REVIEW OF MAJOR DECISIONS ON FUNDAMENTAL RIGHTS AND FREEDOMS IN UGANDA, 2008–2009

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I. INTRODUCTION

The major decisions on fundamental rights and freedoms in the years 2008 and 2009 are underpinned by particular situations and circumstances obtaining in the preceding 4-5 years. They are largely two-fold. Firstly, a number of the decisions arose from key incidents of a politically-charged post-2005 period in the wake of the opening up of political space following the reversion to a multiparty system of governance. This included the prosecution of an opposition presidential candidate for various offences (including those under the anti-terrorism law); refusal to grant bail to officers and men awaiting trial before a military court and the intransigence of prosecuting terrorist suspects before military courts. These incidents provided the context of several decisions on fundamental rights before the Constitutional Court from 2004 to 2006 and, at the appellate stage, before the Supreme Court in 2008 and 2009. Secondly, several decisions, especially on appeal, were rendered in late 2008 and in 2009 owing to the lack of quorum to hear constitutional appeals before the Supreme Court.

In that respect, decisions of the Constitutional Court arising from petitions related to the aforementioned political-military incidents were not heard and determined on appeal until 2008 and 2009. This was also the case with appeals from other decisions of the Constitutional Court pertaining to the death penalty and grant of bail. And similarly the case with a petition before the Constitutional Court on fair trial guarantees within the military justice system (for which an appeal on an application had been pending before the Supreme Court since 2003).

The other major decisions in 2008 and 2009 were in respect of the freedom of assembly (in the context of the power of the police to prohibit assemblies); the right to property *vis-à-vis* protection of the environment; and the procedural aspects of enforcing human rights. This review examines these major decisions on fundamental rights and freedoms in the years 2008 and 2009.

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II. RIGHT TO LIFE *VIS-À-VIS* THE DEATH PENALTY

The right to life is guaranteed under article 22 of the 1995 Constitution.[1] However, the right is not absolute and deprivation can inure as a result of a judicially-sanctioned sentence of death. The death penalty had been retained under the Constitution on the premise that it had the support of the majority of Ugandans with regard to certain heinous crimes.[2] Although the penalty has been imposed by the courts since 1995, it has rarely been carried out, save for a few notable incidents.[3]

Additionally, while there has been debate on the constitutional or legal aspects of the penalty,[4] this was never raised before the courts[5] until 2003 when some 418 death row inmates petitioned the Constitutional Court to challenge the penalty and the conditions of their incarceration in *Susan Kigula & 417 Ors v. Attorney General*.[6] Regarding it as an "exception to the enjoyment of the right to life",[7] and as not in contravention of the freedom from cruel, inhuman and degrading treatment or punishment, the Constitutional Court upheld the retention of the penalty (including the mode of its execution by hanging),[8] although, by a majority of 3-2, it held the prescription of mandatory death sentences and delays in executions (resulting in the "death row" syndrome) unconstitutional.[9] The Attorney General appealed and the

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1. UGANDA CONST. (1995), art. 22(1).

2. *See*, e.g. REPORT OF THE UGANDA CONSTITUTIONAL COMMISSION: ANALYSIS AND RECOMMENDATIONS (1993), ¶¶ 7.120-7.122. As of 2009, the penalty exists in respect of offences under the penal law: Penal Code Act, Cap. 120, §§ 23, 124, 129(1), 134(5), 189, 243(1), 286(2) and 319(2), Penal Code (Amendment) Act No. 7/2006, § 2; offences under the military law: Uganda Peoples' Defence Forces Act, No. 7/2005, §§ 15, 17-20, 28-30, 32, 34, 36-8, 49-51, 53, 57, 60(a) and 70; and offences under the anti-terrorism law: Anti-Terrorism Act, No. 14/2002, § 7.

3. The incidents include the execution of thirty-one (31) civilian convicts (by hanging) at Luzira Government Prison in April 1999 and of two (2) low-ranking members of the armed forces (by firing squad) in March 2002 after summarily being tried for murder before a Field Court Martial.

4. *See, e.g.*, G.P. Tumwiine-Mukubwa, *The Promotion and Protection of Human Rights in East Africa*, 6 EAST AFR. J. PEACE HUM RIGHTS 130 (2000), at 153; A.N. Makubuya, *The Constitutionality of the Death Penalty in Uganda: A Critical Inquiry*, 6 EAST AFR. J. PEACE HUM RIGHTS 222 (2000).

5. The constitutionality of the death penalty was alluded to by the Constitutional Court in an *obiter dictum* in *Simon Kyamanywa v. Uganda*, Const. Ref. No. 10/2000 (CC)(unreported), at 15.

6. Const. Petition No. 6/2003 [2005] 1 EALR 32 (CC).

7. *Id*., judgments of Okello, JA, at 143-5; Twinomujuni, JA, at 160-70; Mpagi-Bahigeine, JA, at 201-3. Neither the original court decision nor the case-reporting in the *East African Law Reports* contain a separate judgment of Byamugisha, JA.

8. *Id*., judgments of Okello, JA, at 53-4; Twinomujuni, JA, at 181-4; Mpagi-Bahigeine, JA, at 208.

9. *Id*., judgments of Okello, JA, at 149-52, 156-60 and Twinomujuni, JA, at 173-9, 186-91. The dissenting judgments did not regard the mandatory death sentences and death-row syndrome to be in contravention of articles 24, 28 and 44 of the Constitution. *See, id.*, judgments of Mpagi-Bahigeine, JA,

petitioners cross-appealed to the Supreme Court in *Attorney General v. Susan Kigula & 417 Ors*.[10]

By and large, the Supreme Court upheld the decision of the Constitutional Court. Firstly of all, while recognizing that the "right to life is the most fundamental of all rights",[11] the Court regarded the retention of the penalty under article 22(1) of the Constitution to be in conformity with international human rights law and, in effect, Uganda's obligations under the relevant treaty instruments.[12] Further, it regarded the penalty under the constitution (and the international legal regime) as buttressed by safeguards, in particular the right to a fair hearing and the prerogative of mercy under articles 28 and 121 of the Constitution.[13] Secondly, the Court rejected the contention that the penalty constituted cruel, inhuman and degrading treatment or punishment and is therefore inconsistent with articles 24 and 44(a) of the Constitution. It held that given the premise behind the drafting of articles 22 and 24 provisions, there was no conflict between the two provisions. It held that the non-subjection of the right to life under article 22(1) to the derogation clause under article 44 was to be considered against the safeguards to the right to life in several provisions of the constitution which underscored the fact that the penalty did not (and was never intended to) fall within the ambit of the freedoms under article 24 of the Constitution.[14] The Court construed the absence of conflict between articles 22(1) and 24 on two other premises—that is, one historical and the other conceptual. On the one hand, the Court held that the relationship between the two provisions had to be contextualized in the history of Uganda. Reflecting on the country's experiences with human rights violations, the

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at 205-7, 209 and Kavuma, JA (agreeing with Mpagi-Bahigeine, JA that the "petition should fail in *toto*").

10. Const. Appeal No. 3/2006 (SC) (unreported).

11. *Id*., at 11.

12. *Id*., at 11-8. The Court examined the scope of the right to life under international instruments such as the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966 and the African Charter on Human and Peoples' Rights, 1981. In particular, the Court highlighted the use of the word "arbitrary" in the provisions of the instruments on the right to life as a recognition that "under certain acceptable circumstances a person may be lawfully deprived of his life." *See id*., at 13, 17. In the end, the Court noted that "[t]he retention of capital punishment by itself is not illegal or unlawful or a violation of international law." *See id*., at 19. Although this was not addressed by the Court, it is to be noted that Uganda is yet to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights that seeks to universally abolish the death penalty.

13. *Id*., at 13-4, 21-3. It concluded that, in light of the deliberative provisions encapsulating those safeguards, "the framers of the Constitution purposefully provided for the death penalty in the Constitution of Uganda." *See id*., at 23.

14. *Id*., at 25, 29-31. The Court had prior deferred to the provisions of articles 6 and 7 of the International Covenant on Civil and Political Rights, regarding them to be *in pari materia* with articles 22(1) and 24 of the 1995 Constitution, and noted that the UN Human Rights Committee had not construed any conflict between the two provisions of the Covenant: *id*., at 14-5.

Court noted that:

> The framers of the Constitution had in mind the recent history of Uganda, characterized by gross abuses of human rights … Article 22(1) is clearly meant to deal with and do away with extra-judicial killings by the state. The article recognizes the sanctity of human life but recognizes also that under certain circumstances acceptable in the country, that right might be taken away… The framers of the Constitution were also aware of the numerous instances of torture and other cruel punishments that had characterized our recent history. They seem to have come out on these two aspects of out history and dealt with them by providing that life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had opportunity to exercise the prerogative of mercy. On the other hand, there must not be torture or cruel, inhuman or degrading punishment under any circumstances. *In our view there is no conflict between article 22(1) and 44(a).*[15]

On the other hand, the Court considered the conceptual aspects of the right under article 22(1) and the freedoms under article 24 to underpin the absence of a conflict between the two provisions. It noted that while the freedoms in article 24 pertained to the *quality of living as a process*, the right in article 22 concerned with the *existence of life as a state*.[16] In the court's view, this conceptual discourse underpinned the higher value accorded to the freedoms in article 24 (as to render them non-derogable under article 44(a)) than to the right in article 22.[17] In the end, the Court concluded that the "[death] sentence could not be torture, cruel or degrading punishment in the context of article 24."[18]

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15. *Id*., at 30-1. The Court referred to the human rights situation as documented in the reports of the *Commission of Inquiry into violations of Human Rights in Uganda from 1962 to 1986* and the *Uganda Constitutional Commission*: *id*., at 29-30. In light of the historical realities, the Court concluded: "the effect and purpose of the two provisions was to treat the right to life with qualification but with the necessary safeguards, while totally outlawing all forms of torture, cruel and degrading punishments as had been found to have taken place in Uganda": *Id*., at 31.

16. *Id*., at 25-6.

17. *Id*. The Court pointed out that the conceptual premise on the right and the freedoms has resonance in the international human rights discourse.

18. *Id*., at 31.

Thirdly, the Court did not regard hanging, as a manner of carrying out the penalty, to be inconsistent with article 24 and 44(a) of the Constitution.[19] Deferring to the constitutional permissibility of the penalty, the Court held that the "difficulty must be to identify the method of carrying it out … without causing excessive pain and suffering."[20] The Court was inclined to view "pain and suffering" as inherent in the execution of a penalty that is constitutionally permissible and, in that respect, it was unable to regard the manner of its execution by hanging "unconstitutional in the context of article 24 of the Constitution".[21]

Fourthly, the Court upheld the judgment of the majority of the Constitutional Court as regards mandatory death sentences in certain capital offences and delays in the execution of sentences of death. The Court viewed the mandatory death sentence as a contravention of a fair trial and equality rights. Observing that the "process of sentencing is part of the trial", the Court considered mandatory death to be inconsistent with a court's exercise of its function as "an impartial tribunal in *trying* and *sentencing* a person" and therefore "compromises the principle of fair trial".[22] In the Court's view, the denial or removal of a court's exercise of sentencing powers was inconsistent with the right to a fair trial guaranteed under article 28(1) of the Constitution.[23] Further, the Court felt that the failure to avail a convict of a capital offence the opportunity to mitigate a *sentence* (as was the case with a convict of a lesser offence) was inconsistent with the right to equality before (and under) the law as guaranteed under article 21 of the Constitution.[24]

Additionally, the Court viewed mandatory death sentence as constraining the functioning of (and the administration of justice by) the courts, particularly in exercise of *judicial discretion* in *sentencing*. It held that by "fixing a mandatory death penalty, Parliament removed the power to determine sentence from the courts" in a manner inconsistent with articles 121(5) and 126 of the Constitution and in denigration of the principle of separation of powers.[25]

As regards delays in the execution of death sentences, the Court construed the "death row" syndrome as occasioned by inordinate delays in carrying out executions

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19. *Id*., at 53-8. Hanging as the method of carrying out the penalty is provided for by section 99 of the Trial on Indictments Act, Cap. 23.

20. *Id.*, at 55-6. The Court considered "a method that causes death within minutes" to "meet the standards of not causing excessive pain and suffering." *See id*., at 58.

21. *Id*., at 57.

22. *Id*., at 38, 41.

23. *Id*., at 38.

24. *Id*., at 38-40.

25. *Id*., at 38, 40-1.

and the conditions of incarceration pending execution.[26] The Court construed inordinate delay in the context of *death row* syndrome as a period of three years after confirmation of a death sentence by the highest appellate court,[27] and it held that, upon the expiration of the three years, a "death sentence shall be deemed to be commuted to life imprisonment without remission".[28]

Ultimately, the orders of the Supreme Court are in respect of two key aspects of its judgment—the *death row* syndrome and mandatory death sentences. It ordered the processing and determination within three years of petitions of mercy for convicts whose sentences have been confirmed by the highest court, with inaction on petitions resulting in the sentences being commuted to life imprisonment without remission.[29] Further, it ordered the remittal to the High Court of cases involving sentences arising from mandatory death provisions for hearing and determination solely on mitigation of sentences.[30]

Except for a few divergences in judicial reasoning and modification in the orders, the Supreme Court arrived at the same decision on the issues framed as the Constitutional Court. Nonetheless, the Court exhibited the same reluctance that had hamstrung the Constitutional Court with regards the interpretation of article 22(1) *vis-à-vis* article 24 of the Constitution. The Court's reasoning is premised upon the supposed absence of conflict between articles 22 and 24 of the Constitution and, given its view that the right under article 22 was never intended to fall within the ambit of the freedoms under article 24, its decision is further based on a *separate* application and interpretation of the two constitutional provisions. To that end, the three strands that underpin its decision—the safeguards to the deprivation of the right under article 22(1); the historical context of articles 22(1) and 24; and the conceptual aspects of the right and freedoms—serve to highlight the keenness of the Court to construe article 22(1) *separately* from article 24 under the guise that there is no conflict between the two provisions. In deferring to the obligations under human rights treaties, the Court was *partial* in its examination and treatment of the decisions of the UN Human Rights Committee.

A correct rendering of the decisions of the Committee (and other human rights bodies) reveals a harmonious reading of the permissibility of the penalty *vis-à-vis* the likelihood of certain aspects of penalty being in violation of the prohibition on cruel,

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26. *Id*., at 44.

27. *Id*., at 51-3.

28. *Id*., at 53, 59.

29. *Id*., at 59. The Court indicated that the petitions for mercy "must be processed and determined within three years *from the date of confirmation of the sentence*" (italics mine).

30. *Id*.

inhuman or degrading treatment or punishment. The gist of the decisions[31]—given the Court's recognition of the provisions of the Covenant on Civil and Political Rights as being in *pari materia* with articles 22(1) and 24 of the Constitution—is: a *general* prohibition of the penalty is not envisaged under article 24 given that it is constitutionally permissible under article 22(1), save *circumstances* or *factors* pertaining to the penalty may situate *punishment* or *treatment* arising from the penalty within the proscription under article 24.[32] This reflects a harmonious interpretation of articles 22(1) and 24 that the Court opted not to adopt[33]—for in the three strands that define its decision, the Court tended to construe article 22(1) *separately* from article 24. Thus, the existence of constitutional safeguards is examined in isolation of the fact that, irrespective of the safeguards, inordinate delays in carrying out executions situate the penalty within the proscription of article 24.[34]

The conceptualization of the right and the freedom as pertaining to the *state of being* and the *process of living* similarly underscores the Court's views on the penalty (and manner of its execution by hanging) and the *death row* syndrome. It explains the Court's disinclination to regard the penalty and hanging (as *a manner of executing* the penalty)—in contrast to the *death row* syndrome as a *condition of incarceration*— as falling within the proscription under article 24. However, there is difficulty with the conceptualisation of hanging as a facet of the *existence of life as a state* where the realities are such as to render the method to fall short of the threshold of article 24.

To view hanging in the context of the *existence of life as a state* in the conceptual discourse is to simplify and diminish the realities of the experiences that define hanging (or, for that matter, any other method of executing the penalty). The factual realities of hanging, as practiced in Uganda, are underpinned by acts of brutality and barbarism in the run-up to and by the act of execution itself that render it, as a *manner of executing* the penalty, cruel, inhuman and degrading within the proscription

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31. The relationship between the death penalty and prohibition against torture and cruel, inhuman or degrading treatment provisions in human rights treaty instruments has been dealt with by the Human Rights Committee: e.g. *Earl Pratt & Another v. Jamaica*, Commn Nos 210/1986 and 225/1987, ¶¶ 13.7 and 14(a); *Martin Howard v. Jamaica*, Commn No. 317/1988, ¶ 12.2; *Chitat Ng v. Canada*, Commn No. 469/1991, ¶¶ 16.1-16.5; *Joseph Kindler v. Canada*, Commn No. 470/1991, ¶¶ 15.2-15.3; and the European Court on Human Rights: e.g. *Soering v. United Kingdom* (1989) 11 EHRR 439, ¶¶ 103-4, 111. For a discussion and analysis of some of these decisions, see K.N. Bojosi, *The Death Row Phenomenon and the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment*, 4 AFR. HUM. RTS L. J. 303 (2004), at 319-21.

32. This understanding of the gist of the decisions, in particular the *Ng* and *Soeting cases* underpins the dissenting judgment of Egonda-Ntende, Ag. JSC, *supra* note 10, at 69-81, 89-90.

33. This is a criticism apparent in the dissenting judgment of Egonda-Ntende, Ag. JSC, *id*., at 74, 79.

34. *See*, *Chitat Ng case*, *supra* note 31, ¶ 16.1; *Soering case*, *supra* note 31, ¶ 111.

under article 24.[35] In effect, there is difficulty in accepting the Court's finding on hanging; for the method as practiced in Uganda fails to satisfy the test of "causing the *least* possible physical and mental suffering."[36] In fact, it is to be noted that the Court uses the phrase "causing *excessive* pain and suffering" which is a higher threshold than that used by the UN Human Rights Committee in the *Ng case* (and in its other decisions).

Therefore, although the decision of the Court might have been the right one, its reasoning on the pertinent issues as regards the relationship between articles 22(1) and 24 was premised on a separate, rather than harmonious, interpretation of the two provisions of the Constitution. It was therefore to that extent unsatisfactory. The proper interpretation—one that mirrors the jurisprudence of international human rights bodies—is to subject the constitutional permissibility of the death penalty to its non-contravention of the prohibition on torture, cruel, inhuman or degrading treatment or punishment.[37] The factual realities of *death row* should have engendered that the court find the penalty as imposed (and not merely the conditions of incarceration) to constitute cruel, inhuman or degrading punishment of treatment.

III. THE RIGHT TO APPLY FOR GRANT OF BAIL

Bail is historically and traditionally associated with the administration of criminal justice. In that regard, applications for grant of bail are largely dealt with by the courts from the purview of criminal procedural law.[38] In human rights discourse, it is a facet of the right to personal liberty.[39] Since 1995 (particularly from 2004), the courts have in numerous decisions addressed the rationale for grant of bail in the context of other

35. The factual realities of hanging in Uganda—presented in an affidavit of one Mr. Okwanga, a former prison officer but was at the time of the petition on death row—include decapitation, bludgeoning and round-the-clock reminder of impending death by hanging for three days. It is to be noted that the Constitutional Court had found hanging, as a manner of executing the penalty, to be cruel *but* not in the context of article 24 given the constitutional permissibility of the penalty under article 22(1). *See supra* note 7, judgments of Okello, JA, at 153-4; Twinomujuni, JA, at 183-4 and Mpagi-Bahigeine, JA, at 208. In his dissenting judgment, Egonda-Ntende, Ag. JSC highlighted the realities in the use of hanging as a method of executing the penalty in Uganda. *See supra* note 10, at 81-90. In the end, he concluded that "hanging as a method of execution *as it is carried out in Uganda* is a cruel, inhuman and degrading treatment or punishment." *See id*., at 90.

36. In the *Ng case*, the Human Rights Committee regarded asphyxiation by cyanide gas to constitute cruel and inhuman treatment in violation of article 7 of the Covenant, since it would not meet the test of "causing the least possible physical and mental suffering." *See supra* note 31, ¶ 16.4.

37. *See supra* note 10, dissenting judgment of Egonda-Ntende, Ag. JSC, at 71-4, 79-80.

38. *See*, Magistrate Courts Act, Cap. 16, § 74; Trial on Indictments Act, § 14.

39. The right to apply for grant of bail is guaranteed under article 23(6) of the 1995 Constitution.

rights, especially the right to a fair trial,[40] as well as the character of the fundamental right as guaranteed under the constitution.[41] The rationale and character of the right to grant of bail resurfaced in the decisions rendered in 2008 in *Foundation for Human Rights Initiative v. Attorney General*[42] and *Attorney General v. Joseph Tumushabe*[43] before the Constitutional Court and the Supreme Court respectively.

In the *FHRI case*, the issues concerned the constitutionality and legality of the restrictions imposed on the grant of bail by specific provisions of, *inter alia*, the criminal procedural law and the military law.[44] The provisions of the said laws were challenged as inconsistent with the provisions of, *inter alia*, article 23(6) of the Constitution.[45] Before addressing the issues, the Constitutional Court reiterated an aspect of bail it had previously pronounced upon; that is, that bail is not an automatic right but is granted at the discretion of the courts.[46] In that regard, the Court regarded the restrictions on grant of bail under sections 14(2) and 15(1)-(3) of the Trial on Indictments Act as not taking away the discretion given that the restrictions were not "mandatory" and the courts would still be "free to exercise discretion judicially … to

40. The courts have variedly addressed the grant of bail in light of the guarantees to the right to a fair trial under article 28 of the Constitution. On the right to presumption of innocence (art. 28(3)(a)): e.g. *Emmanuel Katto v. Uganda*, Crim. Misc. Appln No. 10/2005 (HC)(unreported); *Aliphusadi Matovu v. Uganda*, Misc. Crim. Appln No. 15/2005 (HC)(unreported). On the right to a speedy trial (art. 28(1)): e.g. *Joseph Tumushabe v. Attorney General*, Const. Petition No. 6/2004 (CC)(unreported). On the right to be afforded adequate time and facilities for preparation of one's defence (art. 28(3)(c)): e.g. *Uganda v. Denis Obua*, Crim. Appln No. 18/2005 (HC) (unreported).

41. The character of bail as a constitutional right has been affirmed by the courts: *see*, *Col. (Rtd.) Dr. Kizza-Besigye v. Uganda*, Crim Misc. Appln Nos 228 & 229/2005 (HC)(unreported); *Uganda (DPP) v. Col. (Rtd.) Dr. Kizza-Bseigye*, Const. Ref. No. 10/2005 (CC)(unreported); *Uganda Law Society v. Attorney General*, Const. Petition No. 18/2005 (CC)(unreported).

42. Const. Petition No. 20/2006 (CC)(unreported).

43. Const. Appeal No. 3/2005 (SC) (unreported).

44. The impugned provisions were §§ 14(2), 15(1)-(3) of the Trial on Indictments Act; §§ 75(2) and 76 of the Magistrate Courts Act and §§ 219, 231 and 248 of the Uganda Peoples Defence Forces Act. It is to be noted that the Constitutional Court had in previous decisions hinted on the question of the constitutionality of certain provisions of the Trial on Indictments Act and the Magistrate Courts Act: *see*, *Tumushabe case*, *supra* note 40, judgment of Twinomujuni, JA, at 17-8; *Charles Mubiru v. Attorney General*, Const. Petition No. 1/2001 (CC)(unreported). A similar concern had been expressed by the High Court: *see*, *Alex Burton Ssemanda v. Uganda*, Misc Appln No. 157/1999 (HC)(unreported), at 7.

45. The other provisions of the Constitution that the provisions of the laws were regarded inconsistent with were articles 20, 23(1), 28(1) and 28(3).

46. *Supra* note 43, at 20-3, 26. The lead judgment was delivered by Mukasa-Kikonyogo, DCJ. For the Constitutional Court's previous pronouncement on this aspect of bail: *see*, *Col (Rtd.) Dr. Kizza-Besigye case*, *supra* note 41.

impose reasonable conditions on the applicant."[47]

Additionally, the Court viewed the restrictions as underscored by the object and effect of bail as an important judicial instrument to ensure, on the one hand, "individual liberty" and, on the other, "the accused person's appearance to answer charge or charges against him or her."[48] Further, it regarded the restrictions under the impugned provisions of the criminal procedural laws as not inimical to the right to presumption of innocence.[49] Ultimately, the Court held that the right to bail had to be "enjoyed within the confines of the law" and, to that end, it declared that the provisions of sections 14(2) and 15(1)-(3) of the Trial on Indictments Act and section 75(2) of the Magistrate Courts Act were not inconsistent with article 20, 23(6) and 28 of the Constitution.[50] However, in light of the fact that the State had conceded that the other impugned provisions of the criminal procedural law and military law, the Court declared them void to the extent of inconsistency with the provisions of article 23(6) of the Constitution.[51]

In the *Tumushabe case*, in an appeal from the decisions of the Constitutional Court by the Attorney General, the crucial issue, as rightly set out by the Supreme Court, concerned the constitutionality of the failure of the General Court Martial, as a military court, to release over 25 detained officers and men on bail.[52] At the outset, the Court considered the genesis of the right to bail as the protection of the right to liberty: therefore while not questioning the relationship between the right to grant of bail and the right to a fair trial as underpinned the decisions of the Constitutional Court,[53] the Supreme Court held that the rationale for the right was *primarily* to be founding the

47. *Id*., at 25. *See generally*, *id.*, at 24-5. The provisions in question deal with the power of the court to cancel bail (§ 14(2)) and the accused being requited to demonstrate that he or she will not "abscond" or of the existence of "exceptional circumstances" (§ 15(1)-(3)).

48. *Id*., at 25-6.

49. *Id.*, at 26, 28. The Court rejected the contention that the limitation in §75(2) of the Magistrate Courts Act – restricting grant of bail by a magistrate court with regards to certain offences – inferred guilt on part of the accused for the offences preferred: *id*., at 28. It is to be noted that the High Court had held somewhat in similar terms that "rejection of a bail application and presumption of innocence can co-exist:" *Dr. Aggrey Kiyingi v. Uganda*, Misc. Crim. App. No. 41/2005 (HC).

50. *Id*., at 28.

51. These included § 16 of the Trial on Indictments Act, § 76 of the Magistrate Courts Act and §§ 219, 231 and 248 of the Uganda Peoples Defence Forces Act: *id*., at 28-9, 30.

52. The Supreme Court felt that the arguments before (and decision of) the Constitutional Court had obscured the crucial issue in the petition: *supra* note 44, judgments of Mulenga, JSC, at 6 and Katureebe, JSC, at 9.

53. For an analysis of the decision of the Constitutional Court in 2004: *see*, H. Onoria, *Review of Major Decisions on Fundamental Rights and Freedoms in Uganda in 2004*, 11 EAST AFR. J. PEACE HUM RIGHTS 323 (2005), at 346-9.

right to personal liberty itself.[54]

Admitting that the right to liberty is not absolute and is subject to limitation, the Court considered the permissible derogations "not permanent or indefinite", with liberty reclaimable through specific judicial guarantees in the right to an order of *habeas corpus* and the right to bail.[55] The Court regarded the non-derogable character of the right to an order of *habeas corpus* to lie in the question of the *lawfulness* of a detention in contrast to the question of seeking *release* from detention in respect of the right to bail—in the former, a court *must* order release of a detainee while in the latter, a court has *discretion* whether to grant such release.[56] However, the Court considered the discretion to grant bail qualified with respect to mandatory bail, since a "court has *no discretion* except in regard to reasonable conditions to impose."[57]

More significantly, the Supreme Court addressed the import of the provisions on mandatory bail in light of the fact that much of the confusion before the Constitutional Court stemmed from construing clauses (b) and (c) of article 23(6) of the Constitution.[58] The Court held that the object of the two provisions was not to identify or distinguish the *courts* empowered to grant bail but rather to stipulate the *maximum periods* of custody on remand.[59] The Court observed that the differentiation in the periods of custody for purposes of mandatory release on bail obtains from pre-trial procedures in respect of indictable offences before the High Court, which calls for more time, while such procedures are not required for cases tried before "subordinate courts."[60]

Ultimately, the Supreme Court held that article 23(6) of the Constitution applied to every person awaiting trial for criminal offence *without exception*[61] and, in that regard, included persons awaiting trial before the General Court Martial as a military court. The Court viewed this as arising from a constitutional guarantee of *rights* to every person and a constitutional imposition of *duties* upon the State, its

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54. *Supra* note 43, at 7-9.

55. *Id*., at 8-9.

56. *Id*., at 9.

57. *Id*. In the *FHRI case*, the Constitutional Court stated somewhat similarly that "in … article 23(6)(b) and (c) [of the Constitution] the court has *discretion to determine the conditions of bail*." *See supra* note 42, at 23.

58. The pertinent issue before the Constitutional Court was in respect of the two clauses of article 23(6) of the Constitution applied to proceedings before the General Court Martial. For a review of the Court's decision on this issue. *See*, Onoria, *supra* note 53, at 348-9.

59. *See supra* note 43, at 9-10.

60. *Id*., at 10.

61. *Id*. The Court stated: "The framers of the Constitution deliberately directed the provisions in Article 23(6) to everybody who happens to be on criminal charge and so had no reason to particularise any category." *See id*., at 11.

diverse agencies and organs and all persons to uphold the rights so guaranteed. It stated that:

> [T]he Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the Constitution. The Constitution also commands the Government, its agencies and all persons, without exception, to uphold those rights. The General Court Martial is not exempted from the constitutional command to comply with the provisions of Chapter 4 or of Article 23(6) in particular, nor is a person on trial before a military court deprived of the right to reclaim his/her liberty through … application for mandatory bail in appropriate circumstances.[62]

In the end, the Court held that the failure to release the detainees, remanded in custody for more than 120 days awaiting trial before the General Court Martial, was "inconsistent with Article 23(6)(b) of the Constitution."[63]

IV. THE RIGHT TO A FAIR TRIAL

The right to a fair trial guaranteed under article 28 of the Constitution was a crucial facet of several decisions in 2008 and 2009. This included the decisions of the Supreme Court on the death penalty and the right to grant of bail in the *Kigula* and *Tumushabe case* respectively. The more significant decision however was rendered by the Constitutional Court in 2009 in respect of the guarantees that buttress the right in the context of military courts and military justice in *Uganda Law Society & Anor v. Attorney General*.[64] Filed in the wake of the military execution of two low-ranking soldiers at Kotido in March 2002,[65] the petitioners challenged the trial of the soldiers before a Field Court Martial as being in violation of the right to a fair trial under article

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62. *Id*., at 11.

63. *Id.*, at 15. The Court upheld the detainees' right to mandatory bail under article 23(6) of the Constitution "irrespective of the provisions of the UPDF Act concerning bail." In any event, the provisions on bail under the military law had been declared inconsistent with article 23(6) of the Constitution by the Constitutional Court in the *FHRI case*, *supra* notes 44 and 51 and accompanying text. The decision in the *FHRI case* was delivered three months prior to the decision of the Supreme Court in the *Tumushabe case*.

64. Const. Petition Nos 2 and 8/2002 (CC) (unreported).

65. For a constitutional-legal analysis of the trial and executions, see H. Onoria, *Soldiering and Constitutional Rights in Uganda: Kotido Military Executions*, 9 EAST AFR. J. PEACE HUM. RIGHTS 87 (2003).

28 of the Constitution.[66] Additionally, in light of that trial, the petitioners challenged the subsequent execution of the soldiers as a violation of the right to life under article 22 of the Constitution.

In terms of the right to a fair trial, the Court grudgingly regarded the Field Court Martial as satisfying the requirement of "independence" and "impartiality" in article 28(1) of the Constitution within the context of the existing laws under which it was constituted and the military structure in which it operated.[67] Additionally, the Court found a "substantial compliance" with the right to language of the accused as guaranteed under article 28(3)(b) of the Constitution, except it opted to couch it as the "right to an interpreter."[68] However, the Court regarded the three hour trial to be a contravention of article 28(1) of the Constitution, noting that the requirement of a "speedy" trial had to "be measured against the requirement that the trial must be fair in all other aspects spelt out by the Constitution."[69]

Further, the Court felt that, given the circumstances surrounding the trial before the field military court—haste in the trial, the quiet and unquestioning attendance of the accused soldiers to proceedings—the right to adequate time and facilities to prepare a defence and the right to legal representation as guaranteed under article 28(3)(c) and (e)

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66. The two petitions, filed separately by the Law Society and Jackson Karugaba, were consolidated by the Constitutional Court. It is to be noted that the decision of the Constitutional Court was rendered seven years after the petitions were filed in 2002 owing to several factors. Firstly, the petitioners sought a stay to further death penalty executions in the military (*Uganda Law Society & Anor v. Attorney General*, Const App. No. 7/2003 (CC) (unreported)) which application was unsuccessful before the Constitutional Court. Secondly, the petitioners appealed to the Supreme Court (*Uganda Law Society & Another v. Attorney General*, Const Appeal No. 4/2003) and, as occurred to several other appeals between 2004 and 2008, the appeal became victim to lack of quorum in the Supreme Court and it remained unfixed and unheard until 2008. Thirdly, when the appeal eventually came up for hearing, it was withdrawn by the petitioners (appellants) and the petition was thereupon heard on its merits before the Constitutional Court.

67. *See supra* note 64, at 14-17. The lead judgment was delivered by Twinomujuni, JA. *See also* the declaration of Kavuma, JA, at 40-41.

68. *Id*., at 17-18. *See also* declaration of Kavuma, JA, at 44. The right to an interpreter is in fact guaranteed under article 28(3)(f) of the Constitution. The Court noted that, at the start of the trial before the field court, the accused were asked the language they preferred to use and they indicated Kiswahili and, although the Court remarked as to the absence on record of the military court of the identity of a person brought to interpret in Kiswahili, the corollary could have been that, having indicated a language of preference, the accused were conversant with the language and there was therefore no need for an interpreter. The Court's holding is invariably bolstered by a contextual interpretation of clauses (b) and (f) of article 28(3) of the Constitution

69. *Id*., at 17. The Court emphasized that haste in the trial process was never intended to be at the expense of a proper investigation and prosecution of the case. *See*, however declaration of Kavuma, JA, arguing that speed is a facet of administration and operations in the military: *id*., at 43-44.

of the Constitution had been contravened.[70] The Court expressed particular disquiet over the right to legal representation since the soldiers were charged with capital offences.[71] Ultimately, it held that the "gross contravention of article 28(3) (e) of the Constitution" was not "cured by the fact that there was a military legal officer present throughout the trial."[72] In the end, having construed article 28 of the Constitution as a "package of protections" (each constituting *inexhaustively* what the right to a fair trial comprises of),[73] the Court concluded that, given the denial of certain of those protections, "the trial cannot be said to [have been] fair."[74] In light of the violation of the right to a fair trial, the Court additionally considered the execution of the soldiers to have been in contravention of article 22(1) of the Constitution.[75]

It is to be noted that the Court found a violation of the right to life within the purview of article 22(1) itself given that, apart from requiring a sentence of death to inure from a fair trial, the court handing down a death penalty conviction has to be competent and the conviction has to be confirmed by the highest appellate court. Although it considered a field Court Martial to be a competent court[76] and a right of appeal to exist from decisions of the field military court,[77] the Court felt that the condemned soldiers had been denied the right of appeal and the sentences had not been confirmed by the Supreme Court as the highest appellate court.[78]

The right to a fair trial in the context of trial before the military courts was also considered in an appeal before the Supreme Court involving the Law Society in *Attorney General v. Uganda Law Society*.[79] The contentious issue on appeal, as had been the case before the Constitutional Court, concerned the trial of civilians for offences of terrorism before military courts as well as before the High Court. In

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70. *Id*., at 18-20. On the right to legal representation, *see* also declaration of Kavuma, JA, at 44-45. For a discussion of the pertinent issues on legal representation (as relied upon by the Court). *See*, Onoria, *supra* note 65, at 104-5.

71. The Court observed that "the proceedings of the [court] … reveal that the accused [were] not even informed that he had a right to legal representation;" *id*., at 18.

72. *Id*., at 20.

73. *Id*., at 13, 20.

74. *Id*., at 20.

75. *Id*., at 21, 30-31.

76. *Id*., at 24-5. *See also*, declaration of Kavuma, JA, at 39-40.

77. *Id*., at 26-27.

78. *Id*., at 27-30. *See*, however, declaration of Kavuma, JA, disputing the existence of a right of appeal from the decisions of a field military court in light of the provisions of the military law, although he held that the non-existence of a right of appeal under the law resulted in the "execution of the soldiers before their sentences had been confirmed by the Supreme Court" in violation of their right to life under article 22(1) of the Constitution. *See id*., at 46-48.

79. Const. Appeal No. 1/2006 (SC) (unreported).

upholding the judgment of the lower court, the Supreme Court considered the concurrent trials of the accused persons in the two courts to be "inconsistent with the principle underlying the provision in Article 28(9) of the Constitution."[80] The Court noted that prosecutorial discretion as regards trial should entail recognition of the principle that an accused person should be "subjected to trial on the same facts only once"[81]—that, is the principle against double jeopardy. To that end, the trial of the accused persons for the same offences of terrorism with respect to the same facts, albeit *concurrently* and in *different* courts, was inconsistent with the right to protection against double jeopardy under article 28(9) of the Constitution.

The other major decision on the right to a fair trial was in *Soon Yeon Kim & Anor v. Attorney General*.[82] The matter before the Constitutional Court, coming as a reference from a criminal trial before a magistrate court, concerned the right of the applicants, as accused persons, to be availed copies of prosecution witness statements and exhibits. Reflecting on a history of pre-trial procedure in Uganda since 1960s,[83] the Constitutional Court considered pre-trial disclosure a facet of the right to a fair trial in the context of the guarantees on presumption of innocence, being afforded adequate facilities and preparation of one's defence and equality of arms between litigants.[84] The Court therefore regarded what it viewed as "trial by ambush" to be inconsistent with the provisions of article 28(3)(a), (c), (d) and (g) of the Constitution. In the end, it held that an accused person had a *prima facie* right to pre-trial disclosure of material statements and exhibits, with the timing and scope of disclosure within the discretion of a trial court.[85]

V. FREEDOM OF ASSEMBLY

The freedom of assembly is part of the quintet of freedoms guaranteed under article 29(1) of the 1995 Constitution.[86] The freedom was the subject of a petition filed before the Constitutional Court in *Muwanga Kivumbi v. Attorney General*.[87] The petition arose

80. *Id*., at 10. The lead judgment was delivered by Mulenga, JSC

81. *Id*., at 10-11.

82. Const. Ref. No. 6/2007 (CC) (unreported).

83. The court noted that pre-trial disclosure arrangements in Uganda had moved from preliminary hearings (screening) to disclosure under the Criminal Procedure (Summary of evidence) Act 1967 to trial by "ambush" under the Magistrate Courts (Amendment) Statute 1990, *id*., at 7-8.

84. *Id*., at 5-8.

85. *Id*., at 8-9. The Court observed that "[e]ssentially, disclosure should be made before the trial commences depending on the justice of each case and on which documents to be disclosed:" *id*., at 9.

86. *See supra* note 1, art. 29(1)(d).

87. Const. Petition No. 9/2005 (CC) (unreported).

from several aborted efforts between March and May 2005 by the Popular Resistance against Life Presidency (PRALP), of which the petitioner was a member, to organize a rally, seminar and public dialogues in various places in Uganda. The PRALP's efforts, through letters written seeking permission to hold the said assemblies, were thwarted by refusals to grant permission in light of the provisions of the police law. The contention before the Court pertained to the constitutionality of section 32 of the Police Act.

The Constitutional court declared the impugned provision of the police law unconstitutional for being in contravention of the freedom of assembly under article 29(1)(d) of the Constitution. The decision of the court is premised on several reasons. Firstly, the Court considered the freedom of assembly to lie at the heart of public debates and discourse and was therefore closely related to the other conscientious freedoms under article 29(1) of the Constitution and, in that regard, it was a vital aspect of a democratic society. Mpagi-Bahigeine, JA stated:

> [T]he right of assembly is the aggregate of the individual liberty of the person and individual liberty of speech. The liberty to have personal opinions and the liberty to express them is one of the purposes of the right to assemble, which right or freedom constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and therefore each individual's self-fulfillment.[88]

Secondly, in its examination of the nature of the restrictions under the police law, the Court considered them to be *prohibitive* than *regulatory*,[89] particularly in light of the availability of other powers exercisable by the police to maintain law and order—the Court viewed such powers to include the arrest of any persons acting in breach of the peace, provision for more security in anticipation of disturbances, securing undertakings of good behavior, etc.[90] Thirdly, the Court considered the police law to place the power to *prohibit* assemblies at the mercy of the *subjective* reasoning of the police chief or his

88. *Id*., at 7. *See* also judgments of Kitumba, JA, at 9 and Byamugisha, JA, at 11-2. The lead judgment was delivered by Byamugisha, JA.

89. *Id*., judgments of Mukasa-Kikonyogo, DCJ, at 4; Okello, JA, at 6 and Byamugisha, JA, at 13, 16. Byamugisha, JA observed that the operative word in section 32(2) of the Police Act as to powers of the Inspector General of Police with regard to assemblies is "to prohibit," which ordinarily means "to forbid someone from doing something." *See id*., at 13.

90. *Id*., judgments of Mukasa-Kikonyogo, DCJ, at 4; Okello, JA, at 6; Mpagi-Bahigeine, JA, at 7; Kitumba, JA, at 9; and Byamugisha, JA, at 15.

junior officers, with the danger that it could be exercised *arbitrarily* and *excessively*.[91]

The decision of the Court addresses what has been a perennial situation in which peaceful processions and demonstrations have been forcibly dispersed by the police and, in extreme cases, has involved the use of tear-gas and batons. However, owing perhaps to the narrowness of the scope of the petition—in the sense that it sought to impugn the provisions of section 32 of the Police Act as regards the power of the police to *prohibit* assemblies—the other nugatory aspects of policing powers over assemblies were left unaddressed.[92] This is particularly the case with the provisions of section 35 of the Act requiring the obtaining of a permit to assemble (and criminalizing participation in an assembly held without such a permit): in fact, the PRALP's efforts, through letters, were to seek permission for the various assemblies it had intended to hold. The Constitutional Court's decision about *arbitrariness* applies similarly to the unchallenged provisions of the Act, since they hijack and place the freedom of assembly under the personal disposition and uncontrolled discretionary power of an individual police officer.[93]

VI. THE RIGHT TO PROPERTY *VIS-À-VIS* PROTECTION OF THE ENVIRONMENT

The concern over the utilization of natural resources and preservation of the environment was dealt with by the Constitutional Court in *Amooti Godfrey Nyakana v. National Environment Management Authority & 6 Ors*.[94] The petition was brought in the wake of the demolition of the petitioner's incomplete house by the first respondent after inspections had revealed that the house was being constructed on a wetland and after the authority had served him with an environmental restoration order. The

91. *Id*., judgments of Mukasa-Kikonyogo, DCJ, at 4; Okello, JA, at 5-6 and Kitumba, JA, at 8-9 (noting that section 32(2) of the Police Act gave the Inspector General of Police *excessive* powers that he may use as he *wishes* to curtail rights and freedoms) and Byamugisha, JA, at 12 (noting the dangers of the power being exercised by the police in an *unaccountable* and *discriminatory* manner and of its being "*open ended* since it has no duration").

92. For a critical analysis of the case, see R. Kakungulu-Mayambala, *Muwanga Kivumbi v. Attorney General: An Appraisal of the Right to Assemble and Demonstrate in Uganda*, 14 EAST AFR. J. PEACE HUM. RIGHTS 485 (2008).

93. The courts in Tanzania, Ghana, Zimbabwe and Zambia have struck down (and declared unconstitutional) provisions of police (or public order) legislation requiring the obtaining of a permit in order to hold a peaceful assembly: *see*, *Rev. Christopher Mtikila v. Attorney-General*, Civil Case No. 5/1991 (unreported) (Tanzania HC); *New Patriotic Party (NPP) Headquarters v. Inspector-General of Police & Ors*, Writ No. 4/1993 (unreported) (Ghana SC); *Re Munhumeso & Ors* [1994] 1 LRC 282 (Zimbabwe SC); *Christine Mulundika & 7 Ors v. The People* [1996] 2 LRC 175 (Zambia SC).

94. Const. Petition No. 3/2005 (CC) (unreported).

issuance and service of the restoration order was made under the provisions of sections 67, 68 and 70 of the National Environment Act. The petitioner challenged the said provisions of the environmental law as inconsistent with articles 21, 22, 24, 26, 28, 43, 237 and 259 of the Constitution. In the end, the issues were narrowed down to whether the Act (and actions of the first respondent) were inconsistent with the petitioner's rights to property and fair hearing under articles 26 and 28 of the Constitution.

In dismissing the petition, the Constitutional Court took cognisance of the fact that the National Environment Act conferred upon the first respondent "power to deal with and protect the environment for the benefit of all".[95] The Court noted that the Act imposed restrictions on the use of wetlands and, in that regard, vested in the first respondent the power to carry out inspection on the petitioner's land to ascertain that its use was in compliance with the provisions of the law.[96] Further, the Court regarded the environmental restoration order as drawing the attention of the petitioner to the misuse of land and his obligation to restore the environment.[97] In the end, it rejected that there had been an infringement on the petitioner's right to property under article 26 of the Constitution, given that "[w]hat was taken away from him was *misuse of land* and this was done to *protect the environment*."[98] Additionally, the Court held that, given the grace period accorded to the petitioner after being served with the environmental restoration order, the provisions of the Act has "in built mechanisms for fair hearing as is enshrined in Article 28 [of the Constitution]."[99]

The decision of the Court highlights the growing concerns over the use (and misuse) of ecologically-fragile areas for human activity. Unfortunately, the more pertinent concern as to how in the first place part of a wetland was leased to the petitioner as private property was not addressed by the Court. Nonetheless, it was voiced in passing by Mpagi-Bahigeine, JA who, in agreeing with the judgment of the Court, emphasised that "such wetlands could not be granted to private individuals/entities because the State holds such natural resources in trust for the citizenry and they must be preserved for the public benefit, in this case to protect the environment."[100]

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95. *Id*., at 13.

96. *Id*., at 12-13. The Court observed that restrictions on the use of wetlands were provided under section 36 of the Act and that "the petitioner is not challenging the constitutionality of these restrictions."

97. *Id*., at 13.

98. *Id*., at 14 (my italics).

99. *Id*., at 13. The Court noted that "upon receipt of the restoration order, the petitioner had 21 days within which to make a presentation to the first respondent for a review or variation of its order."

100. *Id*., at 14.

VII. PROCEDURAL ASPECTS IN ENFORCING HUMAN RIGHTS

For several years after the 1995 Constitution, the enforcement of fundamental rights and freedoms has proceeded in part on the basis of procedural rules that predate the constitution. The relevant procedural rules—particularly where the enforcement is sought before the High Court as a "competent court" in terms of article 50 of the Constitution—have been the 1992 Fundamental Rights and Freedoms (Enforcement Procedure) Rules.[101] The other rules adopted in 1996 after the inception of the constitution were intended to deal with petitions to the Constitutional Court.[102]

Over the years, while it was accepted that claims in respect of violations of human rights (in which no interpretation of the Constitution is called for) could be brought before a "competent court" other than the Constitutional Court, the manner of presentation of such claims was never clearly defined. In most instances, given the accepted practice, the claims were filed before the High Court by way of notice of motion. The procedure and manner of presentation of claims for violations of human rights was the subject of three decisions across the three tiers of the courts of record in 2008 and 2009. In *Charles Harry Twagira v. Attorney General & 2 Ors*,[103] the appellant had filed before the High Court an application seeking several declarations of the court with respect of his criminal prosecution before a magistrate court. Before the High Court and on two appeals, the contention pertained to the appropriateness of the appellant presenting his application by way of notice of motion rather than as a petition (to the Constitutional Court).

Reaffirming the now-settled position that claims seeking declarations involving interpretation of the constitution had to be presented by *petition* under article 137 of the Constitution,[104] the Supreme Court voiced concern as to the propriety of instituting a claim in respect of declarations on human rights *as well as damages* by *notice of motion*.[105] The Court's concern was in respect of how the *damages* could be awarded by a court without evidence being called as to such damages in the absence of

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101. SI No. 26/1992 (or SI 13-14 with the 2000 revision of the laws of Uganda). Under the Rules, a person seeking to enforce his or her rights had to apply to a single judge of the High Court for necessary redress.

102. Const. Court (Petitions of Declarations under Article 137 of the Constitution) Direction, Legal Notice No. 4/1996. The Direction has since been replaced by the Constitutional Court (Petitions and References) Rules, SI 91/2005.

103. Civil App. No. 4/2007 (SC) (unreported).

104. *Id*., at 12, 15. For an examination of the jurisprudence on jurisdiction of the Constitutional Court under articles 50 and 137 of the Constitution, see, Onoria, *supra* note 53, at 361-66.

105. Civil App. No. 4/2007, *supra* note 103, at 13.

institution of an ordinary suit by way of a plaint.[106] It held that in spite of the prevailing practice as regards the institution of proceedings under article 50 of the Constitution by notice of motion, this was not the only procedure for doing so.[107] In the end, the Court held that the "[p]rocedure under Article 50 can be by *plaint* or by *motion* depending on the facts and nature of each case."[108] In the context of the ruling of the Court, it is implicit that a claim primarily for declarations as regards human rights could be brought by notice of motion while a claim that additionally sought damages could only be brought by way of a plaint.

The manner of instituting a claim in respect of human rights was also raised in *Hannington Mwesigwa & 3 Ors v. Attorney General*,[109] in which the appellants appealed against the dismissal of their application before the High Court seeking the enforcement of their human rights as well as damages. Their application, brought under article 50 of the Constitution, was by notice of motion. Although the Court of Appeal conceded that, in light of the *Twagira case*, the appellants' claim in seeking additionally damages should have been brought by way of a plaint,[110] it considered the Supreme Court decision as having been overtaken with the adoption of new procedural rules in 2008 requiring claims regarding human rights under article 50 of the Constitution to be brought by notice of motion.[111] The Court further observed that the concerns of the Supreme Court as regards proof of damages by evidence had been addressed under the new rules.[112]

The 2008 rules were in issue before the High Court in *Eng. J.S. Ghataura v. Uganda Telecom Ltd.*,[113] in which the plaintiff sued the defendant for the violation of his right to a clean and healthy environment under article 39 of the Constitution. The claim under article 50 of the Constitution, by plaint, was in respect of the defendant allegedly illegally erecting a mast in a residential area. Given that the suit had been

106. *Id*., at 13, 15.

107. *Id*., at 15-6.

108. *Id*., at 16.

109. Civil Appeal No. 2/2008 (CA) (unreported).

110. *Id*., at 3. The appellants' claim before the High Court was in respect of acts of mistreatment, torture and detention *incommunicado* committed against them by the military.

111. *Id*., at 5-6. The new procedural rules, adopted by the Rules Committee (chaired by the Chief Justice) are the Judicature (Fundamental Rights and Freedoms Enforcement Procedure) Rules, SI 55/ 2008. The rules came into force on 12 December 2008, five months after the decision of the Supreme Court in the *Twagira case* delivered on 7 July 2008.

112. *Id*., at 7. Reflecting on the possibility of calling evidence on any particular matter in an application (by notice of motion) under rule 6 of the 2008 Rules, the Court noted that "the Rules Committee has made an innovation for a simpler way of adducing evidence to prove anything including *damages*."

113. Civil Suit No. 238/2008 (HC) (unreported).

filed before the 2008 rules came into force, the Court considered the procedure to be that under the then prevailing *specific procedural rules* (the 1992 rules) "by way of notice of motion."[114] In the end, the Court regarded the procedure adopted by the plaintiff in instituting a plaint with respect to his human rights as "fundamentally flawed."[115]

Although the decision of the Court is largely correct in terms of the law, neither the court nor counsel referred to the decisions of the Supreme Court and Court of Appeal in respect of the *Twagira* and *Mwesigwa cases*. The correctness of the decision, given the context of its filing prior to the 2008 rules, lies in the fact that the plaintiff was primarily seeking a *declaration* as to his human rights. In light of the decision in the *Twagira case*, the claim ought to have been brought by notice of motion (rather than by plaint). In effect, although the High Court observed that the pre-2008 procedure by notice of motion had been re-adopted in the 2008 rules,[116] this could not be the proper premise of its decision.

VIII. ADDITIONAL OBSERVATIONS AND CONCLUDING REMARKS

It was noted at the outset of this review, the major decisions on fundamental rights and freedoms in 2008 and 2009 were in respect of petitions and appeals that had been pending before the courts for several years. The passage of the years during which the petitions and appeals were pending had implications for decisions before the courts in respect of the pertinent human rights issues underlying those decisions. This was for instance the case with death penalty convictions. Additionally, with appeals pending before the Supreme Court, the status of provisions of specific laws *vis-à-vis* human rights had remained in a flux. The following observations and remarks address the import and implications of the major (and certain minor) decisions during (and prior to) 2008 and 2009 upon the scope, content and enforcement of fundamental rights and freedoms in Uganda.

A. Death Penalty Convictions: Reasserting Judicial Discretion on Sentencing?

Although the constitutional permissibility of the death penalty was reaffirmed in the *Kigula case*, the Supreme Court importantly reasserted the discretion of the courts to hand down death penalty convictions. In real terms, it even took away the power of the executive to dither over death penalty *executions* in the context of the Court's orders

114. *Id.*, at 3, 5-6.
115. *Id.*, at 5.
116. *Id.*, at 3.

regarding inordinate delays and *death row*. The correctness of the overall decision of the Supreme Court—and the question as to whether the retention of the penalty under article 22(1) of the Constitution only "*recognizes* its existence" but does not *constitutionalize* the penalty as such[117]—will undoubtedly remain the subject of further debate among human rights activists and scholars.

More significantly, the decisions of the Supreme Court addressed the sense of uncertainty over the penalty that had bedeviled the three tiers of the higher courts—the High Court, Court of Appeal and the Supreme Court itself—during the three or so years of the pending constitutional appeal. While the appeal was pending, sentencing of offenders convicted of capital offences was the source of considerable uncertainty at the High Court while it largely came to a standstill at the Court of Appeal and the Supreme Court. At the High Court and the Court of Appeal, the judges tended, in light of the decision of the Constitutional Court (although it was subject to appeal), to view the power to hand down death penalty convictions as discretionary and, in that respect, heard convicted offenders in mitigation and imposed lesser sentences where appropriate.[118] On the other hand, the stance of the Supreme Court was to suspend or postpone confirmation of death sentences.[119] In the aftermath of the judgment of the Supreme Court, the courts have asserted the discretion to hand down death sentences within the context of the constitutional permissibility of the penalty.[120]

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117. For this view *see*, Tumwiine-Mukubwa, *supra* note 4, at 153.

118. *See, e.g. Uganda v. Bizimana*, Crim. Case No. 122/2005 (HC) (unreported). The High Court sentenced the accused, convicted (with several others) of nine counts of murder, to 15 years imprisonment instead of death, noting that, in light of the *Kigula case*, "the [Constitutional] court ordered that in capital offence the trial court must, before sentencing the convict afford him/her a hearing on mitigation of sentence." *See, William Okwang v. Uganda*, Crim. Appeal No. 69/2002 (CA) (unreported). The Court of Appeal noted that, given the decision of the Constitutional Court, it had to take "into account all the mitigating factors," although in the end, it "found no mitigating factors deserving reduction of the sentence" given that it was of the "considered view that this was a brutal murder." *But see, Uganda v. Wepondi Robert alias Mutto*, Crim. Case No. 3/2005 (HC) (unreported). The High Court, in sentencing the accused to death for convictions on three counts of murder, held that there was "only one sentence authorized by the law and that is that you shall suffer death in a manner authorised by the law." The *Wepondi* case was decided just over a month after the Constitutional Court had declared mandatory death sentences to be unconstitutional in the *Kigula case*.

119. *See, e.g., Henry Walugembe & Anor v. Uganda*, Crim. Appeal No. 39/2003 (SC)(unreported); *Susan Kigula Serembe & Anor v. Uganda*, Crim. Appeal No. 1/2004 (SC) (unreported); *Enock v. Uganda*, Crim. Appeal No. 11/2004 (SC) (unreported); *Philip Zahura v. Uganda*, Crim. Appeal No. 16/2004 (SC) (unreported); *Hasan Sekandi v. Uganda*, Crim. Appeal No. 12/2005 (SC) (unreported); *Peter Batagenda v. Uganda*, Crim. Appeal No. 10/2006 (SC) (unreported).

120. In this regard, the Court of Appeal has for instance, in the appeals heard since 21 January 2009, mitigated the death sentence to life imprisonment with respect to aggravated robbery: e.g. *Moses Kamaukama v. Uganda*, Crim. Appeal No. 52/2002 (CA) (unreported); found no *mitigating* factors in respect of a conviction for murder: e.g. *Santos Bongomin v. Uganda*, Crim. Appeal No. 16/2007 (CA)

B. Restoring Liberty: Reaffirming Discretion to Grant Bail?

In the *FHRI* and *Tumushabe cases*, the Constitutional Court and the Supreme Court reiterated the discretionary nature of the grant of bail. Further, both courts regarded the discretion qualified to the imposition of reasonable conditions of bail with respect to mandatory release on bail under article 23(6)(b) and (c) of the Constitution. The constitutionality of certain provisions of the criminal procedural laws and the military law limiting or restricting the grant to bail was addressed by the Constitutional Court in the *FHRI case*. It is to be noted that the State's concession as to unconstitutionality of section 76 of the Magistrate Courts Act and section 16 of the Trial on Indictment Act was essentially premised on the fact admission that the period of pre-trial custody with respect to bail under the impugned provisions was at variance with the periods stipulated under article 23(6) of the Constitution.[121] On the other hand, the concession as regards the unconstitutionality of sections 219, 131 and 248 of the Uganda Peoples' Defence Forces Act was in respect of restrictions placed upon military courts granting bail for certain offences.

Invariably, in premising the rationale for the right to grant of bail as *primarily* to restore liberty through *release* from lawful detention, the Supreme Court in the *Tumushabe case* determined that the non-release of the over 25 officers and men was unconstitutional in terms of article 23(6)(b) of the Constitution. In that regard, with the continued detention of the soldiers unconstitutional (and, in effect, *unlawful*), the remedy to regain their liberty in the circumstances was, in light of the reasoning of the Supreme Court, an order of *habeas corpus*.[122] This reasoning is similar to that of the Constitutional Court which deferred to the right of the detained soldiers to apply for a writ of *habeas corpus* before the High court for their release.[123]

(unreported); and upheld the death sentence as the *maximum* penalty for convictions in respect of brutal and heinous acts of murder: e.g. *Lubega Musiitwa v. Uganda*, Crim. Appeal No. 73/2003 (CA) (unreported); *Matayo Chesakit v. Uganda*, Crim. Appeal No. 95/2004 (CA)(unreported); *Jackline Atto v. Uganda*, Crim. Appeal No. 146/2004 (CA) (unreported); *Syson Muganga v. Uganda*, Crim. Appeal No. 33/2005 (CA) (unreported).

121. The provisions of the two criminal procedural laws provide for 240 and 480 days period of pre-trial custody while article 23(6)(b) and (c) stipulated, as of 2005, 120 and 360 days. The periods of pre-trial custody for purposes of mandatory bail have since been reduced to 60 and 180 days. *See*, Constitution (Amendment) Act (No. 2), 2005. This reduction in the periods of pre-trial custody was deferred to by the Supreme Court in the *Tumushabe case*. *See supra* note 43, at 10.

122. *See supra* notes 55-6 and accompanying text.

123. For a discussion of this aspect of the decision of the Constitutional Court in the *Tumushabe case*, see Onoria, *supra* note 53, at 349 & *supra* note 120. *See also*, *infra* note 134 and accompanying text.

C. Of Officers and Men: Constitutionalizing the Military?

The more significant implication of the decisions rendered in 2008 and 2009 has perhaps been with regards to the military in the context of constitutionalism. In both the *Uganda Law Society* and *Tumushabe cases*, the Supreme Court determined that the military—including its courts (and overall criminal justice system) and legal framework—was subject to the Constitution. This was similarly reiterated by the Constitutional Court in the *Uganda Law Society case* involving the Kotido military executions. In that regard, in the context of the decisions in the three cases, the military was subject to the provisions on the right to life, grant of bail and fair trial guarantees under articles 22, 23 and 28 of the Constitution.

In the *Uganda Law Society case* before the Constitutional Court, the Court rejected and departed from its previous position that article 22(1) of the Constitution was inapplicable to field military courts, a position that was premised on the special status accorded to the Field Court Martial under the provisions of articles 121(6) and 137(5) of the Constitution.[124] The concern of the Constitutional Court at the time—in respect of an application by the Law Society for a stay of further death penalty executions in the military[125]—was in respect of the right of appeal in the context of article 22(1) of the Constitution as regards death penalty convictions by field military courts.[126] Deferring to the decision of the Supreme Court in the *Tumushabe case* affirming the subjection of the military to the constitution, the Constitutional Court held that the exemptions accorded to the field military court under the constitution (under articles 121(6) and 137 (5)) did not render the provisions of article 22(1) similarly inapplicable to those courts.[127] On the exemption accorded to the field military court under article 137(5) of the Constitution, the Court explained:

> [T]his provision is intended to ensue that proceedings which start in Military Courts remain there until they are finalised in the Court Martial Appeal Court or in case of capital offences, until they are referred to the Court of Appeal. This is logical in that it minimizes delays which would otherwise occur if cases moved from Military Courts to civilian courts and then backwards to Military Courts. [We]

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124. *Supra* note 64, at 27-29.

125. *Supra* note 66 and accompanying text.

126. For an analysis and criticism of the Court's ruling at the time in 2003, see H. Onoria, *Review of Major Decisions on Fundamental Rights and Freedoms in Uganda in 2003*, 11 EAST AFR. J. PEACE HUM. RIGHTS 137 (2005), at 142-43.

127. *See supra* note 64, at 29-30.

> do not read this article as recognising that the Field Courts Martial as special courts that should be exempted from the application of article 22(1) of the Constitution.[128]

The Court similarly viewed the exemption under article 121(6) of the Constitution as only intended to expedite proceedings before a field military court but not as exempting it from the "mandatory application of article 22(1) of the Constitution" or affecting the "right of appeal."[129] In fact, the Court did not consider article 121(6) of the Constitution as taking away the prerogative of mercy in the President, since he could exercise the prerogative save *at his own initiative* and "without the intervention of the Advisory Committee on the Prerogative of Mercy."[130]

In the *Tumushabe case*, the Supreme Court rejected what it construed as a disguised appeal to supremacy of military law over the Constitution,[131] holding that the provisions of the Constitution on grant of bail applied to all persons awaiting trial, including those being tried under the military justice system.[132] Further, the Court's determination of the parallel status of the General Court Martial, as a military court, and the High Court was only intended to clarify on an issue that had underpinned the contention of the inapplicability of article 23(6) of the Constitution to military courts.

In explaining the status of the General Court Martial as a "subordinate" court *vis-à-vis* the High Court in terms of article 23(6) of the Constitution—as premised on the *mode of establishment* rather than the *appellate hierarchy* of the two courts[133]—the Supreme Court implicitly addressed the powers of the two courts with regards to the particular remedies for purposes of restoring liberty. In that regard, while the power to grant bail to persons awaiting trial before the General Court Martial lay with the military court, the power to grant an order of *habeas corpus*— in the context of the *lawfulness* of the continued detention of the detained soldiers beyond the pre-trial custody period of 120 days—would lie with the High Court.[134]

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128. *Id.*, at 31

129. *Id*., at 32.

130. *Id*. In September 2003, a soldier sentenced to death by a Field Court Martial for the offence of cowardice and due for execution was saved by the President's exercise of the prerogative of mercy. *See, Uganda President Quashes Death Sentence for "Coward" Soldier*, CLARINEWS, September 18, 2003, available online at <http://quickstart.clari.net/qs_se/webnews/wed/dr/Quganda-military-justice.RJb1_DSI.html>, (accessed on 8 February 2010).

131. *See supra* note 43, at 14-5. *See also*, judgment of Katureebe, JSC, at 18.

132. *See supra* note 61 and accompanying text.

133. *Supra* note 43, at 11-3. *See also*, judgment of Katureebe, JSC, at 18-19.

134. *Id*., judgment of Katureebe, JSC, at 19. *See also, supra* notes 122-3 and accompanying text. The High Court has in fact upheld its jurisdiction to entertain *habeas corpus* application in matters involving officers charged before military courts and, although it affirmed the availability of *bail* to

D. Fair Trial Guarantees: Expanding the Scope of Article 28?

The right to a fair trial (or its import in other rights and freedoms) was pre-eminent in the decisions in 2008 and 2009. Both the Constitutional Court and the Supreme Court notably recognised article 28 of the Constitution to constitute a *package of protections* or *minimum requirements* that the right to a fair trial is comprised of.[135] Although in the *Kigula case*, the Supreme Court opted to address the question of mandatory death sentences from the viewpoint of right to equality under the law,[136] it could likewise, as the Constitutional Court did, have regarded denial to a convict of a right to mitigate a sentence as inconsistent with the right to equality of arms and therefore the right to a fair trial.[137] Likewise, in the *Uganda Law Society case*, the Constitutional Court did not construe the right of appeal in the context of article 22(1) of the Constitution as a facet of the right to a fair trial under article 28 of the Constitution.[138] However, in *Soon Yeon Kong Kim case*, the Court rightly considered pre-trial disclosure to be a facet of, *inter alia*, the right to equality under article 28(3)(g) of the Constitution, in terms of "ensuring equality between contestants in litigation."[139]

The scope of the right to a fair trial was considered in a number of several other minor decisions. In *Dong Yun Kim v. Uganda*,[140] the Court of Appeal held that the appellant was entitled to a certified copy of the proceedings of the trial court since it was pertinent to the right to *adequate* preparation of one's appeal in terms of article 28(3)(c) of the Constitution.[141] Conversely, in *Butamanya Kabaale v. Uganda*,[142] the denial to an advocate of the opportunity to make submissions on the appellant's case was not considered a violation of the right to a fair trial.[143] Although the Court of Appeal premised its decision on the fact that "the omission to make the submissions by the advocate of the appellant did not prejudice his case",[144] the right to address court

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detainees under jurisdiction of military courts, it expressed reluctance to intervene to grant bail. *See*, *Lt. Godfrey Kasangaki v. Uganda*, Misc. Crim. App. No. 17/2002 (HC) (unreported).

135. *See*, *Uganda Law Society case*, *supra* note 64, at 11-3; *Soon Yeon Kong Kim case*, *supra* note 82, at 5. *See also*, *supra* notes 73 & 74 and the accompanying text.

136. *Supra* note 10, at 38-40.

137. *Supra* note 67, judgments of Okello, JA, at 149-52 and Twinomujuni, JA, at 173-9.

138. For an analysis of the right of appeal in this context in light of the military law and the Kotido military executions, see Onoria, *supra* note 65, at 106-09.

139. *Supra* note 82, at 7-8 (my italics). *See also*, *supra* note 85 and accompanying text.

140. Crim. Appeal No. 86/2007 (CA) (unreported).

141. *Id*., at 4.

142. Crim. Appeal No. 16/2003 (CA) (unreported).

143. *Id*., at 5.

144. The Court observed that while submissions *assist* court, by the time they are made, evidence in a case has already been adduced (as was the case from the record of the court).

and to make submissions is in fact implied in the *right to legal representation*.[145]

Finally, in *Uganda Projects Implementation Management Centre v. Uganda Revenue Authority*,[146] although the Constitutional Court upheld the right of access to court as a facet of the right to a fair trial,[147] it did not find a violation of the right to a fair trial given that the petitioner's case, by a reference, was "based on discrimination under article 21 and not article 28 which provides for access to court."[148] Therefore, specific acts or situations can be construed as *attributes* of the right or read into the right as *additional attributes* beyond those specifically stipulated under article 28 of the Constitution. To that end, article 28 is indeed only a *minimum* of a *package of protections* with regards the right to a fair trial.

E. Decisions vis-à-vis Law-making and Reform

The increased constitutional litigation of the Bill of Rights since the inception of the 1995 Constitution has meant that petitions are challenging not only acts or conduct of the State (and non-State actors) but also existing legislation (or provisions thereof) as inconsistent with the provisions of the Bill of Rights.

The decisions of 2008 and 2009 witnessed provisions of legislation such as the Penal Code Act, Magistrate Courts Act, the Trial on Indictment Act, the National Environment Act, the Police Act and the Uganda Peoples Defence Forces Act being challenged as inconsistent with provisions on fundamental rights and freedoms under the Constitution. With a few exceptions, most of the impugned provisions of the said laws were declared unconstitutional by the courts. In the corollary, in some of the decisions, changes in the previous legal framework were taken into account. Thus, in *Tumushabe case*, the Supreme Court took notice of the reduction of the period of pre-trial custody for purposes of mandatory bail under article 23(6) of the Constitution in light of the 2005 amendment to the constitution.[149]

In *Mwesigwa* and *Ghataura cases*, the Court of Appeal and High Court were cognizant of the adoption of the Judicature (Fundamental Rights and Freedoms

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145. *See*, *Bandaranaike v. Jagathsena & Ors* [1985] LRC (Crim.) 776 (Sri Lanka, SC).

146. Const. Ref. No. 18/2007 (CC) (unreported).

147. *Id*., at 8. Referring to the decision of the Court of Appeal of Tanzania in *Ndyanabo v. Attorney General*, the Court regarded the right of access to court (and to justice) as central to the rule of law, fundamental rights and an independent, impartial and accessible judiciary. *See id*., at 6-8.

148. *Id*., at 8. The Court found no evidence of discrimination against the petitioner in terms of article 21 of the Constitution.

149. *Supra* note 121 and accompanying text.

Enforcement Procedure) Rules.[150] Notably, the rules adopted five months after the decision of the Supreme Court in the *Twagira case* are to be seen as a proactive response by the Rules Committee to address an area of procedure that had become a source of confusion. In fact, the need to revisit the procedure for the institution of claims on human rights had been voiced by the Chief Justice in the *Twagira case* as:

> In view of the apparent uncertainty regarding the proper procedure to be followed in making applications under Article 50 of the Constitution, I would direct that copies of this judgment in this appeal be forwarded to the Rules Committee for the purposes of reviewing the Judicature (Fundamental Rights and Freedoms) Enforcement Procedure Rules, SI 13-14 (previously SI 26 of 1992) and making appropriate amendments to clarify the procedure applicable.[151]

The pro-activeness of a committee comprised of Justices of the Supreme Court is a very welcome one in the face of a decade of decisions, dating back to 1997-1998, declaring the provisions of specific laws unconstitutional without responsive efforts at legislative reform. In the *Kigula* and *Uganda Law Society* cases, the Supreme Court and the Constitutional Court called for legislative efforts to review the death penalty and to address the flaws in the military justice system respectively.[152] The necessity for reforms in the relevant legislation cannot be gainsaid.

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150. *Mwesigwa case*, *supra* note 109, at 5-7; *Ghataura case*, *supra* note 113, at 1-3. *See also*, *supra* note 117 and accompanying text. In the *Mwesigwa case*, the Court of Appeal observed that "the appellants should be the first beneficiaries of the new rules." *See id*., at 7.

151. *Supra* note 103, judgment of Odoki, CJ, at 20.

152. In the *Kigula case*, the Supreme Court urged Parliament, as the legislature, to "reopen the debate on the *desirability* of the penalty in our Constitution." *See supra* note 10, at 58. In *Uganda Law Society case*, Kavuma, JA made additional orders for the executive and legislative arms of government to "review and where necessary *amend* the laws relevant to the administration of justice by [Field] Martial Courts." *See supra* note 64, at 55.