

GHOSTS & THE LAW

An Inaugural Lecture



J. Oloka-Onyango - Professor of Law

November 12, 2015

TO:

BO

(BERNARD ONYANGO)

WHO TAUGHT ME ABOUT LIFE

AND

OB

(OKOT P'BITEK)

WHO SCHOOLED ME ON "HAUNTOLOGY"

TABLE OF CONTENTS

PROFILE	v
OVERVIEW	vi
ACKNOWLEDGMENTS	vii
1. IN THE BEGINNING: WHO'S AFRAID OF GHOSTS?	1
2. BEFORE LAW THERE WAS ART: EXPLORING THE GHOSTS IN LITERATURE AND THEIR FRIENDS IN PHILOSOPHY	5
2.1. 'Camouflage Art' and the Role of Literature, Dance and Drama.....	6
2.2. Spirit Life in the Realm of Philosophy	11
3. GHOSTS, THE LAW AND THE POLITICAL QUESTION DOCTRINE (PQD): EX PARTE MATOVU AND ITS MILITARISTIC LEGACY	15
3.1 1966 and The Background to Matovu's Case	17
3.2 A Look at the Dramatis Personae	20
3.3. What was the Case all About?	25
4. THE 'GOOD' GHOST FIGHTS BACK: PUBLIC INTEREST LITIGATION (PIL) AND THE QUEST FOR DEMOCRATIC CONSTITUTIONALISM	30
4.1 Reassessing Matovu's Contribution	30
4.2. PIL Developments Since the 1995 Constitution.....	33
4.3. The Achilles Heel of Economic, Social and Cultural Rights (ESCRs).....	44
5. AND IN THE END ... WHICH GHOST WILL IT BE?	51
BIBLIOGRAPHY	53
CASES CITED	57

PROFILE

Joe Oloka-Onyango is a Professor of Law at Makerere University where he has also been Dean of the School of Law and Director of the Human Rights & Peace Centre (HURIPEC). He is an active litigant, advisor and campaigner on a wide range of human rights and social justice issues in Uganda and internationally. Oloka-Onyango served as Special Rapporteur on Globalization and Human Rights of the United Nations Sub-Commission on the Promotion and Protection of Human Rights. He has been a visiting professor at various universities around the world, including Oxford, Cape Town and the United Nations University in Tokyo. Last academic year (2014/2015) he spent his sabbatical as Fulbright Professor at George Washington University (GWU) in the USA and Fellow at the Stellenbosch Institute of Advanced Studies (STIAS) in South Africa. His most recent publications include: *Battling over Human Rights: Twenty Essays on Law, Politics and Governance* (Langaa Publishing, 2015); *When Courts Do Politics* (Cornell University, 2016); “Debating Love, Politics and Identity in East Africa: The Case of Kenya and Uganda” in the *African Journal of Human Rights* (2015), and “Human Rights and Public Interest Litigation in East Africa: A Bird’s Eye View” in the *George Washington University International Law Review* (2015).

OVERVIEW

Ugandan law has long been haunted by ghosts. They come in many varied shapes and sizes—as the Common Law itself, as the Doctrine of Precedent and even in the manner, dress, deportment and language of our courts. All these are the ‘Ghosts of History Past, Present and Future.’ In the arena of Constitutional Law and governance the ghost appears in the form of the Political Question Doctrine (PQD), a concept most associated with the 1966 High Court decision, *Uganda v. Commissioner of Prisons, ex parte Matovu*. But as with all spiritual beings—such as the Roman God, Janus—there are two sides to the case. In other words, there are not just one but (at least) two ghosts of *ex parte Matovu*. There is the backward-looking one which supported the extra-constitutional overthrow of government in 1966 and paved the way for military dictatorship, judicial restraint and conservatism. And in the same case, there is its reverse which “jettisoned formalism” to the winds, overruled legal “technicalities,” and underlined the need for the protection of fundamental human rights. The jettisoning formalism decision eventually opened the way to a robust and growing industry of Public Interest Litigation (PIL) in Uganda. As we celebrate 20 years of the 1995 Constitution and approach the 50th anniversary of the decision in the case, it is the most appropriate time to look back and consider which of the ghosts of *ex parte Matovu* has been most successful in influencing the Ugandan body politic. What does the future portend for the life of these fraternal twins?

ACKNOWLEDGMENTS

Inaugural lectures are supposed to be given at the start of a professorial career, not at its end. I am delivering mine ten years after becoming Professor of Law at a point closer to the end of my tenure than the beginning. The reasons for the delay are enough to fill another lecture, hence I will spare the reader the tedious explanations and move on to thank those who both inspired me into the Academy and sustained me while there.

As an undergraduate at the-then Faculty of Law at Makerere, the furthest thought from my mind was a career in academics. But a group of young lecturers persuaded me to change both focus and direction. The quartet of Frederick Jjuuko, Deogratius Mabirizi, Richard Kiwanuka (RIP) and George Okoth Obbo opened up the intricacies and pleasures of academic teaching and research that had me hooked from the beginning. My 'bashema' classmates, Kenneth Kakuru, Richard 'Musajja' Karyegesa, Patrick Karegeya (RIP) and Donald Nyakairu were my first intellectual co-travellers as we negotiated the rough waters of jurisprudential theory and the nitty-gritties of learning how to digest a court case.

My postgraduate life was peopled by individuals like Makau Mutua, Sol Picciotto, Philip Alston, Morton Horowitz, David Smith, Henry Steiner, Randall Kennedy, David Hall, and Bill Snipes, all of whom helped me hone my skills of investigation, debate and outreach. These engagements compelled me to understand academics as more than just a scholarly preoccupation.

As a teacher and researcher I have variously drawn inspiration from colleagues like Mahmood Mamdani, Busingye Kabumba, James Gathii, Celestine Nyamu, Balakrishnan Rajagopal, Athena Mutua, Nii Francis Botchway, Christopher Mbazira, Willy Mutunga, Chris Maina Peter, Frederick Egonda-Ntende, Issa Shivji, Maureen Owor, Solome Balungi Bbosa, J. J. Barya, Ben Shokoro Twinomugisha, Charles Onyango Obbo, Adam Branch, James Otto, Ann Gibwa Kajubi, Amina Mama, Sallie Simba Kayunga, Joel Ngugi, Akwasi Aidoo, Tade Aina, B.S. Chimni, Abdullahi An-Naim, Chidi Odinkalu, Obiora Chinedu Okafor, Francis Nyamnjoh, Adrian Jjuuko and Ladislav Rwakafuzi.

I end with thanks to my parents, Bernard and Lucy Onyango who set high standards that have been difficult to follow, and my in-laws, the Nkima clan, and particularly Taata IBB and Maama Eva. Finally, none of this would have been possible but for the constant, phenomenal and inspirational support of my life/love partner, Sylvia Tamale and our sons, Kwame Sobukwe Ayepa and Samora Okech Sanga.

*The smell of carbolic soap;
Makes me sick;
And the smell of powder;
Provokes the ghosts in my head;
It is then necessary to fetch a goat;
From my mother's brother;
The sacrifice over;
The ghost-dance drum must sound;
The ghost be laid;
And my peace restored.*

Okot p'Bitek, Song of Lawino¹

1. In the Beginning: Who's afraid of ghosts?

In the stanza quoted above, Okot p'Bitek's Lawino candidly speaks of the need to restore peace in order to get rid of the ghosts in her head. Lawino is at least honest about her ghosts as well as about the need to sacrifice an animal in order to appease the spirits. Most people pretend not to believe in ghosts. But there is an abundance of literature on the phenomenon of ghosts for us to step back and question that belief. This is especially true of ghosts in the Law. How else would one describe the Doctrine of Precedent or *Stare Decisis*? It is the dogma which says an English case decided in 1820 can still determine the way a Ugandan court in 2015 will make its decision.

For the past 30 years of my academic career I have been battling with a ghost.² Every time I believe he is dead and buried, he resurrects again and again ... and again. And yes; I am pretty sure it is a 'he.' His name is *ex parte Matovu*. For any student of the Law, it is a sin not to be on intimate terms with this ghost, whose full name is *Uganda v. Commissioner of Prisons, ex parte Michael Matovu*.³ On February 2nd, 2017 *Matovu's* case will be 50 years old. In that sense, he is still quite a young phantom, because it is generally believed that he died at the relatively young age of 28 on October 8th, 1995, when our new Constitution was born. However, *ex parte Matovu* is still a domineering presence in the Law, right from the very first class in Constitutional

¹ Okot p'Bitek, 1972 at 37.

² At the time I believed it was only one, but as with the Gergescene demoniac, the one ghost has become legion. See Oloka-Onyango, 1996.

³ [1966] EA 514.

Law and throughout the four-year degree course of study. The ghost of *ex parte Matovu* will be felt in whichever branch of the Law one looks at in study or practice, directly or otherwise.

So when did *Matovu*'s ghost last make an appearance? And what should we make of that visit? On April 10th, 2015, *Matovu*'s ghost showed up in Justice Elizabeth Musoke's chambers at the High Court. He would have been missed because the visit was very short, and the ghost came dressed in one of its very many guises. But Justice Musoke let the cat out of the bag when she called him by his pseudonym, the Political Question Doctrine (PQD). I was surprised to see him back in the country so soon and looking so healthy; I thought he had been packed off for good. PQD last visited in 2011 in a case called *CEHURD v. the Attorney General (No.1)*,⁴ and by the time of Justice Musoke's ruling was still waiting to go up to the Supreme Court on appeal.⁵

What happened in Justice Musoke's court? In the case of *The Institute of Public Policy Research (IPPR) (Uganda) v. The Attorney General*,⁶ the applicant appeared before the court to apply for an injunction. IPPR's application was intended to stop the government from executing what can only be described as a brilliant idea. Dubbed the 'Brain Drain' petition, the case concerned an attempt by the Ministry of Foreign Affairs to sponsor a scheme by Trinidad and Tobago to import Ugandan doctors and nurses to work in their hospitals.⁷ IPPR applied for the injunction to stop the government from proceeding with the plan, arguing that the decision of the government to recruit, deploy and or export over 250 highly qualified, specialized and experienced healthcare professionals employed in the Ugandan public health sector was "illegal and unlawful, irrational and unreasonable, and *ultra vires* the jurisdiction, powers, authority and mandate of the government, as well as being contrary to the Constitution and international human rights conventions." The injunction was sought as a matter of urgency to immediately stop the government from proceeding with the scheme. In the meantime the full case which had been filed would consider whether or not this was an issue that concerned the protection of human rights.

Here's what Justice Musoke had to say:

Regarding criteria number one, as to whether there is a prima facie case established by the applicant, I am yet to be convinced

4 Constitutional Petition No.16 of 2011.

5 See Dennison, 2014.

6 Miscellaneous Application No.592 of 2014 (arising from Miscellaneous Cause No.174 of 2014).

7 Mwesigwa, 2015.

that the issues involved in the main cause do not rotate around the political question doctrine. This doctrine is to the effect that certain disputes are best suited for resolution by other government actors.⁸

Thus, citing the PQD, Justice Musoke refused to grant the application and in the rest of her very short decision gave the indication that it was most likely she was going to rule against IPPR in the main case too.

The merits or otherwise of the case do not need to engage us at this point. Instead, I want to focus on the sub-text of the decision, to wit, “certain disputes are best suited for resolution by other government actors,” which as the learned judge pointed out, is at the heart of the Political Question Doctrine. Her reference to ‘other government actors’ basically means the Executive, which in the case of Uganda is the President and Cabinet.⁹ The argument that I will make in this lecture is that we have every reason to be very afraid of the return of the PQD. Indeed, I will also contend that the PQD is but a thinly-veiled cover for a much more dangerous spectre; the ogre of presidentialism.¹⁰ Through the very real phenomenon of presidentialism, *Matovu’s* ghost is given new life and sustenance.

But as you all know, ghosts in Africa—unlike in Western mythology—do not have only one side or character. There is the good, the bad and all of the other myriad variations in between. Many times these attributes are combined together in a single spectral being. Thus, you will not be surprised to learn that *ex parte* also gave birth to a daughter. PQD has a twin. Her name is PIL, or Public Interest Litigation, in full. PIL or Social Action Litigation (SAL) or what some people call ‘Cause Lawyering’ is the opposite face of the same ghostly being, and like the PQD it continues to influence our jurisprudence until the present day.

This lecture is all about ghosts. However, it is also about living and breathing human beings and institutions. To many people the law (just like ghosts) is not a living thing, but I want to demonstrate just how much the law influences our daily lives, even via a case which was decided nearly half a century ago. The portrait that I set out to paint in this lecture is of the complex relationship between law, politics and society and the impact which that connection has for not only the

8 *IPPR* ruling *op.cit.*, at 5.

9 It is not clear whether in Justice Musoke’s mind the ‘actors’ also includes the Legislature, because later in the ruling she states, ‘The court would normally get concerned if the decision had been implemented by legislation; otherwise the courts may not interfere in how government deploys its resources.’ *Id.*, at 5.

10 For a general comment on the phenomenon of presidentialism, see, Linz, 1990.

observation and protection of human rights, but for all matters that are basic to our contemporary existence. To put it in a different way, I am talking about the phenomenon of Democratic Constitutionalism.

So what does this lecture consist of? It begins with some reflections on how we get ghosts in the law by first looking at how and where we find ghosts in Literature and in Philosophy. I then proceed to tell you a little bit more about *ex parte Matovu*, explaining how and why the case became such a *cause celebre* of contemporary Ugandan jurisprudence. I move on to an examination of the Political Question Doctrine, contrasting it to the emergence of Public Interest Litigation as a form of change-oriented and socially conscious lawyering. I end with a consideration of what the future holds for Uganda, for *ex parte Matovu* and for his unidentical twins.

2. Before Law there was Art: Exploring the Ghosts in Literature and Their friends in Philosophy

Why should we start with Literature and Philosophy? Before the Law there was Art. And Philosophy obviously has a lot to say about connections between different academic disciplines. That is why in a lecture on the Law, Politics and Ghosts, I thought it would be both appropriate and useful to begin by looking at the subjects of Literature and Philosophy, especially in an African context.¹¹ Philosophy will also help provide the foundation for us to engage with the subject of Jurisprudence—the Philosophy of Law—which is the wider framework within which the topic of this lecture is situated.

Uganda's greatest poet was Okot p'Bitek, who died at the fairly young age of fifty-one. Few people know that he was also a soccer star even playing on the national side (The Cranes) in the early-1950s. p'Bitek was also critic, scholar, musician, events manager, philosopher, anthropologist and lawyer, all rolled into one.¹² His most famous text, *Song of Lawino* which opens this lecture, is full of allusions to African spiritual bodies, *Jwok* in Luo (*mizimu* in our Bantu languages) who have their role throughout our history and even in contemporary society.¹³ But many of Okot's other works looked at legal, anthropological and philosophical issues.¹⁴

Through his poetry Okot managed to combine these different disciplines into a coherent whole and in doing so demonstrated how the medium of poetry could be used to provide useful insights on the processes of law, politics and governance. As Peter Leman has said, paraphrasing a little-known work by p'Bitek, '... the African poet is not simply an entertainer or cultural educator, but a fully acknowledged law-maker.'¹⁵ In his own words, p'Bitek said,

I believe that a thought system of a people is created by the most powerful, sensitive, and imaginative minds that society has produced: these are the few men and women, the supreme artists, the imaginative creators of their time ... the artist

11 For a discussion of the links between the two disciplines in an African context, see Okolo, 2007.

12 See p'Ochong, 1986.

13 See for example, the account of Joseph Kony in Green, 2008.

14 Others among his non-fiction works were RELIGION OF THE CENTRAL LUO, 1971; AFRICA'S CULTURAL REVOLUTION, 1973; AFRICAN RELIGIONS IN WESTERN SCHOLARSHIP, 1970, and DECOLONIZING AFRICAN RELIGION: A SHORT HISTORY OF AFRICAN RELIGIONS IN WESTERN SCHOLARSHIP (with Kwasi Wiredu), 2011.

15 Leman, 2009, at 110.

proclaims the laws but expresses them in the most indirect language: through metaphor and symbol, in image and fable. He sings and dances his laws. The artist creates the central ideas around which other leaders, law makers, chiefs, judges, heads of clans, family heads, construct and sustain social institutions.¹⁶

In sum, the artist is our translator, the person who transmits the message from those who are led to the leaders and back. The artist is also our conscience, subtly conveying lessons on morality, ethics and integrity. Finally, the artist is our connection between the past, the present and the future, forcing us to recall—through parable, allegory and even rumour—that things are not always what they may appear to be, and compelling us to look ahead to different possibilities.¹⁷ Who can forget the formidable ‘Radio Katwe,’ the channel the people of Kampala used in the 1980s to spread information on politics, on corruption and on the latest Operation ‘*Panda Gari*?’¹⁸ But perhaps the most important medium through which popular culture expresses itself is Art, and especially through music, dance and drama.

2.1. ‘Camouflage Art’ and the Role of Literature, Dance and Drama

It is important to recall the important role that artists of all kinds have played in Uganda’s political struggles, under the medium that Angelo Kakande has baptized ‘Camouflage Art.’¹⁹ Aside from p’Bitek, Robert Serumaga and Byron Kawadwa were among the prominent sages of the early independence period, the latter paying with his life for the 1977 play *Oluylimba Lwa Wankoko* (The Song of the Cockerel), which President Idi Amin learnt was a bitter satire on his murderous regime.²⁰ Makerere’s very own Rose Mbowa—otherwise known as ‘Mother Uganda’—initiated the theatre-for-development movement that has been used as a model from Latin America to Russia.²¹ *Kadongo Kamu* has long been the people’s soundtrack,²² while our artistes of the 21st century like Jose Chameleon and Bobi Wine are also sending their own messages out, *Basiima Ogenze* and *Tugambire ku Jennifer* among them. In *Sitya Loss*, Eddy Kenzo captured not only the mood

16 p’Bitek, ARTIST, quoted in Leman, *Id.*, at 109-110.

17 See Kiyimba, 1998.

18 Kasozi, 1994, at 147-148.

19 Kakande, 2008, at 175-218.

20 Serumaga’s most political plays were *Renga Moi* and *Amayirikiti*. Kakande *Id.*, at 190-191.

21 Collins and Gardner, 1999.

22 But for a critique, see Serubiri, 2012.

and exuberance of our youth, but he also sent out a poignant message about the state of the country.²³

Turning back to Ghosts, we find them everywhere in Literature. The author most famously plagued by them was William Shakespeare.²⁴ A list of both ghosts and what in Literature is referred to as “ghost characters” in his varied plays includes the following: Violenta in *All’s Well That Ends Well*; Lamprius, Rannius and Lucillius in *Antony and Cleopatra*; Beaumont in *Henry V*, Innogen, the wife of Leonato in early editions of *Much Ado About Nothing*, Petruchio in *Romeo and Juliet*, and Mercer in *Timon of Athens*.²⁵

In *Hamlet*,²⁶ a ghost interrupts the dialogue between Marcellus, Bernardo and Horatio at Elsinore Castle. It is the Ghost of the late king of Denmark, which suddenly appears and promptly withdraws into the night. Horatio recognizes the armour covering the Ghost and remarks that it is the very armour which the King wore “when he the ambitious Norway combated.”²⁷ Barnardo, Marcellus, and Horatio suspect that the appearance of the ghostly King is an ominous message to all of Denmark, as they prepare for war with Norway. Horatio pleads with the apparition to reveal its intentions:

Hamlet, Act I, Scene I: [Enter Ghost]

MARCELLUS	Peace, break thee off; look, where it comes again!	40
BERNARDO	In the same figure, like the king that’s dead.	
MARCELLUS	Thou art a scholar; speak to it, Horatio.	
BERNARDO	Looks it not like the king? mark it, Horatio.	
HORATIO	Most like: it harrows me with fear and wonder.	
BERNARDO	It would be spoke to.	
MARCELLUS	Question it, Horatio.	
HORATIO	What art thou that usurp’st this time of night, Together with that fair and warlike form In which the majesty of buried Denmark Did sometimes march? by heaven I charge thee, speak!	
MARCELLUS	It is offended.	
BERNARDO	See, it stalks away!	50
HORATIO	Stay! speak, speak! I charge thee, speak!	

[Exit Ghost]

23 For an incisive examination of the song see Namboze, 2015 at 7.
24 Charlie Griffiths, ‘More things in Heaven and Earth: The Role of Ghosts and the Supernatural in Shakespeare’s Hamlet and Macbeth,’ accessed at: <https://www.uclan.ac.uk/students/research/crit/griffiths.php>.
25 See Wikipedia: The Free Encyclopaedia, ‘Ghost Characters,’ accessed at: http://en.wikipedia.org/wiki/Ghost_character.
26 Shakespeare, HAMLET, Act I, Scene 1, (Elsinore, A Platform before the castle).
27 Id., at 61.

Of course Shakespeare himself is also alleged to have been a ‘ghost’ in the sense that there is a belief that many (if not all) of his great works were not actually written by him.²⁸ Those who love Christopher ‘Kit’ Marlowe believe he was the true ‘bard’ of the Elizabethan era, while some feminists argue that all Shakespeare’s plays, sonnets and poems were in fact written by his wife, Anne Hathaway.²⁹

Another great Englishman who was adept at weaving ghosts into his writing was Charles Dickens. Can you forget Ebenezer Scrooge’s three ghosts in the novel, *A Christmas Carol*?³⁰ *The Haunted House* is an anthology of ghost stories—collected together and edited by Dickens—which are used to frame the themes of injustice, terror, and regret. And of course, in *Great Expectations*, the image of the convict who scares (and eventually liberates) Master Pip, has a most ghostly, indeed, deathly demeanour. It is not accidental that the two first meet in a cemetery.

The ghost is a prominent actor in African-American literature, with authors such as Nobel Prize winner Toni Morrison one of the most celebrated for using the device to convey the experience of slavery to a contemporary audience. From her famous book, *Beloved* comes the quote, “Freeing yourself was one thing; claiming ownership of that freed self was another.” In other words, the struggle against oppression and its various ghosts must continue: there are many burdens to maintaining freedom once it has been achieved. This quote comes from that part of the book where one of the two main characters - a woman called Sethe - is praying in the Clearing.³¹ She doesn’t have a companion anymore, so she has to lean on the spirit of her Baby Suggs for support. While praying, Sethe feels what she assumes to be Baby Suggs’ fingers rubbing her neck - softly at first and then so violently it starts to strangle her. After she breaks away from the ghost fingers, *Beloved* rubs Sethe’s neck to soothe the bruises. When *Beloved* reaches up to kiss the bruises, Sethe jerks away; *Beloved*’s breath smells of new milk, just like a baby’s breath, and her touch reminds Sethe of the baby ghost’s touch.

And finally from diasporan Africa, we have our very own Kenyan-American, Barack Hussein Obama in his classic ode to Africa and his forebears, *Dreams From My Father*, where he writes:

28 Martin Hickes, ‘In search of Shakespeare’s ghosts,’ *The Guardian*, <http://www.theguardian.com/uk/the-northerner/2011/jul/14/in-search-of-shakespeare-s-ghosts>.

29 See Ryan, 2010, which is fiction, and earlier, Churchill, 1958.

30 The Ghost of Christmas Past, The Ghost of Christmas Present, and The Ghost of Christmas Future.

31 Morrison, *Beloved*, at 95.

I finally fell asleep, and dreamed I was walking along a village road. Children, dressed only in strings of beads, played in front of the round huts, and several old men waved to me as I passed. But as I went farther along, I began to notice that people were looking behind me fearfully, rushing into their huts as I passed. I heard the growl of a leopard and started to run into the forest, tripping over roots and stumps and vines, until at last I couldn't run any longer and fell to my knees in the middle of a bright clearing. Panting for breath, I turned around to see the day turned night, and a giant figure looming as tall as the trees, wearing only a loincloth and a ghostly mask. The lifeless eyes bored into me, and I heard a thunderous voice saying only that it was time, and my entire body began to shake violently with the sound, as if I were breaking apart

I jerked up in a sweat, hitting my head against the wall lamp that stuck out above the bunk. In the darkness, my heart slowly evened itself, but I couldn't get back to sleep again.³²

Although Obama entitled his book 'Dreams,' he could just as well have called it the 'Ghost of My Father,' since the book begins and ends with his father's death and for the larger part of the story his father is not really there and remains throughout as a haunting presence. But being a shrewd politician, he must have known that such a choice of title would probably not have been very good for his future presidential career.

African Literature is full of ghosts and all their relatives, friends and in-laws. Ghanaian author and playwright, Ama Ata Aidoo's first play was entitled *The Dilemma of a Ghost*. In *Rights of Desire*³³ by the recently-deceased South African author, André Brink, the main character, Ruben, has a ghost in the house whose body he discovers under the floorboards. In life, she was a slave from Bengal named Antje brought to South Africa in the late 17th century, abused by her master and wrongly executed for the murder of his wife. From Nigeria, there was the great Amos Tutuola's *Palm-Wine Drinkard*,³⁴ and of more recent times, Booker prize winner, Ben Okri's *Famished Road*.³⁵ In both cases, the authors deal with the phenomenon of the abiku (Yoruba) or ogbaanje (Igbo)—a child repeatedly born but doomed

32 Obama, 1995, at 340-341.

33 The phrase is taken from Johann Coetzee's Booker Prize winning novel *Disgrace*.

34 Tutuola, 1994.

35 Vintage, London, 2003. See also Peeren, 2010 at 106-117.

to die at a young age as it remains tied to the spirit world, or, in the words of Edna Aizenberg, a child who, "... dies and returns, [and] dies and returns."³⁶

Ghosts also abound in African Orature (Oral Literature) that is everywhere around us. One just needs to listen to any of the Luganda FM radio stations at 1:00 o'clock at night or to Lady Titi Tabel on NBS TV in order to learn just how much of our lives are filled with spirits, ghosts, apparitions and other kinds of otherworldly and extra-terrestrial beings. A Nollywood/Nigerian movie is not genuine unless a ghost appears on the screen to stir matters up. And then of course, there is the great *Agataliiko N'fuufu*, that nightly 10 o'clock window into *obulogo* (witchcraft) *mayembe* (spirits) and *okunamira* (curses) and the numerous other creatures and features of the occult. What is most interesting about the show apart from the live-time feeds that it relies on is that there is no hint of scepticism or artistic license. While *Keeping up with the Kardashians* on Channel E often seems contrived and almost like it is staged and unreal, *N'fuufu* conveys an authentic—if sometimes disturbing—reality of contemporary Ugandan society via the mechanism of live television.

Colonialists disparagingly called African Hauntology 'Witchcraft' but it is really the same thing as the mystical and psychic phenomena that have long been a part of Western culture and which continues to be treated with fascination, simply judging by how much popular media in that part of the world is consumed by ghost-related stories.³⁷ Think only of the *Harry Potter* and the *Twilight Saga* franchises. The manner in which experiences that the British found, reinterpreted and renamed negatively in countries like Uganda is illustrative of how influential the phenomenon of colonialism was on not only the social and economic structures, but especially on our legal regime. This process of destruction even reached the extent of reconfiguring concepts and beliefs and rendering them devoid of their original meaning.

So what can be said about all these ghosts that have come to us via Literature, drama and the more technologically-modern mediums, TV, radio and film? The first point is that they all represent some human quality: resilience, anger, torment or simple good manners. In other words, these are traits which are largely human even if they may also be attributed to the gods and spirits, and in so doing amplified or exaggerated. Secondly, ghosts are universal in scope, although local

³⁶ Aizenberg, 1999.

³⁷ See Nyamnjoh, 2001, at 28-49.

in application. A Nigerian incubus will not necessarily have the same traits as a troll born in Sweden. Lastly, one ignores the message that a ghost brings to one's peril. Irrespective of the content of the message, it needs to be properly digested and applied wisely. These are all lessons that are relevant to the theory and the practice of the Law. But before turning to the Law, let us look at the arena of Philosophy.

2.2. Spirit Life in the Realm of Philosophy

What is the place of the ghost in the discipline of Philosophy? If the bible can be taken as a Great Book not only of prayer or religion but also one of Philosophy, there are many allusions to ghosts in there. The one I best remember from my minimal readings of the New Testament is the story of the Geresene or Gergescene Demoniac, or—as we were told in the Catechism classes we took—the story of the man with ‘many demons’:

They came to the other side of the sea, into the country of the Gerasenes. ² When He got out of the boat, immediately a man from the tombs with an unclean spirit met Him, ³ and he had his dwelling among the tombs. And no one was able to bind him anymore, even with a chain; ⁴ because he had often been bound with shackles and chains, and the chains had been torn apart by him and the shackles broken in pieces, and no one was strong enough to subdue him. ⁵ Constantly, night and day, he was screaming among the tombs and in the mountains, and gashing himself with stones. ⁶ Seeing Jesus from a distance, he ran up and bowed down before Him; ⁷ and shouting with a loud voice, he said, “What business do we have with each other, Jesus, Son of the Most High God? I implore You by God, do not torment me!” ⁸ For He had been saying to him, “Come out of the man, you unclean spirit!” ⁹ And He was asking him, “What is your name?” And he said to Him, “My name is Legion; for we are many.” ¹⁰ And he began to implore Him earnestly not to send them out of the country. ¹¹ Now there was a large herd of swine feeding nearby on the mountain. ¹² The demons implored Him, saying, “Send us into the swine so that we may enter them.” ¹³ Jesus gave them permission. And coming out, the unclean spirits entered the swine; and the herd rushed down the steep bank into the sea, about two thousand of them; and they were drowned in the sea.³⁸

38 Mark 5, v.1-13.

So too, in the Koran, we are exposed to the world of *djini* (or *majini* in our local languages). Hinduism, Buddhism and Religions of the Soil—*Abasawo abanansi*—all have their respective ghosts.

In the secular world, there is much debate over the connection between the Spiritual and the Temporal. Philosophers from Plato to Socrates through to Hegel and Marx have all had something to say about ghosts or on matters spectral. Indeed, in many respects, these authors have themselves assumed something of a ghostly pallour. Consequently, the charge has long been made that the halls and corridors of academia in North America and Europe are filled with the ghosts of so-called ‘DWMs’ a.k.a Dead White Men. Decrying the absence of African scholarship from the schools of philosophy in the USA and Canada, Olufemi Taiwo places the blame squarely at the feet of Hegel in a not altogether complementary fashion:

Hegel is dead! Long live Hegel! The ghost of Hegel dominates the hallways, institutions, syllabi, instructional practices, and journals of Euro-American philosophy. The chilling presence of this ghost can be observed in the eloquent absences as well as the subtle and not-so-subtle exclusions in the philosophical exertions of Hegel’s descendants.³⁹

More recently, scholars such as Marcuse have written about ghosts,⁴⁰ while in *Specters of Marx* Jacques Derrida coined the term “hauntology,” to point to a key element in the philosophy of history and urging that contemporary society “learn to live with ghosts.” As Esther Preen points out, Derrida did not mean this literally, rather as a way of conveying the view that to understand the present, we must appreciate our past:

Of course, what Derrida is speaking of is not the literal ghost (the dead demonstrably returned to life), but the ghost or specter as a signifier of absolute alterity and of the way such alterity disturbs established notions of presence, identity, and history. Derrida urges us to treat the metaphorical ghosts of our society (immigrants, foreigners, victims of historical injustices like colonialism and slavery, but also a supposedly surmounted thinker like Marx) in a way that respects their otherness. Through the principles of absolute hospitality

³⁹ Taiwo, 1998 at 4.

⁴⁰ Marcuse, 1964, at 194, *quoted* in Jacob Glover, 2012.

and the messianic, we should allow this otherness to disrupt the rigid categorizations (presence/absence, life/death, past/present/future) that govern our day-to-day practices, thus transforming ontology into hauntology. For Derrida, then, the everyday is inevitably suffused by numerous forms of otherness so that in it we can never expect to find ourselves on solid ground, unambiguously present or “at home.”⁴¹

In other words, the ghost appears in many philosophical accounts as representative of the battle within the human mind over matters which have to do with the existential, that is, with things very much on the ground. Philosophy’s engagement with these issues also grapples with many timeless questions such as: who exactly are ‘we?’ Why have we been placed here? Can it really be that humankind is a self-sustaining entity?

If we move our lens to look at African Philosophy, I return again to Okot p’Bitek in one of his many philosophical moments. According to Okot, the philosopher Rousseau—the so-called ‘father’ of the French Revolution—was wrong to declare that ‘Man’ (also including ‘woman’) was “born free but everywhere is in chains.” In his essay, ‘Man the Unfree,’ Okot says,

[African] man has a bundle of rights and privileges that the society owes him. In African belief, even death does not free him. If he had been an important member of society while he lived, his ghost continues to be revered and fed: and he, in turn, is expected to guide and protect the living. This is the essence of what is wrongly called ‘ancestor worship.’ Should he die a shameful death, his haunting ghost has to be laid. In some cases his ghost has to be ‘killed.’⁴²

The point being made is that African Philosophy is not in as much turmoil and angst about matters spectral as their Euro-American counterparts. Whereas in the West the association of ghosts is most often with vampires, zombies and other manifestations of the occult which are supposed to threaten, frighten and cause utmost despair, Africans generally give to their ghosts a much more accommodating and nuanced quality. Furthermore, the Western approach to life experiences is one which gives pride of place to the so-called ‘rational,’ or ‘objective’ existence. Given the imperialist impulses that have

41 Peeren, at 107.

42 Okot p’Bitek, *Artist, op.cit.*, at 19.

accompanied Western thought and interaction with other societies, attempts have also been made to export this approach elsewhere and to categorize the ‘others’ which it confronts. This approach, as Francis Nyanmjoh points out, is caught up in the belief that the world is a dichotomous one: “... there is real and unreal. The real is rational, the natural and the scientific; the unreal is the irrational, the supernatural and the subjective.”⁴³ In this way, it fails to capture the nuance and subtly of life in these societies.

From the preceding analysis, we can be helped to understand that ghosts are a feature of attention, concern and analysis in many different academic professions and disciplines. It is thus not a surprise that the Law has many ghosts and ghostly stories which even extend into the courts.

⁴³ Nyanmjoh, *op.cit.*, at 29.

3. Ghosts, the Law and the Political Question Doctrine (PQD): Ex Parte Matovu and its Militaristic Legacy

Before turning to the specific case of *ex parte Matovu*, how has the issue of ghosts been treated in the jurisdiction from which we derive our law, Great Britain? The most famous case involving ghosts is known as the Hammersmith Ghost murder case. The following is the popular account given by Mike Dash:

Late on the evening of 3 January 1804, a bricklayer by the name of Thomas Millwood left his home in Hammersmith, to the west of London. He was smartly dressed in the sort of clothes favoured by men in his trade: “linen trowsers entirely white, washed very clean, a waistcoat of flannel, apparently new, very white, and an apron, which he wore round him.” Unfortunately for Millwood, though, those clothes proved to be the death of him. At 10.30pm, while he was walking alone down Black-lion-lane, he was confronted and shot dead by a customs officer called Francis Smith.⁴⁴

The shooting happened on the back of claims made towards the end of 1803 that a number of people had seen and even been attacked by a ghost that had been regularly haunting the locality. It was widely believed that the ghost was of a young man who had recently committed suicide. Smith shot Millwood believing him to be the ghost tormenting the area. The legal question that the court had to consider was whether a person could be held liable for their actions even if they did so under a mistaken belief.⁴⁵

Across the Atlantic, the courts have likewise been plagued by these paranormal beings. Thus, the case of *Stambovsky v. Ackley*,⁴⁶—commonly known as the ‘Ghostbusters ruling’—is a staple of First Year classes in the Law of Contracts in American Schools of Law. In that case, one Helen Ackley was the owner of a big old Victorian home in Nyack, New York. The area around the town was well known to be the home of many haunted places. According to the facts of the case, Mrs. Ackley was well aware that her house was supposedly haunted.

⁴⁴ Dash, 2009.

⁴⁵ Also see Wikipedia, ‘The Hammersmith Ghost Murder Case,’ accessed at: http://en.wikipedia.org/wiki/Hammersmith_Ghost_murder_case.

⁴⁶ 169 A.D.2d 254 (N.Y. App. Div. 1991) (http://en.wikipedia.org/wiki/Stambovsky_v._Ackley).

She also claimed to have spotted several ghosts herself, including one that gave her approval for a new paint colour in the living room and several dressed in colonial—era clothing. To add to the mystique of the house, Mrs. Ackley had even given interviews to local and national papers about the special inhabitants of her house, and was successful in getting the house included as part of the tourist ‘haunted’ route in the town.

Mrs. Ackley decided to sell the house and Jeffrey and Patrice Stambovsky agreed to buy it for US\$650,000. It is only after making a down-payment of US\$32,500 that the couple learnt that they had been sold a ‘haunted house.’ On receiving this information, they tried to renege on the contract, but Mrs. Ackley denied she had done anything wrong and refused to cancel the sale or return their money.

In the first hearing of the case, the Stambovsky’s lost the claim on the grounds of the well-known doctrine *caveat emptor* (buyer beware). On appeal, the State Supreme Court reversed the lower court’s decision by a 3-2 majority, holding that, irrespective of whether or not ghosts are real and the house was truly haunted, the fact that the house had been widely reported as haunted affected its value. The court held that Mrs. Ackley “... had deliberately fostered the belief that her home was possessed by ghosts” in the past and was therefore at fault for not disclosing this attribute of the house to the buyers. Since the buyers were from outside town, it would be difficult to have expected them to easily discover the defect on their own.⁴⁷

There are many other ghostly stories—too many for them to be contained in a piece such as this one, which is only looking at the phenomenon tangentially. But the point has been made; the Law and matters to do with the mystical have always travelled hand in hand. For those interested in pursuing this area of study as a possible Ph.D, perhaps the best place to start is with a blog entitled “Ghosts, Witches, Vampires, Fairies and the Law of Murder.”⁴⁸

The fact is that we have ghosts everywhere in the law! Despite this reality, this is one area of research that has been studiously avoided by Ugandan scholars. Are we so afraid of ghosts? There is not a single article which deals with the issue in the legal literature. I nevertheless believe that there is much that a socio-anthropological examination of

47 Matt Soniak, ‘4 BR, 2 BA, 1 Ghost: What the Law Says About Selling Haunted Houses,’ *Mental Floss*, October 31, 2011 accessed at: <http://mentalfloss.com/article/29123/4-br-2-ba-1-ghost-what-law-says-about-selling-haunted-houses>.

48 Dash, *op.cit.* For an African account, see Aremu, 1980: 112-131.

the Law on this topic would usefully reveal.⁴⁹ By way of stimulating further the debate, I would suggest that one begins with the case of *Salvatori Abuki & Richard Obuga v. The Attorney General*⁵⁰ and works their way back into the colonial and pre-colonial eras. However, it is the main thesis of this lecture that the biggest, most influential and most powerful ghost in the Law in Uganda is the Ghost of *ex parte Matovu*.

3.1 1966 and The Background to Matovu's Case

In ancient Roman religion and mythology, Janus is the god of beginnings and transitions. In this respect, Janus is also a gatekeeper, in charge of doors, doorways, and also of endings. Janus is also the god in charge of time. He is usually a two-faced god since he looks to both the future and backwards into the past. The case of *ex parte Matovu* in many respects was both an ending and a beginning for Uganda; it looked both backwards and forwards, and even sideways from time to time. Filed in the middle of 1966, it marked the transition from a semi-federal arrangement of government to a republican system, confirmed by what was described as the 'pigeon hole' Constitution.

The story of how the 1966 Constitution became Uganda's basic law has been told enough times to have entered the realm of mythology; everybody knows it such that it does not require repeating here. Needless to say, perhaps it would be helpful to hear the account given by the architect of the instrument more than 3 decades later. In an interview with journalist Andrew Mwenda, former President Apolo Milton Obote gave the following account of how the new grand norm came into being:

On February 9th, Muteesa called the British High Commissioner and asked for massive military assistance. When I asked Muteesa why, he said it was a precaution against trouble. I asked him, "Trouble from whom and against whom?" He just waved me to silence. Although he was president, head of state and commander in chief of the armed forces, Muteesa did not have powers to order for arms. Later, I sought the advice of my Attorney General, Godfrey Binaisa QC. He told me that given what Muteesa had done, I had to suspend him from being president of Uganda, the only way I could was to suspend the constitution itself.

49 See for example, Geschiere, 1997, esp. 169-197.

50 Constitutional Case No.2 of 1997, accessed at: <http://www.ulii.org/ug/judgment/constitutional-court/1997/5>.

I told Binaisa, “That constitution was my very child. I cannot become its killer”. “You do not have to kill it,” Binaisa advised, “it is already dead, as dead as a door nail, killed by Muteesa when he asked for arms from the British government unconstitutionally. All you have to do right now is to bury your dead child as decently as possible.”

There was no constitutional way out, so on February 24, 1966 I called the press and suspended the constitution and hence the posts of president and vice president. On April 15, 1966, I introduced the 1966 constitution in parliament whose only difference from the 1962 constitution was to merge the office of the prime minister with that of the president. There were 55 votes for it and only four votes against.⁵¹

Viewed from Obote’s angle, the 1966 Constitution attempted to achieve a number of things. First, it sought to introduce political stability to a situation of interregnum and social tension generated—as he claims in the passage quoted above—by the Kabaka’s attempt to illegally acquire arms. Secondly, it was an attempt at *autochthony*, in other words the indigenization of the constitutional regime seeing that the 1962 instrument was basically an arrangement with Britain, the departing colonial regime. Lastly, it was cast as an effort to forge national unity within a context in which colonialism had produced and encouraged disparate sub-national identities in classic divide and rule fashion.

In terms of transition, the 1966 Constitution marked the departure into exile of Sir Edward Mutesa, first president of an independent Uganda and 36th Kabaka of the Kingdom of Buganda. It marked the first real test of the post-colonial judiciary, and it also commenced the transition from a parliamentary system of governance to a presidential regime, buttressed by a framework of military and autocratic central authority which eventually burst at the seams to give birth to Uganda’s second Field Marshal, Idi Amin.⁵²

Nineteen Sixty-six was only four years after Uganda had gained independence, and the country was thus still in an ‘Age of Innocence.’ Accounts of the time from newspapers like *Uganda Argus*, *Taifa Empya* and *The People* paint a picture of some kind of tropical idyll,

51 See Uganda People’s Congress, ‘Milton Obote: Telling his own Lifetime Story,’ (Victor Karamagi, *Daily Monitor*, October 24, 2005), accessed at: http://www.upcparty.net/memorial/life_story.htm.

52 Uganda’s first Field Marshal was the intrepid John Okello, the instigator of the 1964 revolution in Zanzibar. In both cases, the titles were self-imposed.

of course with the moniker ‘Pearl of Africa’ thrown in to add flavour to all the journalistic narratives. One could travel from Jinja to Kampala in one hour flat, without meeting a single pothole, and all the traffic lights in Kampala—which were many more than they are today—worked. The railway network could take you virtually around the whole country. Cinemas like Neeta and Odeon as well as the Drive-In existed not only in the capital but in major regional towns. Although education had not been universalized via UPE, a student from rural Kisoko Primary School in Bukedi District could compete favourably with his or her Nakasero Primary counterpart. It seemed like a time of order and tranquil governance; a time of social stability and economic prosperity.

However, simmering below the surface was a country in serious conflict with itself. That conflict was in part stimulated by the decision in *ex parte Matovu*, although its roots extended even further back into the colonial experience. In that sense, *Matovu* may have simply been a reflection of the underlying socio-political crisis given legal expression.

Given how prominent *ex parte Matovu* has been in Ugandan political and constitutional history it is something of a surprise that there are so few analyses of the decision. And indeed, that is partly where the problem lies. Ghosts do not invite serious analysis. We learn to accept them as part of our normal lives and to integrate them into the daily waft and wave of our contemporary living. And yet, they can exert such an influence to the better or for worse. In the arena of governance it is not too advisable to forget our ghosts especially because of that old lesson from our fore parents: those who forget history are bound to repeat its worst mistakes.

A systematic examination of *Matovu’s* case needs to begin by asking three essential questions: First of all, how did it end up in court? Secondly, who were the main actors behind it, both in arguing its merits and in deciding them? And finally, why was the case so significant? It is important to start with the second of these questions because it also provides some context to understanding the transitions and continuities which were taking place in an institution that was central to the implementation of the law, namely, the Judiciary. We can also make some remarks about those of our compatriots who sit on the other side of the Bench, the members of the Bar.

3.2 A Look at the *Dramatis Personae*

The panel which decided *Matovu's* case was made up of a Bench of three in accordance with the rules of the time which stipulated a three-person bench in all matters of a constitutional nature. The team was led by Sir Udo Udoma, who had been Chief Justice of Uganda since 1963. He was assisted by two British judges, both of whom had been in the country from before independence, namely, Dermot Joseph Sheridan and Jeffreys Jones.

Egbert Udo Udoma was born on June 21, 1917 in the Ibibio area of Akwa Ibom State, Nigeria, earning university degrees from Trinity College in Dublin and from Oxford.⁵³ He was a traditional leader—the Obong Ikpa Isong Ibibio—and a politician, eventually becoming one of the acknowledged leaders of the Nigerian independence struggle. The most detailed obituary of the man describes him in the following manner:

The Hon. Justice Sir Egbert Udo Udoma was one of the most important Nigerians of the 20th century, he rose to become an iconic figure, not just in Nigeria and Africa but in the entire Commonwealth through the distinction of his achievements in every field in which he was engaged: education, politics, law, community service, Christianity, statesmanship and scholarship. His personal example defined by his prodigious output, his versatility, his capacity for self-reinvention, his professionalism in legal practice, legal science and administration, his commitment to values and his sheer, divine anointing, even at the family level, has become the stuff of legend.⁵⁴

There is some question as to how and why Udoma became the first African Chief Justice of Uganda, although the reason could simply have been that he was part of a Commonwealth capacity building scheme for newly-independent countries.⁵⁵ At the time there was a marked shift from importing our judges from England to looking around the continent and elsewhere in the Black Commonwealth for such personnel. Thus, many judges came from the Caribbean and countries like Ghana, Pakistan and The Gambia. In an article written in the mid-1960s Abu Mayanja suggested that no Ugandan had yet been appointed to the

⁵³ Wikipedia, 'Egbert Udo Udoma,' accessed at: http://en.wikipedia.org/wiki/Egbert_Udo_Udoma

⁵⁴ Abati, 2009.

⁵⁵ See Ogoola, 2012.

office several years after independence because there was none from the ‘right ethnicity.’ That claim—together with Mayanja’s attack on the proposals for a new constitution in 1967—eventually landed him in detention.⁵⁶

From being a judge of the High Court of Lagos Territory, Udoma was seconded to be Chief Justice of Uganda soon after independence. According to former Principal Judge James Ogoola, his work was cut out for him:

His Lordship the Chief Justice must have busied himself engrossed in issues of Africanising and indigenising the court, and transforming the ethic and culture of the court from an essentially Anglocentric imperial appendage to a modern judicial institution promoting and protecting the rights of an independent, liberated citizenry of a newly emancipated sovereign state, thirsty for the true rule of law.

That court’s work and role were, therefore, clearly cut out—namely: to conceive, gestate and give birth to a new dispensation of real justice and genuine rule of law, unbismirched by colonial folly or imperial impudence. Ironically, the most celebrated jurisprudence to come out of the Udo Udoma Court will for ever be the celebrated case of *Ex Parte Matovu*—a cerebral expose on the ugly reality of coups d’etat.⁵⁷

Udoma remained in the Chief Justice’s office until he was unceremoniously eased out of his Chambers in 1969. The reasons for his dismissal are unknown although Udoma himself blamed ‘Biafran agents’ who told lies to President Obote.⁵⁸ Aside from Matovu’s case which he is most remembered by, Udoma left his mark on the jurisprudence of the country through cases such as *Tumuhire v. Uganda*, and *Attorney General of Uganda v. The Kabaka’s Government*,⁵⁹ the latter of which could be described as one of the many straws which eventually broke the camel’s back in the relationship between KY and UPC.

56 See Mazrui, 2007 at 6-7. For an account of the charges, detention and trial of Mayanja (in which he was eventually acquitted), see Napček-Neogy, 1997.

57 Ogoola, *op.cit.*, ‘Rule of Law.’

58 Udoma, 2008.

59 [1965] EA 393.

Dermot Sheridan⁶⁰ was eventually to replace Udoma as Chief Justice in 1969, remaining in office until he too was unceremoniously removed by Amin in 1971 and replaced by Benedicto Kiwanuka; he left Uganda and joined the East African Court of Appeal which was headquartered in Nairobi.⁶¹ Sheridan was to gain fame in the trial of the six men who attempted to assassinate President Obote at the UPC delegates conference at Lugogo on December 19, 1969, describing chief conspirator Mohamed Sebaduka as ‘... a man of low mentality.’⁶² Like Sheridan, the third judge—Justice Jeffreys Jones—was also a Briton, having been appointed to the Bench in 1960, and who several years later became the chairperson of the Commission of Inquiry into the case of the two missing American Journalists, Nicholas Stroh and Robert Siedle.⁶³ The learned judge was to find that soldiers attached to President Idi Amin’s Simba Battalion in Mbarara had killed the two, but was not sure that his safety would be guaranteed after releasing such damning information. He fled the country and posted his voluminous report from the safe distance of Nairobi.

The Bar which argued *Matovu’s* case brought together what could be regarded as perhaps the most skilful pleaders that 20th Century Uganda ever produced, with each one of them going on to play crucial roles in the country’s subsequent development. The lawyer who filed the petition was one Abubaker Kakyama Mayanja. ‘Abu’—the nickname everybody knew him by—was both a seasoned lawyer and a politician of some note. Co-founder of the Uganda National Congress (UNC) in 1954, expellee of Makerere for leading a strike against the poor diet at the college and law graduate from Cambridge and the Inns of Court in London, it was unsurprising and perhaps even inevitable that he would lead the charge against the 1966 Constitution. After all, in his other capacity as Kabaka Yekka (KY) Member of Parliament (MP), he was among only one of six who refused to accept the validity of the pigeon-hole document.

In the magazine *Transition*, Mayanja joined forces with his great friend Makerere Political Science professor, Ali Mazrui and locked horns with ideologues of the Obote regime like Ali Picho and Akena Adoko to condemn the turn that the country was taking towards increasing

60 In mid-1970 he was entered on the Queen’s Diplomatic Service and Overseas list of honours and appointed a Companion CMG (Most Distinguished Order of St. Michael and St. George); see Supplement to the London Gazette, June 13, 1970, at 6366, accessed at: <https://www.thegazette.co.uk/London/issue/45117/supplement/6366/data.pdf>.

61 Ellet, 2008, at 138.

62 Onyango-Obbo, 2001.

63 Kasozi, *op.cit.*, at 116.

autocracy. After defending Matovu, Abu was himself to end up in jail at Luzira in similar fashion to Nelson Mandela's communist lawyer Bram Fischer. Mazrui quotes the offending passage which got Abu in trouble thus,

... in so far as the Proposals [for the 1967 Constitution] do not provide for democratic government by consent, with the people as the ultimate source of power, it is doubtful whether the Constitution envisaged in the proposals is a truly Republican Constitution... For a republic connotes more than a mere abolition or absence of Kings; it also positively implies a democratic form of Government.⁶⁴

Ironically, Abu had started off as Obote's friend and close political ally. There are two stories about this relationship over which there is much contention. The first is that Abu brought Obote into the UNC in order to oust Ignatius Musaazi and Jolly Joe Kiwanuka, the party's founders with whom Abu had disagreed. Reading the sign of the times, Abu realized that in order to be truly national, UNC needed to move away from its overly Ganda roots and embrace the rest of the country. Having just returned from Kenya and becoming a rising star in the Legislative Council (LEGCO), it was clear that Obote was going to be a very influential figure in the politics of the independent country. Whether Abu brought him in to control him as some allege, or whether Abu was indeed committed to the bigger picture is something for the historians to tell us. The party eventually split into UNC—Kiwanuka and UNC—Obote, with the latter subsequently joining up with the Uganda Peoples' Union (UPU) to form the Uganda Peoples' Congress (UPC). The rest, as the old saying goes, is history.

The second story is shrouded in even more controversy. It is that Mayanja introduced Obote to Mutesa and thus was born the marriage-of-convenience between Kabaka Yekka and UPC.⁶⁵ Some go so far as to allege that when King and Commoner first met Obote knelt before the monarch, having previously been advised to do so by Mayanja as a way of convincing Mutesa of his fealty. In his biography of Obote, Kenneth Ingham gives Obote's recollection of the association between the two of them differently.⁶⁶ According to Obote, it was the Kabaka

64 Mazrui, 'Between Secular Activism,' *op.cit.*

65 Obote himself disputes this story. In the interview with Mwenda, *op.cit.*, Obote said, 'The UPC-KY alliance was a matter of discussion between Muteesa and me only. Even UPC central executive committee did not discuss it. I used to report just the outcome. UPC and Mengo had a common cause: we both wanted DP government out of office. Our dilemma was how we get rid of DP.'

66 Ingham, 1994 at 51.

who reached out to him through his mother-in-law, Pumla Kisosonkole, and Obote then asked Abu to accompany him to the meeting. Obote also denied prostrating before the King, although he asserts that Abu did.⁶⁷ According to Ingham, given Mayanja's previous relations with the kingdom, Obote's choice of him as a partner in the meeting with the Kabaka was somewhat surprising.⁶⁸ However, it is clear that Mayanja strongly backed Obote during the struggles over the leadership of the UNC:

Seeing Uganda's political life with fresh eyes after his return from Britain, Mayanja was greatly impressed by the new member of the Legislative Council from Lango, recognizing more swiftly than many other observers the power which resided in Obote's small frame. When the first split within the UNC took place Mayanja had already concluded that his old colleague, Musazi, was no longer the man to lead the party through the constitutional complexities which faced Uganda. Later, when Obote broke with his allies, (Jolly Joe) Kiwanuka and Kununka, Mayanja threw his weight behind Obote, whom he already saw, perhaps uniquely at that early stage, as the future leader of an independent Uganda.⁶⁹

Whatever the truth of the matter, *ex parte Matovu* represented yet another instance in which the two former comrades in the independence struggle were ranged against each other in battle.

Pitted against Mayanja, the team from the Attorney General's Chambers was also a formidable one. It was led by Godfrey Lukongwa Binaisa, Uganda's one and only Queen's Counsel (QC), educated at two King's Colleges—Budo and London—and trained as a Barrister at Lincoln's Inn. Of Uganda's major politicians of the time, Binaisa was distinguished by the fact that he had spent time in deportation (internal exile in Karamoja) before independence. If, as has been alleged, Binaisa left Obote's government over the manner in which the 1966 Constitution was introduced, by the time of *ex parte Matovu's* case, he was still battling from Obote's corner. Of course, Binaisa is better remembered for becoming President of Uganda for a short 11 months in 1979/1980. Although he denies doing so, many have alleged that it was current President, Yoweri Kaguta Museveni who orchestrated his rise to that position.

⁶⁷ *Id.*, at 52.

⁶⁸ *Id.*, at 51.

⁶⁹ *Id.*, at 52.

Two other Makerere/London/Cambridge graduates joined Abu on the applicant's team, the erudite Solicitor General and former University of Dar es Salaam Law teacher, Peter James (PJ) Nkambo Mugerwa, and his affable deputy, Mathias Bazitya Matovu. With the very essence of the character of the state as the main issue in contention, the stage was set for the joining of what turned out to be Uganda's most important post-colonial legal battle.

3.3. What was the Case all About?

Michael Ssebbwaga Matovu belonged to the Buganda Kingdom aristocracy. By the time the case which took him to court was decided he had been the County Chief (*Pokino*) of the-then Buddu County in the south of the Kingdom. His troubles began when a session of the Lukiiko was called to discuss Obote's abrogation of the Constitution and the subsequent deposition of the Kabaka as President. In what has generally been described as a fairly rowdy session, the most notable decision made was the demand for the removal of the central government from Buganda soil. It is alleged that of the members of the Lukiiko, Matovu was one of the most vocal in supporting the motion.⁷⁰ In any event, he was arrested alongside several other Baganda notables and taken to Luzira Maximum Security Prison.

Ordinarily, it would have been an easy thing to have dealt with Matovu. However, two things had happened which made it rather difficult for the government to simply cast him adrift and throw away the key. The first was that the favourite tool that the colonialist's used in order to rusticate those who opposed it—the Deportation Ordinance—had just been declared unconstitutional. As a matter of fact this was in the case of *Ibingira v. Uganda*—a case which was filed by the five ministers detained by Obote.⁷¹ The court held that with the introduction of a Bill of Rights and among others the recognition of the right to freedom of movement, a Ugandan citizen could no longer be lawfully deported under the Constitution. Earlier practice had been to take such deportees to places such as Karamoja, away from the major centres of political

⁷⁰ For an interesting account of the 1966 events see Magembe, 2015 at 34-35.

⁷¹ Ibingira's case was argued by John Wycliffe Rutagymwa Kazzora. Alongside Grace Stuart Ibingira—Obote's first Minister of Justice and UPC Secretary General and himself detained a few months before Matovu—Kazzora was one of Ankole Kingdom's first lawyers, who had studied at the famous Welsh University of Aberystwyth. Not much has been written about Kazzora or his legal exploits, in part because he was mainly a behind-the-scenes operator. But his influence on Ugandan politics cannot be underestimated as he makes an appearance much later in the lives of two Ugandans who have comprehensively affected the history of the country, namely Yoweri Kaguta, and Janet Kataaha Museveni. Kazzora was Janet's cousin, but acted as her putative father. He thus gave her hand away in marriage, and was a major benefactor of the rebel National Resistance Army/Movement in the war against the Obote-2 regime from when it started in 1981.

action which at the time were concentrated in Buganda. Attorney General Binaisa had himself been the victim of this law.

Of course the government had no intention of releasing Ibingira, but were forced by a court order to do so. In order to comply with the order, the government did two things. First of all, Ibingira and his co-detainees were flown to Entebbe Airport and released onto the tarmac in order for the government not to be found in contempt of the court order. As soon as they touched down on the apron, they were immediately re-arrested using Detention Orders issued under Emergency Regulations specifically designed for Buganda. They were then shipped off to join Matovu in Luzira. To insulate itself against any claims for compensation by the detainees, the government then passed the Deportation (Validation) Act, which gave legal sanction to a detention that had obviously been illegal. That law made history by making reference to specifically—named individuals, violating one of the cardinal principles of legality—that laws must be neutral and applied equally to everybody.

Matovu was detained under new Emergency Regulations applicable only in Buganda, and *habeus corpus* proceedings were instituted to have him released. When the judge who initially heard the case refused to let him go, Mayanja challenged the validity of the Regulations, arguing that they had been made under a Constitution (passed by a compliant Parliament on April 15, 1966) which was lacking in validity. Hence the case ended up in front of the Three-panel Bench. The issues in the case were fairly straight - forward: first, whether the application was properly before the court (under Article 32 of the 1962 Constitution); secondly, whether the emergency powers invoked to detain Matovu were in conformity with the Constitution, and finally whether Matovu's constitutional rights had been contravened (as per Article 31). However, the most important issue was that raised by the court over the validity of the 1966 Constitution, which the court felt compelled to inquire into given the circumstances in which the application had landed before them.⁷²

Although the court overruled the preliminary issues and agreed that Matovu was entitled to be heard on the merits of his application, on the more fundamental issue of the legality of the Constitution and the validity of the government, the court was more circumspect. Citing the two American cases of *Marbury v. Madison* and *Baker v. Carr*,⁷³ Chief

⁷² Judgment of Udoma at 527.

⁷³ 369 U.S. 186 (1962).

Justice Udo Udoma first addressed the question of the extent to which a court could review the actions of a separate arm of government, in other words, the Political Question Doctrine (PQD).

In addressing this issue, the Udoma bench asserted that there was a difference between the duty of the court to interpret the constitution versus giving an opinion on the validity of the extra-legally established Obote government. Making a fine distinction as to the applicability of the Political Question Doctrine to the instant case, the court stated that,

... any decision by the judiciary as to the legality of the government would be far reaching, disastrous and wrong because the question was a political one to be resolved by the executive and the legislature which were accountable to the Constitution, but a decision on the validity of the Constitution was distinguishable and within the court's competence.⁷⁴

Having made the distinction the court then relied on the theories of Austrian legal philosopher and jurist Hans Kelsen (about the meaning of a legal revolution) and the more-recent case of *State v. Dosso*⁷⁵ which had legitimated a *coup d'état* in Pakistan, to uphold a Constitution that had in fact been introduced by extra-constitutional means. By upholding the Constitution it logically followed that so too was the government which it created validated.

In finding that the 1966 (pigeon-hole) Constitution had been properly introduced, *Matovu's* decision ultimately upheld the extra-constitutional usurpation of power by the Obote government and gave it judicial validity and legal cover. While such a decision can with hindsight be criticized, the obvious constraints the court was operating under are quite clear. As Carlson Anyangwe has pointed out if the judges in the *Matovu* case had failed to cooperate, the consequences for them would have been dire.⁷⁶

Following *Matovu's* case, the one other court challenge to an unconstitutional change in government failed largely because the judiciary took the view that political matters should be left to politicians to resolve. Hence, in the 1980 case brought to challenge the removal of Yusuf Lule only 68 days after he had been sworn in as President

⁷⁴ *Ex parte Matovu, op.cit.*, at 533-534.

⁷⁵ PLD 1958 SC 533.

⁷⁶ Anyangwe, 2012 at 85.

to replace the deposed Idi Amin in 1979,⁷⁷ the court declined to rule that the action of the National Consultative Council (NCC) had in fact been unconstitutional. The court instead stated that not only had the circumstances of the case been overtaken by events, but also that the consequences of making such a declaration would be “grave indeed.”⁷⁸

If the influence of *Matovu* had only been confined to the legality of violent changes in government perhaps the damage it did could have been limited. However, the Political Question Doctrine—the essence of the ghost of *ex parte Matovu*—found its way into most cases which even simply challenged the exercise of executive power. Thus, in the case of *Opoloto v. Attorney General*,⁷⁹ which concerned the dismissal of the then commander of the army for refusing to execute the order to attack the Kabaka’s palace, the court held that the Ugandan president had inherited the prerogative powers of the British monarch to dismiss at will officers in its service. Furthermore, when faced with excesses by the Executive such as detention-without-trial, arbitrary administrative action, or human rights abuse, it was more likely to be the case that the judiciary succumbed to the authority which was backed by military power.

During the Idi Amin period of governance, executive excess reached its peak while simultaneously both the desire and the ability of the judiciary to provide a check against it greatly diminished. In part this was the result of the gradual removal of oversight powers from the judiciary coupled with the creation of alternative centres of power within which such matters were dealt with. Bodies such as the Military Tribunal (ironically instituted for both army personnel and civilians) and *ad hoc* institutions that exercised judicial power over a wide range of issues supplanted the traditional judiciary.

The second Obote government was arguably not a military one, and many of the institutions which had illegally assumed authority of a judicial nature were closed down. Nevertheless, its relationship with the judiciary remained both tenuous and confrontational, partly on account of the highly unstable conditions in which the government operated. Via the ghost of *ex parte Matovu*, executive power reigned supreme as did the notion that a violent takeover of government would be considered legally valid. Such was the view of the courts well into the

77 See *Andrew Lutakome Kayira & Paulo Ssemogerere v. Edward Rugumayo* 1993, *Omwony Ojwok, Frederick Ssempebwa & 8 others* (Constitutional Case No.1 of 1979).

78 Judgment of Chief Justice Wambuzi, at 51. See further Oloka-Onyango, *op.cit.*, at 32-33.

79 [1969] EA 631.

early years of the National Resistance Army/Movement government.⁸⁰ It took the re-emergence of *ex parte Matovu's* second child—public interest litigation—for this situation to change.

80 That was the rationale for the decision in the case of *44123 Ontario Limited (Export—Import) Division v. Attorney General & 4 Others*, Civil Suit No.1038 of 1990, which observed that “... revolutionary movements are not legal entities until they assume power.” Judgment of Justice C.K. Byamugisha, at 6.

4. The ‘Good’ Ghost Fights Back: Public Interest Litigation (PIL) and The Quest For Democratic Constitutionalism

Simply put, Public Interest Litigation (PIL) is the use of courts of law as a mechanism to challenge authoritarian structures of governance, structural conditions of oppression and domination and established frameworks of marginalization and exclusion. In contrast to the idea that certain issues should not be the subject of judicial intervention—the essence of the Political Question Doctrine (PQD)—Public Interest Litigation underscores the idea that law and politics are intertwined in such an intimate manner that to distinguish the two is to simply split hairs. Put simply, PIL is politics pursued through legal means and using the Judiciary as the main channel, especially when the traditional political avenues of reform and progressive transformation have been blocked. In the case of *NAACP v. Button*,⁸¹ US Supreme Court Justice William J. Brennan argued that PIL was a form of political expression:

Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.... And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.... For such a group, association for litigation may be the most effective form of political association.

It follows from the above that in theory there are virtually no matters of Executive or Legislative operation that lie beyond the purview of judicial scrutiny. Whether or not the judiciary rules in favour or against the Executive or the Legislature is a different subject of attention. The point is that unlike the PQD, public interest litigation asserts that executive power must be held fully accountable for its exercise. Needless to say, arriving at this point in the case of Uganda has been a tortured and well drawn-out process that is yet to be concluded. The following sections of this lecture chronicle that journey.

4.1 Reassessing Matovu’s Contribution

By upholding the validity of the ‘Pigeon-hole’ constitution of 1966 the Udoma panel in *Matovu*’s case effectively provided legal cover for what

⁸¹ Led 2d 405.

was plainly a *coup d'état*. What followed was the emasculation of judicial power especially when confronted by executive excess. However, as the old saying goes every dark cloud has a silver lining. The silver lining in *Matovu's* case was to allow the litigation to go ahead over strenuous objections raised by the Attorney General. Secondly, the court asserted its power of judicial review over the constitution when it could have adopted a less confrontational position and simply declared that it had no power to hear the application. Instead, on the question of access, the *Matovu* court adopted a progressive position particularly where, in the words of the court, the issue involves "the liberty of a citizen." That position contrasted with the traditional view of courts of law that matters political should be left to the politicians to decide.

The *Matovu* court arrived at this position when it was asked to dismiss the petition on several preliminary grounds. In response, the court agreed that the application was "indeed defective" and that the court would have been justified in holding that there was no application properly before it. The court also observed that the title and heading of the application were defective; no respondent had been named against whom the writ was sought; the applicant appeared to be in some doubt as to who was actually detaining him and against whom the writ ought to issue; the affidavits were not accompanied by proper documents, a defect "so fundamental" said the court "as to be almost incurable."⁸²

To make matters worse, applicant counsel's affidavit was "bad in law and should have been struck out." Indeed, the court declared that on examining the papers their first reaction was to "...send back the case to the judge with a direction that the matter be struck off as we were of the opinion that there was no application for a writ of habeus corpus properly before him."⁸³ Instead, the court observed,

On further reflection, however, bearing in mind the facts that the application as presented was not objected to by counsel who had appeared for the state; and that the liberty of a Citizen of Uganda was involved; and that considerable importance was attached to the questions of law under reference since they involved the interpretation of the Constitution of Uganda; we decided, in the interests of justice, to jettison formalism to the winds and to overlook the several deficiencies in the application, and thereupon proceeded to the determination of the issues referred to us.⁸⁴

82 *Id.*, at 519 and 520.

83 *Id.*, at 521.

84 *Id.*, at 521.

Through this statement *Matovu's* court set the stage for a gradual movement away from the swift dismissal of significant constitutional cases on flimsy technical grounds. More importantly, the “jettisoning formalism” mantra continued to crop up in subsequent judicial decisions especially those of a sensitive political nature and particularly those to do with illegal changes in government.⁸⁵ Needless to say, for the twenty-one years between 1967 when *Matovu's* case was decided and 1988 when the mantra was first revisited in a progressive fashion, the courts in Uganda had largely failed to embrace this liberal spirit.

The case of *Edward Frederick Ssempebwa v. AG*⁸⁶ was the first constitutional case decided after *Matovu* not to be detained by the formalism of legal technicalities and to decide that the purported changes to the constitution were improper.⁸⁷ The case concerned a judgment-debt Ssempebwa was owed on account of a case that he had won against the previous Obote government but which the new NRM/A refused to honour. Instead, the new government sought recourse in Legal Notice No.1 of 1986, an instrument that legitimized the extra-constitutional assumption of power and attempted to insulate the NRM government from any claims related to the actions of its predecessors in power. Justice Arthur Oder in this case affirmed many points which had hitherto been avoided or simply relegated to the back-burner in litigation over politically-sensitive matters in Uganda. He also confirmed the need for the legislature to work within the bounds of constitutionalism and declared that retrospective legislation violated the principle of legality. The case represented a strong affirmation of the independence of the judiciary after many years of malaise.

Ssempebwa's case was important for several other reasons. It was the first since the early-1960s to find legislation unconstitutional, and thus appeared to herald a new era of judicial revival in Uganda. Secondly, while all cases that had challenged the extra-legal amendment of the Constitution since *ex parte Matovu* had failed to find judicial approval, the court in *Ssempebwa* was unequivocal in condemning such action. The fact that the government passed a new law which effectively overturned the decision of the court reflected less on the courage and competence of the court in doing what was right, than it was illustration of the fact that even the new NRM government which had seized power

85 See *Andrew Kayira & Paulo Ssemwogerere v. Edward Rugumayo, Omwony Ojwok, Frederick Ssempebwa & 8 Ors.*, Constitutional Case No.1 of 1979.

86 Constitutional Case No.1 of 1987, and *Oloka-Onyango op.cit.*, at 40-43.

87 The Attorney General initially objected to the reference of the matter to a constitutional court. See *Edward Frederick Ssempebwa v. The Attorney General*, Miscellaneous Application No.90 of 1986.

on a platform of ‘fundamental change’ was not quite ready to subject itself to complete judicial oversight and control.

4.2. PIL Developments Since the 1995 Constitution

The change to a more assertive engagement by the judiciary with matters to do with governance and the actions of the other arms of the State is directly retraceable to the 1995 Constitution. Adopted after several years of research and deliberation, the 1995 Constitution represented a new conceptual framework for the approach of matters relating to the operation of the different arms of government. First, it introduced a section on National Objectives and Directive Principles of State Policy. Secondly, Article 43 followed many other constitutions around the world and stipulated that any limitation to the enjoyment of rights and freedoms must not go beyond “... what is acceptable and demonstrably justifiable in a free and democratic society,” defining the term “public interest” and thereby laying down the permissible limits to the protection of human rights which excluded political persecution and detention without trial.

Lastly, the 1995 Constitution freed up access to the courts of law to virtually anybody by allowing petitions to the court to be brought by a wide range of individuals even those who had no direct interest in the matter, the so-called ‘busybodies.’⁸⁸ The instrument also reduced the weight applied to legal technicalities (Article 126(2)(e), gave unfettered powers of constitutional interpretation to the Court of Appeal sitting as a Constitutional Court (Article 137), and permitted the modification of existing law to conform to the new instrument (Article 273).

The most important post-1995 decision that revived the “jettisoning formalism” opinion in *Matovu’s* case was the case of *Major General David Tinyefuza v. The Attorney General*.⁸⁹ In that case, after a run-in with the Uganda Peoples’ Defence Forces (UPDF) over testimony he gave to a parliamentary committee investigating the war in Northern Uganda, General Tinyefuza (now known as Sejusa) sought to resign from the army. However, his petition was blocked by the Head of State/ Commander-in-Chief (President Museveni) and the-then Minister of Defence (Amama Mbabazi). The Attorney General raised several preliminary objections to the petition. Invoking the decision in *ex parte Matovu*, then-Deputy Chief Justice Seth Manyindo stated that it would

⁸⁸ Article 50.

⁸⁹ [1997] at 12. The judge stated that the Court should ‘...readily apply the provision of Article 126(2) (e) of the Constitution in a case like this and administer substantive justice without undue regard to technicalities.’ On Art.126(2)(e) see Mbabazi, 2001 at 101-135, Kirunda, 2010.

be “highly improper” to deny the petitioner a hearing on technical or procedural grounds: “I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all.” Thus, General Tinyefuza was allowed to proceed with his claim that being compelled to remain in the Army by the Act of the President refusing to accept his resignation amounted to forced labour.

Responding to the negative aspects of the *Matovu* decision, the 1995 Constitution enacted Article 3 (entitled ‘Defence of the Constitution’) which prohibited the illegal taking control of government. It also characterized any attempt to overthrow the Constitution as an act of treason, upholding the force and effect of the Constitution even if such an attempt were to be successful. Finally, the provision imposed a duty on all Ugandan citizens to defend the Constitution and resist its overthrow.

The effect of Article 3 is the subject of on-going contention among legal scholars, jurists and activists, particularly with respect to its impact on the decision in *ex parte Matovu*.⁹⁰ My considered opinion is that Article 3 combined with articles 2 (on the supremacy of the Constitution) and 137 (on the interpretative power of the Court of Appeal) effectively eliminated the Political Question Doctrine from Ugandan jurisprudence. This is especially insofar as it applies to the authority of a court of law over matters to do with the illegal assumption of state power, which can be regarded as the most extreme political act and one that has traditionally been off limits to judicial sanction.

Given that the Constitutional Court has powers to interpret anything in the Constitution it logically follows that *ex parte Matovu*’s application of the PQD to Uganda is no longer valid. Grace Tumwine Mukubwa adds another angle to this argument. According to him, the reformulation of the Bill of Rights heralded especially by Article 43 imposes a duty on Ugandan courts to directly engage political questions without excuse, since they must now at least engage in an assessment of the meaning of the words “democratic society,”⁹¹ when faced with an alleged infringement of human rights. Once such an inquiry is embarked upon, the collapse with matters otherwise deemed political is complete.

There are still other features of the 1995 Constitution that support the argument that things have changed. In my view, nothing could

90 See for example the debate in the Constituent Assembly.

91 Tumwine Mukubwa, ‘Ruled,’ *op.cit.*, at 299.

be considered more political than a presidential election. Flowing with the spirit of the times, all the constitutions enacted in Uganda before 1995 placed this process beyond judicial scrutiny. Given that the judiciary is now empowered to question even presidential elections this demonstrates that in conceptual terms there is virtually nothing beyond the ambit of judicial scrutiny in the name of a “political question” under the constitutional dispensation introduced in 1995.⁹²

Unfortunately, the PQD aspect of *Matovu* is still referred to as ‘good law’ since no court in the country has come out to directly overrule the decision and declare that it was decided on wrong grounds, and every so often the doctrine is referred to by one court or another.⁹³ It is also important to note that only two cases in the post-1995 era of constitutional adjudication have sought to invoke Article 3, but in circumstances different to those existing at the time of *ex parte Matovu*.⁹⁴ Neither of the two cases mentioned the PQD.

In part influenced by a reluctance of the courts to fully assert their powers under the new instrument, PIL cases after 1995 initially faltered on several occasions. Topping the list were objections based on the standing of the petitioner (*Locus Standi*).⁹⁵ There were also claims of the alleged non-disclosure of causes of action; bad pleadings and the alleged failure to follow rudimentary rules of procedure, e.g. time limits; correct forum, and right plaintiff.⁹⁶ Cases also failed because of the absence of the Chief Justice’s rules of procedure to enforce human rights⁹⁷ and finally constitutional petitions run aground on account of any technicality that could be found to defeat a hearing of the merits of the case.⁹⁸

The turning point came with a series of actions relating to Article 39 of the Constitution, which is concerned with the protection of the environment. The first of these was *The Environmental Action Network (TEAN) v. The Attorney General and the National Environment*

92 Thus, presidential elections have been challenged twice in 2001 and 2006 respectively. See Tumwine Mukubwa, 2004.

93 See Kirkby, *op.cit.*

94 *Dr. Rwanyarare James and Anor v. The Attorney General* Constitutional Petition No. 11 of 1997, declined to give a broad reading to the Article. However a broader reading of the provision was made in *Uganda Association of Women Lawyers & 4 Ors. v. Attorney General* (Constitutional Petition No. 2 of 2003). In that case, Justice Twinomujuni held that the attempt to impose time limitations on the filing of a constitutional petition violated Article 3(4).

95 *Rwanyarare and Afunadula v. Attorney General*, Constitutional Petition No.11 of 1997.

96 *Utex Industries Ltd. v. Attorney General*, SCCA No.52 of 1995, and *Baku Raphael Obudra & Obiga Kania v. The Attorney General*, Constitutional Petitions Nos.4/2002 and 6/2002.

97 *Uganda Journalists Safety Committee (UJSC) v. AG*, Constitutional Petition No. 7 of 1997.

98 See Tusasirwe, 2014, at 58-64.

Management Authority (NEMA).⁹⁹ Sweeping aside all the State Attorney's preliminary objections as to hearsay evidence, the expertise of the applicant, and the applicant's (un)representative capacity Justice Ntabgoba ordered that costs be paid by the respondents for delaying hearing of the main application. He went on to state, "... the interest of public rights and freedoms transcend technicalities, especially as to the rules of procedure leading to the protection of such rights and freedoms." In a strong rebuke to defence counsel who challenged the petition as misconceived, the same judge in a later decision stated, "To say that our constitution does not recognise the existence of needy and oppressed persons and therefore it cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution."¹⁰⁰ A host of cases followed on access to information connected to environmental pollution,¹⁰¹ environmental impact assessments,¹⁰² the public trust doctrine,¹⁰³ and the polluter pays principle.¹⁰⁴ While some of the cases were lost, many were won. But more importantly, these cases provided the necessary foundation on which to allow PIL cases to flourish.¹⁰⁵

A similar pattern played out with respect to constitutional petitions although in many instances the Constitutional Court lagged behind the Supreme Court in upholding the clear terms of Article 2 which stipulates that any law or custom inconsistent with the Constitution shall be void. In this respect, the Supreme Court led the way in ensuring that rights which had been violated were protected.¹⁰⁶ Hence, in contrast to the earlier decision of the Constitutional Court which outrightly dismissed the petition in *Ismail Serugo v. KCC & Attorney General* because it was filed out of time, the Supreme Court confirmed that the gates of justice were open.¹⁰⁷ In *Charles Onyango Obbo & Andrew Mujuni Mwenda v. The Attorney General*,¹⁰⁸ Justice Amos Twinomujuni was the sole voice on the bench of five judges of the Constitutional Court to find that section 50 of the Penal Code (the publication of false news) was unconstitutional. On appeal to the Supreme Court, all seven of the

99 H.C. Misc. Applic. No.39 of 2001.

100 See judgment of Justice Ntabgoba in *British American Tobacco Ltd. v. Environmental Action Network Ltd.*, Civil Appeal No.27/2003.

101 *Greenwatch (U) & ACODE v. Golf Course Holdings Ltd.*, H.C. Misc. Applic. No.390 of 2001.

102 *National Association of Professional Environmentalists (NAPE) v. AES Nile Power*, H.C. Misc. Applic. No.268 of 1999.

103 *Siraji Waiswa v. Kakira Sugar Works Ltd.*, H.C. Misc. Applic. No.230 of 2001.

104 *Byabazaire Grace Thaddeus v. Mukwano Industries*, H.C. Misc. Applic. No.909 of 2000.

105 For a comprehensive discussion of public interest case over the first decade of the 1995 Constitution, See Karugaba, 2005.

106 For an incisive analysis, see Ssempebwa, (n.d.).

107 Constitutional Appeal No. 2 of 1998.

108 Constitutional Petition No.15 of 1997.

judges—led by the powerful judgment of Justice Mulenga—found that the section was unconstitutional.¹⁰⁹

Another unfortunate Constitutional Court decision was made in the case of *Jim Katugugu Muhwezi v. The Attorney General*,¹¹⁰ in which the petitioner sought to challenge his censorship as a Cabinet minister by Parliament. The Court summarily rejected the petitioner's argument that the law which required the permission of Parliament in order to access its proceedings was unconstitutional. Unfortunately, the petitioner did not appeal the decision.

The final straw in the stand-off between the two courts came with the Supreme Court decision in the case of *Paulo Ssemogerere v. The Attorney General*¹¹¹ which involved a challenge to the Referendum Act. Justice George Kanyeihamba minced no words in charging that the Constitutional Court had abdicated its primary duty of interpretation under the Constitution: "The Constitutional Court is under a duty to make a declaration, one way or the other. In denying that they had jurisdiction to make a declaration on this petition, the learned majority Justices of the Constitutional Court abdicated the function of that court."¹¹²

Regarding the issue of technicalities, then-Chief Justice Benjamin Odoki more or less buried their use by the Attorney General to defeat justice when in the first presidential election petition he stated,

From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in Article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it.¹¹³

After burying the ghost of technicalities revived, several cases have similarly added to the body of PIL jurisprudence that has built up over the years in various Ugandan courts. For example, the courts

109 *Charles Onyango Obbo & Andrew Mujuni Mwenda v. The Attorney General*, Constitutional Appeal No.2 of 2002; [2004] UGSC 1.

110 Constitutional Petition No.4 of 1988.

111 Constitutional Appeal No.1 of 2002.

112 Judgment of Justice Kanyeihamba, in *Paul K. Ssemogerere, Zachary Olum & Rainer Kafire v. The Attorney General*, Constitutional Appeal No.1 of 2002 at 93; accessed at: <http://www.ulii.org/files/ug/judgment/supreme-court/2004/10/10.pdf>.

113 *Col. (rtd.) Kizza Besigye v. Yoweri Kaguta Museveni*, Presidential Election Petition No.1 of 2001, at 16-17.

declared a 10 year exclusion/banishment order against a person accused of witchcraft as cruel, inhuman and degrading¹¹⁴ as it did with corporal punishment.¹¹⁵ The court also confirmed the right of access to information in the possession of the State¹¹⁶ and declared the publication of false news unconstitutional.¹¹⁷

The Supreme Court has also been very clear about the place of the Judiciary within Uganda's post-1995 constitutional scheme of governance, with the Constitutional Court empowered with the duty of interpretation in all circumstances, including when different provisions of the instrument are in conflict. According to Justice Mulenga in the case of *Paulo Ssemogerere v. The Attorney General*,

There is no authority, other than the Constitutional Court, charged with the responsibility to ensure that harmonisation. Even where it is not possible to harmonise the provisions brought before it, the court has the responsibility to construe them and pronounce itself on them, albeit to hold in the end that they are inconsistent with each other. Through the execution of that responsibility, rather than shunning it, the court is able to guide the appropriate authorities, on the need, if any, to cause harmonisation through amendment. In my opinion therefore, the decision that the Constitutional Court has no jurisdiction to construe or interpret any provision of the Constitution is misconceived and erroneous in law.¹¹⁸

In a number of instances, the courts have modified existing law in order to conform to the spirit and letter of the law after 1995. Thus, in the case of *Attorney General v. Osotraco*,¹¹⁹ the court granted the remedies of eviction and injunction against the government (and its officers), departing from the Common Law protection accorded to the sovereign and emphasizing that everybody—state or otherwise—must uphold and respect the Constitution. In *Dr. James Rwanyarare & Ors. v. Attorney General*,¹²⁰ the Constitutional Court held that under Article 126(1) judicial power was derived from the people to be exercised in their name and in conformity with the law, values, norms and aspirations of the people. Consequently, an injunction against the state was permissible

114 *Salvatori Abuki*, Constitutional Case No. 2 of 1997

115 *Simon Kyamanywa*, Constitutional Court Const. Ref. No. 10 of 2000

116 *Zachary Olum & Rainer Kafiire*, Constitutional Petition No.6 of 1999.

117 *Onyango Obbo & Andrew Mwenda*, Constitutional Petition No. 15 of 1997

118 Judgment of Justice Mulenga, in *Ssemogerere*, *op.cit.*, at 5.

119 Civil Appeal No 32 Of 2002.

120 Constitutional Application No.6 of 2002.

as there was no sound reason why the government should be given preferential treatment in comparison to ordinary citizens. Numerous other cases have been decided on personal freedoms and political rights, on fair hearing and on the right to education among others.

A number of decisions have been made on the status of women, for e.g. outlawing the offence of criminal adultery, declaring certain provisions of the law on succession as discriminatory,¹²¹ prohibiting the practice of female genital mutilation (FGM),¹²² as well as striking down the manifestly biased provisions in the Divorce Act,¹²³ which compelled women to prove aggravated adultery (2 grounds) in order to secure a judicial dissolution of marriage, in contrast to a man who could get a divorce by relying on only one.

In sum, there has been a veritable explosion of cases filed in the public interest.¹²⁴ Some of them have been frivolous and mundane, but many others have explored interesting and important issues of governance and development, as well as advancing the overall protection of the rights of the Ugandan public, confirmed the independence of the Judiciary and checked the powers of the Executive and the Legislature. Thus, a petition successfully challenged President Museveni's purported re-appointment of retired Chief Justice Benjamin Odoki who had relinquished the post upon attaining the constitutionally-mandated retirement age of 70.¹²⁵ When the President failed to respond to the judgment, another petition was filed by the Legal Brains Trust seeking a writ of *mandamus* compelling the President to appoint a new CJ and seeking orders that the-then acting Chief Justice Steven Kavuma (who simultaneously happened to hold the post of acting Deputy Chief Justice) not be allowed to preside over official functions of the judiciary and be forced to refund all allowances and salaries of the CJ's office.¹²⁶ These actions paved the way for the eventual appointment of the Hon. Bart Katureebe as Chief Justice earlier this year.

Despite the impressive and fairly progressive jurisprudence that has developed over the past two decades, *Matovu's* case has found a way of holding the courts ransom in a variety of decisions. This continuing influence demonstrates that the aspect of the case which condoned

121 *Law & Advocacy for Women in Uganda (LAW-U) No.1*,) Constitutional Petitions Nos.13/05 and 05/06 [2007].

122 *Law & Advocacy for Women in Uganda (LAW-U) No.2*), Constitutional Petition No. 8 of 2007.

123 *FIDA-U* Constitutional Petition No. 2 of 2003.

124 In the period between Independence in 1962 and 1995 the number of such cases was less than ten (10). Since enactment of the 1995 Constitution such cases number in the hundreds.

125 *Gerald Karuhanga v. AG*, Constitutional Petition No.39 of 2013.

126 Alex Bukumunhe, 'Why Katureebe was Finally Appointed CJ,' *Red Pepper*, March 6, 2015 at 2.

military power and its excesses and the dominance of the Executive over the other two arms of government has by no means been tamed. That the PQD lives on is demonstrated in a number of cases decided by various courts in Uganda since 1995.

While the Constitutional Court granted General Tinyefuza's application to leave the Army, the decision was reversed on appeal to the Supreme Court. In the lead judgment in that case, Justice George Kanyeihamba laid out what has perhaps become the most influential statement on the relationship between the three arms of government in the post-1995 era:

The rule appears to be that courts have no jurisdiction over matters which arise within the constitution and legal powers of the Legislature or the Executive. Even in cases, where courts feel obliged to intervene and review legislative measures of the legislature and administrative decisions of the executive when challenged on the grounds that the rights or freedoms of the Individuals are clearly infringed or threatened, they do so sparingly and with the greatest reluctance.¹²⁷

Directly citing to *Matovu's* case and mentioning the Political Question Doctrine, the learned judge went on to state,

The reluctance (*sic!*) of the Courts to enter into the arena reserved by the Constitution for the other arms of government reaches its zenith when it comes to the exercise and control of powers relating to the armed forces, their structure, organisation, deployment and operations. The accepted principle is that Courts will not substitute their own views of what is public interest in these matters especially when the other co-ordinate powers of government are acting within the authority granted to them by the Constitution and the law.¹²⁸

Justice Kanyeihamba's opinion in *Tinyefuza's* case is highly instructive about the influence and struggle of the two ghosts of *ex parte Matovu* in the higher bench. Indeed, the victory of the Political Question Doctrine is quite apparent in his judgment. Thus, Kanyeihamba distinguishes the 'jettisoning formalism' face of *Matovu's* case with regard to the preliminary objections raised by the Attorney General in *Tinyefuza's* petition, asserting that the case was distinguishable

¹²⁷ Judgment of Justice Kanyeihamba in *Tinyefuza*, *op.cit.*, at 11.

¹²⁸ *Id.* at 11.

because the matters complained of in the earlier case were, “... merely procedural and technical whereas in the present case the objection that there is no cause of action is of substantive law going to the root of the dispute.”¹²⁹

At the same time, and without a hint of contradiction, while the learned Judge reiterated that there were certain boundaries over which the Judiciary should not cross, he also overruled the decision in *Opoloto’s* case, arguing that “In this age of modernity, democracy and entitlement to human rights and freedoms, Opoloto’s case can no longer be treated as good law.”¹³⁰ It will be recalled that *Opoloto’s* case had allowed the President to dismiss the applicant at will on the grounds that prerogative powers inherited from the British Crown permitted him to do so. Declaring *Opoloto’s* case as “out of step,” the learned judge contradicted his earlier position that courts should be much more cautious in addressing matters to do with the military. Moreover, just as was the case with *Tinyefuza*, the matter at issue in *Opoloto’s* case did not involve the life or liberty of the petitioner, just his job.

Since *Tinyefuza*, the position of courts with respect to the other two arms of government has varied from outright deference to thinly-disguised interference, with Justice Kanyeihamba’s formulation of the PQD being a favourite quote for the reluctant judges. In *Miria Matembe’s* case, the *Matovu/Tinyefuza* doctrine was invoked to bar interference by the Court in the making of a bill in parliament. By a majority of 4 to 1 the court decided that,

The Constitution does not require this court to supervise the functioning of the legislature in every aspect and at all the stages of its work. The greatest care must be taken to ensure that as far as possible the principle of separation of powers is duly observed by the three arms of government to avoid unnecessary erosion of each other’s constitutional functions otherwise good and balanced governance may be unduly hampered.

Justice Mpagi-Bahegaine disagreed and her dissent spoke volumes of the contradiction in the position of the majority on the issue:

Generally, and while not conclusive, the construction given by Parliament to the provisions of the Constitution dealing with legislative procedure is accorded great weight but at the same

129 *Id.*, at 17

130 *Id.*, at 36.

time it has to be born in mind that this being a Constitutional Republic where the Constitution is supreme and not a Westminster Model (Parliamentary democracy), the courts as the bulwark of constitutionalism have to remain vigilant about the legislative procedure in the House, since there is no other available tribunal to determine whether the legislature has complied with the constitutional provisions. The judiciary would be failing its mandate if it closed its eyes to any infraction on the ground that it is too early in the process, to interfere.¹³¹

Mpagi-Bahegaine's position represented those judges who fought against the influence of the PQD. Indeed, with the passage of time, judges who pursue a more "activist" posture have not been shy to call the Executive to order even over matters to do with the military. Thus in the case of *Attorney General v. Joseph Tumushabe*¹³² the Constitutional Court stressed that the Constitution, "... guarantees to every person the enjoyment of the rights set out in Chapter 4 only in the circumstances that are expressly stipulated in the Constitution."¹³³ Referring to the purported insulation of the UPDF General Court Martial from the provisions of the Constitution, the Court went on to assert that,

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 the order of habeus corpus or application for mandatory bail in appropriate circumstances.¹³⁴

The court has also made significant strides in relation to the presidential powers of removal of a public servant or of a Member of Parliament representing the Armed Forces. In the case of *Ananais Tumukunde v. The Attorney General*,¹³⁵ the Constitutional Court held that the President could not direct the Public Service Commission (PSC) to terminate the petitioner's contract since Article 172(1)(a) of the 1995 Constitution empowered the appointment or termination of the service of public officers only on the advice of the PSC.

131 See dissenting judgment of Justice Alice Mpagi-Bahegaine in *Hon. Miria Matembe & 2 Others v. The Attorney General*, Constitutional Petition No.02 of 2005, accessed at: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/afr/uga/eng/uga-2005-d-003?fn=document-frame.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/afr/uga/eng/uga-2005-d-003?fn=document-frame.htm&f=templates$3.0).

132 Constitutional Appeal No.3 of 2005.

133 Judgment of Justice Mulenga, at 11.

134 *Id.*, at 11.

135 Constitutional Petition No.04/2009.

However, this posture of resistance against Executive excess is not always in play in the Constitutional Court. Thus, in the case of *Brigadier Henry Tumukunde v. Attorney General and Electoral Commission*,¹³⁶ which concerned the forced removal by the High Command of the UPDF of an Army representative from Parliament, a majority of the Constitutional Court reverted to the *Matovu/Tinyefuza* doctrine and stated:

[e]ven when constitutional rights are asserted, some questions are too political for the courts to give legal answers. This ‘political question’ doctrine is another way of saying that over certain issues, the Constitution commits complete discretion to the other branches. No matter how justiciable the claim seems—the parties have been injured, they have standing, the cause is ripe for appeal, it will not be moot before the decision is rendered, the claim is clearly based on a constitutional provision, the courts will dismiss it because they are the wrong place to take the grievance.

On appeal, Justice Kanyeihamba was unequivocal in declaring that “... any decree, order or action” of Parliament or an official (including the President) could be challenged if it adversely affected a citizen.¹³⁷ Kanyeihamba’s ruling in *Tumukunde* represented a significant intellectual journey from *Tinyefuza* and indeed reflected the growing influence of the PIL face of *ex parte Matovu*. Hence, in the Supreme Court appeal of the *Paulo Ssemogerere* case, Justice Kanyeihamba reiterated the doctrine of constitutional supremacy, asserting that “In Uganda, courts and especially the Constitutional Court and this (Supreme) Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution.”¹³⁸ While in *Tinyefuza* Kanyeihamba had been at pains to restrain the courts to intervene only when life and liberty were at stake, in *Ssemogerere*, the arena of concern had been extended to “...oppressive and unjust laws and acts.”

The face of PIL was once again on display in the challenge to parliamentary proceedings involving the attempted censure of the-then

136 Constitutional Petition No.6 of 2005.

137 See *Brigadier Henry Tumukunde v. Attorney General and Electoral Commission*, Constitutional Appeal No.2 of 2006, at: <http://www.ulii.org/ug/judgment/supreme-court/2008/14>.

138 Judgment of Justice Kanyeihamba in *Paul K. Ssemogerere, Zachary Olum & Rainer Kafire v. The Attorney General*, Constitutional Appeal No.1 of 2002 at 25, at: <http://www.ulii.org/files/ug/judgment/supreme-court/2004/10/10.pdf>.

Prime Minister (Amama Mbabazi) and several ministers over claims of corruption,¹³⁹ and more recently in the successful challenge to the Anti-homosexuality Act (AHA).¹⁴⁰ Although the result in the two cases was different insofar as the sanction against Parliament was concerned, in both cases the Court held that while Parliament was independent, it had to execute its functions in accordance with the Constitution. Moreover, it is the duty of the Constitutional Court to decide whether such action has conformed to the Constitution.

By way of conclusion, the courts in Uganda have made significant progress in developing public interest litigation and in minimizing the influence of the Political Question Doctrine in deciding matters that affect the operation of the arms of government, especially the Legislature and the Judiciary. It is trite to note that this is especially with respect to civil and political rights (CPRs) where the courts have largely been a bastion for the defence of the beleaguered individual. However, the record of the judiciary on issues relating to economic, social and cultural rights (ESCRs) reveals that the PQD is very much alive and continues to negatively assert its influence on the jurisprudence that has emerged in this sphere of the law. This is the issue to which I now wish to turn.

4.3. The Achilles Heel of Economic, Social and Cultural Rights (ESCRs)

The history of public interest litigation in Uganda since 1995 has contrasted with that in countries such as India¹⁴¹ and South Africa¹⁴² in one material particular. Whereas the courts in these two countries have largely been engaged with litigation over economic, social and cultural rights (ESCRs), the majority of PIL cases in Uganda have been mainly concerned with civil and political rights. There are several explanations for this, but three stand out. The first is that while ESCRs are classic rights which have long been recognized in International Law and are binding on Uganda through a variety of legal instruments such as the International Covenant on Economic Social and Cultural Rights

¹³⁹ *Twinobusingye Severino v. Attorney General*, Constitutional Petition No.47 of 2011. While the court rapped members of Parliament for lacking “restraint and decorum” (see judgment at 24), it nevertheless stopped short of intervening in its internal operations: “However, our observations notwithstanding, we find that the setting up of the ad-hoc committee by Parliament in that heated atmosphere was constitutional under Article 90 of the Constitution and this Court cannot interfere with it. To do so would amount to this Court interfering with the legitimate internal workings of Parliament.” (See judgment at 25).

¹⁴⁰ See *Prof. J. Oloka-Onyango & 9 Others v. Attorney General*, Constitutional Petition No.8 of 2014, at: <http://www.ulii.org/ug/judgment/constitutional-court/2014/14>.

¹⁴¹ Baxi, 1985.

¹⁴² Mbazira, 2006.

(ICESCR), the African Charter on Human & Peoples' Rights (ACHPR) and the Convention on the Rights of the Child (CRC), *inter alia*, the prevailing view is that aside from the right to education and the right to work they are not justiciable. In other words, they cannot be the subject of litigation and enforcement via a court of law. This explains why they were relegated to the National Objectives and Directive Principles of State Policy, which is also regarded as a non-justiciable section of the Constitution.¹⁴³

Taking on from the above position, the second reason is that the Bill of Rights of the 1995 Constitution (Chapter Four) is virtually devoid of rights such as those to adequate shelter/housing, the right to water or the right to health care. Lastly, civil society activists in Uganda have been slow (nay, reluctant) to take up and pursue this category of cases in the public interest.¹⁴⁴ Conversely, when cases of this nature have been filed, the government is quick to raise the Political Question Doctrine as a defence to claims over the assertion of ESCRs, especially when the Executive or the Legislature is directly implicated in the matter.

Aside from the cases we have already reviewed, the doctrine made another appearance in the case of *Julius Ochen & 205,000 Others v. The Attorney General*.¹⁴⁵ The claim was brought by the survivors of the insurgency in the Teso region of the country who argued that the government had failed to protect their lives and property from the rebel Uganda Peoples' Army (UPA), and as a consequence needed to compensate them.¹⁴⁶ The Attorney General raised the PQD as an objection, but Justice Nahamya rejected the argument pointing out that the systems of government (the USA and Uganda) in each instance were different.

However, the PQD was successfully upheld by the Constitutional Court in the case of *CEHURD & Three Others v. The Attorney General*.¹⁴⁷ Here, the Court declined to find the government in violation of its obligations under the right to health in a case concerned with maternal health care. Indeed, the matter never even reached a hearing on the merits

143 This view was first articulated in the Constituent Assembly. For an account see Oloka-Onyango, 2004 at 12-21. Most judges appear to share this opinion, although in Constitutional Court decision in *Tinyefuza v. The Attorney General*, (Constitutional Petition No.1 of 1997) at 18, Justice Egonda-Ntende stated that the principles and objectives outlined in the Constitution, "... ought to be our first canon of construction of this constitution. It provides an immediate break or departure with past rules of constitutional construction."

144 For a more critical examination of the status of ESCRs, see Oloka-Onyango, 2009.

145 HCCS. 292 OF 2010.

146 For a more extensive discussion of the case see Amerit, 2014.

147 Constitutional Petition No. 16 of 2011.

because the Court agreed with the Attorney General's preliminary objection that the case called upon the court to make a determination of a 'political question.'

In addressing the issue, the Court began with the following definition of the concept:

“Political question doctrine” holds that certain issues should not be decided by courts because their resolution is committed to another branch of government and/or because those issues are not capable, for one reason or another, of judicial resolution. Its purpose is to distinguish the role of the judiciary from those of the Legislature and the Executive, preventing the former from encroaching on either of the latter. Under this rule, courts may choose to dismiss the cases even if they have jurisdiction over them.¹⁴⁸

Drawing inspiration once again from the *Matovu/Tinyefuza* doctrine as espoused by Justice Kanyeihamba, the court declined to even consider the merits of the case:

Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is, with guidance from the above discussions reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies of Government, for inter-alia, the good governance of Uganda. This duty is a preserve of the Executive and no person or body has the power to determine, formulate and implement these policies except in the Executive.¹⁴⁹

The court thus took the rather astonishing view that there were other alternatives by which the petitioner could achieve relief, but a constitutional petition was not one of them.

If the case had been decided on its merits—whatever the outcome—it would have at least signified a willingness to engage with an issue that is of grave concern to a large cross-section of the population, i.e. young, expectant mothers with minimal access to necessary health services. However, the case can be faulted on a number of grounds.

¹⁴⁸ Judgment of the Constitutional Court at 11.

¹⁴⁹ *Id.*, at 14.

First, it arbitrarily denied the petitioner the right to a fair hearing, an established right which the court should have taken care to ensure was observed.

Secondly, the *CEHURD* approach undermines the legitimacy of the court and indeed could be described as an abdication of duty similar to what happened with its pre-2000 posture that was rapped in *Ssemogerere's* case. At the broader level, the approach of the Court marks out the Ugandan court as out-of-step with other courts around the world, e.g. Columbia, South Africa, and even in neighbouring Kenya,¹⁵⁰ where ESCRs-jurisprudence is gaining a firm foothold. Finally, as observed by Brian Dennison the decision in *CEHURD* sent the wrong message, and was "... indicative of a Court that wants no part in trying to tell the government what it has to do in the context of the right to health. The Court used the political question doctrine to avert the issue as to whether there is a right to health in Uganda."¹⁵¹

At the time of writing this lecture, the *CEHURD* appeal is yet to be heard by the Supreme Court. Quite clearly the decision of the court on the matter will be of crucial importance for several reasons. First, it provides an opportunity for the court to clarify on the status of the right to health in Uganda's constitutional order. Secondly, it will allow for some critical engagement with ESCRs jurisprudence at the highest level of the Judiciary. Finally, and most importantly, it will provide an opportunity for the highest court in the land to definitively pronounce itself on the PQD and its application in 21st Century Uganda.

While it is arguable that the *CEHURD* decision was also influenced by the absence of the right to health in the Bill of Rights, a more recent case on the right to education is cause for further concern simply because this right is enshrined in Chapter Four.¹⁵² In mid-2014 the group Initiative for Social-Economic Rights (ISER) together with Member of Parliament Joseph Ssewungu teamed up with the aim of blocking the reading of the budget pending a court action compelling Parliament to revise the capitation grants for the UPE program in the coming financial year.¹⁵³

The case was instituted because the government had reduced the

150 For an analysis of the situation of ESCRs in Kenya, see Oloka-Onyango, 2015.

151 Dennison, 2014 at 284.

152 Cases on the right to education have been filed with the Human Rights Commission, but the only case which arrived at the Constitutional Court—*Dimanche Sharon et al v. Makerere University* (Constitutional Cause No.01 of 2003)—was unsuccessful.

153 See, Patricia Kahill, 'Kalungu West MP Seeks To Block the Reading of the National Budget,' UG News, May 7, 2014, accessed at: <http://news.ugo.co.ug/kalungu-west-mp-seeks-block-reading-national-budget/>.

per pupil grant from Ug.Shs.7,560 to Ug.Shs.6,800. This action was described by the petitioners as a detriment to all UPE beneficiaries because it would in effect reduce the benefits which accrued to individual pupils under the program not to mention the fewer resources that would be available for the UPE schools. While the hearing of the main suit was pending, the petitioners sought an injunction restraining the government from “...implementing or enforcing any reduction in the UPE Capitation Grant’ pending disposal of the main application.”¹⁵⁴

In refusing to grant the motion, the court observed that “... the intention of the government as a whole is never to deprive any school going child from the right to an education.”¹⁵⁵ To grant the application for an injunction, the court continued, would amount to “... taking the wheels off the vehicle of the Government in its drive to provide an education to the children of Uganda.”¹⁵⁶ According to the court, the action of the applicants would have the effect of stopping the allocation of up to 10% of the national budget, and would thus “... deprive the children of Uganda the right to an education as set out in Article 30 of the Constitution. Such interference cannot be remedied or corrected by any of the proposals made by the Applicants.”¹⁵⁷

The court was of the view that if the application were to be granted the financial management of the country would be placed in ‘uncertainty’ and “... even the Courts which are dependent on the National Development Plan may cease to function due to the lack of appropriation of funds under the budget.”¹⁵⁸ At the end of the day, the government decided not to cut the budget. The parties to the suit (ISER and the government) then entered mediation in order to work out a compromise position with respect to the main suit. However, at the time of writing this lecture, no progress appears to have been made on the matter, but the case demonstrates that the courts still remain reluctant to engage with the state over ESCRs.

Indeed, there have only been a handful of cases on this category of rights in Uganda, negating one of the foundational elements of Public Interest Litigation, *viz.*, the protection of what former Indian Chief Justice Bhagwati called the ‘meek and the lowly.’ Where courts have enforced ESCRs in Uganda, this has been sporadic and somewhat

154 *Initiative for Social and Economic Rights (ISER) and Hon. Ssewungu Gonzaga Joseph v. The Attorney General of Uganda*, Misc. App. No.173 of 2014.

155 *Id.*, at 6.

156 *Id.*, at 7.

157 *Id.*, at 7.

158 *Id.*, at 8.

accidental, as in the case of *Karokora v. AG*,¹⁵⁹ which involved the right to a pension, with the court declaring that:

Article 254 of the Constitution leaves no doubt in anyone's mind that a pension is an enforceable right in Uganda. Even without Article 254 of the Constitution, but by merely reading section 9(1) of the Pensions Act in conjunction with Article 45, of the Constitution, the inevitable conclusion would be that a pension is an unshakable and enforceable right to any pensioner in Uganda. Thus any suit intended to enforce a pension right would be competent.¹⁶⁰

Karokora's case was a progressive decision. But perhaps this was because it involved a former colleague in the court and the judges could see themselves arriving at the same desperate position in a short matter of time. The courts have otherwise failed to embrace ESCRs and as the preceding analysis has revealed, there have been a number of setbacks registered in the few petitions of this genre.

Since the matter is no longer *sub judice*, the case of the *IPPR* injunction introduced at the beginning of this lecture can now be joined in full discussion. What in substance was the *IPPR* case all about? The petitioner argued that the case in the first instance was about the issue of the right of Ugandan citizens to healthcare and adequate medical services. According to them, it is a right that is not only guaranteed by our Constitution (specifically in the National Objectives and Directive Principles of State Policy—NODPSP), but also by the international instruments to which Uganda is signatory such as the ICESCR and CEDAW. Furthermore, under general International Human Rights Law, the government also had an obligation to ensure that these rights were fulfilled. The petitioner further argued that by engaging in the Brain Drain scheme government was in patent violation of this obligation.

The government's response to the petition was first of all to argue that the Right to Health—unlike for example the Right to Education—is actually not a guaranteed right because the Bill of Rights does not specifically contain such a right and the NODPSP are not a binding obligation. Secondly, the government's efforts to ensure the realization of the right were constricted by the lack of the necessary resources. In such circumstances and where the government is unable to assure

159 Civ. CS. No. 591 of 2007; [2009] UGHC 162.

160 *Id.*, at 169.

to all its graduating doctors and other medical personnel jobs which can adequately compensate them, such a scheme is perfectly legal. Moreover, doctors—like anybody else—have the right to freedom of movement and also to a living wage which the scheme was guaranteed to give them.

Justice Musoke's reluctance to engage the issues in the *IPPR* injunction against the Trinidad Brain Drain scheme and seeking refuge in the PQD re-emphasized two things. The first was the dominant judicial and scholarly view in Uganda on the issue of the justiciability of Economic, Social and Cultural Rights. It is that such rights are simply not justiciable. Thus, in an otherwise erudite paper on the place of the Judiciary in Uganda's constitutional development, Prof. Fred Ssempebwa boldly (but erroneously) states, "The national objectives and directive principles are *of course* not directly justiciable."¹⁶¹ Judges like Egonda-Ntende adopt a different view, arguing that those objectives should provide the framework for a new kind of jurisprudence in Uganda.

Needless to say, the Egonda-Ntende view on justiciability and ESCRs is not the dominant one. And the majority view relates to a fundamental problem in the structure of legal teaching and education in this country and a continuing failure on the part of the Judiciary to grasp the nature, content and application of this latter category of rights. Needless to say, that is a problem of considerable magnitude which requires a wholly separate analysis from the one being pursued in this lecture.

However, the second position of the court—namely that there are certain matters which a court in present-day Uganda cannot inquire into because of the PQD—amounts not only to a fundamental mis-reading of the 1995 Constitution, but a marked reversal from the jurisprudence that has been built up over the character of judicial power over the last two decades. Unfortunately, it reveals the continuing impact of the PQD that *ex parte Matovu* imported into Uganda. Justice Musoke was quite clearly extremely reluctant to get involved in an issue she was of the opinion the Executive should be left alone to handle. Simply put, such a position amounts to an abdication of duty.

¹⁶¹ Ssempebwa, *op.cit.*, at 14. He redeems himself somewhat by going on to say, "It is submitted however, that they are the most important part of the Constitution because they guide or ought to guide the implementation of the Constitution. The extent to which organs of government implement the objectives is what must determine their efficiency in the eyes of the people." *Id.*

5. And in the end ... which ghost will it be?

This story ends where it began, in Justice Elizabeth Musoke's courtroom in the High Court building in central Kampala. It is the same building in which the most significant battle in Ugandan Constitutional Law took place fifty years ago, although many of the judges of the Court are dispersed throughout Kampala in various buildings around the city as well as at the regional centres where the High Court now has branches. All the original *dramatis personae* who peopled the case of *ex parte Matovu* have passed on. To borrow from the main theme of this study, they have become 'ghosts,' with Udoma passing away in 1998.¹⁶²

Despite the departure of the main protagonists in Matovu's case, this study has demonstrated that the twin legacies bequeathed by the case to Ugandan jurisprudence—the PQD and the PIL—continue to live on in our law, albeit in a relationship that is unhappy and problematic for the broader Ugandan citizenry.

Perhaps our ambitions are raised too high; the resilience of the PQD may point to a broader issue than just the manner in which the judiciary approaches and decides the controversial issues which arrive in the courts of law. In this respect the words of Kwasi Prempeh are apposite:

Judicial review is not a self-contained, self-sustaining power detached from the social and political forces of the moment. Stressing the overriding social and political enablers of judicial review, as opposed to the purely judge-centered accounts, is not intended to dismiss judicial agency or the role of judicial preferences. Rather, it is to emphasize that prospect of transformative, counter-authoritarian judicial review is dependent, for its success, on sustained support from influential social and political constituencies (popular as well as elite) and on prevailing conditions outside the courts. Judges, even when vested with the constitutional review powers, cannot by themselves undertake the project of social and political change. Progress and transformative shifts in the direction of the law, when they come by means of judicial decisions, are often products of the interaction between the legal and political

163 Only one to my knowledge—Peter James Nkambo Mugerwa—is still alive and well, retired on a farm in Mukono. After leaving the Attorney General's Chambers in 1974, Mugerwa went on to join another important figure from history, Fred Mpanga—the last Attorney General of Buganda before kingdoms were abolished—to set up Mpanga and Mugerwa, which has since morphed into the very successful MMAKS Advocates.

axes.¹⁶³

The battle between the PQD and PIL now mainly centres around the status of ESCRs and on other issues in which the Judiciary is too timid to directly confront the Executive and Parliament. That battle brings the two ghosts of *ex parte Matovu* into head-on collision, i.e. the one which allows the government to escape all its obligations to ensure that human rights are respected, and the other which underlines the point that the obligation to respect, protect and fulfil human rights also attaches to the State. Hopefully, in this battle over destiny PIL will eventually triumph. That should lead to reconciliation between the two ghosts with the good one of them prevailing over her evil sibling.

163 Prempeh, 2012 at 177.

BIBLIOGRAPHY

- Abati, Reuben, 'Udo Udoma: In The Shelter Of The Elephant Rock [Book Review],' Nigeria Village Square: Marketplace of Ideas, March 8, 2009, accessed at: <http://www.nigeriavillagesquare.com/reuben-abati/book-review-udo-udoma-in-the-shelter-of-the-elephant-rock.html>.
- Aizenberg, Edna, 'I Walked with a Zombie: The Pleasures and Perils of Postcolonial Hybridity,' *World Literature Today* (Summer 1999): 461-466.
- Amerit, Timothy, 'The Doctrine of Political Question: Is It's Non-Justiciability At the Brink of Erosion in the Legal Jurisprudence of Uganda,' August 24, 2014, accessed at: <http://timothyamerit.blogspot ug/2014/08/the-doctrine-of-political-question-is.html>.
- Anyangwe, Carlson, REVOLUTIONARY OVERTHROW OF CONSTITUTIONAL ORDERS IN AFRICA, Langaa Research & Publishing, Mankon, 2012.
- Aremu, L.O., 'Criminal Responsibility for Homicide in Nigeria and Supernatural Beliefs,' *International & Comparative Law Quarterly*, Vol.29, No.1 (1980): 112-131.
- Baxi, Upendra, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," *Third World Legal Studies*, Vol.4 (1985).
- Bukumunhe, Alex, 'Why Katureebe was Finally Appointed CJ,' *Red Pepper*, March 6, 2015.
- Churchill, R. C., SHAKESPEARE AND HIS BETTERS: A HISTORY AND A CRITICISM OF THE ATTEMPTS WHICH HAVE BEEN MADE TO PROVE THAT SHAKESPEARE'S WORKS WERE WRITTEN BY OTHERS, Max Reinhardt, London, 1958.
- Coetzee, Johann, *Disgrace*.
- Collins, Jane and Viv Gardner, 'Mother Uganda,' *The Guardian*, March 15, 1999, at: <http://www.theguardian.com/news/1999/mar/15/guardianobituaries1>.
- Dash, Mike, 'Ghosts, Witches, Vampires, Fairies and the Law of Murder,' March 24, 2009, *Charles Fort Institute*, accessed at: <http://blogs.fortean.org/node/71>.
- Dennison, Brian D., 'The Political Question Doctrine in Uganda: A Reassessment in the Wake of CEHURD,' accessed at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441873.
- Derrida, Jacques, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING & THE NEW INTERNATIONAL, trans. Peggy Kamuf (New York and London: Routledge, 1994).
- Ellet, Rachel L., *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda*, Northeastern University Public and International Affairs Dissertations, Department of Political Science, May 01, 2008, Public and International Affairs Dissertations. Paper 3. <http://hdl.handle.net/2047/d10016120>.
- Encyclopaedia Britannica, 'Okot p'Bitek: Ugandan author,' <http://global.britannica.com/EBchecked/topic/447604/Okot-pBitek>.
- Geschiere, Peter, THE MODERNITY OF WITCHCRAFT: POLITICS AND THE OCCULT IN POSTCOLONIAL AFRICA, University of Virginia Press, Charlottesville/London, 1997.
- Green, Matthew, THE WIZARD OF THE NILE: THE HUNT FOR AFRICA'S MOST WANTED, London, Portobello, 2008.
- Griffiths, Charlie, 'More things in Heaven and Earth: The Role of Ghosts and the Supernatural in Shakespeare's Hamlet and Macbeth,' accessed at: <https://www.uclan.ac.uk/students/research/crit/griffiths.php>.
- Hickes, Martin, 'In search of Shakespeare's ghosts,' *The Guardian*, <http://www.theguardian.com/uk/the-northerner/2011/jul/14/in-search-of-shakespeare-s-ghosts>.
- Ingham, Kenneth, OBOTE: A POLITICAL BIOGRAPHY, Routledge, London, 1994.
- Kahill, Patricia, 'Kalungu West MP Seeks To Block the Reading of the National Budget,' *UG News*,

- May 7, 2014, accessed at: <http://news.ugo.co.ug/kalungu-west-mp-seeks-block-reading-national-budget/>.
- Kakande, Angelo, *Contemporary Art in Uganda: A Nexus Between Art and Politics*, unpublished Ph.D Thesis, University of the Witwatersrand, Johannesburg, 2008.
- Karugaba, 'Public Interest litigation in Uganda: Practice and Procedure (Shipwrecks and Seamarks),' paper presented at the Judicial Symposium on Environmental Law, 11-13 September, 2005.
- Kasozi, A.B.K., *THE SOCIAL ORIGINS OF VIOLENCE IN UGANDA*, McGill-Queens University Press, Montreal/Kingston, 1994.
- Kirkby, Coel Thomas, *Exorcising Matovu's Ghost: Legal Positivism, Pluralism and Ideology in Uganda's Appellate Courts*, Unpublished LLM Degree, University of Montreal, 2007.
- Kirunda, Robert, *An Analysis of Article 126(2)(e) of the 1995 Constitution of Uganda: Application and Interpretation by the Courts*, Lambert Academic Publishing, 2010.
- Kiyimba, Abasi, 'The Ghost of Idi Amin in Ugandan Literature,' *Research in African Literatures*, Vol.29, No.1 (Spring 1998): 124-138.
- Leman, Peter, 'Singing the Law: Okot p'Bitek's Legal Imagination and the Poetics of Traditional Justice,' *Research in African Literatures*, Vol. 40, No. 3, (Fall 2009): 109-128.
- Linz, Juan J., 'The Perils of Presidentialism,' *Journal of Democracy*, Vol.1, No.1, (Winter 1990): 51-69.
- Magembe, Muwonge, '1966 Crisis: Here is the Truth about the Relationship between Obote and Mutesa,' *Sunday Vision*, May 24, 2015.
- Marcuse, Herbert, *ONE-DIMENSIONAL MAN*, 1964, at 194, *quoted* in Jacob Glover, 'Herbert Marcuse: Believing in Ghosts As a Way Toward Philosophy,' *Numéro Cinq Magazine*, Vol. III, No. 11, (November 2012): accessed at: <http://numerocinqmagazine.com/2012/11/02/herbert-marcuse-believing-in-ghosts-as-a-way-toward-philosophy-jacob-glover/>.
- Mazrui, Ali, 'Between Secular Activism and Religious Observance-Abu Mayanja and Africa's Triple Heritage,' Inaugural Abu Mayanja Memorial Lecture, July 30, 2007 at 6-7, accessed at: <http://www.scribd.com/doc/243052267/Between-Secular-Activism-and-Religious-Observance-Abu-Mayanja-and-Africa-Triple-Heritage#scribd>.
- Mbabazi, Mohamed, 'The Interpretation and Application of Article 126(2)(e) of the 1995 Constitution of Uganda: Desecration or Consecration?' *East African Journal of Peace & Human Rights*, Vol.7, No.1, (2001).
- Mbazira, 'Translating Socio-economic Rights from Abstract Paper Rights to Fully Fledged Individual Rights: Lessons from South Africa,' *East African Journal of Peace and Human Rights*, Vol.12, No.2, (2006).
- Morrison, Toni, *BELOVED*.
- Mwesigwa, Alon, 'Uganda Crippled by Medical Brain Drain,' *The Guardian*, February 10, 2015, accessed at: <http://www.theguardian.com/global-development/2015/feb/10/uganda-crippled-medical-brain-drain-doctors>.
- Namboze, Betty, 'Just as Kenzo sang, Ugandans Fear No Losses,' *The Observer*, September 2—3, 2015.
- Napček-Neogy, Barbara, 'Uganda Diary: A Matter of Transition,' *Transition*, No.75/76 (1997): 244-248.
- Nyamnjoh, Francis, 'Delusions of Development and the Enrichment of Witchcraft Discourses in Cameroon,' in Henrietta L. Moore & Todd Sanders (eds.), *MAGICAL INTERPRETATIONS, MATERIAL REALITIES: MODERNITY, WITCHCRAFT AND THE OCCULT IN POSTCOLONIAL AFRICA*, Routledge, London/New York, 2001.
- Obama, Barack, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE*, Kodansha International,

- New York/Tokyo/London, 1995.
- Ogoola, James, 'The Rule of Law in Uganda: Fifty Years of Trial and Tragedy,' Keynote Address to the Uganda Law Society Rule of Law day, Kampala, October 8, 2012, in *The Observer*, October 22, 2012, accessed at: <http://www.observer.ug/component/content/article?id=21672:justice-james-ogoola-the-age-of-the-rule-of-tear-gas&showall=1>.
- Okolo, M.S.C., *AFRICAN LITERATURE AS POLITICAL PHILOSOPHY*, CODESRIA/Zed Books, Dakar/London/New York, 2007.
- Oloka-Onyango, J., 'Expunging the Ghost of Ex parte Matovu: Challenges Facing the Ugandan Judiciary in the 1995 Constitution,' *Makerere Law Journal*, 1996.
- Oloka-Onyango, J., 'Judicial Power and Constitutionalism in Uganda,' in Mahmood Mamdani & J. Oloka-Onyango, *STUDIES IN CONSTITUTIONALISM, SOCIAL MOVEMENTS AND LABOUR*, CBR, Kampala, 1994.
- Oloka-Onyango, J., *Economic and Social Human Rights in the Aftermath of Uganda's Fourth Constitution: A Critical Reconceptualization*, Centre for Basic Research, Kampala, Working Paper No.88/2004.
- Oloka-Onyango, J., 'NGO Struggles for Economic, Social and Cultural Rights in UTAKE: A Ugandan Perspective,' in Makau Mutua (ed.), *HUMAN RIGHTS NGOS IN EAST AFRICA: POLITICAL AND NORMATIVE TENSIONS*, University of Pennsylvania Press, Philadelphia, 2009.
- Oloka-Onyango, J., 'Using Courts to Tackle Social Exclusion and Poverty: The Case of post-2010 Kenya,' Vol.19, *Law, Democracy & Development*, (2015).
- Onyango-Obbo, Charles, 'The Untold Story of a Failed Assassination: The Aftermath (Part VI),' *The Monitor*, Oct. 14, 2001, accessed at: <https://groups.yahoo.com/neo/groups/FedsNet/conversations/messages/1000>.
- p'Bitek, Okot, (with Kwasi Wiredu), *DECOLONIZING AFRICAN RELIGION: A SHORT HISTORY OF AFRICAN RELIGIONS IN WESTERN SCHOLARSHIP*, Diasporic Press, New York, 2011.
- p'Bitek, Okot, *AFRICAN RELIGIONS IN WESTERN SCHOLARSHIP*, East African Literature Bureau, Kampala, 1970.
- p'Bitek, Okot, *AFRICA'S CULTURAL REVOLUTION*, Macmillan Books, Nairobi, 1973.
- p'Bitek, Okot, *ARTIST, THE RULER: ESSAYS ON ART, CULTURE AND VALUES*, East African Literature Bureau, Kampala, 1986.
- p'Bitek, Okot, *RELIGION OF THE CENTRAL LUO*, East African Literature Bureau, Kampala, 1971.
- p'Bitek, Okot, *SONG OF LAWINO AND SONG OF OCOL*, Oxford, Heinemann, 1972.
- p'Ochong, Lubwa, 'Biographical Sketch,' in p'Bitek, Okot, *ARTIST, THE RULER: ESSAYS ON ART, CULTURE AND VALUES*, East African Literature Bureau, Kampala, 1986.
- Peeren, Esther, 'Everyday Ghosts and the Ghostly Everyday in Amos Tutuola, Ben Okri, and Achille Mbembe,' in María del Pilar Blanco & Esther Peeren (eds.), *POPULAR GHOSTS: THE HAUNTED SPACES OF EVERYDAY CULTURE*, Continuum, New York, 2010.
- Prempeh, H. Kwasi, 'Neither "timorous souls" nor "bold spirits": Courts and the politics of judicial review in post-colonial Africa,' in *Verfassung und Recht in Übersee VRÜ* 45 (2012): 157-177, accessed at: http://www.vrue.nomos.de/fileadmin/vrue/doc/Aufsatz_VRUE_12_02.pdf.
- Ryan, Arliss, *THE SECRET CONFESSIONS OF ANNE SHAKESPEARE* (2010).
- Serubiri, Moses, 'Political Music: Kadongo Kamu is Dead,' *Start: Journal of Arts & Culture*, accessed at: <http://startjournal.org/2012/04/political-music-kadongo-kamu-is-dead/>
- Serumaga, Robert, *Amayirikiti*.
- Serumaga, Robert, *Renga Moi*.

Shakespeare, William, HAMLET.

Soniak, Matt, '4 BR, 2 BA, 1 Ghost: What the Law Says About Selling Haunted Houses,' Mental Floss, October 31, 2011 accessed at: <http://mentalfloss.com/article/29123/4-br-2-ba-1-ghost-what-law-says-about-selling-haunted-houses>.

Ssempebwa, E.F., 'The Role of the Judiciary in Developing the Constitution: Uganda's Experience,' (n.d.).

Taiwo, Olufemi, 'Exorcising Hegel's Ghost,' revised version of a public lecture delivered to the Association of Students of African Descent at Simon Fraser University, Burnaby, B.C., Canada, Friday, 21st February, 1997, accessed at: <http://www.virginia.edu/woodson/courses/aas102%20%28spring%2001%29/articles/femi.htm>. Also published as 'Exorcising Hegel's Ghost: Africa's Challenge to Philosophy,' *African Studies Quarterly*, Vol.1(1998): 4.

Tumwine Mukubwa, Grace Patrick, FREE AND FAIR DEMOCRATIC ELECTIONS: A COMMENTARY ON THE UGANDA CASE OF (RTD) COLONEL DR. KIZZA BESIGYE VERSUS LT. GEN. KAGUTA MUSEVENI AND ANOTHER, East African Law Watch, Kampala, 2004.

Tumwine Mukubwa, Grace Patrick, 'Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa,' in J. Oloka-Onyango (ed.), CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES, Fountain Publishers, Kampala, 2001.

Tusasirwe, Benson, *The Judiciary under Uganda's Fourth Constitution*, CBR Working Paper No.104/2014.

Tutuola, Amos, MY LIFE AS A PALM-WINE DRINKARD AND MY LIFE IN THE BUSH OF GHOSTS, New York, Grove Press, 1994 (first published in 1954).

Udoma, Udo, THE EAGLE IN ITS FLIGHT: BEING THE MEMOIR OF THE HON. SIR UDO UDOMA, CFR. USA. Nigeria. UK: Grace & Son, 2008.

Uganda People's Congress, 'Milton Obote: Telling his own Lifetime Story,' (Victor Karamagi, *Daily Monitor*, October 24, 2005), accessed at: http://www.upcparty.net/memorial/life_story.htm.

Wikipedia, 'Egbert Udo Udoma,' accessed at: http://en.wikipedia.org/wiki/Egbert_Udo_Udoma

Wikipedia, 'The Hammersmith Ghost Murder Case,' accessed at: http://en.wikipedia.org/wiki/Hammersmith_Ghost_murder_case.

Wikipedia: The Free Encyclopaedia, 'Ghost Characters,' accessed at: http://en.wikipedia.org/wiki/Ghost_character.

Cases Cited

44123 Ontario Limited (Export—Import) Division v. Attorney General & 4 Others, (Civil Suit No.1038 of 1990)

Ananais Tumukunde v. The Attorney General, (Constitutional Petition No.04/2009)

Andrew Lutakome Kayira & Paulo Ssemogerere v. Edward Rugumayo, Omwony Ojwok, Frederick Ssempebwa & 8 others (Constitutional Case No.1 of 1979)

Association of Women Lawyers & 4 Ors. v. Attorney General (Constitutional Petition No. 2 of 2003)

Attorney General v. Osotraco, (Civil Appeal No 32 of 2002)

Attorney General of Uganda v. The Kabaka's Government, [1965] EA 393

Attorney General v. Joseph Tumushabe (Constitutional Appeal No.3 of 2005)

Attorney General v. Major General David Tinyefuza (Constitutional Appeal No.1 of 1997)

Baker v. Carr, 369 U.S. 186 (1962)

Baku Raphael Obudra & Obiga Kania v. The Attorney General, (Constitutional Petitions Nos.4/2002 and 6/2002)

Brigadier Henry Tumukunde v. Attorney General and Electoral Commission (No.1), (Constitutional Petition No.6 of 2005)

Brigadier Henry Tumukunde v. Attorney General and Electoral Commission (No.2), (Constitutional Appeal No.2 of 2006)

British American Tobacco Ltd. v. Environmental Action Network Ltd., (Civil Appeal No.27/2003)

Byabazaire Grace Thaddeus v. Mukwano Industries, (H.C. Misc. Applic. No.909 of 2000)

CEHURD v. the Attorney General, (Constitutional Petition No.16 of 2011)

Charles Onyango Obbo & Andrew Mujuni Mwenda v. The Attorney General No.1, (Constitutional Petition No.15 of 1997)

Charles Onyango Obbo & Andrew Mujuni Mwenda v. The Attorney General No.2, (Constitutional Appeal No.2 of 2002; [2004] UGSC 1)

Col. (rtd.) Kizza Besigye v. Yoweri Kaguta Museveni, (Presidential Election Petition No.1 of 2001)

Dimanche Sharon et al v. Makerere University (Constitutional Cause No.01 of 2003)

Dr. James Rwanyarare & Ors. v. Attorney General, (Constitutional Application No.6 of 2002)

Dr. Rwanyarare James and Anor v. The Attorney General (Constitutional Petition No. 11 of 1997)

Edward Frederick Ssempebwa v. The Attorney General (Constitutional Case No.1 of 1987)

Edward Frederick Ssempebwa v. The Attorney General, (Miscellaneous Application No.90 of

1986)

FIDA-U and 4 others v. the Attorney General (Constitutional Petition No. 2 of 2003)

Gerald Karuhanga v. The Attorney General, (Constitutional Petition No.39 of 2013)

Grace Stuart Ibingira & 4 Others v. Uganda [1966] EA 306

Greenwatch (U) & ACODE v. Golf Course Holdings Ltd., (H.C. Misc. Applic. No.390 of 2001)

Hon. Miria Matembe & 2 Others v. The Attorney General, (Constitutional Petition No.02 of 2005)

Initiative for Social and Economic Rights (ISER) and Hon. Ssewungu Gonzaga Joseph v. The Attorney General of Uganda, (Misc. App. No.173 of 2014)

Ismail Serugo v. KCC & Attorney General, (Constitutional Appeal No. 2 of 1998)

Jim Katugugu Muhwezi v. The Attorney General, (Constitutional Petition No.4 of 1988)

Karokora v. AG, (Civ. Cs. No. 591 of 2007; [2009] UGHC 162)

Law & Advocacy for Women in Uganda v. The Attorney General, (LAW-U No.1) (Constitutional Petitions Nos.13/05 and 05/06 [2007])

Law & Advocacy for Women in Uganda v. The Attorney General, (LAW-U No.2), (Constitutional Petition No. 8 of 2007)

Major General David Tinyefuza v. Attorney General (Constitutional Case No.1 of 1996)

Marbury v. Madison (5 U.S. 137 (1803))

NAACP v. Button (Ld 2d 405)

National Association of Professional Environmentalists (NAPE) v. AES Nile Power, (H.C. Misc. Applic. No.268 of 1999)

Julius Ochen & Others v. The Attorney General, (HCCS. 292 OF 2010)

Onyango Obbo & Andrew Mwenda, (Constitutional Petition No. 15 of 1997)

Opoloto v. Attorney General, [1969] EA 631

Paul K. Ssemogerere, Zachary Olum & Rainer Kafire v. The Attorney General, (Constitutional Appeal No.1 of 2002)

Prof. J. Oloka-Onyango & 9 Others v. Attorney General, Constitutional Petition No.8 of 2014, *R. v. Binaisa* [1959] EA

Rwanyarare and Afunadula v. Attorney General, (Constitutional Petition No.11 of 1997)

Salvatori Abuki & Richard Obuga v. The Attorney General (Constitutional Case No.2 of 1997)

Simon Kyamanywa v. The Attorney General, (Constitutional Court Const. Ref. No. 10 of 2000)

Siraji Waiswa v. Kakira Sugar Works Ltd., (H.C. Misc. Applic. No.230 of 2001)

Stambovsky v. Ackley, 169 A.D.2d 254 (*N.Y. App. Div. 1991*)

State v. Dosso PLD 1958 SC 533

The Environmental Action Network (TEAN) v. The Attorney General and the National Environment Management Authority (NEMA), (H.C. Misc. Applic. No.39 of 2001)

The Institute of Public Policy Research (IPPR) (Uganda) v. The Attorney General, (Miscellaneous Application No.592 of 2014 (arising from Miscellaneous Cause No.174 of 2014)

Twinobusingye Severino v. Attorney General, (Constitutional Petition No.47 of 2011)

Uganda Journalists Safety Committee (UJSC) v. AG, (Constitutional Petition No. 7 of 1997)

Uganda v. Commissioner of Prisons, ex parte Michael Matovu [1966] EA 514

Utex Industries Ltd. v. Attorney General, (SCCA No.52 of 1995)

Zachary Olum & Rainer Kafiire, (Constitutional Petition No.6 of 1999)

