

GLOBAL FREEDOM OF EXPRESSION CONFERENCE
COLUMBIA UNIVERSITY, IN THE CITY OF NEWYORK
4-5 APRIL 2016

“FREE SPEECH IN UGANDA, PROGRESSIVE OR RETROGRESSIVE?”

1.0 Introduction

I have been asked to discuss the most important freedom of expression court decisions from Uganda in 2015, the overall judicial environment as far as the protection of freedom of expression in Uganda is concerned, a projection of decisions in 2016 from the major cases filed in courts and finally, an enunciation on the emerging themes. Before I explore these issues, I would like to unequivocally say that it is indeed a tall order to expect blossoming freedom of expression jurisprudence from a country like Uganda which has consistently and relentlessly undermined democracy, the rule of law and human rights through a crack-down on citizens who attempt to enjoy their constitutionally guaranteed rights and freedoms. State functionaries continue to shrink space for enjoyment of free speech and related rights through unlawful and illegal restrictions.

Over the past few years, Uganda’s ratings on freedom of expression and access to information have tremendously dwindled due to its visible and increasingly repressive State machinery that has often gagged the media. As accurately contextualized,¹

¹ Freedom House; *Freedom In The World 2016*, Anxious Dictators, Wavering Democracies: Global Freedom under Pressure. Uganda is rated Not Free in [Freedom in the World 2016](#), Partly Free in [Freedom of the Press 2015](#), and Partly Free in [Freedom on the Net 2015](#); <http://allafrica.com/stories/201603250577.html>

democratic space in the country continues to shrink as the ruling party tags onto power despite an outcry for change from the citizenry.

For a country whose Constitution is premised on the principles of unity, peace, equality, democracy, freedom, social justice and progress² with emphasis on the promotion of freedoms including expression and assembly,³ it is ironic that those entrusted with the protection and defense of these rights are at the forefront of violations and abuse. The police has constantly and repeatedly engaged itself in flagrant arrests, detentions, obstruction from accessing information, physical assaults of journalists and destruction of their equipment and sometimes in collaboration with other State agencies like the Uganda Communications Commission sieged and closed down media houses. It is no wonder that of the 143 violations against journalists documented in 2015, the Uganda Police is alleged to be responsible for 107 of the abuses⁴

The highly contested presidential election of February 18 2016⁵ was the epitome of the states' high-handedness in stifling speech, with the government ordering telecommunication providers to shut down all social-media platforms due to "security concerns."⁶ Despite this blockade, a large number of elites managed to sidestep this through use of virtual private networks (VPNs) to access and share information about the election results, which saw the incumbent President extend his rule to 35 years amidst

² Constitution of the Republic Of Uganda, 1995. Commencement: 8 October, 1995. The Preamble.

³ Id. Article 29 (1)

⁴ <https://hrnjuganda.org/?p=2617>

⁵ <http://www.theguardian.com/global-development/2016/feb/17/uganda-election-fear-political-violence-yoweri-museveni-kizza-besigye-amama-mbabazi>

⁶ <http://www.monitor.co.ug/Elections/UCC-shutdown-of-social-media-backfires/-/2787154/3083658/-/ax1g1h/-/index.html>

protests from the electorate. While the incumbent president and his party enjoy free speech, the opposition and journalists covering it have faced arrest, detention, and obstructions by the police.⁷

Notwithstanding the fact that Uganda is a State Party to all the major international and regional human rights treaties including those that provide for freedom of expression, the regime, through its security forces, most especially the police have not hesitated to silence speech, especially on issues of accountability and democratic governance. It is thus not surprising that recently, a cabinet minister punched a female journalist who was recording him as he walked out of the Anti-corruption Court, in a case where he has been accused of swindling road funds worth millions of dollars.⁸

I therefore argue that without respect for democracy, rule of law and human rights, and in the absence of an independent and speedy judiciary, it is difficult for free speech to thrive. This paper briefly discusses the judicial environment in protecting freedom of expression, the most important freedom of expression decisions in 2015, cases to watch out for in 2016 and emerging general themes.

⁷ <http://www.monitor.co.ug/News/National/Another-journalist-arrested-covering-Besigye/-/688334/3098466/-/d877tc/-/index.html>

⁸ <http://mobile.monitor.co.ug/News/Minister-Byandala-beats-up-journalist/-/2466686/3131160/-/format/xhtml/-/9jyptw/-/index.html> and <https://www.youtube.com/watch?v=qJ3fGwJgAFA>

2.0 The overall Judicial Environment

A report released by the International Bar Association in 2007⁹ on the state of Uganda's judiciary still reflects the current predicaments faced by the Judiciary. Some of the identified threats to the independence and performance of the Judiciary include politicizing cases, defiance of court orders, direct interferences with the discharge of judicial duties, allegations that some members of the Judiciary collude with the police, politicization of the appointment of judges, lack of funding and shortage of judges have contributed to the case backlog.¹⁰ It is true that the judiciary is occasionally affected by "political ping-pong," most especially when faced with politically intoned cases, raising questions as to its legitimacy and independence, most especially in deciding cases pertaining to human rights, and democracy.

For example, so far, two High Court Justices, have declined to hear a defamation case¹¹ in which opposition leader and the current President, Museveni's biggest political rival, Dr. Kiiza Besigye was sued by, Lieutenant Colonel Ndahura Atwooki Birakurataki, the head of police Directorate of Crime Intelligence in 2012 for alleging in an interview with a local Newspaper that he was involved in murder during the 2001 presidential elections, and thereafter, promoted by the regime. One of the judges allegedly claimed that he was not consulted before the file was allocated to him while the other judge

⁹ IBA, Judicial independence undermined: A report on Uganda, Sept, 2007.

https://www.google.com/?gws_rd=ssl#q=relevance+of+the+independence+of+the+judiciary+in+uganda

¹⁰ Id.at 8

¹¹ http://www.newvision.co.ug/new_vision/news/1308625/col-kizza-besigye-sued-defamation
<http://www.observer.ug/news-headlines/4427-interview-court-will-disband-ec-says-besigye>

withdrew earlier on grounds that he “could not insist on hearing a case where one party was not comfortable with him”¹²

2.0 Most important decisions on freedom of expression in 2015

1. Edward Sekyewa V National Environment Management Authority¹³

In February 2015, the Chief Magistrates Court in Kampala ruled in favor of the Applicant in an access to information case filed in 2013, against the National Forestry Authority, denying him information regarding the procurement of the necessary equipment for prohibiting, control and management of fires in the 506 Central Forest Reserves in the Uganda. In his application, Edward argued that the National Forestry Authority’s refusal to grant his request violated the Access to Information Act of 2005 and Article 41 of the Constitution, which provide citizens a right of access to information in the possession of the State or any other organ or agency of the State.

However, the Respondent defended his refusal by contending that as a private business entity, the Applicant ought to have disclosed the reason and purpose for which the information was required since there was a possibility of jeopardizing public interest in case the information was misused by the Applicant.

In his ruling, the Chief Magistrate stated that it is unnecessary and irrelevant for a person seeking public information to show the purpose for which the information is required. The

¹² <http://www.monitor.co.ug/News/National/Another-judge-quits-Besigye-defamation-case/-/688334/3129682/-/bak09nz/-/index.html>

¹³ Miscellaneous Cause No. 73 of 2014

court found that the National Forestry Authority “acted in blatant disregard of the law” and ordered the Respondent to provide all the information sought in accordance with the law.

2. The case of Sulaiman Kakaire and David Tash Lumu vs The Parliamentary Commission¹⁴

In 2013, two print media journalists working with the “Observer Newspaper” filed a case in the High Court challenging the legality and rationality of their suspension by the Speaker of Parliament from covering proceedings of the House, on grounds that their coverage was marred with falsities and inaccuracies. The duo who had written two stories¹⁵ regarding in-house disagreements between Rebecca Kadaga, the Speaker and her Deputy Jacob Oulanya were barred from accessing Parliament by the Clerk to Parliament, in a letter addressed to them on January 28 2013, claiming that their stories were “full of inaccuracies” and “damaging to the office of the Speaker and Deputy Speaker.”

On July 03 2015, High Court Judge, Yasin Nyanzi nullified the impugned parliamentary directive ruling that the suspension of the journalists by Parliament without giving them a fair hearing in accordance with principles of natural justice was illegal.

¹⁴ High Court Miscellaneous Cause No.232 of 2013.

¹⁵ The stories in question were titled ‘*How Kadaga, Oulanyah fought over petition*’ http://www.observer.ug/index.php?option=com_content&view=article&id=23261&catid=78&Itemid=116 and ‘*House recall; petitioners strike deal with Kadaga,*’ <http://www.observer.ug/news/headlines/23307-house-recall-petitioners-strike-deal-with-kadaga>, published on January 21, 2013 and January 23, 2013 respectively.

It should also be recalled that in 2004, the Supreme Court of Uganda, nullified section 50 of the Penal Code that made it an offence to publish false news on grounds that it was an unjustifiable limitation in a free and democratic society.¹⁶ This has however not deterred authorities from invoking the offence of publishing false information against journalists.

3.0 What to watch out for in 2016

A previous forecast of the freedom of expression environment for 2015 included the hearing and/ or conclusion of constitutional petitions challenging curtailment of free speech and access to information, a Reference in the East African Court of Justice challenging criminal defamation and other cases in the High Court and Magistrates Courts seeking to overturn impugned free speech contentions.

However, there has barely been any significant change from the slow-paced judiciary in Uganda as none of the cases has been brought to their logical conclusion and in fact, there is a high likelihood that these cases will not be concluded soon. Since 2016 has been an election year, it is obvious that the Courts will be swamped with election petitions and subsequent appeals and for this reason, there is a likelihood of limited attention to freedom of expression cases since Courts are mandated by law to suspend other matters, to prioritize and expeditiously hear and determine election cases.¹⁷

Below is a summary of newly filed and pending cases to watch out for in 2016

¹⁶ <http://www.ulii.org/ug/judgment/supreme-court/2004/1/>

¹⁷ The Parliamentary Elections Act, 2005, article 63 (2)

3.1 The East African Court of Justice.

1. Ronald Ssemuusi v. Attorney General of Uganda¹⁸

The Applicant (now deceased), petitioned the East African Court of Justice to challenge a decision by a Magistrates Court in Uganda, convicting and sentencing him to a one year jail term for criminal defamation, for reporting the theft of solar panels in which he indicated the suspicion of the people, alleging involvement of a public officer in the theft. The petition avers that criminal defamation is an unjustifiable restriction to freedom of expression, since it violates fundamental principles of democracy and human rights as enshrined in the Treaty for the Establishment of the East African Community,¹⁹ regional and international human rights instruments.

In a distinctive manner, on July 30 2015, the UN and AU Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, and access to information, David Kaye and Pansy Tlakula, respectively filed a joint application seeking leave to intervene as amicus, to provide insight as to how the AU and UN define the appropriate contours of government restrictions on speech and press in the context of defamation laws, and assist the Court in assessing Uganda's Statute's compatibility with the principles enshrined in the East African Community Treaty. The Court allowed the Application and the Rapporteurs were admitted as experts in November 2015. However, the Court is yet to rule on another Application where nineteen other regional and international NGOs, led by the Media Legal Defense Initiative similarly filed on July 10 2015 for leave to intervene in the case. In the November 2015 hearing of this amicus

¹⁸ Reference No. 16 of 2014, filed in December 2014

¹⁹ Articles 6(d), 7(2) and 8(1) (a) & (c)

Application, the Court said that its decision regarding the admission of these organizations will be given on notice.

3.2 The High Court of Uganda

1. Legal Brains Trust LTD v. Uganda Communications Commission & 2

Others²⁰

On February 19 2016, the Applicant sued the Respondents to wit; the Uganda Communications Commission, the Attorney General and the Central Bank of Uganda for the arbitrary shut down of all social media platforms and mobile money banking services on grounds of “national security” during the presidential elections that commenced on February 18 2016, arguing that the impugned directive is an unlawful and unjustifiable interference with a bundle of constitutionally guaranteed rights and freedoms of users of and dealers in telecommunications and mobile money services, including the rights protected by Articles 29(1)(a), 40(2), 41, 42, 43 and 45, among others.

In seeking a ruling against the Respondents, the Applicant further argues that the directive was uncalled for, and has had a disproportionate effect on the integrity of the general elections by curtailing the free flow of information within the electorate. Additionally, that implementation or repetition of the impugned conduct of the Respondents if not censured and restrained will disproportionately affect and limit freedom of expression and information on social media, interfere with property, livelihood and consumer rights connected with mobile money transactions and institutional checks

²⁰ Miscellaneous Cause No 16 of 2016

and balances provided for in the Constitution and the general law shall be irreparably undermined to the detriment of citizens.

2. Uganda Parliamentary Press Association LTD (UPPA) v. Parliamentary Commission and Another²¹

The Applicant, a journalists' body covering Parliamentary proceedings filed a notice of motion in the High Court seeking a reversal of an impugned directive by the Parliament of Uganda, fixing minimum qualifications for journalists as part of the press accreditation process for the 10th Parliament whose term of office commences in May 2016. The journalists argue that the intended accreditation of only journalists who hold Bachelor's degrees in journalism and at least three years of professional practice is arbitrary, unlawful, irrational and an unjustified form of political interference with the discretion traditionally reserved for editors. They also argue unconstitutionality, and unjustifiable interference with the principle of editorial freedom and constitutional democracy.

In justifying their decision, Parliament argues that the new guidelines “will facilitate complete, fair, accurate and balanced coverage of both committee and plenary sessions.” Editors are therefore required to submit names of reporters accompanied by relevant support documents for accreditation in order to allow their journalists to cover the 10th Parliament. The case seeks to overturn the Parliamentary directive so as to foster open justice

²¹ Miscellaneous Cause No of 2016

3. **Mulindwa Mukasa v. Julius Ceasar Tusingwire**²²

In May 2014, the Applicant, a correspondent for the Associated Press petitioned the High Court over assault and degrading treatment by the Respondent, a divisional police commander in the capital Kampala. The journalist alleges that he was beaten and pepper sprayed by the police officer for taking his photograph at the police station, while he arrested another journalist. During his brief detention, he says his material was deleted from his gadget. The case seeks to dismiss the Respondent from the Police Force and declare him unfit to serve the Government of Uganda in any official capacity specified under the Leadership Code Act²³. In the alternative, Mr. Mulindwa wants court to direct the relevant agencies of Government to take swift and severe disciplinary action against the defendant for his conduct towards journalists.

In a dramatic manner, the defendant counteracted by filing a criminal case of “obstruction” against the plaintiff. The journalist was subsequently charged with willfully obstructing a police officer in the due execution of his duties, in the case of ***Uganda v. Mulindwa Mukasa, No. 528/14***. In a ruling delivered in June 2015, the Trial Magistrate acquitted the accused after finding no evidence to back the allegations.

²² Miscellaneous Cause No. 58 of 2014

²³ <http://igg.go.ug/static/files/publications/leadership-code-act.pdf>

3.3 Constitutional Court

1. Centre for Public Interest Law v. Attorney General²⁴

In November 2015 the petitioner filed a case in the Constitutional Court challenging the sub-judice rule, arguing that the usage of the rule by courts of judicature of Uganda, Parliament and public bodies to deny citizens public access to information is unconstitutional and repugnant to freedom of expression, the press and other media. The matter comes up for scheduling in April 2016.

2. Centre for Public Interest Law, Human Rights Network for Journalists-Uganda & East Africa Media Institute V Attorney General of Uganda²⁵

This petition, filed in March 2014, seeks to annul provisions of the Press and Journalist Act²⁶ for inconsistencies with Articles 29 (1)(a) (b) and (e), 22, 26, 28, 40(2) and 42 of the Constitution of the Republic of Uganda insofar as they infringe on freedom of expression, especially the criminalization of journalism without a practicing certificate issued by the government, definition of journalist, compulsory conscription of journalists in associations in order to practice journalism, the overly broad powers vested in the statutory bodies created by the Act to restrict press freedom among other issues. Since the scheduling of the case in February 2015, it has never been cause-listed for hearing, despite an indication that it would be fixed for April 2015.

²⁴ Constitutional Petition No 40/2015

²⁵ Constitutional Petition No.009 of 2014

²⁶ Sections <http://opm.go.ug/assets/media/resources/306/PRESS%20&JOURNALISTS%20ACT.pdf>

3. Human Rights Network Uganda & 4 Others V Attorney General²⁷

The Public Order Management Act of 2013 controversially re-introduced provisions of the Police Act which were declared unconstitutional by the Constitutional Court²⁸. The law gives wide discretionary powers to the police and government officials to prohibit, manage or disperse public assemblies, thereby restricting the rights to assembly, freedom of expressions and peaceful demonstration as enshrined in the Constitution and International standards.

4. Centre for Domestic Violence Prevention & 8 Others V Attorney General²⁹

The passing into law of the Anti-Pornography Act 2014 (commonly known as the mini-skirt law) saw over twenty country wide incidences of violent attacks including undressing of women and girls whom the public deemed to be indecently dressed. The comprehension of the law by Ugandan media was a clear indication of a gross misinterpretation of some of the provisions therein, which in turn negatively impacted on the society. Ironically, the law is more restrictive to media houses and journalists, than to indecently dressed persons.

The petitioners challenged among others the criminalization of production, publication, broadcast, procurement, importation and exportation, sale or abetment of prohibited acts of pornography whose definition is overly broad, vague and subjective and is likely to criminalize legitimate debate, commercial activities and private pursuits, and is

²⁷ Constitutional Petition No. 56 of 2013

²⁸ Muwanga Kivumbi V Attorney General, Constitutional Petition No. 9 of 2005

²⁹ Constitutional Petition No. 13 of 2014 <http://www.sihanet.org/sites/default/files/Petition%20Anti%20Porn.pdf>

inconsistent with and in contravention of the principle of legality, the right to privacy, freedom of expression, the press and other media, freedom of thought and conscience, academic freedom, freedom of assembly and association, and the right to practice one's profession and to carry on a lawful occupation, trade or business guaranteed under Articles 2(1) & (2), 28(12), 27, 29(1), 40(2) and 44(c) of the Constitution of the Republic of Uganda 1995.

5. Human Rights Network for Journalists-Uganda V Attorney General³⁰

The Applicant filed a Constitutional petition in 2014, arguing that provisions of the Uganda Communications Act, 2013 are inconsistent with and contravene Article 29 (1) of the Constitution, which provides for freedom of expression, the declaration of principles of freedom of expression in Africa and basic standards of regulation of communication under international law in so far as they promote political interference by giving unfettered powers to the Minister of ICT to manage and make decisions for the Communications Commission, compromising its impartiality and independence.

4.0 Emerging freedom of expression themes

The general themes emerging from the trend include open justice, most especially in regards to covering parliamentary proceedings, media regulation, criminal defamation, hate speech, surveillance and cyber-crime.

³⁰ Constitutional Petition No. 36 of 2014

5.0 Conclusion

It is trite that the enjoyment of freedom of expression and access to information is not absolute, and that individuals do have obligations, but the State is required under internationally acceptable standards and best practices to respect, protect and to fulfill the enjoyment of these rights. Uganda has however back-tracked on its obligations, interfering with or curtailing the enjoyment of human rights, most especially freedom of expression.

Article 19 of the ICCPR and Article 29 of the Constitution of the Republic of Uganda therefore remain delusionary as not everyone has the right to freedom of opinion and expression including the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. The authorities have failed to honor the spirit of the constitution that aims at erasing the past history of the country that was characterized by political and constitutional instability and struggles against tyranny and oppression.