BLACK LAWS MATTER

BENEDICTO KIWANUKA'S LEGACY AND THE RULE OF LAW IN THE 'NEW NORMAL'

KEYNOTE ADDRESS

BY

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AT THE 3RD BENEDICTO KIWANUKA MEMORIAL LECTURE

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THE HIGH COURT, KAMPALA

My Lord The Hon. Alfonse Chigamoy Owiny-Dollo, The Chief Justice of the Republic of Uganda,
The Hon. Bart Magunda Katureebe, The Chief Justice of the Republic of Uganda,
The Hon. The Deputy Chief Justice,
The Honorable Minister of Justice and Constitutional Affairs,
The Hon. The Principal Judge,
My Lords the Justices and Judges,
The Chief Registrar,
The Family of the Late Benedicto Kiwanuka,
Heads of JLOS Institutions,
Permanent Secretaries,
Your Worships,
The President of the Uganda Judicial Officers Association,
The President of the Uganda Law Society,
Invited Guests,
Ladies and Gentlemen.

1.0 Introduction

I thank the Chief Justice Alfonse Chigamoy Owiny-Dollo for inviting me to give this lecture in memory of the first Ugandan Chief Justice of our country, the late Benedicto Kagimu Mugumba Kiwanuka.

I am deeply honoured to have been so invited. In the first place because of the immense stature of the man to whom this day is dedicated. Secondly, given the illustrious nature of the previous two key note speakers (Chief Justice Samuel William Wako Wambuzi – three-time Chief Justice of Uganda and Chief Justice Willy Mutunga, the first Chief Justice of Kenya under the 2010 Constitution of that country).

I am keenly aware of the trust exemplified by this invitation, and do hope to try to live up to it. In the same vein, I would like to take a brief moment to acknowledge two people who have been critical in shaping my life and thoughts over the years, and without whose patient guidance the trust placed upon me today would have definitely been misplaced. First, my late father, Professor Ijuka Kabumba. Secondly, Professor Joe Oloka Onyango. Anything of any importance that I might say today I owe to their support and guidance. Any errors I might make, on the other hand, are entirely my own fault.

2.0 Crisis: Ancient and Modern

We meet today in the throes of a national, regional and global crisis. Covid-19 has fundamentally challenged life as we know it, upending and disrupting all aspects of our life – economic, social and political. Indeed, even today's event is held under 'scientific conditions' with most attending electronically – over Facebook livestream – rather than in person.

In these circumstances, it is little wonder that the organizers of this third memorial lecture thought it best to hold it under the theme: 'Promoting the Rule of Law in the New Normal'. It is an appropriate response to the rapidly changing world that confronts us.

At the same time, this morning, I would like to suggest a different way of thinking about, and approaching, the challenging times in which we find ourselves. That the best way of dealing with change – even rapid change – is to recognize those things which are constant.

I think, in this regard, of the words of King Solomon in Ecclesiastes 1:9 (New International Version):

> *What has been will be again,*
> *what has been done will be done again;*
> *there is nothing new under the sun.*

Thus, while the current times might appear to be without precedent, in the long life of the universe, what we are experiencing – as frightening as it seems – is nothing new.

At the same time, its lack of novelty in the larger scheme of things does not take away its novelty as an experience for us – we who are present in this moment. My suggestion this morning is that, in realizing both the novelty and banality of the present crisis – we appreciate it as an opportunity to courageously rethink a number of the notions to which we cling so tightly for comfort.

Who would have thought that most international borders could be closed, and for so long a time? Or that schools would be closed, and work places shut down – with the world seemingly coming to a slow halt? In this moment in which that which we never thought possible – that which was even unthinkable – could come to pass, is an incredible moment to re-examine other facets of life of our economic, social, political and, indeed, legal life.

This morning, it is with the last of these – our legal life - that I would like to briefly reflect upon as we remember the life and service of Chief Justice Benedicto Kiwanuka. As we remember his ultimate sacrifice for the cause and ideal of the rule of law, I invite us to reflect today as to what this might mean in 'the new normal'.

Before Covid-19, we were a nation in crisis. After Covid-19, we shall remain a nation in crisis. Part of this crisis is one of identity. And this identity crisis then manifests in various aspects of our political, social, economic – and legal – life. This crisis can be captured by asking a few simple questions:

1. What is Uganda?
2. What does it mean to be Ugandan?

Only by seriously asking these two simple questions, and earnestly seeking to answer them, can we then accurately answer a third: 'What law(s) should rule in Uganda?' Put differently, this third question would be: 'Why does the law not rule in Uganda?'

The first two questions are critical because they are among many presumptions upon which we proceed. That there is, indeed, such a genuine political entity called 'Uganda', and that there is, in fact, such a genuine politico-legal identity of 'Ugandanness'. In fact, I suggest that both the notion of 'Uganda' and of 'Ugandanness' are very much works-in-progress, and that the law should be sensitive to this dynamism and complexity.

I might also note, at this point, that the title of this address is inspired by the 'Black lives matter' movement for racial justice and equality, most recently re-ignited by a spate of killings of unarmed African-American people in the United States of America. While this particular brand of violence appears far removed from our Ugandan context and reality, there is, in fact, much in our history and our present legal life which reflects a legacy of legalized violence. For a long time, black lives did not matter in Uganda. And for a long time, arguably todate, black laws did not matter either. In such a context – where the law applied and enforced is largely alien – is it appropriate to uncritically refer to the rule of such alien law?

3.0 English Law (and Lawyers) and African Litigants: The problematic history of the law and the legal profession in Uganda

I will not belabour the point of the problematic nature of the historical, and colonial, mode of the creation of Uganda. Suffice to note that, again like many colonial creations, Uganda was started as a company project – an initiative of the Imperial British East African Company (IBEA Co), and subsequently maintained by military force.[1] How were the constituent peoples, who were forced together throughout the colonial moment, to live together following the moment of formal independence? Thus begins the crisis of identity – including legal identity – with which we continue to grapple today.

There would, however, always remain a tension between the legal order established in the colonial territories and the high principles of law established and enjoyed in the home country of the particular colonial power, whether it was England or France; Portugal or Spain.[2] The law, and lawyers, therefore had a duality that would remain for as long as formal colonialism persisted – an illiberal and oppressive 'law' for dominated peoples and a liberal and progressive legal order claimed for themselves and enjoyed by the colonial powers. This tension would remain a prominent feature of the law for the whole time in which colonialism (and its attendant militarism) was experienced in the Uganda Protectorate.[3]

It is noteworthy, in this regard, that for the greater part of the colonial experience, the law of the Protectorate was conceived, interpreted, applied and otherwise managed by British

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[1] For a recent treatment of this phenomenon, see Burna Boy's 'Another Story' available at https://www.youtube.com/watch?v=JXbWwR4rSmY

[2] To take but one example, elections which were regularly conducted in the United Kingdom during its colonial domination of Uganda were invariably denied to the peoples of the Uganda Protectorate, until the very last few years of colonial rule in the late 1950s and early 1960s.

[3] For instance, the 1902 Order-in-Council, in which the British claimed and exercised sovereignty over the Uganda Protectorate, proclaimed that imperial power had been established in Uganda by 'treaty, grant, usage and other *lawful* means' - Preamble, 1902 Order-in-Council. No mention was made of the violence – direct and indirect (the famous 'gun boat' diplomacy – through which any 'Agreements' or 'treaties' had been obtained.

lawyers.[4] The roots of this anomalous situation had been achieved *via* the Reception Clause of the 1902 Order-in-Council by whose terms the Common Law and Statutes of general application of the United Kingdom would be applied to Uganda and, through which, henceforth, 'customary law' would only be applied in so far as it was not "repugnant to natural justice, equity and good conscience."[5] The essence of this exception was that, along with the installation of colonial political domination, came the imposition of an alien legal system, which immediately alienated the peoples of the Ugandan Protectorate from the mainstream of their own political and legal life.[6] From that time, although the people clearly understood their own laws and traditions, these would only be relevant in the so-called 'native courts'—regulating only the most minor and and mundane aspects of their activities—but would have absolutely no relevance in interactions with the State.

The peoples of the Uganda Protectorate were thus deprived of political power and autonomy over their own destiny, through military force and law, and at the same time deprived of a voice and language through the imposition of the alien British statutory and common law as the language of governance (one in which they were themselves invariably illiterate).

The colonial experience in Uganda was one which, like Covid-19 today, upended all aspects of the lives the dominated people – economic, political, social and legal. Through the 1902 Order-in-Council, the laws of the African were replaced a legal framework which gave pride of place to English Law. From that moment, the laws of the African would only be grudgingly accommodated, in so far as they were not 'repugnant'. While this was an apparently 'neutral' standard, we are very much aware that, in fact, it was a highly subjective one – in which the English way of life became the measure by which African laws and practices were either validated or invalidated. As such, an entire way of life was rendered subordinate to the practices of others – a legal subordination which reflected the subordination in economic, political and social life. The 'native' was supposed to be a subject of, not a participant in, the creation, interpretation, adjudication and application of the law. At the same time, consistent with the distinctly racist premise of the colonial project, that English law to which the 'native' would be subject was one which was shorn of most, if not all, of the more progressive aspects of the metropolitan law.[7] From that time, the disjuncture that had been created between 'law' and the people it was ostensibly meant to serve would be manifested in such familiar decisions as *Gwao Bin Kilimo v Kisunda Bin Ifuti; Rex v Amkeyo* and *Yowasi Pailo.*

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[4]For a brief historical account, see H Lubega 'Western justice system comes to Uganda' in *The Daily Monitor* 4 September 2016 available at https://www.monitor.co.ug/Magazines/PeoplePower/Western-justice-system-comes-to-Uganda/689844-3368500-8i0bkdz/index.html (last accessed 13 June 2020).

[5]For an analysis of the legal effect of such clauses in colonial societies, see L Juma 'From "repugnancy" to "bill of rights": African customary law and human rights in Lesotho and South Africa' (2007) 21 *Speculum Juris* 88-112; M Demian 'On the repugnance of customary law' (2014) 56 *Comparative Studies in Society and History* 508-536; ME Kiye 'The repugnance and incompatibility tests in Anglophone Cameroon' (2015) 15 *African Studies Quarterly* 85-106.

[6] A good example of this disconnect was the case of *T Mwenge v S Migade* Miscellaneous Case No.19 of 1933, in which the Court held that clan land could be sold to a third party – a position which was antithetic to long-cherished Buganda customary law and tradition.

[7] Ironically, while the Commissioner was granted the sole power of making law (in essence legalized dictatorship), this power was supposedly to be exercised for the 'peace, order and good governance' of the Protectorate.

It was clear that law was working as part of a broader process of de-culturization (alongside education, language and others). It was an integral part of the 'civilizing mission' which Lugard and others had proffered as a central tenet of the colonial project. From then on, there would be a clear disconnect and disjuncture between law and society in Uganda – a legal identity crisis which remains with us todate. For instance, while before 1902 the instruction in law was a natural part of socialization and community life, after that time, 'law' became something alien, which could only be understood or learnt by leaving one's society. Legal education, like other forms of education (but even more so), could now only be acquired by 'going away' – literally and metaphorically.

This phenomenon was aptly captured by Okot p'Bitek in his *Song of Lawino*:

> *Listen, my clansmen,*
> *I cry over my husband*
> *Whose head is lost.*
> *Ocol has lost his head*
> *In the forest of books.*
> *When my husband*
> *Was still wooing me*
> *His eyes were still alive,*
> *His eyes were still unblocked,*
> *Ocol had not yet become a fool*
>
> …
>
> *My husband was still a Black man.*
> *The son of the Bull*
> *The son of Agik*
> *The woman from Okol*
> *Was still a man,*
> *An Acoli.*
>
> *My husband had read so much,*
> *He has read extensively and deeply…*
> *And he is clever like white men*
> *And the reading*
> *Has killed my man,*
> *In the ways of his people*
> …
>
> *He abuses all things Acoli,*
> *He says*
> *The ways of black people*
> *Are black*
>
> …

My husband's house
Is a dark forest of books
Some stand there
Tall and huge
Like the Tido tree…

…

I feel like vomiting!
For all our young men
Were finished in the forest
Their manhood was finished
In the classrooms
Their testicles
Were smashed
With large books!

Evidently, colonial education involved a kind of 'social death' – the acquisition of which in a certain real sense – made one socially and culturally unrecognizable.

Simultaneously to the imposition of alien regimes of legal governance, colonialism also created a structure which delegitimized traditional forms of knowledge, and being. At the same time, formal education—let alone legal education—was denied to the African. The situation was no different in Uganda. For a long time, the colonial government hesitated to establish a university—let alone a law school within the Uganda Protectorate. The goal of colonial education had always been to produce low-level African civil servants, with just enough education to assist in the running of the colonial education—but not of any quantity, or quality, as to disrupt it. As such, colonial education was designed to create rote learners rather than critical thinkers. Indeed, this explains why Makerere was first established as a vocational school in 1922—the Makerere Technical School (Musisi and Muwanga, 2003: 7; Reid, 2017: 246). The Oxbridge model of higher learning, with its focus on such esoteric subjects as Philosophy, Ethics and the Classics were deemed unsuitable for the tropical climes. According to Musisi and Muwanga, three factors provided the impetus for its establishment: i) the British government's desire, following the First World War, to demonstrate to international society its concern for the welfare of the people in its colonies; ii) the pressing need for skilled African civil servants, other than the initially envisaged cadre of "clerks, messengers and interpreters;" and iii) the findings of the American Phelps-Stokes Commission to the effect that the education provided by missionaries and the State was below par (Musisi and Muwanga, 2003: 7). The Technical School initially taught carpentry, mechanics and building, before the curriculum was broadened to include science and pre-clinical medicine, engineering and agriculture (Musisi and Muwanga, 2003: 7).

By the same token the colonial government was similarly always very hesitant about encouraging the emergence of African lawyers, and actively discouraged their training (Ndulo, 2002: 489). According to William Twining, colonial policy considered it "more important to train engineers, doctors, and agriculturalists than lawyers" since "Africans

who wished to read law were regarded as preparing for a career in politics" and "it would be self-destructive for a colonial government to encourage the production of politicians" (Twining, 1966: 116). Thus, although a High Court—and following that an entire legal profession and architecture—was instituted in the Uganda Protectorate starting from the enactment of the 1902 Order in Council, that significant corpus of the law and its accompanying institutions was something the "native" experienced, rather than participated in.

Law was done to and not for, or by, the indigenous population. For instance, according to the 1904 Uganda Legal Practitioners Rules, the following persons were permitted to practise before Her Majesty's High Court of Uganda: i) members of the Bar of England, Scotland or Ireland (barristers); ii) solicitors of the Supreme Court of England or Ireland, Writers to the Signet and Solicitors to the Supreme Courts in Scotland (solicitors); iii) "pleaders" who had been admitted to practice before one of the High Courts in India; and iv) "native *vakeels*" (Mugerwa, 1968: 105). According to Rule (v) of these Rules, a "native *vakeel*" could be allowed to represent "natives" based on "the discretion of the judge and upon such terms and conditions as he might think fit" (Mugerwa, 1968: 105). Thus, for much of its colonial experience Uganda "received" English law—as well as mainly English lawyers and judges. A legal profession abounded in Uganda, but it was closed to the African, whose interaction with it was either as an accused person, litigant, complainant, witness, interpreter or such other role.

In a context in which legal education was absent and discouraged, any Africans who acquired legal education at the time did so against very many odds—in spite of, rather than because of, the colonial State. Indeed, the only means by which African lawyers could emerge was by way of a trip to London or Delhi; from the former where they would seek admission to one of the inns of Court and thereafter acquire English legal qualifications (Manteaw, 2008: 915).

The major implication of this was that "only the rich could embark on such a quest to attain legal education" and "as a result, in the colonial era, British expatriates and Asians heavily patronized and dominated the legal profession in the African colonies" (Manteaw, 2008: 915). Even those Africans who did make it to England to study law only did so under the most difficult circumstances, often receiving less-than-ideal education and training. As Gower has noted, in the English system of the time, a barrister was not deemed to have been properly trained unless they had both a law degree and bar preparation, as well as pupillage for at least a year in a decent set of chambers (Gower, 1967: 60-61). By contrast, in the African colonies, persons were allowed to practice as both barristers and solicitors with neither a law degree nor pupillage, their only qualification being a call to the Bar in England (Gower, 1967: 60-61). In his view, even if such a call had been buttressed by what was then a traditional three-months post-call training programme, this remained woefully insufficient for the work they were called upon to perform (Gower, 1967: 60-61). He goes on to note that less than 25 per cent of African students were admitted to universities in Britain or Ireland (Gower, 1967: 61-62). In any case, even these were mainly instructed in English law, with no content relevant to the legal framework in East or West Africa (Gower, 1967: 61-62). In his view this failure by the

English legal profession to better support African students was 'one of the gravest indictments' that could be directed against that establishment (Gower, 1967: 61-62).

In these circumstances, African lawyers would only emerge as major actors in the life of the Uganda Protectorate in the late 1950s, following the self-education of a handful of lawyers in the tradition of the British Common Law. Even then, by 1961, out of approximately 150 lawyers practicing law in the Ugandan Protectorate, only 20 were African (Manteaw, 2008: 916). This small group of lawyers would be tasked with the substantial burden of doing what they could to challenge the colonial domination and subordination of their people through the means and tools at their disposal. Indeed, a brief survey of the case law of the post-1950 period shows the emergence of a cadre of African lawyers, who began to engage the legal system of the day in the furtherance of various causes. For instance, the 1954 case of *Mukwaba and Others v Mukubira and Others* (which subtly challenged the deportation of Ssekabaka Mutesa II by Governor Andrew Cohen), was argued by, among others Apollo Kironde.[8] The role of African lawyers was even more prominent in the 1959 cases of *Daudi Ndibarema and Others v Enganzi of Ankole and Others*; *Re G.L Binaisa* and *Katikiro of Buganda v The Attorney General of Uganda*, with JWR Kazzora and L Lubowa singly handling the *Ndibarema* and *Binaisa* cases respectively, and Binaisa himself working with an English QC, Phinehas Quass, in the *Katikiro* case.[9]

Benedicto Kiwanuka's own journey to the law was a similarly difficult one. After military service in Palestine as part of the King's African Rifles (KAR) during World War II, he returned to Uganda, where he obtained employment at this very High Court, as a library attendant. It was from here that, upon the advice of a visiting American lawyer, he decided to embark on a career in the law. He first went to school in present-day Lesotho, from where qualified for entry into law school in the United Kingdom. He was finally admitted to the bar at Gray's Inn in 1956. Like Binaisa and others, following his qualification, Benedicto Kiwanuka used his legal training to defend the victims of injustice, especially as a notable criminal defence lawyer (Ssemogerere, 2015: 2-5).

However, we must hasten to add that this single story cannot by itself provide an exhaustive picture of the experiences, choices and struggles of those early Ugandan lawyers. More work needs to be done to explore these important accounts, as a basis for a more nuanced and comprehensive appreciation, and understanding, of the role these lawyers played in the early democratic struggles of Uganda.

As complex individuals, with diverse backgrounds and experiences, no doubt the composite picture of their various interventions might present significant areas of convergences and, it must be said, critical divergences. For instance, the tentative list of African legal practitioners before the High Court of Uganda in the 1950s shows them to

[8] The two other lawyers for the petitioners were Diplock and Foot, both English QCs.
[9] It is telling, that, in all four cases (*Mukwaba*, *Ndibarema*, *Binaisa* and *Katikiro*) the colonial government of Uganda has exclusively represented by English lawyers.

be exclusively Christian,[10] from Kingdom societies, ethnic Bantu—and male.[11] These identities, taken together with their individual backgrounds and other experiences, doubtless informed their outlook towards, use of, and engagement with, the law—for better or for worse. These factors would also play a role in shaping the course of Uganda's politico-legal history.

The biographies of these early pioneers in the legal profession are worth exploring–and deserve to be properly researched and accurately recorded. They are themselves histories of the legal profession in Uganda itself, and contain important lessons and insights for current and future legal practitioners, students and academics.[12]

4.0 The situation today: African Lawyers, Judges and Litigants and English Law

4.1 The Constituent Assembly and Parliament

Indeed, there are a number of indications that the Ugandan legal establishment is coming to terms with this urgent challenge. To this end, a fundamental step in this regard was taken by the Constituent Assembly in the conceptualization of judicial power under the 1995 Constitution.

In this regard, Article 126 (1) is to the effect that judicial power is derived from the people and that it must be exercised by the courts in the name of the people 'and in conformity with the law and with the values, norms and aspirations of the people' Article 126 (2) goes on to lay down a number of principles by which the courts should be guided, again subject to the law, in adjudicating cases of a civil and criminal nature: i) justice must be done to all irrespective of their social or economic status; ii) justice must not be delayed; iii) adequate compensation must be awarded to victims of wrongs; iv) reconciliation between parties must be promoted; and iv) substantive justice must be administered without undue regard to technicalities. An additional effort in this regard is represented in Article 127, which mandated Parliament to make a law 'providing for participation of the people in the administration of justice by the courts.'

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[10] An exception would emerge at the tail end of the 1950s, when Abubaker Kakyama Mayanja completed the bar at Lincoln's Inn in 1959, having previously completed a law degree at the University of Cambridge in 1957 – S Ssenkaaba 'Celebrating Abu Mayanja the statesman' *The New Vision* 29 July 2007 available at https://www.newvision.co.ug/news/1160110/celebrating-abu-mayanja-statesman.

[11] This would only change in 1965, when Princess Elizabeth Bagaya of the Toro Kingdom qualified as a Barrister-at-Law, having previously completed a degree at the University of Cambridge in 1962. It is telling that her 1965 qualification was a first for a woman not just in Uganda, but the East African region as a whole – Admin 'Legend: Princess Elizabeth Bagaya' *The New Vision* 28 November 2019 available at https://www.newvision.co.ug/news/1511331/legend-princess-elizabeth-bagaya.

[12] It would be interesting, for instance, to study the postures adopted by those lawyers who emerged from humbler backgrounds (such as Binaisa and Mayanja) and those who came more privileged backgrounds (such as Bagaya and Kironde). While, as noted above, Bagaya (the first female lawyer in Uganda) was a member of the Toro royal family, Kironde – the (first African lawyer in Uganda when he qualified in the early 1950s) was the grandson of Sir Apollo Kaggwa, one of the chief negotiators and signatories of the 1900 Buganda Agreement, and one of the three regents of the young Ssekabaka Daudi Chwa – A Mugisa 'Diplomat Kironde is dead' *The New Vision* 22 April 2007 available at https://www.newvision.co.ug/news/1166595/diplomat-kironde-dead.

Also notable are the provisions of the Constitution which recognize a right to cultural life (Article 37).

At the same time, I suggest that this effort, although commendable: i) reveals the legal crisis that the framers of the Constitution were grapping with; ii) did not itself go far enough in affirmatively resolving that crisis. Although the Constitution attempts to re-center '*omuntu wa wansi*' – the ordinary 'Ugandan' - as the central subject of the law, either by design or by default, this effort was not successful.

In the first place, the language of Article 126 maintains the primacy of 'law' even as it attempts to redress the historical wrong of 1902. In the end, therefore, 'the law' – which is really English law – remains hierarchically superior to the real 'law(s)' which the vast majority of Ugandans recognize and by which they order their lives, interactions and affairs.

Secondly, I am not aware of any real attempt on the part of Parliament to effect the constitutional imperative under Article 127. The result is that the real and effective participation of people in the administration of formal justice remains unfulfilled.

Thirdly, the recognition of the right to culture under the Constitution is accompanied by significant language that appears to presume its problematic nature. In any case, at no point in the Constitution is there specific recognition – and affirmation – of customary law.

Statutory law is even more problematic, with the Judicature and the Magistrates' Courts Act, uncritically reproducing both the hierarchical superiority of formal (essentially English) law as well as the 'repugnancy' test for customary law. In this way, the 'second class' nature of African customary law continues to be entrenched in the law.

4.2 The Judiciary

Unfortunately, the second-class status of African customary law appears to be re-affirmed in a number of decided cases. The challenge in this regard appears to stem from the 1965 Kenyan case of *Ernest Kinyanjui Kimani v Muira Gikanga*[13] in which the Court observed that:

> As a matter of necessity, the customary law must be accurately and definitely established ... The onus to do so is on the party who puts forward the customary law ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.[14]

This position seems to have been largely adopted by the Ugandan judiciary.[15] The effect is that a significant barrier is placed in the way of the growth and development of African customary law as a source of law in Uganda.

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[13] (1965) EA 735.

[14] At 789.

[15] See, for instance, the decisions in *Odongo & Anor v Ojera* (CIVIL APPEAL No. 0053 OF 2017) [2019] UGHCLD 1 (21 February 2019); *Jacob Mutabazi Vs. Seventh Day Adventist Church & Anor (*Civil Suit No. 054 Of 2009) [2011] UGHC 53 (29 April 2011); *Ogaba Vs Kilama* (CIVIL APPEAL No. 0051 OF 2015) [2018] UGHCCD 63 (25 October 2018); *Musebeni v Namugala & Anor* (CIVIL APPEAL NO. 40 & 41 OF 2010) [2012] UGHC 242 (16 November 2012); *Mugerwa & Anor v Kiganda* (CIVIL APPEAL NO. 09 OF 2012) [2013] UGHCCD 122 (20 September 2013); *Obitre v Abdu Matua* (CIVIL APPEAL No. 0024 OF 2011) [2017] UGHCLD 16 (23 February 2017); *Alule v Agwe* (CIVIL

A good example of the effect of such an approach is provided by the decision of the Supreme Court in *Uganda Electricity Board v GW Musoke.*[16] In that case, the Supreme Court noted as follows:

> On the second ground of appeal, learned counsel for the appellant … criticized, the learned judge for taking judicial notice of the fact that parents in African societies expect their children to look after them in old age. He argued that under section 55 of the Evidence act. There was no provision authorizing court to take judicial notice of a custom which had to be proved, as was held in *Kimani V. Gikanga & Another* (1965) EA.735.
>
> …
>
> In assessing damages for loss of services and loss of expectation of life, the learned judge said,
>
> 'The deceased at the time of his death was aged 14 years. As the learned counsel rightly pointed out, his age and loss of services which he rendered to his parents as is customary in African Society, complied with their expectations - that he would sustain them in their declining years should be considered by the Court. I accept this submission. Judicial notice could be taken of the fact that Ugandan children like other African ones who are educated at considerable sacrifice by their parents are expected to make some return …'
>
> … The learned judge then took judicial notice of the fact that African children who were educated at considerable sacrifice were expected to make a contribution to their families when they complete school … There was no proof that there existed a custom that children who were educated by their parents were required to support their parents and families on completion of school. There to be evidence to establish the existence or otherwise of a certain custom and it was wrong to presume the existence of any custom. Section 55 of the Evidence Act was silent on power of the court to take judicial notice of notorious facts. In my view, however, the court should have power to take judicial notice of notorious facts. The problem is how to establish that a particular fact is notorious or common knowledge as not to require specific proof. In the present case it was not established that the practice where children provide financial support to their parents was notorious, prevalent, or common, to all children. It may be common in some communities and less common in others. It may well be less common at the material time than it was in the past. In these circumstances, I do not find that the learned judge was justified in taking judicial notice of that so called custom or practice. What was needed was to establish by evidence that there was a reasonable prospect of pecuniary benefit, not merely a fanciful

APPEAL No. 0032 OF 2014) [2017] UGHCLD 17 (23 February 2017); Miza v Bruna Ososi (CIVIL APPEAL No. 0026 OF 2016) [2017] UGHCLD 101 (21 December 2017); *Simea Umika & Ors v Maber Group Farm Limited* (CIVIL APPEAL No. 0019 OF 2016) [2018] UGHCLD 23 (15 March 2018); *Kampala District Land Board and Another v Venansio Babweyaka and Others* ((Civil Appeal No.2 of 2007)) [2008] UGSC 3 (11 February 2008); *Oyua v Okot & 9 Ors* (CIVIL APPEAL No. 0022 OF 2014) [2017] UGHCLD 18 (23 February 2017); *Maghwi v MTN (U) Limited & Anor* (CIVIL APPEAL No. 0027 OF 2012) [2017] UGHCLD 53 (12 April 2017); *Kansiime v Himalaya Traders & 7 Ors* (CIVIL SUIT NO. 132 OF 2011 CONSOLIDATED WITH HCCS NO. 57 OF 2011) [2017] UGHCLD 1 (14 July 2017); *River Oli Division Local Government v Sakaram* (CIVIL APPEAL No. 0018 OF 2013) [2016] UGHCCD 62 (8 September 2016); *Bwetegeine Kiiza & Anor Vs Kadooba Kiiza* (CIVIL APPEAL NUMBER 59 OF 2009) [2015] UGCA 183 (30 June 2015); *Wokorach & Ors Vs Dr. Okech & 3 Ors* (CIVIL SUIT NO. 059 OF 2011) [2019] UGHCCD 158 (30 May 2019).

[16] Civil Appeal No. 30 of 1993, [1994] UGSC 4 (7 September 1994) [Coram: Manyindo DCJ, Odoki JSC and Oder JSC].

> probability as was held in *Barnett v Cohen (*1921) 2. K.B 461…

There is an evident continuity between the colonial and post-colonial experience in Uganda. In the colonial time, Ugandan litigants were faced with the prospect of English Judges, English lawyers and English law. In the post-colonial period, Ugandan litigants now deal with Ugandan Judges, Ugandan lawyers – and again, mainly English law. This is deeply problematic.

At the same time, there are certain instances in which the Courts have been alive to the need to affirm and validate African laws and values. For instance, *Magbwi v. MTN & Anor* Mubiru J took into account the need for the courts to be sensitive to customary laws and institutions:

> Customary laws and institutions are not completely eliminated although their reach is greatly diminished as their application is relegated to instances where the formal, state-sanctioned laws permit. Although, their role has been significantly diminished, customary laws and institutions continue to play a significant role in the lives of large segments of the population in Uganda, in matters that impact greatly on their day-to-day lives, such as inheritance to land …These laws and protocols concern many aspects of their life. They can define rights and responsibilities on important aspects of their life, culture, use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters. In many traditional communities in a rural setting, a majority of the people identify with customary laws of inheritance and conduct their lives in conformity with them … In the rural traditional community setting, interwoven into all interactions between family and community members are the dual concepts of shame and respect. Shame and respect create the parameters for interactions and create the framework for customary law. One reason that customary law is more often used than written law in relation to family and community relations is that it embodies the notions of shame and respect. Where conflicts exist between customary law and written law, customary law generally prevails in the villages because written law often fails to reflect the reality of the villagers' lives. Enactments which disregard the value and strength of these cultural norms are barely embraced. Without an understanding of these fundamental norms of behaviour, such enactments and the decisions based on them quickly become irrelevant. In the result, legal rules do not automatically change or override customary law. Rather, legal rules support change and the desire for change, but real change only occurs when it is no longer shameful or disrespectful to behave in the manner mandated by the legal rule … The struggle of maintaining customary law as a legal system while adhering to the expectations of statutory law and developments in the modern world reflects another battle: that between an idyllic world and the reality of traditional societies.'

In *Lwamasaka Nkonge Prosper (Kinyenyambali) V James Magala Muteweta (Kyana) & Another*[17] the Court was called upon to determine the rightful head of the Kkobe Clan in Buganda (*Namwama).* One of the issues framed was as to whether the matter was justiciable before the court. In determining this issue Judge Musa Ssekaana observed as follows:

> … cultures and customs in our Country are part and parcel of our livelihood. One may say we breathe and live our respective cultures and customs in the way we relate with one

[17] Miscellaneous Cause No. 65 of 2015 & 87 of 2016 [2019] UGHCCD 140 (12 July 2019).

> another as Ugandans of various ethnicities. It is therefore of utmost importance that Ugandans should not forget their origins and background regardless of the evolving modernisations and globalisation the world is experiencing. The identity of Ugandans is of great value and the courts play a major role of observing and enforcing the legislated laws, international laws and the customary traditions/laws in as far as applicable … The question for determination is to what extent should the courts of law determine or entertain disputes arising out of culture or customs of a given area. …The courts are too westernized to handle cultural and customary issues. The laws and the persons who may be faced with a cultural or custom dispute may sometimes be foreign to the given cultural area … It would be prudent to refer such disputes always to the King or the Traditional or cultural Leader since they are custodians of such cultural institutions, customs, practices and norms … The different cultural institutions or Traditional & Cultural leaders must have competent and credible mechanisms of addressing the resolution of disputes in their institutions and territory in relation to customary issues and practices …The legitimacy and acceptability of decisions of courts of law which may not be based on informed or known cultural and customs of the given society, tribe or area will subject to ridicule and may become a recipe for disaster. It is equally important to reflect Uganda traditional culture and principles in a meaningful way within the new constitutional dispensation of our country. The flexible nature of customary law, along with its ability to develop to adapt to changing circumstances, means that it is not possible to identify a unified system on how to resolve disputes in every traditional system of every tribe or ethnicity … Apart from its importance, all customary law and leadership will have to reflect and adjust to the overall changes that have occurred in Uganda's constitutional and legal system. The customs and culture that conflict with the Constitution, especially the Bill of rights or any enacted legislations shall always be challenged in the courts for invalidity. The Constitution is supreme and customary law must comply completely with all constitutional requirements. The current dispute presented in both consolidated applications can better be resolved by traditional systems within the Buganda Kingdom. The court would not competently resolve the issue of who is the proper head of the Kkobe Clan-NAMWAMA. The parties are advised to refer their dispute to the KABAKA OF BUGANDA to address their grievances through their established dispute resolution mechanism.

On another occasion, when dealing with the notion of the 'reasonable man' Justice Kenneth Kakuru in *Male Mabirizi and Others v Attorney General* thought it appropriate to contextualize this to suit the Ugandan context:[18]

> In the context of this Country an ordinary reasonable person, is probably, one who has a national identification card, a mobile phone, listens regularly to radio, attends LCI meetings, has a job or tends to his/her garden or businesses, rides on a boda to town, and takes his /her children to school.[19]

Similarly, Chief Justice Bart Katureebe in *Male Mabirizi and Others v Attorney General* described a house with which many Ugandans could identify:[20]

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[18] Consolidated Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018, available at https://judiciary.go.ug/files/downloads/AgeLimitJudgment_Mbale20180726.pdf

[19] At Page 519.

[20] Consolidated Constitutional Appeals Nos. 2,3 and 4 of 2018, available at https://ulii.org/system/files/judgment/supreme-court-uganda/2019/6/supreme-court-uganda-2019-6.pdf

> To my understanding, the Basic Structure doctrine may be equated to a family house. It must have a strong foundation, strong pillars, strong weight-bearing walls, strong trusses to support the roof. The roof could be grass thatch, as happens in many of our homesteads. The roof could be iron sheets of particular gauge. The iron sheets could be of different colours. If the wind blew away part or all of the roof, the basic structure should remain and the next day the family can put the roof back. But if the weight bearing pillars were undermined or removed, the whole structure would collapse. It would not be a dwelling house any more.[21]

These judicial efforts at re-centering the 'Ugandan' as a real subject of the law are important. At the same time, there remains a need for a more holistic and deliberate treatment of the challenge presented by the disconnect between law and society today.

In many ways, this challenge goes to the root of the credibility and relevance of the Judiciary – and indeed, of the entire legal profession - in contemporary Uganda. As Tamale has noted:

> It is a well-documented fact that the formal legal system is only marginal to the experience of day-to-day justice of African *wananchi*. For example, in Uganda, less than 5 percent of dispute resolution takes place in a court of law. The remaining 95 percent of the population use the informal 'living customary law' or community justice to manage conflicts, maintain social harmony and protect important resources. (Tamale, 2020: 139)

The marginal position of the formal justice system in the lives of most Ugandans is a stark wake-up call to us all.

At this juncture, it may be appropriate to refer to a well-beloved, and oft-quoted, dictum from the famous English Judge, Lord Denning LJ. In *Nyali v Attorney General*,[22] he made the following critical observations:

> The next proviso says, however, that the common law is to apply 'subject to such qualifications as local circumstances render necessary'. This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These offshoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.

[21] At Page 12.

[22] (1955) 1 A.E.R. 646.

While there is some evident good sense in this passage, which might explain its popularity, it also carries many clues to the impasse in which Uganda, like many post-colonial countries, finds itself.

Lord Denning begins from the presumption of the validity of English law. The law is said to have a 'tough character' and to contain 'many principles of manifest justice' and 'good sense'. From Denning's standpoint, therefore, it is not the law that is problematic. Rather, any examination or qualification of that law only arises from certain questions regarding the population(s) to whom it might be applied.

Evidently, he was wrong. The 'oak' might be flourishing, but this is for only 5% of the population. The other 95% appear to prefer the *Muvule* and other trees.

Faced with this legacy, what is to be done? Denning suggested that all that was required was a pruning exercise. I would suggest that what is required is a far greater, more elaborate, and more radical task: uprooting, replanting – and, essentially, 'reforestation'.

This 'reforestation' would have to contend with the planting of not one, but many indigenous trees. To return to the two questions posed at the start – regarding 'Uganda' and 'Ugandanness' – a brief survey of the case law reveals the myriad of societies and communities which come into contact with the formal court system. In this regard, Courts have made various reference to the notions of: clan;[23] Tribe;[24] Tribes in Uganda;[25] Bari tribe;[26] Acholi tribe;[27] Bantu tribes;[28] the Baganda;[29] People in Alwi;[30] Bahima tribe;[31]

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[23] Ojera Vs Labeja (CIVIL APPEAL No. 0020 OF 2013) [2018] UGHCCD 61 (25 October 2018); Miza v Bruna Ososi (CIVIL APPEAL No. 0026 OF 2016) [2017] UGHCLD 101 (21 December 2017); Namukasa v Kakondere (DIVORCE CAUSE NO. 30 OF 2010) [2015] UGHCFD 49 (10 April 2015); Rwabinumi v Bahimbisomwe (CIVIL APPEAL NO. 10 OF 2009) [2013] UGSC 5 (20 March 2013); Muhindo & 3 Ors Vs Attorney General (MISCELLANEOUS CAUSE No.127 OF 2016) [2019] UGHCCD 3 (25 January 2019; Attorney General v Salvatory Abuki (CONSTITUTIONAL APPEAL NO. 1 OF 1998) [1999] UGSC 7 (25 May 1999); Ayiko v Lekuru (DIVORCE CAUSE No. 0001 OF 2015) [2017] UGHCFD 1 (17 February 2017).

[24] Law Advocacy for Women in Uganda v Attorney General ((Constitutional Petitions Nos. 13 /05 /& 05 /06)) [2007] UGCC 1 (5 April 2007); Magbwi v MTN (U) Limited & Anor (CIVIL APPEAL No. 0027 OF 2012) [2017] UGHCLD 53 (12 April 2017); Ayiko v Lekuru (DIVORCE CAUSE No. 0001 OF 2015) [2017] UGHCFD 1 (17 February 2017); Andrew Mujuni Mwenda & Anor v Attorney General (Constitutional Petition No.12 of 2005) [2010] UGCC 5 (25 August 2010); Carolyne Turyatemba & 4 Ors Vs Attorney General & anor ((CONSTITUTIONAL PETITION NO.15 OF 2006)) [2011] UGCC 13 (8 August 2011); His Majesty Omusinga Mumbere Vs Uganda (CRIMINAL MISC. APPLICATION NO. 075 OF 2016) [2017] UGHCCRD 11 (13 January 2017); Fredrick Kato v Ann Njoki (HCT-00-FD-DC-0010-2007) (HCT-00-FD-DC-0010-2007) [2009] UGHC 23 (28 January 2009);

[25] Law & Advocacy for women in Uganda v Attorney General (Constitutional Petition No. 8 of 2007) [2010] UGCC 4 (28 July 2010);

[26] Oyee & 2 Ors v zubeida (CIVIL APPEAL No. 0027 OF 2012) [2017] UGHCLD 27 (29 March 2017).

[27] Amongin Vs Akello (HCT-05-CV-EP-0001 OF 2014) [2015] UGHCCD 47 (29 June 2015);

[28] Ebil Fred vs Ocen Peter & Anor (ELECTION PETITION NO. 001 OF 2016.) [2016] UGHCEP 39 (12 August 2016);

[29] Ahamad Ssebuwufu v Uganda (HCT-OO-ICD-CM-0021-2019) [2020] UGHCICD 1 (8 January 2020); Paul Kafeero and Another vs Electrol Commision and Attorney General ((Constitutional Petition No. 22 of 2006)) [2008] UGCC 3 (30 April 2008); Re Nakawesa, Namanda & Katongole (infants) (ADOPTION CAUSE NO 164 OF 2011) [2011] UGHC 107 (2 August 2011);

[30] Uganda v Munguriek & Anor (CRIMINAL SESSIONS CASE No. 0008 OF 2017) [2018] UGHCCRD 92 (16 April 2018);

[31] Grace Bamurangye Bororoza and 53 others vs Dr Kasirivu Atwooki and 5 others ((Civil Application N0.44 of 2008)) [2008] UGCA 5 (29 July 2008);

Munyankore;[32] Balaalo; [33] Mukiga;[34] Musamya;[35] International Community;[36] Prison Community;[37] Banyarwanda;[38] Sikh Community;[39] An African community;[40] Commercial community;[41] Human Community;[42] Respondent's community;[43] Unsophisticated community;[44] Communities that were predominantly illiterate;[45] Serere community;[46] Mpunge Community;[47] Batwa Community;[48] Pagel Kal Clan community;[49] Kabale Community;[50] Kaptoyoyi sub-county Community;[51] Bunyoro Kitara-Kingdom community;[52] Banyala Community;[53] Community engaged in cattle rustling;[54] Cattle

[32] Amos Twinomujuni v The Attorney General & Another (CIVIL Suit No. 0413 Of 2005) ((CIVIL Suit No. 0413 Of 2005)) [2009] UGHC 145 (22 January 2009); Uganda v Munguriek & Anor (CRIMINAL SESSIONS CASE No. 0008 OF 2017) [2018] UGHCCRD 92 (16 April 2018);

[33] Grace Bamurangye Bororoza and 53 others vs Dr Kasirivu Atwooki and 5 others ((Civil Application N0.44 of 2008)) [2008] UGCA 5 (29 July 2008); Uganda v Munguriek & Anor (CRIMINAL SESSIONS CASE No. 0008 OF 2017) [2018] UGHCCRD 92 (16 April 2018);

[34] Kawalya Aloysious V Sendagire Norman (HCCS No. 162 of 2006) ((HCCS No. 162 of 2006)) [2009] UGHC 69 (5 February 2009);

[35] Grace Karuhanga Butare v Ssanyu Mukasa Kyazike (Civil Application No.652 of 2007) [2009] UGHC 96 (17 June 2009);

[36] Thomas Kwoyelo alias Latoni V Uganda ((Const. Pet.No. 036 Of 2011(reference)) [2011] UGCC 10 (22 September 2011);

Lanyero Sarah & Anor Vs Lanyero Molly (REFERENCE NO. 225 of 2013) [2014].UGCA (30 June 2014);

Nelson Dhibikirwa v Agro Management (U) Ltd (misc application no. 651 of 2010) [2012] UGCOMMC 33 (24 April 2012);

USAFI Market Vendors Association v Safinet Uganda Limited & Anor (CAD/ARB/68/2017) [2018] UGCADER 8 (28 March 2018);

[37] Susan Kigula & 416 Ors v Attorney General (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005);

[38] Bashaija & Anor v Mutatina & Anor (HCT-05-CV-APPEAL No. 081 OF 2011) [2012] UGHC 240 (16 November 2012); Daaka Nganwa v Rukyema & Anor (HCT-05) [2012] UGHC 241 (16 November 2012);

[39] Piarasingh & Anor v Sukhveer (CIVIL SUIT NO. 52 OF 2012) [2016] UGHCCD 144 (14 November 2016);

[40] Namukasa v Kakondere (DIVORCE CAUSE NO. 30 OF 2010) [2015] UGHCFD 49 (10 April 2015).

[41] Hussein Nsubuga Mpombe & Anor Vs Administrators Of the Estate of the late Gladys Ndagire Faaka (MISCELLANEOUS APPLICATION NO. 726 OF 2011) [2012] UGCOMMC 7 (23 February 2012); Shay Kameo & 4Ors v Kenya Airways Ltd (HCT) [2012] UGCOMMC 78 (9 July 2012); Barclays Bank Uganda Ltd v Kikwaya (MISCELLANEOUS APPLICATION NO 128 OF 2012) [2012] UGCOMMC 94 (17 August 2012).

[42] Uganda v Jamtoo (CRIMINAL SESSION CASE NO. 0109 OF 2012) [2013] UGHCCRD 48 (1 October 2013);

[43] Legal Action for People with Disabilities v Attoney General Anor (MISC CAUSE NO. 146 OF 2011) [2014] UGHCCD 76 (20 May 2014).

[44] Uganda Vs Owora (CRIMINAL SESSION CASE NO. 067/2004) [2005] UGHCCRD 2 (6 January 2005).

[45] Turyatunga v Rwakakeiga (HCT CIVIL APPEAL NO.00-07 OF 2010) [2012] UGHC 160 (7 August 2012).

[46] Alaso v Electoral Commission & Anor (HCT- 00- CV – E.P – 0005 – 2016) [2016] UGHCEP 33 (25 July 2016).

[47] Nalugo Mary Margaret Sekiziyivu Vs Bakaluba Peter Mukasa ((Election Pet. No 30 Of 2011)) [2011] UGHC 99 (22 July 2011).

[48] Uganda v Ahimbisibwe (CRIMINAL SESSION CASE NO.0137 OF 2013) [2016] UGHCCRD 120 (10 October 2016).

[49] Obita Vs Kilama & 4 Ors (CIVIL APPEAL No. 0045 OF 2016) [2018] UGHCCD 64 (25 October 2018).

[50] Uganda v Buko & Anor (HCT-05-CR-CSC-0123-2009) [2010] UGHC 01 (18 January 2010).

[51] Board of governors Toswo sss v Kokop (HCT-04-CV-CA-0071-2013) [2013] UGHCCD 151 (12 November 2013).

[52] Annette Nakalema Kironde v Apollo Kaddu Mukasa Kironde & Anor (CIVIL DIVORCE CAUSE NO. 006/2001) ((CIVIL DIVORCE CAUSE NO. 006/2001)) [2002] UGHC 29 (12 December 2002); Rose Achom Opio v Lugazi Town Council (CIVIL SUIT NO. 240 OF 2000.) ((CIVIL SUIT NO. 240 OF 2000.)) [2003] UGHC 35 (12 December 2002).

[53] Lugonvu & 3 Ors v Attorney General (CONSTITUTIONAL PETITION NO. 24 OF 2009) [2015] UGCC 15 (17 December 2015).

[54] Okupa v Attorney General & 3 Ors (MISC. CAUSE NO. 14 of 2005) [2018] UGHCCD 10 (31 January 2018).

keeping community;[55] International arbitration community;[56] Diplomatic community;[57] Student community;[58] Communities of scholars and students;[59] Christian Community;[60] Donor Community;[61] Community of ancestrally related people;[62] 'Same class or community to which the accused belongs';[63] Traditional Communities in Uganda;[64] Somali community;[65] Local community;[66] Local Muslim community;[67] Muslims;[68] Ethiopian Orthodox Community;[69] Muslim – Sunni;[70] Warr Muslim Community;[71] Rwanyamukinya Moslem Community;[72] Adherents of the Muslim religion in Uganda;[73] Muslim Community;[74]

[55] Mifumi (U) Ltd & Anor Vs Attorney General & Anor (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015).
[56] Pile Corporation Limited v Twed Property Development Ltd (CAD/ARB/004/2018) [2018] UGCADER 2 (9 February 2018).
[57] Kemigisha v The Red Pepper Publications Ltd (CIVIL SUIT NO. 162 OF 2012) [2020] UGHCCD 14 (13 March 2020).
[58] Ndiege v Kyambogo University (MISC. CAUSE NO. 20 OF 2013) [2013] UGHCCD 139 (21 October 2013).
[59] Dramadri v Elwoku & 7 Ors (MISCELLANEOUS CIVIL APPLICATION No. 0014 OF 2016 AND MISCELLANEOUS CIVIL APPLICATION No. 0003 OF 2016) [2017] UGHCCD 86 (15 June 2017); Kitara David Lagoro v Gulu Univsersity (Miscellaneous Civil Cause No. 10 of 2017) [2019] UGHCCD 58 (12 February 2019).
[60] In re Namukose (an infant) (MISCELLANEOUS CAUSE NO. 37 OF 2012) [2012] UGHCFD 1 (23 October 2012).
[61] Nabagesera & 3 ors v Attorney General & Anor (MISC. CAUSE NO.O33 OF 2012) [2014] UGHCCD 85 (24 June 2014).
[62] Atunya vs Okeny (CIVIL APPEAL No. 0051 OF 2017) [2018] UGHCLD 69 (6 December 2018).
[63] Uganda v Omony (CRIMINAL SESSIONS CASE No. 0061 OF 2017) [2017] UGHCCRD 3 (31 July 2017).
[64] Re Namugerwa Joyce & 2 Ors (Family Cause No 28 Of 2009) [2010] UGHC 13 (9 February 2010).
[65] Dr. Ismail Kalule & 3 Others V Uganda (Criminal Miscellaneous Applications 57, 58, 59, & 60 of 2010) [2011] UGHC 184 (27 January 2011)
[66] Uganda v Owacha (CRIMINAL CASE No. 0181 OF 2014) [2016] UGHCCRD 128 (23 December 2016); Kapalanga & 6 Ors v Martina Nunu & Anor (CIVIL APPEAL NO. 0045 OF 2008) [2011] UGHC 82 (29 June 2011); Ojera Vs Labeja (CIVIL APPEAL No. 0020 OF 2013) [2018] UGHCCD 61 (25 October 2018); Magbwi v MTN (U) Limited & Anor (CIVIL APPEAL No. 0027 OF 2012) [2017] UGHCLD 53 (12 April 2017); Miza v Bruna Ososi (CIVIL APPEAL No. 0026 OF 2016) [2017] UGHCLD 101 (21 December 2017).
[67] Ayiko v Lekuru (DIVORCE CAUSE No. 0001 OF 2015) [2017] UGHCFD 1 (17 February 2017).
[68] Uganda Vs Hussein Hassan Agade & 12 Ors (CRIMINAL SESSION CASE No. 0001 OF 2010) [2016] UGHCCRD 5 (27 May 2016); Namukasa v Kakondere (DIVORCE CAUSE NO. 30 OF 2010) [2015] UGHCFD 49 (10 April 2015); Mukiibi & 2 Ors v Uganda Moslem Supreme Council (CIVIL APPEAL NO. 004 OF 2016) [2018] UGHCLD 6 (6 February 2018); Uganda v Kamoga Siraje & 13 Ors (CRIMINAL SESSION CASE No. HCT- 00-ICD- CR- SC- No. 004 OF 2015) [2017] UGHCICD 1 (21 August 2017).
[69] Tenaw Esteziaw and Others v Aba Habteyesu Kegesse and Ors ((Civil Suit No.757 of 2003)) [2005] UGHC 28 (4 October 2005).
[70] Quality Uganda Ltd Vs The register Trustees of the Muslim (sunni) Association & Anor (HIGH COURT CIVIL SUIT NO.288 OF 2008) [2014] UGHCLD 71 (17 January 2014).
[71] Warr Muslim Community v Okello (CIVIL APPEAL NO. 0021 OF 2008) [2013] UGHCCD 24 (20 February 2013).
[72] Sarah Nkongi v Rwanyamukinya Moslem Community (HCT-05-CV-CR-0001-2005) ((HCT-05-CV-CR-0001-2005)) [2005] UGHC 87 (5 July 2005);
[73] Ssenyonga & 7 Ors Vs Kakooza & 6 Ors (CIVIL APPEAL NO. 9 OF 1990) [1991] UGSC 12 (19 March 1991);
[74] Ayiko v Lekuru (DIVORCE CAUSE No. 0001 OF 2015) [2017] UGHCFD 1 (17 February 2017); Omar Awadh & 10 Ors v Attorney General (CONSOLIDATED CONSTITUTIONAL PETITION NUMBERS 55 AND 56 OF 2011) [2014] UGCC 18 (22 October 2014); Munobwa Muhamed Vs Uganda Muslim Supreme Council (Civil Revision No. 1 Of 2006) ((Civil Revision No. 1 Of 2006)) [2010] UGHC 121 (26 August 2010); Abdulai & 3 Ors v Wailojo & 2 Ors (CIVIL SUIT No. 0028 OF 2013) [2017] UGHCCD 4 (24 January 2017); Warr Muslim Community v Okello (CIVIL APPEAL NO. 0021 OF 2008) [2013] UGHCCD 24 (20 February 2013); Mukiibi & 2 Ors v Uganda Moslem Supreme Council (CIVIL APPEAL NO. 004 OF 2016) [2018] UGHCLD 6 (6 February 2018);

Church community;[75] Foreign donors;[76] Society;[77] Free and Democratic Society;[78] 'Just, free and democratic society';[79] 'Democratic society';[80] 'Modern society';[81] 'Peaceful society';[82] 'Civilized fora';[83] 'Civilized nations';[84] 'Civilized people';[85] 'Open and democratic society';[86] 'open societies';[87] 'Normal man of the same class or community as that to which the accused belongs';[88] Civil Society;[89] 'Just society';[90] 'ever developing society';[91] 'Wider

[75] Serwanga v Namujju & Anor (ELECTION PETITION NO. 0005 OF 2016) [2016] UGHCEP 18 (7 July 2016).
[76] Attorney General & Anor v Uganda Law society (MISC. CAUSE NO. 321 OF 2013) [2014] UGHCCD 99 (18 August 2014).
[77] Uganda Projects Implementation & Management Centre v Uganda Revenue Authority ((Constitutional Petition No.18/07(Reference)) [2009] UGCC 2 (9 February 2009); Twagira v Attorney General & Anor (HCT-00-CV-CS-0836 OF 2006) [2012] UGHCCD 291 (19 April 2012); His Majesty Omusinga Mumbere Vs Uganda (CRIMINAL MISC. APPLICATION NO. 075 OF 2016) [2017] UGHCCRD 11 (13 January 2017); Centre for Health, Human Rights & Development & Anor. V Attorney General (CONSTITUTIONAL PETITION NO. 64 OF 2011) [2015] UGCC 14 (30 October 2015); Legal Action for People with Disabilities v Attoney General Anor (MISC CAUSE NO. 146 OF 2011) [2014] UGHCCD 76 (20 May 2014); Fredrick Kato v Ann Njoki (HCT-00-FD-DC-0010-2007) (HCT-00-FD-DC-0010-2007) [2009] UGHC 23 (28 January 2009).
[78] Thomas Kwoyelo alias Latoni V Uganda ((Const. Pet.No. 036 Of 2011(reference)) [2011] UGCC 10 (22 September 2011); Sharon and Others v Makerere University ((Constitutional Appeal No. 2 of 2004)) [2006] UGSC 10 (1 August 2006); Susan Kigula & 416 Ors v Attorney General (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005); Charles Onyango Obbo and Another v Attorney General ((Constitutional Petition No. 15 of 1997)) [2000] UGCC 4 (21 July 2000); Attorney General v Salvatory Abuki (CONSTITUTIONAL APPEAL NO. 1 OF 1998) [1999] UGSC 7 (25 May 1999).
[79] Nyakaana v National Environment Management Authority and Others (Constitutional Appeal No. 05 of 2011) [2015] UGSC 14 (20 August 2015); Hon Sam Kuteesa & 2 Others Vs Attorney General (Constitutional Reference No. 54 O f 2011) [2012] UGCC 02 (4 April 2012).
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and larger human society';[92] 'Patrilineal society';[93] The Law Society;[94] East African Law Society;[95] Medical Community;[96] Religious Community;[97] Moslem Community;[98]Indian Community;[99] East African Community;[100] Business Community;[101] European Community;[102] Flemish community;[103] Civilized Society;[104] Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Community;[105] International Community of Nations;[106] Regional and international Community;[107] Local community;[108] and 'Certain African Societies'.[109]

Indeed, on one occasion, the Court has even referred to 'the community members of Ben Kiwanuka village'.[110]

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[110] Geoffrey Ntambirweki Kandeebe & 3 Others V ATC Uganda Limited & Another (MISC APPLICATION NO. 346 OF 2019) [2019] UGHCCD 180 (16 August 2019).

How is the judiciary to contend with this complexity? If these (among many others) are the various 'peoples' in Uganda, how are the norms, values and aspirations of the collective 'people' envisaged under Article 126 (1) to be determined and enforced?

5.0 No longer at ease: Giving effect to African law in a changing world

The above situation – the efforts of various actors to deal with the politico-legal identity crisis we face today – evidences the enormity of the challenge at hand.

It is one of a society caught between a number of worlds. The Nigerian poet Gabriel Imomotimi Okara captured something of this dilemma in his 1985 piece entitled *Piano and Drums:*

> *When at break of day at a riverside*
> *I hear the jungle drums telegraphing*
> *the mystic rhythm, urgent, raw*
> *like bleeding flesh, speaking of*
> *primal youth and the beginning*
>
> *I see the panther ready to pounce*
> *the leopard snarling about to leap*
> *and the hunters crouch with spears poised;*
>
> *And my blood ripples, turns torrent,*
> *topples the years and at once I'm*
> *in my mother's laps a suckling;*
> *at once I'm walking simple*
> *paths with no innovations,*
> *rugged, fashioned with the naked*
> *warmth of hurrying feet and groping hearts*
> *in green leaves and wild flowers pulsing.*
>
> *Then I hear a wailing piano*
> *solo speaking of complex ways in*
> *tear-furrowed concerto;*
> *of far away lands*
> *and new horizons with*
> *coaxing diminuendo, counterpoint,*
> *crescendo. But lost in the labyrinth*
> *of its complexities, it ends in the middle*
> *of a phrase at a daggerpoint.*
>
> *And I lost in the morning mist*
> *of an age at a riverside keep*
> *wandering in the mystic rhythm*
> *of jungle drums and the concerto*

Like many post-colonial societies, 'Uganda' is caught in this crisis of identity. As a legal establishment, we have to contend with the playing the piano that is English Common

Law, while contending with the stubborn beat of the drum of the living African customary law.

To return to the questions posed at the start – how are we to navigate this diversity – in the face of multiple realities and definitions of what it means to be 'Ugandan'? First, at the very least, it is extremely important that the bench and bar now broadly reflect the minimum identity of Ugandanness. Representation matters. It is not accidental, for instance, that the problematic precedent in *Amkeyo* was set aside in the post-colonial period by Uganda's first African Chief Justice – the Nigerian Sir Udo Udoma – in the *Alai* case. Indeed, part of the effort of Benedicto Kiwanuka's life, in forming the Democratic Party, was the struggle for representation of Catholics who were demonstrably marginalized by the Anglican establishment in the Protectorate. More recently, the same can be said for JEEMA, with the regard to the situation of Muslims in Uganda. Representation matters. These lives, these identities, these experiences - matter. As such, we must continue to struggle, in the first place, for greater representativeness on the bench and in the bar. Those charged with the interpretation and application of the law should, at the very minimum, broadly reflect the diversity that is Ugandan society (indeed, *societies*).

Secondly, we must consciously and deliberately affirm the experiences and lived realities of our people through the law. Just as our neighbours in Kenya are grappling with how to make the law work for '*Wanjiku'* – the ordinary Kenyan woman - we must undertake a very serious and conscious effort to make the law work for '*Omuntu wa wansi'* in Uganda. The decolonization effort which Apollo Makubuya and others have called for with regard to the renaming of Ugandan streets should be urgently extended to our laws and legal institutions. As lawyers, judges and other guardians of the legal professions, we should have the courage to appreciate the problematic history of that profession of which we are part. This introspection might lead to not a little discomfort regarding our part in the continued alienation of society from society.

Nevertheless, as noted above, it remains an urgent responsibility. The Rule of Law which we must defend and support must necessarily be of 'law' which works for the 100% rather than the 5%. It must be the rule of that law which validates and affirms the lives, struggles, realities, hopes and dreams of the various constituent peoples who make up the continuing project that is Uganda. Their lives matter. Their laws must matter.

It is in struggling for a more just and representative legal framework and establishment, I suggest, that we best honour the memory and ultimate sacrifice of Chief Justice Benedicto Kiwanuka.

I thank you for your kind attention.

For God and My Country.

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