guided by policy considerations that put economic development (capital) over and above everything else. This interpretation of the law may be referred to as purposeful, in order to facilitate and enhance economic development. The capitalist ideology had a role to play in court's decision.

Ideology and philosophical orientation influence and shape one's understanding of law generally and the rule of law in particular. This is evident as we have seen in the *Lexington and Ohio Rail Road v Applegate* case. Similarly, Forte[21] reminds us of the influence of ideology as he reviews the decision of *Roe v Wade*.[22] In discussing the case he observes that that *was not an example of untrammeled positivism.* He stresses that although judges, who belong to the positivist school of thought, have no choice, but to stick to the provisions laid down in the constitution of the land, its very premise provides justification for extension of judicial power beyond the provisions in the constitution.

[20] (1839) 8 Dana 289 at 305.

[21] See, David Forte, *Natural Law and the Rule of Law on Principle*, Volume 4, No.2, >http://www.ashbrook.org/publicat/onprin/v4n2/forte.html< accessed 2/14/2008.

[22] 410 U.S 113 (1973) US. Supreme Court Case.

The concept of the rule of law has evolved over the centuries, and influenced by ideology and philosophy. The rule of law has been defined and at certain times threatened by historical movements, institutions and events at different times in world history. The catalyst has been ideology and philosophical orientation. For example, in England, the *Magna Carta* enjoined King John to submit to the law and had his feudal powers limited.[23] The *Magna Carta*, (which means a Great Charter or Great Paper), was issued in 1215 and is recognised as having laid the foundation for constitutional rule and required the king to renounce certain rights, respect some legal procedures and admit that his will had to be bound by law. It specifically protected specific rights of the free or bondmen.[24]

The American Revolution, as well as the challenges posed by slavery, and the Second World War had serious implications for the rule of law in America.[25] Elsewhere, other enlightment philosophers and writers, such as Samuel Rutherford[26], and Montesquieu[27], have to a large extent in their works discussed the meaning, scope and content of rule of law, and in all their discussions, ideology and philosophical orientation, are inherent reference points.

4. The General Conceptual Framework of the Rule of Law

How do we conceptualise and characterise the rule of law? Is the rule of law a means or an end in itself? Where does it begin and end? These are

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[23] See, http://en.wikipedia.org/wiki/Rule_of_law accessed 2/13/2008.

[24] See, Magna Carta, Wikipedia, the free encyclopedia, http://en.wikipedia.org./wiki/Magna_Carta accessed 3/13/2008.

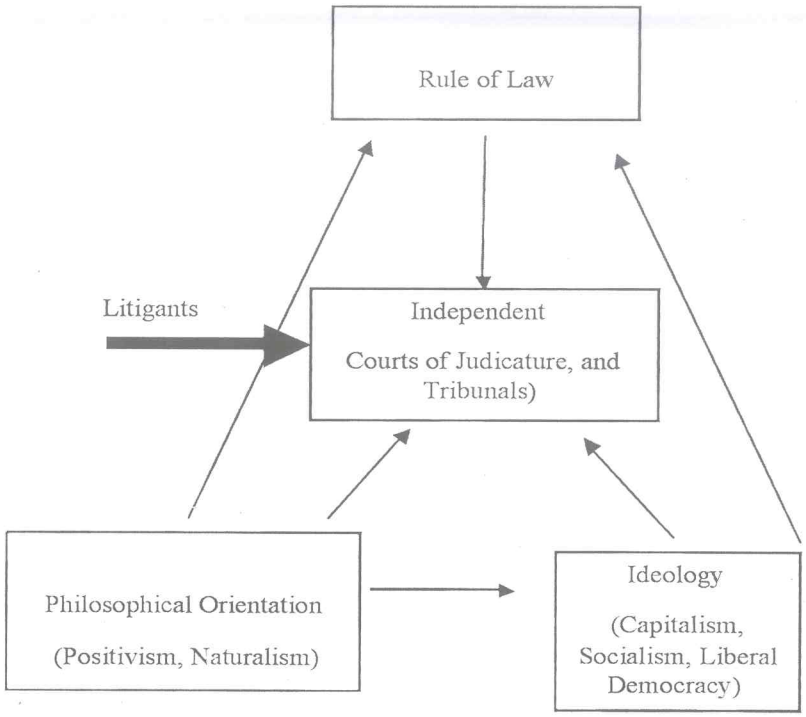
[25] See, for example the American Declaration of Independence, which, inter alia, provides: "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and pursuit of Happiness. .. [w]henever any form of Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it, and to institute a new Government*". The same spirit is embraced by the Universal Declaration of Human Rights, 1948, which provides thus: "*It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*". This view is shared by American Bar Association, Division of Public Education, as documented in: *Part II Rule of Law in History*, p.7.

[26] See Lex, Rex 1644.

[27] Montesquieu, *The Spirit of the Laws* 1748.

not easy questions to answer. They are similar to the egg-chicken argument as to what comes first! The questions become relevant as we focus on the conceptualisation of the rule of law. We may pose still another question, viz: can a society realise social and economic development without the rule of law?

Following below is a simple conceptual framework to explain the rule of law and how it should be understood in the context of Uganda.



5. Explanation of the Conceptual Framework

The above general conceptual framework which visually represents the influence of the philosophical orientation and ideology on the rule of law may be applicable to Uganda. For example, in a society under socialist orientation, the rule of law is said to be for the common good; under a society that is purely capitalist, the rule of law seeks to preserve the interests of controllers of capital; whereas under a liberal democratic orientation,

society advocates and cherishes values such as good governance, individual human rights promotion and protection; and the emphasis is on the dignity of every one irrespective of status.

We may add that, in a state, where there is no ideological commitment, and where a state is arbitrary and tyrannical, such as was the case in Idi Amin's Uganda, (1971-1979) the rule of law is easily jettisoned, although such a state may profess to uphold the rule of law. This then leads us to the conclusion that the rule of law does not consist in claims and counter-claims on the part of the state functionaries, but it is manifested by the the said state functionaries' commitment and actions. The state functionaries cut across the three arms of government, although those in the executive are the main actors, because their actions usually result in violation of human rights, which violation is antithetical to the rule of law.

6. Theoretical Basis of the Rule of Law

Theorists on the concept of the rule of law have identified corresponding concepts, or principles, which inform and establish the rule of law. According to *Halsbury's Laws of England,* which in many respects is a restatement of the English Common law, the rule of law may also be viewed as the upholding of the principle of legality.[28]

Professor Dicey[29] is one such theorist. He identifies three major principles, namely:

1. The absolute supremacy of regular law, contrary to the influence of arbitrary power;
2. Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary courts; and
3. The law of the constitution is the consequence of the rights of individuals as defined and enforced by the courts.

Justice Mahomed[30] revisits Aristotle's formulation of the rule of law and

[28] See *Halsbury's Laws of England*, Vol: Constitutional Law and Human Rights, Paragraph 6, footnote 1

[29] See, A.V Dicey, *The Law of the Constitution,* 10th Edition, 1959, p.187.

[30] Senior Counsel and President of Lesotho Court of Appeal. He later became the first Chief Justice of The Republic of South Africa, after the democratic elections of 1994.

attempts to expand the premises of rule of law. He argues that the following are the main features of the rule of law, that is, law should be: sovereign[31] over all authority; clear and certain in its content and accessible and predictable for the subjects; and that law should be general in its application. Alongside these, he recognises the need for an independent judiciary, without which the rule of law is impossible. He finally submits that in order for the rule of law to be realised, law must have procedural and ethical content.[32]

The characterisation offered by Mahomed may be supplemented by Lord Bingham's eight sub-rules of rule of law.[33] These include: the law must be accessible and, so far as possible, intelligible, clear and predictable; questions of legal right and liability should be resolved by application of the law and not exercise of discretion; the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; the law must afford adequate protection of fundamental human rights; means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; ministers and public officers at all levels must exercise the power conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers; adjudicative procedures, provided by the state, should be fair; and the state must comply with its obligations in international law, the law which, whether deriving from treaty or international custom and practice, governs the conduct of nations.[34]

When we talk about an independent judiciary we are in essence talking about the doctrine of separation of powers. This has been discussed by Montesquieu, who argues that in order to have an effective government, the three arms of government must exercise their powers independently and without influence on one from the other. He argues against concentration of all powers in one organ of government. That these powers should be separate from and dependent upon each other such that one power does not

[31] See http://en.wikipedia.org/wiki/Rule_of_law p. 4 of 7, accessed 2/13/2008.

[32] See, Ishmael Mahomed, S.C, Preventive Detention and the Rule of Law, Lesotho Law Journal, Faculty of Law, National University of Lesotho, Vol. 5. No. 1, 1989, pp.2-3.

[33] See, Lord Bingham's speech on November 16, 2006, for the Sir David William Lecture, Law Faculty, Cambridge University, http://en.wikipedia.org/wiki/Rule_of_law p. 4 of 7, accessed 2/13/2008; see also, http://cpl.law.cam.ac.uk/past_activities/rule_of_law_audio.php

[34] ibid

exceed the other two and vice versa.[35]

The doctrine of separation of powers is upheld in the common law countries, as well as in civil law systems. The United States, which is largely characterised as an Anglo-American legal system, subscribes to this doctrine. For example, John Adams, in drafting the Constitution of the Commonwealth of Massachusetts, justified the principle of separation of powers when he said:

> *In the government of this commonwealth, legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.*[36]

In reiterating the importance of the rule of law, for all countries of the world, Thomas Carothers argues that in the US, one may not go far without hearing it (the rule of law) being fronted as a solution to most of the problems encountered in their foreign policy. He says, without the rule of law, societies may not experience peace and prosperity. However, he quickly points out that the rule of law is not a quick fix. He also acknowledges that the rule of law may be difficult to come by in societies without a history of it, (rule of law) and that there must be change of attitudes of the majority of people, including the elites. He particularly observes that:

> *The primary obstacles to such reforms are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled*

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[35] See, http://en.wikipedia.org/wiki/charles_de_Secondat,-baron_de_Montesquieu See also, The Spirit of Laws>http://en.wikipedia.org/wiki/The_Spirit_of _the_laws<

[36] Massachusetts Constitution, The First Part, art. XXX (1780);
See also *http://en.wikipedia.org/wiki/Rule_of_law* p.4 of 7, accessed 2/13/2008. For further reading see, Judith N. SHKLAR, "The Political Theory and Rule of Law" in Hutchinson and Monahan (Eds) *The Rule of Law, Ideal or Ideology*, Toronto: Carswell, 1987; Waldron, "Is the Rule of Law an Essentially Contested Concept? In Florida" in Law and Philosophy, Vol.21/2, 2002; See also The Rule of Law in China, see: Five Years of EU and US Perspectives on China's Compliance with Transparency Commitments and Transitional Review Mechanism, <http://papers.ssm.com/sol3/papers.cfm?abstract_id=916768> Paolo Farah, *Legal Issues of Economic Integration*, Kluwer Law International, vol.33, Number 3, pp. 267 – 270, 2006; See also Tom G. Palmer, Cato *Handbook for Congress: Policy Recommendations for the 108th Congress*, CATO Institute, Washington, DC, USA.

> *by the law. Respect for the law will not easily take root in a system rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interest only under pressure. Even the new generations of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.*[37]

It is observed that there is a tendency to assume that rule of law presupposes fairness. Hammerstrom is of the view that the rule of law does not seem to mention justness as a condition precedent for the subsistence of the rule of law.[38] He further argues that the rule of law is not necessarily democratic. He says:

> *We who seek to build democracy must not be bound by the false assertion that the rule of law is democratic. A re-examination of history teaches us that our powerful legal system is a massive fortress against popular sovereignty. One of our most important tasks is to revisit fundamental questions that were resolved by undemocratic means in the past.*[39]

III. APPLICATION OF THE CONCEPT OF THE RULE OF LAW

1. Is the Rule of Law a Universal or Particular/Relative Concept?

Does the rule of law mean the same thing every-where and at all times? We may rush to answer this question in the affirmative, but that may leave many issues unresolved. The rule of law is a concept which is widely accepted by most scholars of law, political economy and of philosophy. We may say that the rule of law seems to have universal application. However, those who espouse the Leninist-Marxist school of thought may not agree with

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[37] See, Thomas Carothers, The Rule of Law, Revival, From Foreign Affairs, published by Council on Foreign Affairs, March/April 1998, http://www.foreignaffairs.org /19980301faessay1377/thomas-carothers/rule -of-law-revi...(accessed 2/14/2008)

[38] See, http://en.wikipedia.org/wiki/Rule_of_law p. 4 of 7, accessed 2/13/2008.

[39] See http://www.ratical.org/corporations/RoLvdEM.HTML

this position.

The critics of the rule of law concept, particularly the Marxists, argue that the capitalist state is an instrument of oppression of the proletariat by the bourgeoisie, which ensures that law is enacted to suit the bourgeoisie interests. They argue that the rule of law is a judicial fiction, which perpetrates violence covertly. They term this *"class struggle"*. They also criticise the rule of law as being an ideological construct that masks power relationships. However, some Marxist critics acknowledge that observance of the rule of law could curb abuses by the ruling class. Another criticism against the rule of law stems from mainly American scholars, who are of the view that judges in the 19th century changed the basis of the law of contract, by incorporating the *laissez-faire* doctrine of *caveat emptor,* (let the buyer beware). They argue that a few wanted everyone and everything to be seen as a commodity in which they would speculate. They argue that the *laissez-fare* contract law made the rule of the jungle the rule of law. [40]

2. Political Models to Guarantee the Rule of Law and Enjoyment of Human Rights

Many countries and societies in the world have experimented with a myriad of political models or systems, dictated by their chosen ideology or philosophy. This is not for us to question, but rather to ask whether those systems are suited to guarantee the rule of law. Until a decade ago, the world was mainly polarised between the Eastern block, emphasising the economic, social and cultural rights on one hand and the West, stressing civil and political rights of individuals on the other. There was also the non-aligned movement, which did not want to associate itself with any one political ideology, although invariably their political economy tended to gravitate towards the Eastern bloc.

A closer look at the political and legal reality in those three categories reveals that the rule of law was not well received in the majority of the Eastern bloc countries, including China. In the case of China, there was and still is an attempt to wriggle out of dictates of the rule of law by advocating a concept, which enhances the power of the state and the nation, namely the *rule by law*. [41]

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[40] See, Doug Hammerstrom, The Rule of Law versus Democracy, By What Authority (Vol.6, No.1 – Winter 2002, (from the PROGRAM ON CORPORATIONS, LAW AND DEMOCRACY, p.5 of 9, >http://www.ratical.org/corporations/RoL.vDem.html< accessed 2/14/2008

[41] *Ibid.*

As for the non-aligned countries, especially those of Africa, the position was not very different from the Eastern bloc, where there was political repression of the opposition, where it existed. In most of the non-aligned countries opposition parties were not allowed to operate. To hold a political view contrary to the ruling party was and still is considered treasonable by a majority of those countries, which do not subscribe to multiparty politics.

Uganda recently rejoined the multi-party democracy, which allows for competition of ideas and views. In a truly multi-party system, democracy is not guided.

With this brief background, it is, therefore suggested that, while the rule of law may not be a preserve of any given country, it is likely to thrive in a society that allows its citizens to enjoy their right to participate fully in the political affairs of the state, including electing representatives and standing for elections. A country that disenfranchises its citizens because they are suspected to belong to the opposition falls short of the requirements of a proper rule of law.[42]

The freedom of the press is another good indicator for the rule of law. In a situation where newspapers are banned or radio stations are closed for voicing a contrary view, such a scenario is not a positive development for the rule of law.[43]

IV. RULE OF LAW AND PROTECTION OF HUMAN RIGHTS IN UGANDA: 1986 TO THE PRESENT.

1. Contextual Background

Once the National Resistance Movement (NRM) Government, had set itself up as the de jure government, it started to consolidate its power base. The

[42] For example many citizens in Uganda during the last elections were not registered, because they were suspected to belong to the opposition. Some of the names of the voters were left out on the voters register, while those of the dead were in some constituencies still on the register of voters. This does not augur well for the rule of law.

[43] See, Constitutional Petition No.15 of 1997; Constitutional Appeal No. 2 of 2002. See also the banning of the Monitor Newspaper and radio. See Attack on the Press – 2002 >http://www.cpj.org/attacks02/africa02/Uganda.htm; see also Reporters Without Frontiers for Press Freedom, Uganda – 2004 Annual Report>http://www.rsf.org/article.php3?id_article=10210

political stage was established and a Constituent Assembly was convened to discuss the political future of Uganda.[44]

The period under examination is probably the most checkered dispensation in Uganda's political history. Oloka-Onyango, writing 10 years after the inception of the NRM regime attests to this when he says:

> *...Celebrating 10 years in power, Yoweri Museveni's National Resistance Movement (NRM) Government is the longest-serving since independence in 1962, it has also produced the most varied dimensions of social, political and economic transition Uganda has ever experienced.*[45]

It is for this particular reason that we decided to focus on this period. It is also important to say that this period followed a chaotic era in Uganda's history, between 1966 and 1986. Security of person and individual liberties hang in a balance in the said period and the rule of law deteriorated considerably, after ascendance to power by the late President of Uganda, Field Marshall Idi Amin Dada. The situation did not improve much after the fall of Amin as had been expected.[46]

2. Jurisprudence Emanating From Superior Courts: Implications for Human Rights and the Rule of Law

There are many cases, which have been lodged in the superior courts in Uganda from 1986 to the present. We may not discuss all of them, however, we will refer to those we were able to access, and which we think are

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[44] See Constituent Assembly Statute 1993. The Constituent Assembly was to scrutinise, the debate and prepare final draft of the Constitutional Text. For a discussion of this see, Benjamin J.Odoki, *The Search of a National Consensus: The Making of the 1995 Uganda Constitution,* Fountain Publishers, 2005, particularly pp.253 – 265.

[45] See J. Oloka-Onyango, Uganda, *Human Rights in Developing Countries Yearbook 1996* – in Peter Baehr, Lolaine Sadiwa, Jacqueline Smith (Editors) in Cooperation with Annelies Bosch – Kluwer Law International/Nordic Human Rights Publications, p.363. For Transformation of Uganda see, J. Oloka- Onyango, "Law Grass-root Democracy and National Resistance in Uganda", *International Journal of Sociology and Law,* Vol. 17 No. 4, 1989; See also Siri Gloppen, Alexander Kibandama, and Emmanuel Kasimbazi, "The Role of Courts in the Transition Dynamics in Uganda, Background Notes" March 2005, CMI CHR Michelsen Institute – Makerere University, The Legal and Institutional Context of the 2006 Elections in Uganda, Monthly Update.

[46] See for example similar observations in http://www.ugandaonlinelawlibrary.com/lawlib/constitution.asp

relevant to the article. We are using the term superior courts in this context to mean the High Court, Court of Appeal and Supreme Court of Uganda. These courts have been very instrumental in nurturing and upholding the rule of law in Uganda, during the period under discussion, as can be seen in the various judgments handed down.

There have been instances where academics, legal practitioners and members of the public have strongly criticised the decisions of these courts. Academics are at liberty to criticise judgments of the learned judges. This is healthy for purposes of showing possible alternative positions.[47] However, some of the criticism may be attributable to cynicism, political bias or sheer fanaticism on the part of the critics. Although Justice Kanyeihamba does not put it as such, he seems to agree with this view when he says:

> *...I narrate the case of General Tinyefuza v. Attorney General, which was a case of a senior army officer who petitioned the court that both the Constitution of Uganda and the act of the President in assigning him civilian duties outside the army, allowed him to resign and retire from the armed forces without any further act on his part. The case went all the way to the Supreme Court which held that for an army officer to resign from his commission or the army, he had to first comply with the rules and regulations of the army dealing with resignation and termination of service of serving army officers which, in this case General Tinyefuza had not complied with. The decision was welcomed by Government and its supporters as just, principled and accurate. Government opponents and multipartists condemned it as unjust, anti people and cowardly and as having denied Tinyefuza his constitutional rights. In January, 2000, the same Supreme Court, in the case of Ssemogerere & Another v. Attorney General held that the Constitutional Court erred in law when it denied itself the jurisdiction to hear the case and ordered that court to hear the case. The decision was widely condemned by certain elements supportive of Government. At the same time the decision was welcomed by opposition and multipartists as just and as symbolizing the impartiality and independence of the*

[47] These may be referred to as dissenting judgments or opinions. The dissenting judgments are taken seriously, where the dissenting judge has over the years distinguished himself or herself by the jurisprudence, which, derives from his or her judgments.

judiciary.[48]

In the last sentence of the quotation, Justice Kanyeihamba uses the words *just and symbolising the impartiality and independence of the judiciary.* The word just is synonymous with fair. We agree with this position. What is curious is that some academics, particularly the positivists, argue that there is a distinction between the rule of law and rule of fairness.

Dana Pico, a seasoned proponent of this view submits, regarding the role of the Supreme Court and the Philosopher King, that the rule of law should not imply fairness. However, he concedes that judges, like umpires in their interpretation of rules, should be guided by fundamental commitment to fairness, and that this is what equality before the law is about.[49] Let us now examine some of the cases, which the superior courts have handled and how the jurisprudence thereof impacts on the rule of law and human rights.

One of the early cases is *Edward Fredrick Ssempebwa v Attorney General,* [50] where the petitioner , petitioned the court challenging the legality of Legal Notice No. 6 of 1986, amending proclamation in Legal Notice No. 1 of 1986. He also challenged the constitutionality of paragraph 12 (2) of the Legal Notice No. 1 of 1986 as amended by Legal Notice No. 6 of 1986. He wanted the Court to declare that judgment debt/decree in High Court Civil Suit No. 435 of 1982 is property within the meaning of articles 8 (2) (c) and 13 of the Constitution.

The Court unanimously held that the impugned Legal Notice was not properly made and declared it null and void. That the Legal Notice No. 1 of 1986 as amended by Legal Notice No. 6 of 1986 is inconsistent with the Constitution of Uganda.[51] The court further held that the Judgment debt/ decree in HCCS No. 435 of 1982 is property within the meaning of Articles 8 and 13 of the Constitution. The petition was allowed with costs.

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[48] See Address by the Guest of Honour, Hon. Justice Prof. Dr. G.W.Kanyeihamba, at The International Commission of Jurists (Kenya) Section Jurist of the Year Award Ceremony: 10th December 2003, p.13.

[49] See, Dana Pico, "The Rule of Law, American Thinker", February 14, 2008. This may be accessed at >http://www.americanthinker.com/2005/10/the_rule_of_law.html< accessed 2/14/2008.

[50] High Court Constitutional Case No. 1 of 1986.

[51] It is the 1967 Constitution which was in force.

This decision demonstrates that the courts, will not hesitate to declare any law unconstitutional, if in the opinion of the courts such law is indeed unconstitutional. The Legal Notice in question was the first legal instrument to be promulgated by the NRM Government regime. The court, desirous to uphold the rule of law, would not miss the opportunity to declare the provisions of the Legal Notice unconstitutional.

In *Osotraco v. Attorney General*[52], the plaintiff company sought an order for the eviction of the defendant from the premises. The company was also seeking a permanent injunction against the defendant. The plaintiff company had claimed to be the registered proprietor of the property on plot No. 69 Mbuya Hill, Kampala, which they had purchased from Uganda Times Newspapers in June 1985. However, employees of the Ministry of Information and Broadcasting were in occupation of the property. They refused to vacate, whereupon the plaintiff approached the High Court for an equitable remedy of injunction against the State. The High Court was faced with the task of deciding on an issue which entailed subjecting the executive arm of government to an injunction. The Court was of the opinion that the matter before it was not one of interpreting the Constitution, but rather to construe the existing law, with such modifications, adaptations, qualifications and exceptions, as to bring it into conformity with the Constitution.

The proviso as contained in section 15 (1) (b) of the Government Proceedings Act,[53] appears to have set the government apart from the rest of litigants before courts of law. In other words, the government was being treated differently, contrary to the requirements of the rule of law. The Court, per Egonda-Ntende J, observed that the courts do not exercise authority on behalf of the successor to the crown or even the state or Government of Uganda, but judicial authority is derived from the people. The said Court, with approval, referred to jurisprudence emanating from the Privy Council decision, in *J.Nagendra Rao and Co.v State of A.P,* [54] where it was held that:

> *No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent acts of officers of the State without any remedy. The modern social thinking of progressive*

[52] HCCS No. 1380 of 1986.
[53] Cap 77.
[54] AIR 1944 SC 2663.

> *societies and judicial approach is to do away with archaic State protection and place the Government at par with any other juristic legal person.*

The Court in the *Osotraco case* also referred to the decision of the Supreme Court of Ireland in the case of *Byrne v. Ireland and the Attorney General*, [55]where Walsh J observed:

> *Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to also be available. It is as much the duty of the State to render justice against itself in favour of citizens, as it is to administer the same between private individuals...*

The High Court in the case of Osotraco issued the equitable remedy of injunction against government as prayed. This was a bold step by the court and it demonstrates judicial activism in upholding the rule of law and protection of the right to property, which is one of the human rights, guaranteed under the Constitution of the Republic of Uganda, 1995. This ruling has been criticised by academics. It may be considered as an attempt by the High Court to usurp the powers of the Constitutional Court and interpret the Constitution by default. We are not persuaded by this criticism.

We are of the view that judicial activism must be encouraged. However, there is a view that judicial activism may be a threat to the rule of law. One scholar who holds this view is Brian Dennison.[56] He argues that judicial activism may not go unchallenged by the executive, who may feel the judiciary is interfering. But in our opinion this may give the executive a reason to disregard the decisions of courts and thereby fail or refuse to comply with the dictates of the rule of law, as we will see in some of the cases later in this article.

The Attorney General, in the Osotraco case appealed.[57] The grounds of appeal were that the learned judge erred in law and fact when he construed section 15 (1) (b) of the Government Proceedings Act not to be

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[55] [1972] IR 241.

[56] Brian D. Dennison is an American Attorney, currently serving as a missionary and also lecturer, Faculty of Law, Uganda Christian University. He shared these views with the author. This is documented in his comments on the draft version of this article. The author is grateful to him.

[57] See *Attorney General v Osotraco Ltd.*, Civil Appeal No. 32/2002. Coram: Justices A.E.N Mpagi Bahigaine, JA; C.N.B. Kitumba JA; and S.B.K. Kavuma, JA.

in conformity with the Constitution. That the learned Judge erred in law in granting the respondent an order of vacant possession of the suit property and/or eviction as against the appellant. Mr. Mike Chibita, Principal State Attorney, contended that the learned trial Judge usurped the powers of the Constitutional Court. He further argued that the Judge had basically amended the Act of Parliament and yet he had no such powers to do so. This submission is contestable. Uganda is a common law jurisdiction. In countries with a common law tradition judges do to an extent make law through interpretation. This is acceptable in a rule of law setting.

On the other hand Mr. Madrama, Counsel for the appellant, submitted that the Judge had correctly acted under article 273 (1) of the Constitution. Further, that none of the parties reserved any question for interpretation and that the Judge on his own motion considered whether there was such a question to be referred to the Constitutional Court and found that there was none. The appeal was dismissed with costs. In our humble opinion this is a correct decision.

The case of *Obbo and Others v Attorney General,* [58] revolves around a challenge by the Managing Editor of *Monitor* Newspaper, of the constitutionality of section 50 of the Penal Code Act of Uganda. The Editor and other petitioners had been charged with publication of false news. The Constitutional Court found for the State and Obbo appealed to the Supreme Court, which held that the offence under article 50 of the Penal Code was too vague, wide, and conjectural to provide the requisite certainty to impose an acceptable limitation on freedom of expression.

The Parliament of Uganda passed Constitution (Amendment) Act No.13 of 2000. This Act was challenged in *Semogerere, Zachary Olum and Rayner Kafire v Attorney.* [59] The Constitutional Court with a majority of three to two dismissed the petition, holding that the constitutional amendment had been properly passed and, as such, articles 88, 89, 90, 97, and 257 of the Constitution of the Republic of Uganda, 1995 had been properly amended. The petitioners were dissatisfied and appealed to the Supreme Court. The Supreme Court declared the Constitution (Amendment) Act No. 13 of 2000 as unconstitutional and declared the Act null and void.

In *Paul K. Semogerere and 5 Others v Attorney General,*[60] the

[58] Constitutional Petition No. 15 of 1997; See also Constitutional Appeal No.2 of 2002
[59] Constitutional Petition No. 7 of 2000
[60] Constitutional Petition No. 5 of 2002.

petitioner commenced the petition under article 137 of the Constitution, and Modification to the Fundamental Rights and Freedoms (Enforcement Procedure)Rules, 1992Directions, 1996. They challenged the constitutionality of sections 18 and 19 of the Political Parties and Organisations Act 2002. The Constitutional court held that the sections imposed unjustifiable restrictions or limitation on the activities of Political Parties and Organisations contrary to article 73 (2) of the Constitution; that sections 18 and 19 of the Act do render Political Parties and Organisations non-functional and inoperative and further, that the sections, in effect, established a one-party state in favour of the Movement Political Organisation, contrary to article 75 of the Constitution. The sections were accordingly declared null and void.

The Constitutional Court pronounced itself on the provisions of the Divorce Act in Constitutional Petition of *Uganda Women Lawyers Association et al v Attorney General*.[61] The petitioners brought the petition under article 137 (3) (a) of the Constitution and under Modification to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996.[62] The petitioners challenged certain sections of the Divorce Act as being inconsistent with many articles of the Constitution. In particular section 4 (1). The court held that the impugned sections discriminate on the basis of sex and that this brings them into conflict with articles 21(1) (2), 31(1) and 33 (1) and (6) of the Constitution. The Court saw this as a ground for modifying or declaring them void, and declared them unconstitutional.

In *Dr Rwanyarare et al v Attorney General*[63] the court was faced with almost similar issues as in *Paul K. Semogerere* supra. However, the Constitutional Court partially allowed the appeal. The court in particular held that parties should be free to decide for themselves what period is suitable for electing top organs; that the restriction in section 10 (4) of the Political Parties and Organisations Act is unjustifiable in a free and democratic society; that these restrictions are not justified under article 43 of the Constitution; that they are not consistent with the spirit of the Constitution; and further that section 13 (b) contravenes the right and freedom to associate and the right to participate in the affairs of Government. The court also observed that some issues in this case had been overtaken by events in the *Semogerere case*.

[61] Constitutional Petition No. 2 of 2002.
[62] Legal Notice No. 4 of 1996.
[63] Constitutional Petition 7 of 2002, reported in [2002] 2 ULSR p.66.

The ruling by Tabaro J. in Re: *Lt. Benjamin Ahimbisibwe*[64] also shows how the courts have responded to issues of human rights violation and the rule of law. The lawyers for the applicant applied for a writ of *Habeas Corpus* for the production of Lt. Benjamin Ahimbisibwe, who had been allegedly detained illegally in Makindye Military Barracks. The supporting affidavit sworn by the wife averred that the applicant had been arrested on 4th June 2002 at Bombo Barracks and transferred to Makindye. At the time the matter came up for hearing the detainee had again been moved back to Bombo. Tabaro J held:

> *The Constitution is the supreme law of Uganda and has binding force on all authorities and persons throughout Uganda... It is my finding that the respondents have not shown that the applicant is in detention in accordance with the laws of Uganda. In view of this court's finding, the application is granted with costs. On failure or disobedience to produce the applicant before court, I wish to observe that such orders (for the production of the applicant before court) are not negotiable. I would humbly add that they are vital for democratic governance and observance of rule of law, which are fundamental for lawful exercise of authority by any person or institution in our country.*

In *Uganda Association of Women Lawyers v Attorney General,* [65] the Constitutional Court was petitioned to declare void some sections of the law as explained below. The petitioners, an association that advocates for women's rights in Uganda, filed two separate petitions which were later consolidated. The petitioners alleged that section 154 of the Penal Code Act is inconsistent with Articles 20, 21, 24, 31, 33 (1) and 44 of the Constitution. Secondly, that sections 2 (n) (i) (ii), 23, 26, 27, 29, 43, 44 of the Succession Act are inconsistent with Articles 20, 21, 24, 26, 31, 33, and 44 of the Constitution. The Constitutional Court declared the impugned sections null and void. The decision affirms equality of all persons before the law and the right of non-discrimination, which are cardinal to the rule of law.

The Constitutional Court had occasion to interpret the relevant law and bring it in line with the rule of law, in the Constitutional Petition of *The Uganda Law Society v Attorney General.*[66] The petitioner, a body corporate, whose objectives include representation, protection and assisting the

[64] High Court Miscellaneous Application No. 18 of 2004.

[65] Constitutional Petition Nos. 13/05 and 05/06.

[66] Constitutional Petition No. 18 of 2005. At the time of writing this article, the decision in the case was appealed against in the Supreme Court.

public in Uganda in all matters touching, ancillary or incidental to the law, petitioned the Constitutional Court seeking, inter alia, a declaration that the acts of the Anti-Terrorism Task Force Urban Hit Squad, committed on the afternoon of 16th November 2005, at the High Court, during and immediately after the hearing by Justice Edmund Lugayizi of bail applications of the accused, contravened Articles 23 (1) and (6); and 128 (1) and (2) of the Constitution.

The Court held by a majority of four to one that the acts of the security agents at the premises of the High Court on the day in question contravened Articles 23 (1) (6) and 128 (1) (2) and (3) of the Constitution; by a majority of four to one that the concurrent proceedings in the High Court, Case No. 955 of 2005 and Court Case No UPDF/Gen. 075 of 2005 contravened Article 28 (1) and 44 (c) of the Constitution, as the General Court Martial had no jurisdiction to try the charges preferred against the accused in the said court; by a majority of four to one, the trial of 23 accused persons before the General Court Martial on charges of terrorism contravened articles 22 (1), 28 (1) and 126 (1) of the Constitution. In the final analysis the petition was allowed in part by a majority of four to one. Parties were ordered to pay their respective costs.

In Constitutional Reference of *Uganda (DPP) v Col. (Rtd) Dr. Kiiza Besigye*,[67] the Constitutional Court was called upon to interpret the Constitution. Ogola J, the Principal Judge, at the request of Mr. Michael Wamasebu, Assistant DPP, had referred the matter to the Constitutional Court to determine whether under Article 23(6) of the Constitution, courts have the discretion to grant or not grant bail. The respondent and 22 others had been arrested around March 2003, and were jointly charged with treason, contrary to section 23(1) (c) of the Penal Code Act.

The respondent had also been charged with rape, contrary to section 123 of the Penal Code Act. He had applied for bail, which the DPP opposed. In an earlier case Lugayizi J, had ruled in *Layan Yahaya v Uganda*, [68] that the court of law in refusing bail, would be acting unconstitutionally, as this would contradict the suspect's inherent right of innocence, and that bail is a constitutional right that flows from the presumption of innocence under article 23 (3) (a) of the Constitution.

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[67] Constitutional Reference No 20 of 2005.

[68] High Court Miscellaneous Criminal Application No. 96/2005.

The Constitutional Court in the Constitutional Reference Uganda *(DPP) v Col. (Rtd) Dr. Kiiza Besigye* discussed above, held that under article 23 (6) (a) the accused is entitled to apply for bail; that the word "entitled" creates a right to apply for bail and not a right to be granted bail; that the said word may create discretion for the court to either grant or deny bail. The court also gave general guidelines to be considered before granting bail. These include: setting reasonable conditions, balancing the constitutional rights of the applicant, protection of society from lawlessness, the welfare of the accused and his family members, risk of absconding, and interference with course of justice. The Court also observed that bail should not be denied simply because the prosecution objects to it, and that the grounds for the denial must be substantiated.

Recently, the Constitutional Court in *Muwanga Kivumbi v Attorney General* [69] nullified section 32 of the Police Act. In their landmark ruling, the five Constitutional Court judges unanimously agreed that the law represented a limitation "on the enjoyment of a fundamental right to freedom of assembly and association".

Under the said section Uganda Police was given powers to prohibit assemblies and demonstrations organised by political parties that did not have prior permission to do so. This ruling nullified the Police Declaration of Gazetted Areas Statutory Instrument, in force since September 2007 that required anyone who wanted to hold an assembly of more than 25 people to get written permission from the Inspector General of Police.

The Constitutional Court, in the instant case, held inter alia, that such a law has no place in a functioning democracy. The Court further noted that:

> *... In the matter now before us there is no doubt the power given to the Inspector General of Police is prohibitive rather than regulatory...That it is open ended since it has no duration. This means that the rights available to those who wish to assemble and therefore protest would be violated. The justification for freedom of assembly in countries which are considered free and democratically*

[69] Constitutional Petition No. 9 of 2005. The petition was heard by the Deputy Chief Justice, Leticia Mukasa Kikonyogo, Justice Constance Byamugisha, Justice Galdino Okello, Justice Mpagi Bahigaine, and Justice Christine Kitumba. Muwanga -Kivumbi is the head of Popular Resistance Against Life Presidency.

> *governed in my view is to enable citizens to gather and express their views without government restriction...Maintaining the freedom to assemble and express dissent remains a powerful indicator of the democratic and political health of a country.*

This decision was applauded by the opposition, but the State appealed. We are yet to get the decision of the Supreme Court.

In *Col. Rtd Dr. Kiiza v Electoral Commission and Yoweri Kaguta* Museveni,[70] The Supreme Court was petitioned for an order to declare the second respondent, Yoweri Kaguta Museveni, who had been declared elected President by the first respondent, the Electoral Commission, that he was not validly elected, and that a rerun be held or that a recount be conducted. The Supreme Court found that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act; the elections were marred with a number of malpractices, including: disenfranchisement of voters by deleting their names from the voters' register or denying them the right to vote, irregularities in counting and tallying of results, bribery, vote-stuffing and intimidation; and the principle of free and fair elections was compromised. The Supreme Court further noted that there was no illegal practice or offence proved to the satisfaction of court, to have been committed in connection with the second respondent, personally or by his agent, with his knowledge, consent or approval and it was not proved to the court's satisfaction that the non-compliance with the law and that the malpractices affected the results in a substantial manner as required by law and that the malpractices affected the results. The Supreme Court then dismissed the petition.

One of the main concerns for constitutional lawyers in particular is: how much must an irregularity be to be substantial? They seem to be at a loss as to how much irregularity is required to render an election invalid? Academics have criticised the judgment. For example, Onoria blames the courts for condoning the inefficiency and incompetence of the Electoral Commission. He is of the view that the proven inefficiency of the Electoral Commission has disastrous consequences for the future of democratic

[70] Presidential Election Petition No. 01 of 2006. For a critical view see, Ronald Naluwairo, "The Trials and Tribulations of Rtd. Col. Dr. Kiiza Besigye and 22 others: A Critical Evaluation of the General Court Martial in the Administration of Justice in Uganda" [October 2006], HURIPEC Working Paper No. 1. May 2007.

process in Uganda; that the Electoral Commission has got away with this incompetence; that the decision was a big puzzle particularly to the ordinary people, who may not appreciate the complex legal issues involved and may lead to voter apathy; and further, that the decision negated the idea of constitutionalism and it was detrimental to democracy, constitutionalism and good governance.[71]

In his contribution to the same discussion regarding the inefficiency of the Electoral Commission, Bainomugisha recalls the African Union Declaration, during the Durban Summit in 2002, which affirmed that democratic elections are the basis of the authority of representative government; that elections measure a regime's commitment to democracy and provide legitimacy to leaders and act as a conflict management, prevention and resolution mechanism.[72]

In April 2008, the Constitutional Court in *The Foundation for Human Rights Initiative v Attorney General,* [73] handed down an interesting judgment with respect to rule of law and protection of human rights. The petitioners alleged that sections 219, 231, and 248 of the Uganda Peoples Defence Forces Act[74] permitted the army to detain suspects for an indefinite period; section 25 (2) of the Police Act[75] allowed the police to detain suspects beyond 48 hours, before charging them; while section 16 of the Trial on Indictment Act[76]authorised the keeping of suspects for un-specified time before trial. The petitioners also argued that the sections seemed to create the impression that the suspects were guilty even before they pleaded guilty or were tried, further that the Trial on Indictment Act infringed the suspect's right to liberty, and freedom of movement. The court, however, declined to rule that bail is automatic and that it should be granted for the asking. In

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[71] See, Baraza, *The Implications of the Supreme Court Ruling in the Presidential Election Petition No. 1/2006 on the Future of Democracy, Good Governance and the Rule of Law in Uganda*, HURIPEC, Rights and Governance and Democracy Project, April, 28, 2006.

[72] *Ibid.*

[73] Constitutional Petition No. 20 of 2006, Coram: Deputy Chief Justice Leticia Mukasa – Kikonyogo; Justices Galdino Okello; Alice Mpagi – Bahigaine, Christine Kitumba; and Constance Byamugisha.

[74] Cap Act No. 7 of 2005.

[75] Cap 303.

[76] Cap 23.

particular, the said court came to the conclusion that the petition would succeed in part, thus:

1. *It is hereby declared that section 16 of the Trial on Indictment Act contravenes Articles 23 (6), 20 and 28 of Constitution and is null and void to the extent of the inconsistency;*

2. *That section 76 of Magistrates Court Act, is null and void to the extent of inconsistency with Articles 20, 23 (1), 23(6), 28 (1) and 28 (3) of the Constitution of the Republic of Uganda in so far as it infringes on the constitutional rights to liberty and speedy trial;*

3. *That sections 219, 231 and 248 of UPDF Act, which subject accused persons to lengthy periods of detention are inconsistent with Articles 20, 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda; and*

4. *That section 25 (2) of the Police Act is inconsistent with Articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void to the extent of the inconsistency.*

This is yet another case, which demonstrates how determined the superior courts are to uphold the rule of law, by nullifying those provisions of the law, which violate human rights.

The rule of law enjoins all to be subject to law and court process. There have been instances where members of the judiciary have taken the executive to court. We may here cite the case of *Masalu Musene Wilson and 3 others vs Attorney General*[77], where the petitioners sought a declaration that the application of the provisions of *Section 4 (1) of the Income Tax Act (Cap.340)* to Judicial Officers renders it inconsistent with Article 128 (7) of the Constitution; that the Judicial Officers' salaries, allowances, privileges and retirement benefits and other conditions of service must not be subjected to any taxation whatsoever and that , those Judicial Officers are entitled to their full pay without variation to their disadvantage with the coming into effect of the Constitution in 1995. The petition succeeded by a majority of 3 to 2.[78] The judgment indicates that courts are impartial even when

[77] Constitutional Petition No. 5 of 2004 [2005] UGCC 4 (23 February 2005)

[78] Justices, Engwau and Twinomujuni concurred with the judgment of A.E.N Mpagi Bahigeine, while Justices C.N.B.Kitumba and C.K. Byamugisha dissented.

matters that touch upon their interests are at stake. This is particularly so in the light of the minority judgment by the two dissenting judges. The state appealed and the appeal is yet to be disposed of by the Supreme Court.

It would be unfair to end this discussion on the jurisprudence regarding the rule of law in Uganda without mentioning the Uganda Human Rights Commission. The Commission is a constitutional body established under article 51 of the Constitution. The functions of the Commission are provided for under article 52 of the Constitution. The Commission has since its inception in 1997 handled many complaints regarding violations of human rights and in appropriate circumstances awarded damages. Some of the cases handled by the commission are available on its website. Others have been highlighted and discussed elsewhere.[79] The Human RightsCommission report released recently is also useful in this regard.[80]

3. Contentious Administrative/Executive and Legislative Measures with Implications for Human Rights and the Rule of Law.

It is not only the jurisprudence of the courts that gives direction on the rule of law, the acts or inaction by the other two arms of government, namely the legislature, and the Executive, or what sometimes is referred to as the administration, are also crucial. If we are to take the rule of law and protection of human rights seriously, we have to consider these as well. We will, therefore, refer to a few administrative or executive and legislative measures, which have been undertaken in the period under discussion.

4 (a) BIDCO, Makerere University Fees, and TV Licenses

In writing about the rule of law in Uganda, Abu Mayanja, decries the arbitrary interference by the President in matters, which are clearly demarcated, under the enabling legislation to be handled by dully authorised officers. He cites three examples, namely BIDCO Agreement, where the directive

[79] See, E. Wamala and G.W.K.L.Kasozi, *University Human Rights Teachers Guide*, Haki Afrika, in Collaboration with Dept. of Philosophy, Faculty of Arts, and HURIPEC, Faculty of Law, Makerere University, 2005.

[80] The 10th Report concentrates mainly on the Land Bill. See *The New Vision*, Wednesday, July 23, 2008 p. 3.

of the National Forest Authority was disregarded; Makerere University, whose attempt to raise tuition fees, was reversed by the President;[81] and TV licenses, which were supposed to be paid by all television owners, was thrown out by the President. He concludes by noting that in a country, where the rule of law is respected, no one agency is above the law. Mayanja argues that while in the case of TV licenses the intervention by the President was applauded by the populace, it nevertheless undermined the rule of law and was an arbitrary use of state power.[82]

What we may add is that since the Office of the President is overloaded with work, and since it is the fountain of honour, it should be respected; through inter alia, in accordence with the relevant procedures, the day-to-day administrative measures being taken by the bureaucrats under the superintendence and political direction of ministers. These must be held accountable. The President reserves the right, in accordence with the relevant procedures to dismiss any inefficient or incompetent bureaucrat, as well as ministers, who do not perform, or who perform inadequately, or better still those that go beyond their mandate. This is the norm in a rule of law setting.

4 (b) Black Mambas

In march, 2009, some security men, referred to locally as the Black Mambas, stormed the Criminal Court Registry of the High Court of Uganda and rearrested six individuals of the alleged People's Redemption Army, on the suspicion that they were members of the alleged Peoples Redemption Army and that they had committed treasonable acts. The High Court had ordered their release on bail.[83]This incident was a blatant disregard of the rule of law. Justice Ogoola, the Principle Judge, described the attack on

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[81] See, *The New Vision,* Tuesday, July 8, 2008, Front page and page 2. The author has informally established from one of senior administrators at Makerere that the fees were not increased at that point in time. However, there have been press reports that fees have been increased.

[82] See, Abu Mayanja, BIDCO has been given concessions which raise eye-brows: State House Interference Undermining Rule of Law, *The New Vision,* Tuesday September 20, 2005, p.12.

[83] For details see *Daily Monitor* 3rd March 2007, See also Daily *Monitor Monday March 5, 2007*, p.1 and 2. This incident received wide media coverage nationally and internationally.

the court as: "a naked rape, defilement and desecration of our temple of justice."[84]

During the recent opening of New Law Year, the Chief Justice Benjamin Odoki referred to the same unfortunate event of which had forced the judiciary to suspend business, until the Executive made a formal explanation. The Chief Justice said:

> *The Uganda judiciary, like in other Commonwealth countries, is often confronted with challenges that threaten its independence. These threats may not necessarily be deliberate, but may unconsciously occur as a result of the overzealousness of some state operatives.*[85]

This act by the Black Mambas was criticised by many human rights groups. Amnesty International, as well as local human rights non-governmental organisations. The Foundation for Human Rights Initiatives called upon the government of Uganda to always respect the decisions of the courts, because failure to do so or acting as they did, amounted to undermining the independence of the judiciary. This, the Foundation argued, seriously affects enjoyment of human rights.

4 (c) Mabira Forest Give Away

In April 2007, the Ugandan civil society, including National Environmental Alert, resorted to a civil disobedience campaign. Unfortunately, criminal elements infiltrated the demonstration protesting the giving away of Mabira Forest to an investor to grow sugar cane. Innocent lives were lost in the riots

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[84] See, Siri Glopen, Emanuel Kasimbazi and Alexander Kibandama, The Evolving Role of the Courts in the Political Transition Process, Legal and Institutional Context of the 2006 Elections in Uganda, CMI CHR Michelsen Institute and Makerere University, p.3. The Principle Judge's statement in the form of a poem entitled *"The Rape of the Temple"* appears in this issue of the Journal as an Appendix.

[85] See, Hilary Nsambu, Let the Judiciary do its work, *The New Vision*, Monday February 18, 2008, p.3; See also Amnesty International Press Release, AI Index: AFR 59/017/2005(Public) News Service No. 316, 22 November 2005>http://www.amnestyusa.org/document.php?lang=ENGAFR590172005< ACCESSED 2/14/2008. See also Dr. Yasin Olum, "Political Parties and the Freedom to Hold Public Rallies in Uganda", a paper presented at a dialogue on Democracy, Good Governance and Rule of Law, organised by Makerere University Convocation in conjunction with HURIPEC, April 20, 2007, Senate Hall, Makerere University.

that ensued.[86] While the loss of life is regrettable, the civil disobedience action may be viewed as a success, because it made the Government to rethink the giving away of Mabira Forest.[87] Mabira Forest, which is part of the ecosystem, has implications for the right to a clean and a healthy environment, which in turn contributes significantly to the right to life. The civil disobedience was a human response to an unjust executive action of giving away the forest.

4 (d) Kiboko Squad

The Kiboko squad[88] merits mention here for the way they were unleashed on to the public. The squad was said to be operating with the knowledge or tacit approval of the police. They were alleged to be under the command of some influential people in government. Their operations were noted particularly in dispersing crowds around the Constitutional Square in Kampala. Their operations were adjudged by many to be contrary to the rule of law.

4 (e) Lifting of Presidential Term Limit

We will recall that fundamental amendments to the Constitution of the Republic of Uganda, 1995 were effected in 2006. Some articles including, article105, (tenure of office of the President), which in effect limited term limits to two terms, was amended.

Professor Ssempebwa, who was the Chairman of the Constitutional Review Commission, was and still is opposed to removal of the term limits.[89] Many critics argued that although Parliament was used to effect the amendment, the parliamentarians were not acting freely in that exercise.

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[86] See *Daily Monitor* Friday April 13, 2007, Monday April 16, 2007, and Saturday April 21, 2007.

[87] See Enock Mayanja Kiyaga and Emanuel Gezaho "Govt. finally drops Mabira", Headline *New Vision* Wednesday, October 17, 2007.

[88] See, Mercy Nalugo, "Youth trained to beat people says MP", *Daily Monitor,* Friday June 20, 2008, fifth Column, p.4.

[89] See, Special Report, Restore Term Limits, *The Weekly Observer*, June 19 – 25, 2008, p.18 -19; See also Alfred Wasike, Ssempebwa for Term Limits, *The New Vision*, Thursday, June 12, 2008, p.2.

It is argued that they were unduly influenced as they received money to do the needful. This may fly in the face of a proper rule of law. It may be argued that the legislators did not exercise independence in their judgment. It is alleged they were influenced by the executive arm of government, and thereby compromising the separation of powers doctrine, which is a factor for the rule of law.

One may wonder whether the above-mentioned scenario may be adjudged to be consistent with one of the principles of the Law of Lagos, which dictates that in order for the rule of law to prevail, legislative bodies must be established in accordance with the will of the people, who have adopted their constitution freely. It should be added that although the Law of Lagos only talks about establishment of legislative bodies, it is implied that such bodies must function independently, without one influencing the decisions of the other. The money that was alleged to have changed hands may have influenced the Honourable members of Parliament to vote the way they did.

The Law of Lagos also requires that in order to maintain adequately the rule of law, all governments should adhere to the principle of democratic representation in their legislatures, which democratic representation appears to be watered down by the actions or inaction of the executive arm of government, in particular the Police in certain situations in Uganda. For example, the Police action[90] in dispersing members of the Democratic Party, who had assembled at Clock Tower, has been critisised as being contrary to the rule of law, particularly in the light of the Constitutional Court ruling in the above mentioned *Muwanga Kivumbi v Attorney General Case.*

It may appear that the Police were and still are not prepared to obey the ruling of the court. In our humble opinion, the Police should have requested the Attorney General to seek an injunction directed to all political parties, restricting them from holding any political meeting around non gazetted areas, pending the finalisation of the appeal in the Supreme Court. This would have been very much in tandem with the rule of law! It is also our conviction that although parliament has not yet amended the law in this regard, the jurisprudence emanating from the Constitutional Court is authoritative and instructive enough to law enforcement officers of

[90] See Moses Mulondo and Eddie Ssejoba, Police Battle DP youth, *Sunday Vision*, Vol. 15 No. 23, June 8, 2008, front page and p.2.

government, because superior court judgments are a source of law. This is the position in the rest of the common law countries.

Speaking in relation to the above mentioned police action to ban the politicians from meeting wherever they may choose, the Honourable Chief Justice Benjamin. J. Odoki has come out and observed that Police has power to regulate rallies, but not to ban them.[91] What may not be clear at this stage is the interpretation of the word regulation in this context. It may be argued by the police that banning may be a way of regulating political activity, which is likely to pose a security risk, to the life and property.

4 (f) Arrest of Members of Parliament

The manner in which some Parliamentarians, particularly those who belong to the Opposition or who hold dissenting views, are arrested or treated leaves many questions unanswered. If we go by press reports, both print and electronic, we may conclude that the mode of arrest is not consistent with the rule of law. These arrests may send a wrong signal that government is targeting the opposition. For example, a Member of Parliament for Rubaga South Constituency, Susan Nampijja, (Conservative Party); Kampala Woman MP, Nabilah Sempala, (Forum for Democratic Change); and Dr. Sam Lyomoki, (National Resistance Movement Workers representative) have been hustled by police in the process of arrest.[92]
It may well be that these Honourable Members of Parliament committed a criminal offence, but the law on arrest is clear. Section 2 (1) and (2) of the Criminal Procedure Code[93] provides for arrest, which is consistent with the rule of law. Subsection 3 in particular provides:

Nothing in this section shall be deemed to justify the use of force

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[91] See *New Vision* Thursday, June 26, 2008, p.3.

[92] See, Mercy Nalugo and Yasin Mugerwa, "MPs to walk out of Budget reading over MPs' assault", *Daily Monitor;* Thursday 12 June 2008 p.2; See also Joyce Namutebi and Barbra Among, MPs protest colleagues' arrest, *The New Vision*, Thursday June 12 2008, p.5; See related story by Simon Kasyate, I will not apologise, says General Kayihura, *Daily Monitor*, June 13, 2008, p.3. For a comment on these arrests and the need for citizens to respond, see Nicolas Sengoba; Indifference breeds Impunity: State Inspired Violence and the helping hand of Society, *Daily Monitor*, Tuesday, June 2008, p.32.

[93] Cap 116 Laws of Uganda 2008.

greater than was reasonable in the particular circumstances in which it was employed or was necessary for apprehension of the offender.

This should be read together with subsection 5 which says the person arrested shall not be subjected to more restraint than is necessary to prevent his escape.
It appears that the police used more force than necessary in effecting the arrests of the parliamentarians.

4 (g) Eviction of the Judiciary

An interesting development, which involved the judiciary, came up recently when the lease agreement between Buganda Land Board and the Judiciary (Government) expired on or about 30 June 2007. Buganda Land Board was reluctant to renew the lease agreement with the judiciary because it was alleged that the judiciary had failed to pay the rent to Buganda Land Board, the land-lord, for Mwanga II Road court land. Consequently, the government was served with an eviction notice.[94] The matter was, however, settled out of court. One senior judicial officer, who spoke anonymously because she is not authorised to speak for the judiciary, argued that this was going to be a great precedent. However, she was of the view that for the judiciary it would still adhere to the rule of law and if it was so requested , it would have issued an eviction order.

4 (h) Arrest of Mengo Officials and other Personalities

Recently, the police arrested some members of the Opposition, including members of Kabaka's government. What is of concern here is the manner of arrest and the *incommunicado* detention under which they were held for more than forty eight hours. The next of kin and their lawyers could not have access to them. The detention period exeeded the time limit provided in Article 23 (3) (b) of the Constitution. This is not acceptable in a rule of law situation.[95]

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[94] See Robert Mwanje and Olandason Wanyama, "when the law catches the courts", The *Daily Monitor*, Monday April 14, 2007, p.13.

[95] On arrest see Steven Chandia and Moses Mulondo, "More Buganda officials arrested", *Sunday Vision* July 20, 2008, p.1 and 2.*Daily Monitor* Monday July 21, 2008, p.1.See also Headline *The New Vision, Tuesday* July 22, 2008;Headline, *Daily Monitor*, Tuesday July 22, 2008.

V. CHALLENGES FACED IN THE PURSUIT OF THE RULE OF LAW

What are the challenges in pursuit of the rule of law? There are many challenges faced in fostering the rule of law. The first major challenge is corruption, which undermines all attempts to do what is right. As long as this is not effectively addressed, the rule of law will always remain a myth. It is true the Inspector General of Government is attempting to address this, but that office must be supported by all other government offices and agencies. The office has managed to unearth several cases of corruption data and recommended prosecution of those involved. However, it appears that some of the cases may never be successfully prosecuted to the end. The good news, however, is that the High Court has established a Division to try cases of corruption, but we are yet to see results.

The national institutions in place seem to be weak, yet they are expected to offer service and direction as required. These institutions must function as required by the law, hence keeping in tune with the rule of law. Most institutions in Uganda have long forgotten about their mandate. They just exist, and the office-bearers are interested in their pay cheques at the end of the month. There are a number of factors which are responsible for this. These may include greed, and lack of moral fibre and concern for fellow human beings. The Ugandan society needs to go back to the basics of public service and leadership in our society.

While bureaucrats and institutions take centre stage in ensuring the rule of law, the general populace must be educated on the basics for the rule of law. We may ask: How much does the populace know about the rule of law? Do we have programmes in the country that address this challenge? This then takes us to another important point, which is illiteracy. The literacy rate in Uganda is rather low. People who may not know how to read and write may not easily comprehend issues of the rule of law. Therefore, Uganda must improve on the literacy rate. Political education should include respect for the rule of law. Respect for authority has declined in Uganda over the years. Many people in institutions disregard procedures in their work. This also applies to the people at large. Their lack of respect for authority contributes to non-compliance with the rule of law.

VI. CONCLUSION

There has been an attempt to discuss the concept of rule of law generally and the article reviewed various scholars' contributions, on the concept of the rule of law , provided background and conceptualisation, as well as the meaning and content of the concept and its historical development. The article discussed the role of ideology, philosophical orientation, including a conceptual framework of the rule of law. It focused on the theoretical basis of the rule of law and came to a general conclusion that this concept has universal application. It also examined political models that may guarantee realisation of the rule of law. Finally, the article referred to jurisprudence from the superior courts in Uganda on the rule of law from 1986 to the present. The article also briefly discussed executive and administrative actions with ramifications for the rule of law and human rights.

It is our conviction that the courts have done their honourable duty, although we may quickly point out that there is always room for more judicial activism, to guarantee the rule of law and uphold human rights. It is our considered opinion that the superior courts in Uganda have interpreted the law, in order to bring it within the scope of the rule of law. The courts should continue to be guided by fundamental commitment to fairness, and indulge more in what is termed creative judicial interpretation of the law.

As far as the executive and to some extent the legislature are concerned, there is need to take stock of all the administrative measures and see how much these measures have been consistent with the rule of law.

It would be interesting to look at the rule of law in a traditional/ African setting, where, for example, the society was formerly governed by customary law. Given what we saw in the section on the theoretical basis of rule of law, can we positively say that that kind of customary law scenario is conducive for the rule of law to prevail as discussed herein? The author may have to reflect more on this question, but the readers are also urged to think about this issue more critically. Suffice to say that the concept of rule of law is a concept critical to a civilised society irrespective of the level of its social and economic development.