

3RD ANNUAL SYMPOSIUM OF THE CENTER FOR
GLOBAL JUSTICE

ADVANCING THE RULE OF LAW IN EAST AFRICA

PANEL SESSION 2 – ADVANCING THE RULE OF LAW
IN EAST AFRICA: OVERCOMING BARRIERS

Presenter: Brian D. Dennison, Professor at Uganda Christian University

I. INTRODUCTION

Before I get into the presentation let me just, first of all, since I am Ugandan—sort of, I have been there for six years—the first thing I have to do is say, “Praise the Lord.” That is what you do in Uganda. And you also bring greetings, so I do bring greetings from Uganda Christian University in Mukono. We are fresh off celebrating our hundredth year as an institution. We originally started as a theological college, Bishop Tucker, and we have been a university since 1997. And we have various friends of the institution here, and there are friends that were here at Regent. So, I feel at home here even though I have not been home in about a year and eight months.

So, a quick story. When you drive around—maybe this is an experience and a story combined—but when you drive around and you are in line on the interstate and then that person decides that they are just not going to follow the rules. They go off the side of the road, and then they try to get in. And you are sitting there and you’re just frustrated, you know? And you are hoping that other person will not let him in and you get the chance not to let them in. If you go to Uganda and you have that emotion, you will die of a heart attack or something will happen to you. It may be the greatest difference between an American and a Ugandan—how we react to that situation, like someone cutting in line. I know that sounds like an overstatement, but bear with me, because I think it goes to what is in our DNA as Americans. We feel like if everybody just plays by the rules—everybody does what they are supposed to do—things are going to work a lot better. So if you just stay in the line and you do that, then you will get there eventually. And we will not have to worry about all the other people blocking the other people and we will just get there. And there are a lot of emotions like that where you feel, as an American, “Man, can’t we all just cooperate and play by the rules together and it will be okay.” And the Ugandan is just like, but you know, nobody else is going to follow the rules. And then that is what they are going to do. I might follow the rules but they can do

what they are going to do, and I do not worry about it. I have to take care of myself, because ultimately Uganda is not going to take care of me. I can take care of my family maybe. Or my family can take care of me. Close friends can take care of me. So I think when we think about the rule of law, there is also something that is very big: just that core expectation of what you can expect from society. A place like Somalia, of course, has even less expectations. But in Uganda, there are just not a lot of expectations of what society is going to do for you. It is, “Can you survive?” “Can you navigate this place the best you can?” Obviously one of the big things I am going to talk about in a second about a tipping point, but with the rule of law, you have to have a tipping point. You have to have a buy-in that this system can work. And I think that is a big problem with a lot of people in Uganda is they do not feel like the system can work. They feel like it is broken. They do not understand it. It is too expensive. It is for other people.

So, we are going to talk about barriers in the Ugandan context—barriers that prevent the rule of law from being advanced. There is your map of Uganda. We have a very Ugandan flavor to the festivities here, which is great. And there are other issues to talk about—especially even we could talk about Eastern Congo as an East African issue as well as South Sudan, as well as the ICC controversy in Kenya, as well as Somalia. There are a lot of very interesting and tragic and important things happening in East Africa. But we are going to focus a bit more on Uganda maybe than we will the other places. So there you see, that is where—there on the map you look down at the lake—we do have a Lake Victoria. We just do not have Victoria Falls. So we got Lake Victoria there, and Mukono, which means, “hand,” is right there over Victoria. So that is where we are, just for your reference. And Kampala is there 20 kilometers to the west, and as we went over last night at dinner, it is the size of Oregon. That is the official geographic thing you are supposed to know. We are going to save the barriers as surprises. Get to them one at a time.

II. BARRIERS

A. Language

The first barrier is language. This is your map of language groups in Africa. You have got down in the lower left the languages where people click and things like that. And then you have got the big purple swath of Zulu languages, and then you have got some Nilo-Sahara languages. You can see that Uganda is in a place where some colors come together. And you could add another color too if you wanted to add, for example, Kushite languages. So you’ve got like 50—40, 50, 60 languages—depends on who is counting. Is Norwegian a language or not? Who is counting the

languages? Lots of languages. And Swahili really did not take off in Uganda for various reasons. People have different theories—why they say people do not know Swahili. So, English is the universal language. And so English is the language of the courts. Obviously for colonial reasons as well. But it is not what most people are speaking as their day-to-day language. So you have a court system that exists in one language, and you exist in another language. This makes you not want to go to court. It's not a surprise.

The Ugandan Constitution has a provision that says, "We are going to put the Constitution in all the languages in Uganda." I have finally—after four years of trying—I have now paid for my own photostat copy of the Luganda Constitution, which I finally received. I think we have the best working version of the Rancoli Constitution at UCU that our students have worked on putting together. I think that is about it. And this Constitution is not new. It is seventeen years old or so. So this requirement is out there to do this, and it has not been done. So, of course, the Ugandans, what are they going to say? Can you expect the government to do something for you? You cannot expect the government, necessarily, to translate the Constitution into the language you speak even though the Constitution says it was supposed to and a lot of time has gone by. And it creates interesting situations. Wills. So, we work with International Justice Mission. We go around and help people write wills, which is great, because usually people respect the wills and they help things go better at the time of death with property succession. And they will say: "Oh by the way, you could write this will in your local language." "Oh great." And so some people choose to write the will in the local language, which is cool. But, when it has to go to court, at the end of the day, when it has to go to the probate process, by law, it has to be translated. And so there are professors sitting around at Makerere that make extra money translating wills into Luganda, because they are the only official translators. So you have told these people they can have it in their own language, but then they have got to pay to have a translation done by a translation professional. These are the kinds of things—like why could they not just probate it in the language? Why can you not have somebody who knows the language and just probate it in that area? But you have these kinds of barriers, and it keeps people on the outside looking in.

B. Resources and Capacity

Resources and Capacity was gone over earlier, and it is sort of the obvious one. This is supposed to be a picture, I think, of someone getting ready to go to the local council court. This is very typical—people going to court under mango trees and with local individuals. And it is a great idea, as far as ideas go; but in terms of implementation, it is a program

that often is not funded. And now the legal capacity of it to render decisions is called into question, because people on local councils were supposed to be replaced by law. They were not, and so now, they are basically mediating, effectively. It can be said that it is not real. Whatever they do has no legal mandate, because they have not replaced the officials that are supposed to be there that make it a legally active body. So, no capacity, no resources. Sounds great—and is good on the ground. And so what are people doing? They are making it work anyway. Right? I cannot afford to go to court. I do not speak English. Yes, they say this court is not real. Yes, they do not keep records. Yes, I have got to pay these people to show up. But it is the best option I have got. So, people are still going to these courts and doing these sorts of things. So, resources and capacity. We could go on and on and on, but oftentimes there are ways to get around resources and capacity. In this case, there is an easy solution to capacity: re-up the local council members officially and get them legally recognized again. That could be done. But for political reasons, it is not being done.

C. “Sticky” Colonialism

All right, then I have this one. It is “Sticky” Colonialism. What is sticky colonialism? Well, first of all, you see that Lady Justice there has a wig on her head, right? But people like the wigs in Uganda, so you do not want to be down on the wigs. It does add pomp and circumstance to the process. Now, the younger generation may not be as big on the wigs, but I think the wigs are okay. It is more about the aspect of colonialism—not about whether you wear a wig—but whether you feel that you have dominion over your own legal system or you feel that you just got this legal system from somebody else and you are curating it—like those computers that you keep in the basement in Afghanistan because you do not want to mess it up. And I think in Uganda, you have had the “we-do-not-want-to-mess-it-up” attitude. You can read things that I have written if you really want to spend time slogging through some stuff that is more substantive, but I am trying to use my time the right way here. And so, I have an article that sort of explains this aspect of colonialism more. But a great example is in the context of customary law. We heard an earlier talk about customary law. What is that? That is the common law of Uganda. It is the law that existed on the ground—people that were there, how they handled their matters. So, the British come in and they have common law. The common law becomes the real common law, and the customary law becomes something that goes away, essentially—unless people are practicing it in their own places, as long as they do not take it to court and take it up different levels.

Uganda has provisions that recognize customary law in marriage and in other contexts. But the problem is proving customary law in court

is very difficult. The judges cannot just know customary law. Customary law is treated like a fact. Imagine if you are a lawyer and instead of just citing Lexis or WestLaw, finding your case, and citing your Supreme Court case, every time you wanted to try a customary law case, you had to prove the law—not just the facts. And how do you prove the law? By finding the oldest man in town and trying to see if he can remember how everything was since time immemorial and tell you what it was. Because he must be the only one that knows what everything has been since time immemorial. Because that is what the law is—some law that has been around forever. It's fine if you have tablets that came from Mount Sinai. You can say: "That is the law. There it is." But if you do not, it becomes very difficult. So you have this customary law; it is what people are practicing. But because you adopt the colonial attitude towards how customary law is proven, which was established by the British courts that were in East Africa, you basically disempower the judges and disempower litigants from having the customary law recognized in the formal court system.

D. Legal Pluralism

So why do I have pictures of ladies when I talk about legal pluralism? We talked about hybrids—this is sort of like hybrids—it is all these different forms of law that are existing at once. It is because women are the most problematic aspect. When we hear a talk about Sharia Law, we want to talk about people's hands getting chopped off, and we want to hear about women having to not drive, right? The previous speaker was careful not to mention those sort of stereotypical aspects of Sharia Law. But, when it comes to legal pluralism, you cannot get around the issue of how women are treated. There is no way around it. And these customary laws are oftentimes patrimonial. And so that means that all the property is going to go through the man, typically. If there were a death, the woman would go back to her old family and leave. The family would often just keep the children and she would go her way. Obviously, you are treating women differently. You are saying they cannot have property. The Islamic laws—they have their own rules about property too. So you have a Constitution that says men and women have to be treated the same. Everything has to be according to the Constitution. But when you start stripping out the different treatment of women and men from a law of succession system, the whole law of succession system does not make sense anymore. The law of succession kept the land in the same people—kept it going right there. And when you have both sides of families claiming interest to land and going different ways, things get very complicated. The system worked okay, but it was not constitutional.

It is still done on the ground. So how do you deal with the reality that it is still done on the ground? So different people are engaging it, and they are trying to say: “Well, we can change customary law. We can make customary law so it meets standards of human rights, standards of our Constitution.” They do that in South Africa. They do that in Namibia. They do not do that in Uganda. It is all or nothing. It is time immemorial—what was time immemorial? Is it in line with these principles? If it is not, it is repugnant; cut it down. Well, that is fine as long as you can take it to court. But if you are living in a legal system that is in your own language and it is not going to court, you are living in a parallel world. You are living outside of that rule of law. You are living in a different rule of law.

E. Immature Common Law

Another barrier—it is all related—is an immature common law system, which is related to that “sticky” colonialism. The example is: there is this case. It is a United States Supreme Court case from 1904. It is called *South Dakota v. North Carolina*. It is an eleventh amendment bond case. What happened was, once they passed the eleventh amendment, people could not sue states. There were all these Confederate states that had a bunch of bonds that they were not honoring. People realized they could not recover against the Confederate states directly. So what do they do? They go to places like South Dakota and sell their bonds on the cheap. And South Dakota says: “Yay, we still have an article in the Constitution that allows us to go after other states, so we are going to try it out.” And the Supreme Court said: “Yes, you can, South Dakota. You have scored big. You can collect these bonds. You have made a nice purchase for yourself—a tidy profit.” Had to tide them over until they discovered all this petroleum or whatever they have done now in South Dakota. They are doing well again in South Dakota.

So there is this case, and it has a dissenting opinion from a judge that says you have to read the Constitution as a whole. It is the dissent; it is not the majority opinion. Somehow this case became part of Ugandan jurisprudence, because a very famous judge named Justice Kenny Hamba decided that he was going to cite it for this principle. He cited the case wrong. He had the wrong date. So no one ever read the case, because it was not cited correctly. No one really knew where it was. But people kept citing the case, and they started calling it *Smith v. Dakota*; they started calling it *South Carolino*, *South Caroline*, or different things, because they were not reading the law. So, they are in a common law system, but they are not reading the case. And this case has been cited—I do not know—fifteen times in Uganda. In three recent high-profile cases in Kenya it was cited. In the presidential election case it was cited incorrectly, because people are not reading the case. They

are simply taking law, really as aphorisms, and saying, “This is a principle; this is a principle.” But who can blame them? Because building a thick common law is difficult. Building a common law that really has careful distinctions between factual situations is difficult. And when you come from a colonial heritage where you did not get the right to mess with the law in the first place, are you really going to think you have the power and the license to make your own common law in a meaningful way? So, instead, common law almost becomes like the law of equity—just a bunch of principles.

F. Corruption

So, corruption. No, Malcolm Gladwell is not corrupt. The point of putting Malcolm’s mug there is that it is important to reach a tipping point.¹ Right now, if you practiced law in Uganda, it is very hard to be ethical. It is really hard to do things the right way. We have someone on the panel that actually does that. It is really exciting. He inspires the students at UCU, at my university, because he comes and tells them: “You can do it. You do not have to pay bribes. You can do it this way. It took me awhile to get my reputation, but now I have it and now they do not mess with me. So if you just do it the right way long enough, and be a little patient, and put off having that really nice car for five or six years or ten years, eventually you will get there.” But I think in Uganda, there has to be enough advocates that think you can practice law doing it the right way, and they are not there right now. And it would take a lot of cloning or a lot of instilling something in our young people. We try to give this talk to our young people and say: “You *can* do it. You can practice.” And they walk the right way, some of them have a gleam in their eye and say, “I can,” and then three of them are walking away going, “I know how it really works. I was at that law firm during the break, and this is how you have to practice law in Uganda.” So, eventually reaching that tipping point where you cannot get away with doing things corruptly. Where are we? How far away is it? I do not know. The more things are technological, the harder things become to fix. Uganda is a cash society. It sure makes it easy to do things when everybody is running around with big wads of cash as opposed to every single thing happening on an electronic transaction. But what sort of things are going to tighten things up? I think eventually things will tighten up, and eventually people will hold people more accountable and feel like you cannot get away with things. But when everybody owes somebody else a favor, it becomes difficult.

¹ Malcolm Gladwell authored a book called *The Tipping Point*.

G. Fallen Culture

I am not going to say culture, because I do not think culture is bad. There is awesome culture, and then in every culture there is fallen culture. And Uganda has some fallen culture like child sacrifice. It does not get much more fallen than that. Of course we have our own fallen culture in terms of a death toll that I think we are all aware of in this country. But in Uganda, there is the sacrifice of children that happens. It is just horrible. It is just as bad as anything you can imagine. Fortunately, it does not happen just constantly, but it happens way, way, way more than anyone would like.

One thing that is pretty cool—Heather Pate and I wrote a paper, along with another UCU student. It is interesting, because it addresses those things about new laws. We have a human trafficking law, and it actually addresses child sacrifice, interestingly enough in the human trafficking law. We do not need more laws about child sacrifice. We just need to enforce the law, and we just need people to think that they know they can go after it.

I think the other cultural problem that is really devastating in Uganda also has to do with children: the sexual abuse of children. And it puts a huge tax on the justice system. How many defilement cases take up high court court dockets! And I think it takes a toll on the judges just to have to see case after case—and the prosecutors—case after case of sexual abuse to children. It makes the justice system something you do not want to be a part of, because if you go there, that is what you see in a high court session—a few murders, and then, essentially, a statutory rape case after statutory rape case. So addressing these issues of where culture is fallen is another challenge. With that, I am finished with my time. Thank you.