

Tax incentives and the realisation of economic and social rights: The right to basic education in Uganda

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Dedication

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Declaration of originality¹ for a research output²

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¹ Annexure G to Postgraduate Administrative Processes for Registered Students – S1834/13 (amended).

² Research output, in this context, is defined as a mini-dissertation, dissertation or thesis.

Abstract

Tax incentives as a public finance policy impact the realisation of economic and social rights. In this study I explore the connection between the fiscal policy on tax incentives and the realisation of economic and social rights. I focus on free and compulsory universal primary education in Uganda as an aspect of the right to basic education especially for poor and vulnerable persons. Using the theory of the human rights-based approach to fiscal sociology developed by Waris, I assess the role of tax competition in the prevalence of unjustified and non-strategic tax incentives. I employ mixed doctrinal and qualitative methods to establish the impact of tax competition on fiscal sovereignty and legitimacy. I argue that the fiscal policies on tax incentives violate critical human rights principles and affect the realisation of rights. This situation is aggravated by the absence of a clear legal obligation on states to deliberately formulate fiscal policy aimed at realising economic and social rights. Inevitably, the realisation of critical rights is subjected to the whims of a largely unregulated private sector-led economy, to the detriment of poor and vulnerable citizens. I further contend that if domestic revenue mobilisation initiatives are to meaningfully contribute to sustainable resources for economic and social rights financing, fiscal policy ought to be human rights compliant. A departure from this position leads to substantial avoidable revenue losses and leakages, which resources could have been used to enhance the realisation of economic and social rights. Ultimately, I emphasise the need for a full realisation, on the part of all actors, of the inseparable nexus between fiscal policy and human rights; and propose the adoption of a definitive normative legal obligation – at the international and domestic levels – upon states to ensure that fiscal policy is directed towards the realisation of economic and social rights, particularly for poor and vulnerable persons. This is the most sustainable way through which states can avoid a fiscal crisis.

List of abbreviations

ACHPRs	African Charter on Human and Peoples' Rights 1981
ACRWC	African Charter on the Rights and Welfare of the Child 1990
African Commission	African Commission on Human and Peoples' Rights
African Union Declaration	African Union Declaration on Illicit Financial Flows 2015
Agenda 2063	African Union Agenda 2063: The Africa We Want
AUC	African Union Commission
AUDP	African Union Development Programme
BEPs	OECD Action Plan on Base Erosion and Profit Shifting 2013
BFP	Budget Framework Paper
CDE	Convention against Discrimination in Education 1960
CESCR	International Covenant on Economic, Social, and Cultural Rights 1966
CFR	Charter for Fiscal Responsibility
CIT	Corporate Income Tax
COMESA	Common Market for East and Southern Africa
Committee on ESCR	United Nations Committee on Economic, Social, and Cultural Rights

CRC	Convention of the Rights of the Child 1989
CRDP	Convention on the Rights of Persons with Disabilities 2006
CSBAG	Civil Society Budget Advocacy Group
CSOs	Civil Society Organisations
Dakar Framework	Dakar Framework for Action: Education for All-Meeting Our Collective Commitments 2000
DCAs	Development Cooperation Agreements
DRD	United Nations Declaration on the Right to Development 1986
DRM	Domestic Revenue Mobilisation
DRMS	Domestic Revenue Mobilisation Strategy 2019
DTAs	Double Taxation Agreements
EAC	East African Community
EACMA	East African Customs Management Act 2004
ECD	Early Childhood Development
Education Act	Education (Pre-Primary, Primary, and Post-Primary) Act 13 of 2008
EFA	Education for All
EOC	Equal Opportunities Commission
ESRs	Economic and Social Rights

ESSAPR	Education and Sports Sector Annual Performance Reviews
ESSP	Education and Sports Sector Strategic Plan
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GERs	Gross Enrolment Rates
GPE	Global Partnership for Education
GPs on HRs in FP	Guiding Principles on Human Rights in Fiscal Policy
HIV	Human Immunodeficiency Virus
ICA	Investment Code Act Chapter 92 of the Laws of Uganda (repealed)
IFF	Illicit Financial Flows
IMF	International Monetary Fund
ISER	Initiative for Social and Economic Rights
ITA	Income Tax Act Chapter 340 of the Laws of Uganda
ITO	International Tax Organisation
KIIs	Key Informant Interviews
LC	Local Council
Limburg Principles	Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights 1987

Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003
MDAs	Ministries, Departments, and Agencies
MDGs	Millennium Development Goals
MoFPED	Ministry of Finance, Planning, and Economic Development
NAP on BHRs	National Action Plan on Business and Human Rights 2021
NAPs	National Action Plans
NDP	National Development Plan
NEPAD	New Partnership for African Development
NGOs	Non-Governmental Organisations
NPA	National Planning Authority
OECD	Organisation for Economic Cooperation and Development
PFM	Public Finance Management
PFMA	Public Finance Management Act 3 of 2015
PFMF	Public Finance Management Framework
PPP	Public-Private Partnerships
PSFU	Private Sector Foundation, Uganda
PTA	Parent-Teachers Association
SAPs	Structural Adjustments Programmes

SDGs	Sustainable Development Goals
SEATINI	Southern and Eastern Africa Trade, Information and Negotiation Institute
SFG	School Facilities Grant
SMEs	Small and Medium Enterprises
TPCA	Tax Procedure Code Act 14 of 2014
UGX	Uganda Shillings
UHRC	Uganda Human Rights Commission
UIA	Uganda Investments Authority
UK	United Kingdom
UNCT	Proposed United Nations Convention on Tax
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
UNGPs	United Nations Guiding Principles on Business and Human Rights 2011
Universal Declaration	Universal Declaration on Human Rights
UPE	Universal Primary Education
UPOLET	Universal Post O-Level Education and Training Program
URA	Uganda Revenue Authority

USD	United States Dollars
USE	Universal Secondary Education
VAT	Value Added Tax
WTO	World Trade Organisation

Definition of key terms

Minimum Core Obligations

These are ‘core components’ of economic and social rights (ESRs) whose enjoyment is not subject to the principle of progressive realisation of ESRs.¹ They are obligations whose realisation states must prioritise to avoid violations.² They include non-discrimination, the provision of essential foodstuff, essential primary health care, basic shelter, housing, and basic education.³

Public Finance

Public Finance is the ‘revenue-expenditure process of government’.⁴ It covers revenue generation and public expenditure initiatives and processes that include fiscal policies and budgets.⁵

Tax exemptions

These are ‘[t]axable expenditure, income or investment on which no tax is levied to serve a specific purpose such as to encourage a certain activity for a specified period’.⁶ The objective may include attracting investment in a particular sector or economic activity. Tax exemptions may also be granted as a form of affirmative action to particular tax payers. In Uganda these include income tax exemptions for persons leasing, letting premises or operating in free zones with a particular stated capital threshold.⁷

¹ H Bielefeldt *et al* ‘Healthcare in the Spectrum of Human Rights. An Introduction’ in S Klotz *et al* (eds) *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and implementation* (2017) 9, available at <https://library.oapen.org/bitstream/handle/20.500.12657/30423/646439.pdf?sequence=1#page=96> (accessed 22 July 2022).

² Para 10 of General Comment 3 of the Committee on Economic, Social and Cultural Rights (Committee on ESCR), adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23), available at <https://www.refworld.org/pdfid/4538838e10.pdf> (accessed 13 March 2021).

³ As above. See F Coomans ‘Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches’ (2004) 50 *Persona & DERECHO* 81.

⁴ RA Musgrave *The Theory of Public Finance: A study in public Economy* (1959) 3; R Jones *The Nature and First Principles of Taxation* (1914) 1.

⁵ RE Wagner *Fiscal Sociology and the Theory of Public Finance - An Exploratory Essay* (2007) 4.

⁶ <http://www.businessdictionary.com/definitions.html> (accessed 25 May 2019).

⁷ See Sect 21(1)(ae) & (af) of the Income Tax (Amendment) Act of 2019.

Tax expenditure

Tax expenditure is a broader concept that encompasses diversion from the traditional tax system whose effect is a reduction in tax liability of a tax payer and includes:⁸

...exemptions: exclusion from the tax base, allowances: amounts deducted from the tax base before applying the tax rate(s), credits: amounts deducted from tax liability, rate relief: a reduced tax rate and tax deferral: a delay in paying the tax liability.

Tax holiday

This is a temporary tax break granted to achieve particular public finance objectives.⁹ The term is used interchangeably with tax exemptions in many jurisdictions.

Tax incentives

Tax incentives are unique fiscal considerations offered to eligible investors that reduce their tax liability.¹⁰ The term can be understood either from the legal perspective or the effect of the incentive:¹¹

A statutory tax incentive is a special tax provision granted to qualifying investment projects and this provision would not be applied to other investment projects outside the selected qualifying categories. An effective tax incentive is a special tax provision granted to qualifying investment projects with the goal of reducing the effective tax burden.

They are further defined as:¹²

special exclusions, exemptions, or deductions that provide special credits, preferential tax rates or deferral of tax liability. Tax incentives can take the form of tax holidays for a limited duration, current deductibility for certain types of expenditures, or reduced import tariffs or customs duties.

⁸ C Heady & M Mansour 'Tax expenditure reporting and its use in Fiscal Management: A guide for Developing Economies' (2019) *International Monetary Fund Cover Design: IMF Multimedia Services Composition: The Greuel Group* 1, available at <https://www.imf.org/-/media/Files/Publications/HowToNotes/HTNEA2019002.ashx> (accessed 19 August 2019).

⁹ As above.

¹⁰ A Easson *Tax Incentives for Foreign Direct Investment* (2004) 3.

¹¹ S Munongo *et al* 'Do tax incentives matter for investment? A literature review' (2017) 13.2 *BEH - Business and Economic Horizons* 153 available at www.academicpublishingplatforms.com (accessed 14 April 2019); HH Zee *et al* 'Tax Incentives for Business Investment: A Primer for Policy Makers in Developing Countries' The International Monetary Fund (2002) 30.9 *World Development* 1497-1499 available at [https://doi.org/10.1016/S0305-750X\(02\)00050-5](https://doi.org/10.1016/S0305-750X(02)00050-5) (accessed 14 April 2019).

¹² A Easson & EM Zolt *Tax Incentives* (2002) 3, available at <https://www.academia.edu/download/49688603/EassonZoltPaper.pdf> (accessed 22 July 2022), See also Civil Society Budget Advocacy Group (CSBAG) 'Widening Uganda's Tax base: What's at stake and what should Government do?' (2017) 6 available at <https://www.csbag.org/download/widening-ugandas-tax-base-whats-at-stake-and-what-should-government-do-2/> (accessed 14 April 2019) & Tax Justice Network (TJN) & Action Aid International (AAI) 'Tax Competition in East Africa: The race to the bottom? Tax incentives and revenue loss in Kenya' (2012) 1 available at https://www.taxjustice.net/cms/upload/pdf/kenya_report_full.pdf (accessed 12 April 2019).

Other examples include tax stability clauses, tax waivers, tax credits, exclusions, export or special tax zones, among others.¹³ These are part of the broader concept of tax expenditure.¹⁴

¹³ E Zolt 'Tax Incentives: Protecting the tax base' (2015) Paper for a Workshop on Tax Incentives and Base Protection, United Nations, New York available at https://www.un.org/esa/ffd/wp-content/uploads/2015/04/2015TIBP_PaperZolt.pdf (accessed 15 August 2019).

¹⁴ Southern and Eastern African Trade Information and Negotiations Institute (SEATINI-Uganda) 'Tax Exemptions; implications on socio-economic development' 3rd December (2012) 11 available at <https://www.seatiniuganda.org/publications/downloads/89-tax-exemptions-implications-on-the-socio-economic-development-3rd-dec-2012/file.html> (accessed 14 April 2019); V Bratić 'Tax expenditures: A theoretical review' (2006) 30.2 *Financial Theory and Practice* 113, 114 & 115 available at <https://hrcak.srce.hr/clanak/9199> (accessed 22 July 2022).

Chapter One

Introduction

1.0 Introduction

Taxation has globally been accepted as a powerful tool that stimulates development; reduces poverty; income and wealth inequalities; generates revenue for financing public goods and services; and promotes economic growth and development.¹ Consequently, first at a national level, low tax yields negatively impact the realisation by states of economic and social services that the poor are distinctly dependent on and also the capacity to develop.² Secondly, at the community level, low levels of tax revenue are detrimental especially on poor and marginalised members who would gain from the grant of social services and other benefits of taxation.³ Thus the fiscal and broader public finance role of taxation impacts the state's human rights functions in various aspects.⁴ It goes without saying therefore that the burden of flawed fiscal decisions

¹ A Bamidele 'Taxation as a Tool for Economic Development of Nigeria' (2020) 6.1 *IDOSR Journal of Current Issues in Social Sciences* 12 available at <https://www.idosr.org/wp-content/uploads/2020/06/IDOSR-JCISS-61-9-14-2020..pdf> (accessed 22 July 2022); S Darcy "'The Elephant in the Room": Corporate Tax Avoidance & Business and Human Rights' (2017) 2 *Business and Human Rights Journal* 1 8, MS Carmona 'Report of the Special Rapporteur on extreme poverty and human rights' (2014) para 36 & 38 available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwiW-o7mhoTkAhUiIMUKHdw-Ah0QFjACegQIARAB&url=https%3A%2F%2Fsocialprotection-humanrights.org%2Fresource%2Freport-of-the-special-rapporteur-on-extreme-poverty-and-human-rights-magdalena-sepulveda-on-fiscal-policies-and-human-rights-ahrc2628%2F&usg=AOvVaw0cP2UV5JJWlqdSnOwPzHbE> (accessed 15 August 2019); A Waris *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) 50 & 154; T Besley & T Persson 'Taxation and Development' (2013) *Handbook of Public Economics* 69 & 70 available at <https://www.lse.ac.uk/economics/Assets/Documents/personal-pages/tim-besley/working-papers/taxation-and-development.pdf> (accessed on 22 July 2022); D Itriago 'Owning Development: Taxation to fight poverty' (2011) *Oxfam Research Report* 47; Fahamu & Pambazuka (Tax Justice Network- Africa) *Tax Us If You Can: Why Africa Should Stand Up for Tax Justice* (2011) 3 & N Kaldor 'Taxation for Economic Development' (1963) 1.1 *The Journal of Modern African Studies* 13-15.

² As above; Darcy (n 1 above) 1.

³ MJ Tuazon & M Stenlund 'Introduction' in MJ Tuazon & M Stenlund (eds) *The Role of Taxation in the Fulfilment of Human Rights and Sustainable Development The Obligation to Mobilize Resources* (2019) 39 & 40 available at <https://www.diva-portal.org/smash/get/diva2:1353116/FULLTEXT01.pdf> (accessed 11 March 2022); MS Carmona 'Report of the Special Rapporteur on extreme poverty and human rights' (2014) para 44 available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwiW-o7mhoTkAhUiIMUKHdw-Ah0QFjACegQIARAB&url=https%3A%2F%2Fsocialprotection-humanrights.org%2Fresource%2Freport-of-the-special-rapporteur-on-extreme-poverty-and-human-rights-magdalena-sepulveda-on-fiscal-policies-and-human-rights-ahrc2628%2F&usg=AOvVaw0cP2UV5JJWlqdSnOwPzHbE> (accessed 15 August 2019).

⁴ MJ Tuazon & M Stenlund 'Introduction' in MJ Tuazon & M Stenlund (eds) *The Role of Taxation in the Fulfilment of Human Rights and Sustainable Development The Obligation to Mobilize Resources* (2019) 1 available at <https://www.diva-portal.org/smash/get/diva2:1353116/FULLTEXT01.pdf> (accessed 11 March 2022).

falls squarely on citizens, especially those at the periphery of society.⁵ It is against this background that taxation is said to play critical public finance as well as human rights functions.⁶ Consequently, states' failure to recognise these two broad objectives as mutually reinforcing could be counterproductive to the detriment of both the state and citizens.

Unfortunately, the broad objectives of taxation mentioned above are constantly struggling for mastery.⁷ Countries are numerously challenged by how to achieve an optimum tax structure that enables fiscal policy to play its rightful role in both economic growth and development and the realisation of human rights.⁸ These challenges include tax incentives policies which firstly affect the states' revenue base and ultimately thus their capacity to carry out their traditional public finance and human rights functions.⁹ Secondly, non-strategic tax incentives decisions contribute to taxation falling short of meeting its objectives such as improving citizens' welfare through the realisation of human rights.¹⁰ These rights include economic and social rights (ESRs) such as the right to basic education.¹¹

Ultimately, the relationship between tax incentives and ESRs realisation is not superficial. Several studies, using empirical evidence, demonstrate the correlation between the two from the revenue generation and financing perspectives for rights such as education and health.¹²

⁵ As above.

⁶ MJ Tuazon & M Stenlund 'Introduction' in MJ Tuazon & M Stenlund (n 4) 39 & 40. This is in line with the emergence of the need to incorporate a human rights based approach to development where both fiscal and other initiatives related to development should be viewed from a human rights perspective. (See D Olowu, 'Human Development Challenges in Africa: A Rights-Based Approach,' (2004) 5 *San Diego International Law Journal* 179-224).

⁷ N Kaldor 'Taxation for Economic Development' (1963) 1.1 *The Journal of Modern African Studies* 7.

⁸ (n 6 above) & A Waris *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) 8 & 9.

⁹ See sect 1.8.2, 3.1, 3.4, and chapter four of the thesis.

¹⁰ United Nations Office of the United Nations High Commissioner for Human Rights Realizing Rights Through Government Budgets (2017) 87 & 111, available at <https://www.ohchr.org/Documents/Publications/RealizingHRTThroughGovernmentBudgets.pdf> (accessed 11 March 2022).

¹¹ Para 10 of General Comment 3 of the Committee on ESCR introduces the concept of the right to basic education as a component of the right to education which must be immediately realisable as a minimum core obligation. See definition of the minimum core obligations in the glossary of terms.

¹² J Tamarappoo 'Analysis of the Linkage Between Domestic Revenue Mobilization and Social Sector Spending Phase 1 Final Report Leadership In Public Financial Management II (LPFM II)' (2016) *USAID report 1* available at https://pdf.usaid.gov/pdf_docs/pbaae640.pdf (accessed 26 September 2019). The report found that although many developing countries mobilise 13% of their gross domestic product (GDP) against the 20% target set by the United Nations (UN) to attain the Sustainable Development Goals (SDGs), a 10% increase in revenue would translate into a 17% increase on health expenditure. See also S Fan, B Yu & A Saurkar 'Public Spending in Developing Countries: Trends, Determination, and Impact' in S Fan (ed) *Public Expenditures, Growth, and*

The most recent study by the World Bank finds that sub-Saharan countries spend an average of 14.4% of the budget on education.¹³ This expenditure is still ‘generally insignificant’ given the demands of the education sector.¹⁴ These inadequacies notwithstanding, research indicates that firstly, as countries become wealthier by increased per capita gross domestic product (GDP), their expenditure on education improves.¹⁵ Secondly, I find that the studies illustrate that increments in revenue collection enhance the GDP performance of the country and ultimately lead to the better realisation of ESRs. These facts notwithstanding, Africa and Uganda in particular, face several domestic revenue mobilisation (DRM) bottlenecks. These largely emanate from gaps within the legal and policy framework, and from the administration of tax incentives that lead to devastating revenue leakages and losses.¹⁶ These flaws eventually affect the capacity of the state to realise critical ESRs such as the right to basic education. Since locally generated revenue is a more sustainable option for financing rights, there is therefore need to bridge the fiscal structural gaps that affect DRM.¹⁷ Accordingly, I seek to establish the impact of tax incentives on the realisation of ESRs and specifically, the right to basic education in Uganda. This will be done through analysing why states struggle to make appropriate fiscal decisions relating to tax incentives which failure results into implied and express human rights violations. This study specifically analyses how this situation plays out in low-income countries such as Uganda.

Poverty Lessons from Developing Countries (2008) 20-56 available at <https://www.ifpri.org/publication/public-expenditures-growth-and-poverty-developing-countries-0> (accessed 22 March 2022).

¹³ See <https://data.worldbank.org/indicator/SE.XPD.TOTL.GB.ZS> (accessed on 5 August 2022). Compare with ME Nyamongo & NJ Schoeman ‘The quality of governance and education spending in Africa’ (2010) 14.2 *Southern African Business Review* 3 available at <https://www.ajol.info/index.php/sabr/article/download/76361/66822> (accessed on 22 July 2022) that find that in many African countries, expenditure on education is the highest, standing at an average of 16.3% of the national budget. The two sources demonstrate a decline that could be attributed to many factors including the effects of the Covid-19 pandemic on economies.

¹⁴ **JG Stotsky** *et al* ‘Sub-Saharan Africa: A Survey of Gender Budgeting Efforts’ (2016) *International Monetary Fund* 4 available at <https://www.imf.org/external/pubs/ft/wp/2016/wp16152.pdf> (accessed on 22 July 2022).

¹⁵ S Fan *et al* ‘Public Spending in Developing Countries: Trends, Determination, and Impact’ in S Fan (ed) *Public Expenditures, Growth, and Poverty Lessons from Developing Countries* (2008) 23 & 24 available at <https://www.ifpri.org/publication/public-expenditures-growth-and-poverty-developing-countries-0> (accessed 22 March 2022).

¹⁶ See sect 5.3, 5.4 & 5.5 of the thesis for a more detailed discussion. See also Civil Society Budget Advocacy Group (CSBAG) ‘Widening Uganda’s Tax base: What’s at stake and what should Government do?’ (2017) 6 available at <https://www.csbag.org/download/widening-ugandas-tax-base-whats-at-stake-and-what-should-government-do-2/> (accessed 14 April 2019) & Fahamu & Pambazuka (Tax Justice Network- Africa) *Tax Us If You Can: Why Africa Should Stand Up for Tax Justice* (2011) 9.

¹⁷ Kaldor (n 7 above).

1.1. Background

Having introduced the economic and human rights functions of taxation, it is important to ascertain how tax incentives affect the same. Globally, there are concerns about tax incentives especially exemptions and holidays that are seen as modern-day ‘production tax havens’.¹⁸ Key among the concerns is double non-taxation which leads to revenue losses to both the country of residence and origin.¹⁹ Uganda, as a low-income country, has not been spared from these and other related predicaments.²⁰ The trend over time reveals that the grant of non-strategic tax incentives leads to unjustifiable foregone tax revenue from otherwise would-be taxpayers.²¹ Illustratively, there is evidence pointing to this conclusion even with the absence of consistent and updated reporting on tax expenditure and disaggregated data on tax incentives especially.²² For instance, in the years between 2014/15 to 2017/18, the revenue foregone from the grant of tax incentives by the Ugandan government stood at approximately United States Dollars (USD) 1 billion.²³ This is even when CIT contributes up to 20% to total tax revenue in developing countries as compared to just about 2-3% in the Organisation for Economic Co-operation and Development (OECD) countries.²⁴

¹⁸ RS Avi-Yonah ‘Globalization and Tax Competition: Implications for Developing Countries’ (2001) 60 available at https://www.researchgate.net/publication/254421609_Globalization_and_Tax_Competition_Implications_for_Developing_Countries (accessed 30 August 2019).

¹⁹ Avi-Yonah (n 18 above) 61. Double non taxation arises in situations where strategic multinational corporations set up shop in countries with tax holidays with the effect that their profit on income will neither be taxed by the host country nor the resident country.

²⁰ I discuss these challenges in detail in sect 5.3, 5.4 & 5.5 of the thesis. See also Southern and Eastern African Trade Information and Negotiations Institute (SEATINI-Uganda) ‘Tax Exemptions; implications on socio-economic development’ (2012) 11 available at <https://www.seatiniuganda.org/publications/downloads/89-tax-exemptions-implications-on-the-socio-economic-development-3rd-dec-2012/file.html> (accessed 14 April 2019).

²¹ As above.

²² Uganda released its first tax expenditure report for the FY 2019/20 in 2022. To date that report and the tax exemptions report by URA for the FY 2018/19 are the only publically available reports on the subject.

²³ URA Exemptions Report FY2017/18 7; N Eissa *et al* ‘What is the fiscal cost of tax incentives in Uganda?’ (2021) *International Growth Centre 2*, available at <https://www.theigc.org/wp-content/uploads/2021/01/Eissa-et-al-2021-final-report-1.pdf> (accessed 15 August 2021) estimates for the same period is USD 652 million with a third of the amount resulting from corporate income tax (CIT) and the other two thirds being mainly custom related.

²⁴ UNCTAD ‘Tackling Illicit Financial Flows for Sustainable Development in Africa’ (2020) 21 & 22; BA O’Hare ‘Perspective, Human Rights and the Social Determinants of Health’ (2018) 20.2 *Health and Human Rights Journal* 57 59 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293362/pdf/hhr-20-057.pdf> (accessed 26 September 2019).

Furthermore, in the financial year 2017/18, Uganda lost approximately USD 290.940 million in tax incentives, the biggest share resulting from value added tax (VAT) related incentives.²⁵ A different report estimates the loss in the same year at USD 254 million, translating to 3% of the budget that year and 1% of GDP in 2017.²⁶ Further, in 2019/20 approximately USD 1.4 billion was forgone in tax expenditures.²⁷ According to the most recent tax expenditure report of 2021/22, approximately USD 652 million was foregone in tax expenditure which is 1.56% of the GDP and 11.9% of total tax yield for the same financial year.²⁸ Moreover, it is reported that about USD 1.944 billion is lost in tax incentives annually, which is the same amount required for debt servicing per year.²⁹ The statistics above illustrate a progressively growing pattern of revenue losses and leakages from the grant of tax incentives.

It is important to note that the biggest chunk of the losses is from taxes such as CIT that are critical for the revenue base of mostly developing countries. Of equal concern is the fact that although Uganda has been improving in revenue collection over the years, there is a decline in the percentage growth rate of the tax yields.³⁰ Furthermore, it is important to note that the tax expenditure to GDP ratio has been raising over time.³¹ For example, by the year 2019/20, the tax to GDP ratio stood at 3.64% as compared to 2.45% in 2016/17.³² These estimations are

²⁵ URA ‘Tax Exemptions Report FY 2017/18’ 7 & M Wambi ‘UGX 1.4 trillion lost in Tax Exemptions-SEATINI’ *Uganda Radio Network* (Kampala) 17 May 2019 available at <https://ugandaradionetwork.net/story/ugx-1-4-trillion-lost-in-tax-exemptions-says-seatini> (accessed 20 August 2019).

²⁶ Eissa *et al* (n 23 above) 17.

²⁷ MoFPED ‘Tax expenditure report of FY 2019/20’ 2 available at <https://www.finance.go.ug/publication/ministry-finance-planning-and-economic-development-tax-expenditures-report-fy-201920> (accessed 13 March 2022).

²⁸ See <https://www.finance.go.ug/sites/default/files/Publications/UGANDA%20TAX%20EXPENDITURE%20REPORT%20FY%202021.22%20.pdf> (accessed 8 November 2022).

²⁹ AA Wadero ‘Parliament quizzes URA on tax holidays’ *Monitor, Kampala*, 23 January 2022 available at <https://www.monitor.co.ug/uganda/news/national/parliament-quizzes-ura-on-tax-holidays-3690870> (accessed 25 January 2022). According to SEATINI ‘Policy Brief on the cost of tax incentives and exemptions in Uganda’ (2019) 3 & 5 available at <https://www.seatiniuganda.org/publications/policy-briefs/318-policy-brief-on-the-cost-of-harmful-tax-incentives-and-exemptions-in-uganda/file.html> (accessed 20 August 2019) estimated that by 2019 Uganda was losing approximately USD 270 million annually in tax forgone as a result of tax incentives.

³⁰ According to the URA Annual Revenue Performance Report of 2019/20 2, available at https://www.ura.go.ug/openFileController/execute?path=/webupload/upload/download//staticContent/TOPM/ENU/9907//10192_RPR.pdf (accessed 5 August 2022) revenue collection declined from 21.01% in 2018, to 5.18% in 2019 to -15.05 in 2020; SEATINI and Action Aid ‘Corporate Tax Evasion and Avoidance in Uganda’ (2017) VI available at <https://www.seatiniuganda.org/publications/research/166-corporate-tax-evasion-avoidance-april-2017/file.html> (accessed 27 September 2019) finds that in the financial years ranging from 2014/15 to 2016/17, for example, collections from corporation tax stalled at an average of US\$ 199 million.

³¹ MoFPED (n 27 above).

³² As above.

approximately the percentage budgetary deficit for Uganda to meet the education funding targets set by international soft law standards.³³ Even with the challenges associated with securing updated official tax expenditure data, the situation relating to the economic impact of tax incentives in Uganda is dire. The magnitude could be higher if there was updated data on all forms of tax expenditure as the available official data has gaps such as not capturing losses and leakages from discretionary tax incentives.

The above state of affairs does not therefore provide a comprehensive situational analysis regarding the ramifications of tax incentives. It however provides an inkling into the losses and leakages that arise from the continued reliance on statutory tax incentives, especially. And for Uganda, the challenge is the continued grant of both statutory and discretionary incentives as discussed in detail in chapter five.³⁴ Case in point, it is estimated that the Ministry of Finance, Planning, and Economic Development (MoFPED) spends an equivalent of approximately USD 20 million annually to pay for different companies' tax obligations arising from agreements between the government and taxpayers.³⁵ This is approximately one-third of the total budget of the education sector for the financial year 2019/20.³⁶ This loss/leakage is usually not captured in the official tax expenditure reports because of the nature of the incentive. The flaws embedded in the legal and policy framework, and the administration of tax incentives contribute substantially to the challenges above.³⁷

From the foregoing discussion, there is a preliminary concern that unjustified tax incentives have a real impact on revenue generation and the enjoyment of rights generally, and the right

³³ Initiative for Social and Economic Rights (ISER) 'Status of Implementation of SDG 4 on Education: Is Uganda on Track?' (2019) 56 available at https://www.iser-uganda.org/images/downloads/Status_of_Implementation_of_SDG_4_on_Education_Is_Uganda_on_Track.pdf (accessed 25 August 2019). These obligations are contained in the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) The final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015 available at https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf (accessed 29 August 2019) & the Muscat Agreement, United Nations Educational, Science and Cultural Organisation (UNESCO) (2014) Target 7, available at <https://unesdoc.unesco.org/ark:/48223/pf0000228122> (accessed 21 August 2019).

³⁴ See sect 5.1.1, 5.3, 5.4 and specifically 5.4.3 of the thesis.

³⁵ CSBG (n 16); IM Ladu, IM 'How relevant are tax holidays to Uganda's economy?' *Daily Monitor* (Kampala) 23 August 2017 available at www.monitor.co.ug; see also section 40A of the Tax Procedure Code (Amendment) Act (TPCA) of 2019, tax arrears arising from these arrangements were waived off.

³⁶ 2019/20 *Budget Speech*, 29 available at <https://www.finance.go.ug/sites/default/files/Budget/FY%202019-20%20Budget%20Speech.pdf> (accessed 1 August 2019).

³⁷ CSBG (n 16) & Ladu (n 35).

to basic education particular to this study. In this study therefore, I analyse and compare the effect of revenue losses on the budget for the provision of ESRs with specific emphasis on the right to basic education. From the wide spectrum of ESRs, the study focuses on the free and compulsory universal primary education (UPE) whose realisation is dependent on government financing as discussed in detail in chapter four below.³⁸ In section 1.8 of this chapter, and in chapters four and five, I explore whether or not the revenue losses are justifiable.³⁹ The exploration considers the motivation for the grant of tax incentives, their impact on both revenue generation and the realisation of ESRs, and in particular the right to basic education which right states are obliged to realise immediately.⁴⁰ Importantly, free and compulsory UPE is a component of basic education that the poor and marginalised largely depend on.⁴¹ These are some of the concerns of the study.

Specifically, from the human rights perspective of the study, Uganda has ratified several international human rights instruments that provide for the right to education. Uganda has taken further steps to domesticate the right to basic education in the Constitution of the Republic of Uganda 1995 and the Education (Pre-primary, primary and Post Primary) Act 2008.⁴² The

³⁸ See sect 4.1, 4.2, and 4.3 of the thesis. See also F Coomans ‘Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches’ (2004) 50 *Persona & DERECHO* 86.

³⁹ See sect 4.3, and 5.3, 5.4, and 5.5 of the thesis.

⁴⁰ Uganda ratified CESCR on 21 January 1987 and the same provides for this obligation under Art 2(3), see also Para 43 of General Comment 13 of the Committee on ESCR (adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999), which provides for the legal obligation of states on the right to education. It provides that despite the principle of progressive realisation of the right to education, states have immediate obligations including the right to ‘take steps towards full realization of the right’ which steps must be ‘deliberate, concrete and targeted towards the full realisation of the right to education. See also Para 10 of General Comment 3 of the Committee on ESCR: The Nature of States Parties’ Obligations, adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 which recognises the right to ‘basic forms of education’ as a minimum core obligation of the right to education. The same provides that the only way state parties can be excused for failing to meet their minimum core obligations is if they demonstrate that they have used all the resources at the state’s disposal, as a matter of priority in the realisation of their minimum core obligations. The concept is defined in the glossary of terms.

⁴¹ See the 5th Objective of the 1998 UPE Guidelines. See also CEHURD *et al* ‘Universal Primary Education,

Human Rights To And The Right of the Health An Assessment of the Policy and Practice in Uganda’ (2015) 36, available at <https://www.cehurd.org/wp-content/uploads/2015/11/UPE-and-Human-Rights-revised-Oct5-2-1.pdf> (accessed 11 March 2022).

⁴² These include the Convention on the Rights of a Child (CRC) 1989, came into force on 2 September 1990, ratified by Uganda on 17 August 1990 available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 30 July 2019), CESCR 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of on 16 December 1966, entry into force 3 January 1976, Uganda ratified on 21 January 1987 available at <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>

importance attached to the right to basic education can be deduced from the facts that firstly it is the only domesticated minimum core obligation, and as such arguably a national priority that should be high on the government's funding priorities. Secondly and equally important, education is not only a right but a means to achieving other human rights.⁴³ Accordingly, 'increasingly, education is recognized as one of the best financial investments States can make'.⁴⁴ From the foregoing, I seek to establish the impact the resources forgone through avoidable tax incentives could have on the realisation of ESRs broadly and basic education specifically, but most particularly the financing and realisation of free and compulsory UPE.

1.2 Research problem

Having provided the status quo relating to tax incentives and the right to basic education trajectory in Uganda, it is now important to appreciate the specific flaws embedded therein. Although Uganda has taken progressive steps, including legislative, budgetary, and international cooperation, towards the realisation of ESRs,⁴⁵ much remains to be done especially from the financing aspect. The financing gaps have been caused by DRM-related

(accessed 30 July 2019), the African Charter on Human and Peoples' Rights (ACHPR) 1981, adopted on 27 June 1981, ratified by Uganda on 10 May 1986 available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 30 July 2019), the African Charter on the Rights and Welfare of the Child 1990, adopted on 27 June 1981, ratified by Uganda on 10 May 1986 available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 30 July 2019), the Convention on the Rights of Persons with Disabilities (CRPD) 2006, Uganda signed on 30 March 2007 and ratified both the Convention and Optional Protocol on 25 September 2008 without reservations, the Protocol to the African Charter on Women's Rights (Maputo Protocol) 2003, Art 12, adopted on 23 March 2003, came into force on 11 July 2003, Uganda ratified on 22 July 2010 available at https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (accessed 4 August 2019). The right to education has been domesticated through Objective XVIII of the National Objectives and Directive Principles of State Policy, Art 30 of the Constitution of the Republic of Uganda, 1995, and the Education (Pre-Primary, Primary and Post Primary) Act 13 of 2008. Sect 4(2) of the Act notably domesticates the right to basic education for all persons. Sect 10(3) of the same Act provides for primary education that is 'compulsory and universal'. The same is free and charging of fees is prohibited under sect 9(1) and (3).

⁴³ Para 1 of General Comment 13 of the Committee on ESCR. Education is an 'empowerment right' that assists the vulnerable and marginalised to improve their economic lives and increase community participation. Education equally ensures empowerment for women, protects children from all forms of exploitation, ensures respect for other rights and democracy, among other benefits.

⁴⁴ Para 1 of General Comment 13 of the Committee on ESCR.

⁴⁵ The legislative steps include recognising the preamble that contains most of the ESRs as part of the Constitution by the Art. 8A amendment that makes ESRs justiciable, recognising the right to basic education as a fundamental human right in Art. 34(2) of the Constitution, and Sect 4(2) of the Education (Pre Primary, Primary and Post Primary) Act 2008. There is also recognition of the largely progressive budgetary increments for ESRs, although a lot is still desired in this respect. It is also important to acknowledge the substantial development partners' support towards the realisation of many of the ESRs.

challenges arising from the adoption and implementation of fiscal policies, such as those on tax incentives, which lack human rights considerations.⁴⁶ This has negatively affected the realisation of ESRs especially the free and compulsory UPE component of the right to basic education.⁴⁷ The education sector funding broadly continues to lag behind the target and expectations set by international standards such as the Addis Ababa Action Agenda.⁴⁸ Notably, Uganda still defaults on the United Nations Educational, Science and Cultural Organisation (UNESCO), and the Education for All (the Muscat Agreement) targets of devoting at least 4-6% of its GDP to education or attaining a 15-20% budget share to the sector respectively by 2030.⁴⁹ These funding challenges have hindered the realisation of the most basic form of education especially for the most vulnerable.⁵⁰ This has been worsened by the economic effects of the Covid-19 pandemic on budget financing and the realisation of critical rights such as health and education.⁵¹ With the pandemic surge in Uganda, and resultant lockdowns in 2020 and 2021, the basic education subsector required innovation to realise the right especially for those on societal margins. The innovation required additional resources to roll out the different remote and distance learning options, especially for the UPE learners who, given their financial vulnerability, found it hard to afford the privately available options.⁵² Attempts at the same

⁴⁶ See sect 3.2, 3.3, 5.3 & 5.4 of the thesis for detailed discussion on such policies and practices.

⁴⁷ A Mwesigwa 'Uganda's success in universal primary education falling apart,' *The Guardian* (London) 23 April 2015 available at www.theguardian.com (accessed 22 March 2019).

⁴⁸ Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) The final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015 para 20 & 118 available at https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf (accessed 29 August 2019). This Agenda discusses concrete ways of generating finances for the realisation of rights, especially ESRs.

⁴⁹ United Nations Educational, Science and Cultural Organisation (UNESCO) (2014) Target 7, available at <https://unesdoc.unesco.org/ark:/48223/pf0000228122> (accessed 21 August 2019). See also A Budoo 'Adoption of a Human rights Approach to Budgeting as a Step to realise the right to Education in African Countries' in A.C. Onuora-Oguno et al. (ed) *Education Law, Strategic Policy and Sustainable Development in Africa* (2018) 30.

⁵⁰ LN Murungi 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 3180 & 3181 available at https://www.researchgate.net/publication/282463797_Inclusive_basic_education_in_South_Africa_Issues_in_its_conceptualisation_and_implementation/citation/download (accessed 1 September 2019). See sect 4.1, 4.2, & 4.3 of the thesis for the Ugandan situation.

⁵¹ See https://www.iser-uganda.org/images/downloads/Respect_for_Social_and_Economic_Rights_During_the_COVID-19_Pandemic.pdf (accessed 15 August 2021); UNDP- Uganda 'COVID-19 Policy brief #1' (2020) 5, 10, 23 available at <file:///C:/Users/Dell/Downloads/Socio-Economic-Impact-COVID-19-Uganda-Brief-1-UNDP-Uganda-April-2020.pdf> (accessed 15 August 2021).

⁵² M Stewart 'Exploring the Impact of COVID-19 on Education with Respect to Gender Equity and Equality' in A Osman & J Keveey (eds) *The Impact of COVID-19 on Education Systems* in

failed largely because of financial constraints.⁵³ The Covid-19 related challenges are only but a recent development that point to larger structural and ideological challenges related to the liberalisation of critical social services, and the effect it has on financing for public services.

In addition, the failure to prioritise UPE financing has been worsened by the current trends of liberalisation of the education sector, including primary education, as has happened with other public services.⁵⁴ In the first place, the privatisation of public goods and services generally excludes the vulnerable as it leads to government relegating its primary obligation to finance the same for the benefit of those on the margins of society.⁵⁵ From the education sector for example, many parents and guardians resort to the privately available options because of the inadequacies in public schools, which is a violation of international human rights standards.⁵⁶ Secondly, education liberalisation raises the cost of basic education which leads to the exclusion of vulnerable learners.⁵⁷ This has been precipitated by the lack of regulation especially of tuition fees charged and inadequate supervision of the schools.⁵⁸ The situation is made worse where the resource envelope is already constrained due to fiscal policies that lack human rights consciousness.

the Commonwealth (2021) Common Wealth Secretariat 134, available at [https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Impact%20of%20COVID-19 UPDF.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Impact%20of%20COVID-19%20UPDF.pdf) (accessed 12 March 2022); J Tumwesige ‘COVID-19 Educational Disruption and e-Learning in Uganda’ (2020) *The Konrad Adenauer Foundation* 6 & 7, available at <https://www.kas.de/documents/280229/8800435/COVID-19+Educational+Disruption+and+Response+-+Rethinking+e-Learning+in+Uganda.pdf/6573f7b3-b885-b0b3-8792-04aa4c9e14b7?version=1.0&t=1589283963112> (accessed 10 March 2022).

⁵³ Tumwesige (n 52 above).

⁵⁴ The Global Initiative for Economic, Social and Cultural Rights (GIESCRs) and the Initiative for Social and Economic Rights (ISER) ‘Privatisation, Discrimination and the Right to Education in Uganda: Alternative Report Submitted by the Initiative for Social and Economic Rights and the Global Initiative for Social and Economic Rights’ (2015) 6, available at https://www.iser-uganda.org/images/downloads/privatisation_discrimination_and_right_to_education.pdf (accessed 12 March 2022).

⁵⁵ T Kessler & N Alexander ‘Assessing the Risks in the Private Provision of Essential Services’ (2004) United Nations Conference on Trade and Development G-24 Discussion Paper Series 2-3 available at: https://unctad.org/system/files/official-document/gdsmdpbpg2420047_en.pdf (accessed 13 July 2022) & SE Gollust & PD Jacobson ‘Privatization of Public Services: Organizational Reform Efforts in Public Education and Public Health’ (2006) 96.10 *American Journal of Public Health* 1733–1735 available at: <https://doi.org/10.2105/AJPH.2005.068007> (accessed 13 July 2022).

⁵⁶ GIESCRs and ISER (n 53 above). I discuss in detail in sect 4.1, 4.2 & 4.3 of the thesis that this in itself is a violation.

⁵⁷ As above.

⁵⁸ GIESCRs and ISER (n 54 above) 7.

Relatedly, Uganda faces DRM bottlenecks arising from observable short comings in the legal and policy framework, and the administration of tax incentives. Among these are the lack of: a tax expenditure governance framework; a monitoring and evaluation framework; or a cost and benefit analysis benchmark to measure and document the impact of the tax incentives against the revenue foregone.⁵⁹ Additionally, the legal and policy framework governing tax incentives falls short of reflecting the spirit and aspirations of the several ESR-related human rights obligations that Uganda has signed-up to. The framework rather focusses on the perceived economic rather than human rights impact. It should be noted right from the onset that tax incentives persist not because of the motivation that states, especially developing nations, front. The concept of tax competition which is analogous to the ‘winner’s curse’, ‘prisoner’s dilemma’, or a ‘race to the bottom’ best explains the prevalence of tax incentives.⁶⁰ Tax competition leads to the loss of would-be tax revenue that could have increased the resource basket for the realisation of ESRs.⁶¹

If the situation above is not addressed, Uganda will continually suffer a failure to optimally utilise its tax resources which will continue to negatively affect the general public expenditure on ESRs including financing for free and compulsory UPE. The failure will further propagate taxpayers’ apathy, tax avoidance and evasion, and as a result a vicious cycle of derogation from Uganda’s international and domestic human rights obligations. This is so, given that the right to basic education is critical for the attainment of sustainable development, the priority areas for Agenda 2063 and other human rights. Paying particular attention to the equitable public financing of the right would therefore enhance fiscal legitimacy.

1.3 Research objectives

The overall objective of the study is to examine how tax incentives affect the generation of revenues necessary for the realisation of ESRs, particularly free and compulsory UPE as an aspect of the right to basic education in Uganda.

The specific objectives of the study include:

⁵⁹ See Ministry of Finance, Planning and Economic Development (MoFPED) Domestic Revenue Mobilisation Strategy (DRMS) (2019) 68 available at https://www.finance.go.ug/sites/default/files/Publications/NEW%20DOMESTIC%20REdxVENUE%20MOBILISATION%20STRATEGY_FEB%202020_0.pdf (accessed 4 January 2021).

⁶⁰ A Easson *Tax Incentives for Foreign Direct Investment* (2004) 104.

⁶¹ SEATINI-Uganda (n 30) & Oxfam in Uganda and SEATINI-Uganda (n 32).

1. To examine the relationship between tax incentives and the realisation of ESRs;
2. To evaluate the extent of realisation of the right to basic education, especially the free and compulsory UPE component in Uganda and the contribution of resources to the status quo;
3. To explore the adequacy of the legal and policy framework of tax incentives in Uganda, and how it affects revenue for the financing of free and compulsory UPE as a component of basic education;
4. To recommend appropriate reforms for better management of tax incentives for the realisation of Uganda's ESRs obligations, with specific focus on financing for free and compulsory UPE as a component of the right to basic education.

1.4 Research questions

The overall research question is: How do tax incentives affect the generation of revenues necessary for the realisation of ESRs, with a focus on the free and compulsory UPE as an aspect of the right to basic education in Uganda?

The sub-questions are as follows:

1. What is the relationship between tax incentives and the realisation of ESRs?
2. what is the extent of realisation of the right to basic education, especially the free and compulsory UPE component in Uganda and what has been the contribution of resources to the status quo?
3. How adequate is the legal and policy framework on tax incentives in Uganda, and how does this affect revenue for the financing for free and compulsory UPE as a component of the right to basic education?
4. What reforms can be suggested for better management of tax incentives for the realisation of Uganda's ESRs obligations, with special focus on free and compulsory UPE as a component of the right to basic education?

1.5 Methodology

1.5.1 Methods

In this study, I adopted qualitative methods of analysis of the relevant doctrinal concepts through the desk review of available primary and secondary sources and purposive key

informant interviews (KIIs) to resolve the questions above. The primary sources comprised of global, regional, sub-regional, and domestic human rights instruments, laws, and public finance and fiscal policies. From these I sought to establish the various legal and policy standards, analyse the extent of their implementation and effectiveness. I additionally analysed selected Hansards from the years under study, to ascertain the intentions of the lawmakers and debates preceding the legal provisions. I also reviewed the available tax exemption and expenditure reports from the Uganda Revenue Authority (URA) and MoFPED respectively. I also evaluated the Education and Sports Sector Annual Performance Reviews (ESSAPR) from 1997, when UPE was introduced, to date to draw the necessary deductions. Although I had initially planned to review the budgets of the education sector and basic education subsector, I faced challenges disaggregating the appropriations to particular subsectors, such as ascertaining the exact proportion that goes to UPE. This was worsened by the realisation that UPE is partly donor funded, with some funds managed by the Ministry of Education and Sports (MoES) and others by the implementing non-governmental organisations (NGOs). These challenges aside, I additionally scrutinised secondary desk sources including scholarly works by researchers, civil society organisations (CSOs), government agencies, human rights, and taxation experts on the subject. These were essential in the literature review and the development of concepts and themes on which this study was anchored. The CSO reports were relied on where primary corroborative sources were unavailable, otherwise, preference was placed on primary sources as much as that was possible.

To augment, and validate the findings from the primary and secondary sources above, I carried out 12 in-depth KIIs with relevant participants using unstructured interview guides. The participants included a representative from the MoFPED, two from the Uganda Revenue Authority (URA), and one from the Uganda Investment Authority (UIA). Other participants included the then representative from the Budget Committee and the Public Accounts Committee of the Parliament of Uganda, a representative from the Private Sector Foundation, Uganda (PSFU), and a tax and human rights expert. Three NGOs with expertise on tax justice, public finance, budgeting, and human rights were also interviewed. These were the Civil Society Budget Advocacy Group (CSBAG), the Southern and Eastern African Trade, Information and Negotiation Institute (SEATINI), and the Initiative for Social and Economic Rights (ISER). From the basic education angle, I conducted interviews with the Commissioner of Basic Education, MoES. The requisite ethical clearances within Uganda and from the University of Pretoria were secured beforehand and are hereto attached as appendices. Also

attached is the list of participants and the interview guides adopted for the study. In some cases, the identity of the participants may not be revealed in accordance with their requests or my own assessment. The interviews complimented the findings from the primary and secondary sources, especially where the latter do not avail sensitive but vital information. I relied on triangulation to test the validity of the different methods adopted.

Prior to the interviews above, I analysed laws, policies, and other soft law standards to assess their impact on revenue for the realisation of ESRs, especially the free and compulsory UPE component of the right to basic education. I used the data from the doctrinal study to develop broader theories, concepts, and viewpoints that formed the basis of the interview guide for the KIIs. After the KIIs, I coded, transcribed the data based on main themes, summarised the same using as nearly as possible the language used by the participants, and checked the same for validity against the primary data before inclusion into the main study.

1.5.2 Scope of the study

The time scope of the study spans from 1997 when the implementation of UPE was introduced till June 2022, at the end of the research and financial year. The focus on the free and compulsory UPE is based on the state's human rights obligations. The study highlights that basic education is broad and includes privately provided primary education, which may not rely as much on state resources for its actualisation. The study is premised on the realisation that free and compulsory UPE is dependent on public resources and is the main viable and available option for learners from poor and vulnerable backgrounds. The year 1997 coincides with the enactment of the Income Tax Act,⁶² which has annually introduced and redefined several income tax-related incentives. The Act equally outlawed ministerial discretionary tax incentives that had hitherto been permissible under the Investment Code Act of 1991 (ICA). Just about two years earlier, the Constitution of the Republic of Uganda 1995 that provides for a progressive framework not only in the management of public finances, taxation, and fiscal policy but also domesticates the right to basic education had been promulgated. In 1996, the VAT was introduced and VAT-related tax incentives form a huge chunk of tax incentives. In essence the years 1995, 1996 and 1997 were determinant years in the development of the public finance and the human rights discourse in Uganda and hence the time scope of the study.

⁶² Cap 340 of the laws of Uganda.

Although tax incentives by scope are granted for many reasons, the study focusses on tax incentives aimed at attracting FDI. This is partly because despite the several legal adjustments to the tax incentives framework aimed at attracting more citizens into strategic sectoral investment, these have not translated into the desired outcome as is discussed in chapter five.⁶³ As such, tax incentives still primarily benefit foreign investors, and hence the focus of the study. I argue in section 1.8.1, 1.8.2 and chapter 5 that given the mismatch between the objectives and realities of tax incentives, the same can rightly be classified as ‘unjustified’.

Equally essential to note is that although I recognise the indivisibility, interdependence and interrelatedness principle of human rights,⁶⁴ the study focuses on ESRs and not cultural rights. This is informed by the general proposition that the latter may not require substantial resources investment for their realisation as compared to the former.⁶⁵

1.5.3 Limitations of the study

I faced a few limitations during the study. The first was minimal access to official statistics on tax expenditures. There were only three publicly available reports from the URA and MoFPED websites. I was able to secure tax exemptions reports from URA albeit with gaps in the years reported. The available figures from the secondary literature equally had gaps, probably due to similar challenges or the different methodological approaches adopted. Some studies for example considered the broader tax expenditure position while others were specific to tax exemptions. Nevertheless, I was still able to make the necessary deductions as to the revenue losses and leakages from tax incentives for most of the years under review. Secondly and related to the above was the general lack of scholarly work that depicted the actual impact of tax incentives on revenue, specifically in Uganda. Most of the analysis of tax incentives related

⁶³ See sect 5.4 of the thesis.

⁶⁴ R Minkler & S Sweeney ‘On the indivisibility and independence of basic rights in developing countries’ (2011) 33 *Human Rights Quarterly* 352. See also UN ‘United Nations Vienna Declaration and Programme of Action’ 1993 para 5 available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> (accessed 24 July 2022).

⁶⁵ JK Mapulanga-Hulston ‘Examining the Justiciability of Economic, Social and Cultural Rights’ (2002) 6.4 *The International Journal of Human Rights* 29 40 available at https://www.tandfonline.com/doi/abs/10.1080/714866691?casa_token=6JilV5yVt-kAAAAA:6jeVYh1P1Az7EV5iT532DMfPuCuxwyzBoRx9WMHb6Gi5x_av40HlrmM9n2SQJtZQ4WEknoIXF_rjUQ (accessed 24 July 2022). There is generally a dearth of literature on the question of resource implications for the realisation of cultural rights. Scholars such as Onuora-Oguno see education more as an economic and social right. See A.C. Onuora-Oguno *Development and the Right to Education in Africa* (2019) 127.

leakages and losses had been documented by NGO and CSO reports which I relied on as a matter of last resort.

The third limitation was in respect to national budgets. As partly pointed out in this section, in the course of the study, it became apparent that it was difficult to disaggregate the budget appropriations to ascertain the exact funding for UPE. I was, however, still able to use the information from the KII and the secondary literature to answer the relevant research questions.

Lastly, but equally important, the study recognises that there are other factors rather than tax competition that could affect states' fiscal sovereignty. These could also affect the realisation of proper ESRs budgets and human rights compliant tax incentives policies. These include the debt burden on poor countries with conditionalities from international financial institutions such as the World Bank and the International Monetary Fund (IMF).⁶⁶ The scope of this study however does not extend to these factors and yet they could contribute to the inability to apportion, with certainty, the negative contribution of tax incentives to the realisation of the ESRs.

1.6 Assumptions of the study

A review of the national budgets over time reveals that the education sector has the second-biggest share of the budgetary allocations, after the works and transport sector.⁶⁷ As such education as a sector appears to be a national funding priority and the study assumes that the savings made from the proper management of tax incentives would boost the national budget for the realisation of all ESRs, specifically the right to basic education. The findings in section 1.1 of the study that indicate that increases in revenue will increase public expenditure on education and health equally confirm this assumption. This assumption is also based on the

⁶⁶ M Thomson *et al* 'Structural adjustment programmes adversely affect vulnerable populations: a systematic-narrative review of their effect on child and maternal health' (2017) 38.1 *Public Health Reviews* 13 available at: <https://doi.org/10.1186/s40985-017-0059-2> (accessed 24 July 2022); see also H Brand 'The World Bank, The Monetary Fund, and Poverty' (1994) 24.3 *International Journal of Health Services* 567–578 available at: <https://manipal.pure.elsevier.com/en/publications/the-world-bank-the-monetary-fund-and-poverty> (accessed 24 July 2022) & V Ferraro & M Rosser 'Global Debt and Third World Development' (1994) available at: <https://www.mtholyoke.edu/acad/intrel/globdebt.htm> (accessed 13 July 2022).

⁶⁷ Ministry of Education and Sport (MOES) 'National Education Accounts Report Uganda' (2016) 82 & 83 available at http://uis.unesco.org/sites/default/files/uganda_nea_report-2016-en.pdf (accessed 30 August 2019). See the 2022/23 Budget speech available at <https://parliamentwatch.ug/wp-content/uploads/2022/06/Budget-Speech-June-2022.pdf> (accessed on 7 August 2022) which shows the education sector taking the highest budget share in the financial year 2022/23.

fact that the right to basic education is the only domesticated minimum core obligation of ESRs in Uganda, hence should be a policy, legal, and funding priority.

Secondly, within the education sector, the expenditure towards primary education has been the highest over the years, with up to 50% of the total sectoral budget.⁶⁸ I therefore presume that when the funding to the sector grows, the portion to basic education as a subsector would considerably rise as well. Thirdly, given that Uganda runs a parallel private and public primary education model, I assume that most of the money appropriated to primary education is channelled to UPE as the public arm of primary basic education. Fourthly, the study also assumes that the challenges affecting the realisation of free and compulsory UPE as a component of the right to basic education in Uganda are largely resource-constraint related. This assumption is supported by evidence as discussed in chapter four.⁶⁹ The study assumes that the bigger the resource envelope, the higher the budget allocations for the realisation of ESRs generally, and basic education specifically, through appropriate financing for UPE. This is not withstanding the current global push for privatisation of education.

Although the late 20th and early 21st centuries witnessed a global push for the privatisation, liberalisation and globalisation of public services including education, decades later, the globe has witnessed the social justice challenges of this model especially for the vulnerable.⁷⁰ Specific to the education sector, privatisation has led to the growth of the ‘global education industry’ with the needs of vulnerable learners largely relegated to the not for profit educational institutions.⁷¹ This in itself is a violation of the states’ obligations. Eventually, there has been a realisation that this move was not the best alternative. In many low income countries, parents opted to enrol their children into private schools largely because of the deficiencies in public schools.⁷² With time, and due to the challenges posed by the privatisation of education in low income economies such as Uganda, which include availability and accessibility gaps and their

⁶⁸ See the Education and Sports Sector Performance Annual Reviews of the years 2012/13-2019/19.

⁶⁹ See sect 4.1.1(b), 4.1.4, 4.2 and 4.3 of the thesis.

⁷⁰ KD Beiter ‘Why neoliberal ideology, privatisation, and other challenges make a reframing of the right to education in international law necessary’ (2022) *The International Journal of Human Rights* 10, available at <https://www.tandfonline.com/doi/pdf/10.1080/13642987.2022.2131773?needAccess=true> (accessed 9 November 2022) & G Walford ‘Privatisation, education and social justice: Introduction’ (2013) 39.4 *Oxford Review of Education*, 421 421 & 422 available at <https://doi.org/10.1080/03054985.2013.820464> (accessed 13 March 2022).

⁷¹ Beiter, (n 70 above) 21, available at <https://www.tandfonline.com/doi/pdf/10.1080/13642987.2022.2131773?needAccess=true> (accessed 9 November 2022).

⁷² Walford (n 70 above) 422.

effects on the most vulnerable, there has been a realisation that public education is fundamental to achieving social justice.⁷³ In fact, some scholars have advocated for the right to ‘public education’ even in the context of privatisation of the right with private providers being mandated to recognise ‘public service obligations’.⁷⁴ Although this discourse is out of the scope of this study, it points to the confusion that has been created by the liberalisation, privatisation and globalisation of the right to education. In Uganda, for instance, even with the privately available options, UPE still absorbs many of the learners from vulnerable families. For example, according to the 2021 statistics from the MoES, 7,624,490 learners were enrolled for UPE in 12,469 schools.⁷⁵ It is difficult to establish the numbers in private schools as statistics are not readily available. What is clear though is the fact that the numbers in UPE schools enrolment are likely to sky rocket given the financial hardships occasioned by the Covid-19 pandemic and the resulting economic recession the country is currently experiencing. It is for instance estimated that 64.6% of parents will struggle to raise school fees after the pandemic, while approximately 30% of all learners at different levels of education may never return to school.⁷⁶ Furthermore, at the primary school education level, government is still in control of 64% of schools as compared to the 36% that are privately owned.⁷⁷ These apparent challenges strengthen the arguments that recognise the relevance of a vibrant public education sector investment for the realisation of the right to basic education, especially in low income nations such as Uganda.

1.7 Significance of the study

This study contributes to the shaping of fiscal policies and laws for the better management of tax incentives. The study does this by exposing the human rights issues that arise from the granting of unjustified tax incentives and weighing them against the potential benefits of the exemptions. In the long run, it is envisaged that the study will contribute to the government and other regional economic, political organisations, and coalitions reconsidering their policy

⁷³ See MoES ‘Education Sector Strategic Plan 2017/18- 2019/20’ 4 available at <https://www.globalpartnership.org/content/education-and-sports-sector-strategic-plan-2017-2020-uganda> (accessed 14 March 2022).

⁷⁴ Beiter (n 70 above) 24.

⁷⁵ MoES ‘UPE and USE/UPOLET and Releases For FY 2021/22’ available at <https://www.education.go.ug/upe-use-enrolment/> (accessed 13 March 2022).

⁷⁶ ‘Uganda school system to lose 30% of learners’ *The Independent* Kampala 7 November 2021 available at <https://www.independent.co.ug/uganda-school-system-to-lose-30-of-learners/> (accessed 13 March 2022).

⁷⁷ MoES (n 73 above).

direction on tax incentives. At a more strategic level, the study could further inform regional efforts geared towards fighting tax competition and the resultant tax incentives policies, which lack a human rights face.

Additionally, the study seeks to strengthen the argument that taxation, especially the management of tax incentives is a relevant and contemporary discussion in the business and human rights discourse. These issues should be highlighted by stakeholders in the ongoing discussions of a binding treaty on business and human rights, and the national action plans on business and human rights (NAPs on BHRs). Furthermore, human rights compliant tax incentives policies should be a preoccupation of the United Nations Working Group on Business and Human Rights' UNGPS 10+ roadmap for the next decade.⁷⁸ This is currently not the case.⁷⁹ The discourse is also relevant in the current global discussion on illicit financial flows (IFFs) especially from Africa, as tax incentives are one of the ways used by corporations to avoid tax and contribute to IFF.

Furthermore, this study seeks to contribute to existing literature that regional and sub-regional economic blocs could rely on to make strategic decisions for the management of tax incentives. These blocs include the African Union, East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), New Partnership for African Development (NEPAD), and African Union Development Programme (AUDP). In chapter five, I argue that tax competition that leads to the persistence of tax incentives can be solved through tax cooperation, especially at the regional level, to avoid the 'spaghetti bowl'.⁸⁰ The 'spaghetti bowl' arises from having a multiplicity of efforts at the sub-regional level partly aimed at eliminating tax competition.⁸¹ This causes duplicity of efforts and multiple reporting obligations that could be counterproductive.

With specificity, at a national level, it is hoped that the study will strengthen CSOs advocacy plans around the role of tax incentives in the realisation of ESRs with the view of achieving better thought out strategies for their design. It is hoped that in the future, tax incentives will

⁷⁸ United Nations Special Procedures 'UNGPS 10+ A Roadmap for the Next Decade Of Business And Human Rights' (2021) *UN Working Group on Business and Human Rights* available at <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (accessed 14 March 2022).

⁷⁹ As above.

⁸⁰ B Vickers *A Handbook on Regional Integration in Africa: Towards Agenda 2063* (2017) 6. See sect 5.2.2 of the thesis.

⁸¹ As above.

be better managed for countries like Uganda, to save the much-needed revenue to finance the realisation of ESRs, such as the right to basic education for the most vulnerable that attend UPE schools.

Having established the likely benefits that could accrue from the study, below I review the relevant literature on the several themes under investigation that I build onto in subsequent chapters.

1.8 Literature review

This section assesses the relevant literature on the subject with the view of identifying entry points for this study. The literature is analysed using the human rights-based theory of fiscal sociology advanced by Waris.⁸² The literature is reviewed under relevant themes that are critical to the understanding of the research problem and partly responding to the research questions.

1.8.1 Tax incentives: A web too delicate and complex to untangle

(a) *The justification and role of tax incentives in attracting foreign direct investments*

Sections 1.0, 1.1, 1.2 above preliminarily indicate that relying on tax incentives hurts the several fiscal and human rights objectives of taxation. In this part, I seek to explore why then states' public finance choices are not alive to this fact. The proponents of tax incentives argue that these tax expenditures like other non-tax-related inducements attract and retain FDI, which in the long run reduce unemployment and encourage regional development, among other benefits.⁸³ Investment incentives are classified into financial (common in developed countries) and fiscal (predominant in developing countries due to financial incapacity).⁸⁴ Financial incentives include loans and grants while tax incentives are examples of fiscal ones.⁸⁵

⁸² See A Waris 'Developing Fiscal Legitimacy by Building State Societal Trust in African Countries' (2018) 4.2 *Journal of Tax Administration*; A Waris & LA Latiff 'Towards Establishing Fiscal Legitimacy Through Settled Fiscal Principles in Global Health Financing' (2015) 23.4 *Health Care Analysis* springer; A Waris *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) & A Waris & W Kohonen *Linking Taxation to the Realisation of the Millennium Development Goals in Africa* (2011). These and other scholarly works by Waris have been instrumental in the development of the human rights-based theory of fiscal sociology.

⁸³ HZ Howell *et al* 'Tax Incentives in Cambodia, Lao PDR, and Vietnam' (2002) 30.9 *The International Monetary Fund, World Development* 1497 1499 available at <http://www.imf.org> (accessed 21 February 2020).

⁸⁴ Easson (n 60) 1.

⁸⁵ As above.

Unfortunately, some states rely on both kinds of incentives for FDI.⁸⁶ The Ugandan government is one such example that has been granting land and other infrastructural assistance in addition to fiscal incentives to mainly foreign investors.⁸⁷ This has its own challenges that are not within the scope of this study. Of concern is that tax incentives pose serious challenges to achieving optimum fiscal policy, public finance management, and the realisation of ESRs as enunciated below.⁸⁸

Tax incentives are criticised for being bad both theoretically and practically.⁸⁹ In theoretical terms, they cause distortions, while practically there is evidence that they are both ‘ineffective’ and ‘inefficient’.⁹⁰ Firstly, they are not effective in attracting FDI as investors would still have invested even without them, especially for projects that are classified as investable.⁹¹ Secondly, they are equally inefficient as their cost in terms of the revenue forgone outweighs their likely benefits.⁹² Thirdly, tax incentives are inequitable as not all investors benefit from them and lastly, they are prone to abuse due to a lack of transparency in the grant and administration processes.⁹³ In view of the above constraints, the World Bank and the IMF have called upon states to desist from granting tax incentives especially to foreign investors.⁹⁴ However, since this may not be achievable in the short run, stop-gap measures for the mitigation of their effects could be adopted in the meantime.⁹⁵

From the analysis above, I argue that the justifications for the grant of tax incentives are questionable from both an economic and human rights-based scrutiny. Later in the study, I analyse the process and considerations relied on to select the beneficiaries of both statutory and

⁸⁶ Easson (n 60) 2.

⁸⁷ MM Stickler ‘Governance of Large-Scale Land Acquisitions in Uganda: The Role of the Uganda Investment Authority’ (2012) 11 available at http://www.abcg.org/action/document/show?document_id=142 (accessed 21 August 2019), see the case of *Hon. Issa Kikungwe and Another v AG* (Constitutional Petition No. 30 of 2006), See OAG Report 2017 available at https://www.cabri-sbo.org/uploads/bia/uganda_2015_oversight_external_audit_report_national_audit_office_comesa_eac_igad_english_3.pdf (accessed 6 August 2022), where BIDCO Limited was promised huge chunks of land in addition to the several tax incentives.

⁸⁸ See B Bolnick ‘Effectiveness and Economic Impact of Tax Incentives in the SADC Region’ (2004) 31-38 available at: https://pdf.usaid.gov/pdf_docs/Pnacy929.pdf (accessed 13 July 2022) & UN ‘*Design and Assessment of Tax Incentives in Developing Countries: Selected Issues and a Country Experience*’ (2018) available at: https://www.un.org/esa/ffd/wp-content/uploads/2018/02/tax-incentives_eng.pdf (accessed 13 July 2022).

⁸⁹ Easson (n 60) 63.

⁹⁰ Easson (n 60) 64 & Organisation for Economic Co-operation and Development (OECD) ‘Harmful tax competition: An emerging Global Issue’ (1998) 16.

⁹¹ As above.

⁹² As above.

⁹³ As above.

⁹⁴ As above.

⁹⁵ As above.

discretionary tax incentives in Uganda.⁹⁶ I additionally analyse the human rights concerns and consequences embedded in the grant and administration of tax incentives, and their impact on the realisation of ESRs, particularly basic education, partly implemented through the free and compulsory UPE.

The challenges highlighted above would leave any state rethinking its tax incentives policies. However, this has not been the case due to tax competition.⁹⁷ Tax competition entangles countries in a web as they struggle to attract investment at all costs, even when the cost of doing so is higher than the perceived benefits.⁹⁸ This is likened to the ‘prisoner's dilemma’ as states get stuck in a complex web after granting the initial tax incentives to keep the investments from moving to other competitive jurisdictions.⁹⁹ This unhealthy tax competition causes a ‘race to the bottom’.¹⁰⁰ Illustratively, research demonstrates that by 1996, 103 countries offered tax incentives for FDI, but each year about 30-40 new incentives were introduced in total disregard of the international financial organisations’ advice.¹⁰¹ The role of tax competition in the prevalence of tax incentives is underscored below:¹⁰²

An extensive literature has demonstrated that taxes do in fact play a crucial role in determining investment location decisions. But all of these studies emphasize that the tax incentives are crucial given the availability of such incentives elsewhere. Thus, it can be argued that given the need for tax revenues, developing countries would in general prefer to refrain from granting tax incentives, if only they could be assured that no other developing country would be able to grant such incentives.

From the above, I opine that the justifications usually fronted by states for the grant of tax incentives are cover-ups with the main push factor being the concept of tax competition that I unpack in the discussion below.

⁹⁶ See sect 5.3 and 5.4 of the thesis.

⁹⁷ Easson (n 60) 85 & OECD (n 90) 14.

⁹⁸ Easson (n 60) 104.

⁹⁹ As above.

¹⁰⁰ As above.

¹⁰¹ Easson (n 60) 85, & OECD (n 90) 14.

¹⁰² Avi- Yonah (n 18 above) 63.

b) Recognising the 'big elephant in the room': The role of tax competition in the prevalence of tax incentives

World over, tax competition is one form of state competition'.¹⁰³ States are increasingly using fiscal policies such as lucrative tax incentives to attract economic activities.¹⁰⁴ Unfortunately, tax competition does not only affect individual states.¹⁰⁵ Countries' fiscal and economic actions are depicted as a 'coalition of interest groups governing states', even though the interests of the different groups may be divergent.¹⁰⁶ Consequently, tax bargains are a reflection of the desires of the interest groups that are in control of a given state or coalition.¹⁰⁷ These include tax incentive bargains.¹⁰⁸

Relatedly, harmful tax practices such as tax competition have been facilitated mainly by secretive tax havens and countries with preferential tax regimes.¹⁰⁹ These are classified by the imposition of low or zero rates of tax on income, and a ring-fenced tax regime where the beneficiaries are a particular class of investors whether intentionally or effectively.¹¹⁰ The other characteristics include a lack of transparency and the proper exchange of information amongst countries, which could include prohibitive access to information laws, practices and processes.¹¹¹ Suffice to note that the test of whether the tax regime is harmful or not is if the effects of the same substantially encroach on a country's tax base.¹¹² This will be the case even when the actual economic effects are difficult to quantify.¹¹³ Thus, in chapter five, I scrutinise Uganda's legal and policy framework on tax incentives to ascertain how it measures up with this categorisation.¹¹⁴ What is clear though is that the current tax incentives framework as discussed in detail in chapter five, effectively benefits largely foreign investors, which is

¹⁰³ AW Oguttu 'International Tax Competition, Harmful Tax Practices and the 'Race to the Bottom': A Special Focus on Unstrategic Tax Incentives in Africa' (2018) *The Comparative And International Law Journal Of Southern Africa* 294 & Andrew & M Lotta 'Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2012) 4.1 *Columbia Journal of Tax Law* 5.

¹⁰⁴ As above.

¹⁰⁵ Andrew & M Lotta 'Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2012) 4.1 *Columbia Journal of Tax Law* 6.

¹⁰⁶ Andrew & Lotta (n 105 above) 6.

¹⁰⁷ Andrew & Lotta (n 105 above) 7.

¹⁰⁸ See sect 5.4 of the thesis where I analyse the interest groups that influence the tax incentives bargains in Uganda.

¹⁰⁹ Andrew & Lotta (n 105 above) 7 & OECD (n 87) 17.

¹¹⁰ As above.

¹¹¹ As above.

¹¹² OECD (n 90) 16.

¹¹³ OECD (n 90) 17.

¹¹⁴ Sect 5.3, 5.4, and 5.5 of the thesis.

problematic and discriminatory.¹¹⁵ It remains to be seen if states gain any advantage from such competition.

Contrastingly, tax competition could have isolated benefits such as being a mechanism for developing jurisdictions to attract economic activity from more economically advanced ones.¹¹⁶ This could be advantageous in some ways like using this competition to ensure optimum taxation or countering states' excessive public expenditure.¹¹⁷ This is, however, not the case in many countries.

The foregoing, notwithstanding, I must emphasize that tax competition is not without demerits. Its disadvantages far outweigh the negligible merits discussed above. The disadvantages include firstly, the possibility of undermining a country's sovereignty as states engage in harmful 'tax wars' that lead to a 'race to the bottom'.¹¹⁸ Secondly, although tax competition could slightly increase government revenue in poorer jurisdictions, it generally lowers revenue in countries regardless of the level of development.¹¹⁹ It is worse that essential revenue is foregone without any guarantees or evidence that tax competition attracts additional investment. Thirdly, tax competition equally affects states' right to self-determination in economic and fiscal affairs.¹²⁰ This is by negatively impacting states' capacity to use their fiscal policy to achieve the several objectives of taxation. This in turn limits the ability of states to use the resources at their disposal, including tax resources, to realise ESRs. This capacity is central to the right to self-determination. Lastly, and connected to the impacts on the right to self-determination are the negative effects that globalisation has on the tax structure and tax rates generally.¹²¹ Globalisation worsened by tax competition negatively erodes fiscal sovereignty, which in turn affects the right to self-determination, to develop appropriate fiscal policies to reflect individual states' circumstances.¹²² Even at individual states' level, the right

¹¹⁵ See sect 5.4 of the thesis.

¹¹⁶ Andrew & Lotta (n 105 above) 9.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ A Christians 'Taxation as a Basic Human Right' (2009) *Research gate* 226 available at https://www.researchgate.net/publication/228135840_Fair_Taxation_as_a_Basic_Human_Right/link/5b0d7d8b0f7e9b1ed7007eb3/download (accessed 13 June 2021).

¹²¹ S Skogly 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12.3 *Human Rights Law Review* 10 available at <https://doi.org/10.1093/hrlr/ngs022> (accessed 22 March 2022).

¹²² W Khan 'Improving Tax Strategy Transparency in the Extractive Industries Sector for the Advancement of Human Rights' in I Feichtner, M Krajewski & R Roesch (eds) *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (2019) 3 *Interdisciplinary Studies in Human Rights* Springer 148.

to self-determination through fiscal sovereignty should not be absolute, and should be questioned when it negatively affects the capacity of the state to generate resources for the realisation of ESRs.¹²³ This is largely the focus of this study especially in chapter five where the relevant policies and laws are assessed in detail.¹²⁴ In chapters two, three, and five, I largely interrogate whether states are at liberty to hide behind the concept of fiscal sovereignty to adopt tax incentives policies that negatively impact the realisation of ESRs generally, and the minimum core obligation.¹²⁵ In chapter six I explore how individual states such as Uganda can counter the pressure of tax competition and use their fiscal sovereignty in ways that advance the enjoyment of ESRs through appropriate financing.¹²⁶

Due to the concerns enunciated above, it is essential that while considering tax competition issues, there is recourse to the different fiscal policy objectives and economic comparative advantages of different jurisdictions.¹²⁷ States need to strategically consider the merits, weigh them against the demerits, and make strategic tax incentives policy decisions that minimise the effects of tax competition. I opine that it is imperative that these objectives and policy decisions incorporate a human rights evaluation in line with the human rights-based theory of fiscal sociology that I adopt for this study.¹²⁸ States should for example not be granting tax incentives to favour investments in sectors where they already have a comparative advantage over neighbouring jurisdictions. Consequently, while dealing with tax competition issues across the globe, policymakers and other stakeholders should be cautious not to adopt a ‘one size fit it all’ kind of approach because of the differences in context, definitions, policy objectives, among other factors.¹²⁹ It is however important to emphasise that these recommendations could be hampered by the capacity and knowledge gaps especially of ministers of finance and justice and of tax administrators, a pressed resource envelope, and lack of political will.¹³⁰ I seek to establish in this study how these challenges play out in Uganda.¹³¹ In chapter six, I suggest

¹²³ As above.

¹²⁴ See sect 5.3 and 5.4 of the thesis.

¹²⁵ See sect 2.1.2, 2.1.3, 3.1, 3.2, 3.4, 5.3, 5.4 and 5.5 of the thesis.

¹²⁶ See sect 6.2.1 of the thesis.

¹²⁷ Andrew & Lotta (n 105 above)12.

¹²⁸ The theory is discussed extensively in chapter two of the thesis.

¹²⁹ Andrew & Lotta (n 105 above) 12.

¹³⁰ Bhatia, M ‘The role of international tax competition in achieving Sustainable Development Goals’ in A Gonzales & M Jansen (eds) *Women Shapping Global Economic Governance* (2019) 25.

¹³¹ See sect. 5.1, 5.3 and 5.4 of the thesis.

options states could adopt to collaboratively handle tax competition, and use the right of self-determination to achieve progressive fiscal independence.¹³²

Thus, to get out of the ‘winner’s curse’ or the ‘prisoner’s dilemma’ or the ‘race to the bottom’ the following have been suggested.¹³³ Firstly, developing countries should scrutinise the sectors that benefit from tax incentives.¹³⁴ I suggest that these could include sectors that ameliorate the human rights situation of the country, especially by enhancing the realisation of ESRs. Secondly, the role of international cooperation in successfully managing this crisis is underscored.¹³⁵ International economic organisations like the World Bank, the OECD, World Trade Organisation (WTO), IMF, and the proposed International Tax Organisation (ITO) could play an important role to this end.¹³⁶ The African Union is equally a relevant stakeholder. However, the literature reviewed still suggests largely economic solutions to the issues without recognising their interplay with human rights. I make a case in chapters five and six for the need for such bodies to work with human rights-based committees or institutions such as the Committee on Economic, Social, and Cultural Rights (Committee on ESCR), the African Commission on Human and Peoples’ Rights (African Commission), among other entities to strengthen human rights-based solutions to these challenges.¹³⁷

In conclusion, I find the literature in this part instructive in highlighting the fact that tax incentives play a minimum role in attracting and retaining FDI, and that countries, especially developing ones are simply trapped in a dilemma they have little control over at the moment. The literature highlights the role that could be played by the international economic organisations in addressing the current dilemma. The literature additionally emphasises the fact that tax incentives are both inefficient and ineffective. I build on this literature and demonstrate further the extent of revenue loss from tax incentives in the mistaken belief that they attract and retain FDI. In this study, I seek to demonstrate how the revenue foregone would have improved the resource envelope for the realisation of ESRs, particularly the unqualified right to basic education for UPE learners in Uganda. I propose recommendations that incorporate a human rights-based approach while relying on the modified theory of fiscal sociology that incorporates the same, which is missing in the literature reviewed. In chapters five and six, I

¹³² See sect 6.2.1 of the thesis.

¹³³ Easson (n 60) 199.

¹³⁴ As above.

¹³⁵ As above.

¹³⁶ Easson (n 60) 200-213.

¹³⁷ See sect 5.1, 5.2, and 6.2.1 of the thesis.

review how organisations such as the OECD and others have handled the issue of harmful tax practices and tax competition to draw necessary lessons for Uganda.¹³⁸ Below I analyse the place of tax incentives in the broader economic growth and development trajectory.

c) Achieving economic growth and development; the place of tax incentives

The literature I review under this subtheme interrogates the view that tax incentives lead to economic growth and development.¹³⁹ Some experts have warned that there is a danger in relying on the inaccurate traditional view that tax incentives lead to FDIs, which steers economic growth and development.¹⁴⁰ They find that tax incentives are used ‘in a defensive and reactionary manner rather than a proactive and positive manner’ with their only logical justification being the concept of tax competition.¹⁴¹ Incidentally, the views of the proponents of tax incentives that these lead to economic growth through increased FDI, ignore their negative contribution to economic development, which is more desirable.¹⁴² The following factors are critical to attaining sustainable economic growth: the state of institutional functionality, rule of law, governance, absence of corruption, a strong legal framework, among others.¹⁴³ The effect of institutions on economic growth is real. Yet the typical tax incentives regime is not designed with these factors in mind. It is thus incapable of delivering economic growth and development.¹⁴⁴ What then is the role of tax incentives in this economic growth and development agenda?

To answer the above question, it is important to note that generally tax plays a minimal role in the decision of the location of FDI.¹⁴⁵ Factors like the presence of a market, political systems, and stability are more critical since a poor investment environment will make even a viable project un-investable.¹⁴⁶ Thus, tax incentives will not only be redundant in influencing FDI decisions, but have other negative effects. These include: complicating a country’s taxation system, facilitating tax avoidance, and imposing high administrative and enforcement costs which result into an unfair, uncertain, and unjust tax system, all of which reduce the

¹³⁸ See sect 5.2.1, 6.2.1 & 6.2.3 of the thesis.

¹³⁹ Y Brauner ‘The future of tax incentives for developing counties’ in Y Brauner & M Stewart (eds) *Tax, Law and Development* (2013) 32.

¹⁴⁰ Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (n 139) 26.

¹⁴¹ As above.

¹⁴² (n 139 above).

¹⁴³ Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (n 139) 35.

¹⁴⁴ As above.

¹⁴⁵ Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (n 139) 39.

¹⁴⁶ As above.

effectiveness of tax incentives.¹⁴⁷ The revenue losses and leakages further complicate the capacity of the government to deliver public services and improve infrastructure, all of which are essential for attaining economic development.¹⁴⁸ The only indirect benefit that could accrue from tax incentives is the payment of eventual employment income tax or indirect consumption taxes by employees in the business undertakings.¹⁴⁹ is the failure to benefit from tax incentives is because the beneficiaries of tax incentives have mastered the art of tax avoidance and it would be unlikely for them to pay any subsequent tax.¹⁵⁰ Even then, the eventual benefits are harder to realise in countries such as Uganda with a weak minimum wage legislation since most of the stipends paid are below the income tax threshold.¹⁵¹ Even in more progressive jurisdictions such as the United States of America (USA), there is evidence of revenue losses that are not commensurate with the jobs created.¹⁵² States therefore need to draw lessons from progressive jurisdictions such as Chile and Estonia that have achieved considerable economic development even when they strategically avoided tax incentives.¹⁵³ In chapters five and six, I discuss lessons Uganda can learn from such jurisdictions.¹⁵⁴

The literature in this part, published decades apart, is consistent with the fact that the only justification for tax incentives is tax competition as they are not able to deliver FDIs or economic growth and development.¹⁵⁵ The state of the people, and public goods and services are critical in achieving economic development yet the typical tax incentives regime may be oblivious to these factors.¹⁵⁶ Furthermore, the literature does not consider a human rights approach to the treatment of tax incentives or development. This study focusses on the right to basic education that is critical for the attainment of not only economic development, or other

¹⁴⁷ Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (n 139) 44.

¹⁴⁸ K Andrew ‘Can State and Local Tax Incentives and other Contributions Stimulate Economic Development?’ (1990) 44.1 *Tax Lawyer* 285–295 available on Hein Online <https://heinonline.org/HOL/LandingPage?handle=hein.journals/txlr44&div=17&id=&page=> (accessed 25 April 2022).

¹⁴⁹ Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (n 139) 44.

¹⁵⁰ As above.

¹⁵¹ See KII with Mr. Festus Akunobera, in chapter three and five of the thesis.

¹⁵² Andrew (n 148 above).

¹⁵³ Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (n 139) 45.

¹⁵⁴ See sect 5.4 and 6.2.1 of the thesis.

¹⁵⁵ See Y Brauner ‘The future of tax incentives for developing countries’ in Y Brauner & M Stewart (eds) *Tax, Law and Development* (2013), K Andrew ‘Can State and Local Tax Incentives and other Contributions Stimulate Economic Development?’ (1990) 44.1 *Tax Lawyer* & AT Wyngaard ‘An Introduction to Economic Development in Western Cape: A primer for Elected Office Bearers, Government Officials and Citizens’ (2006).

¹⁵⁶ AT Wyngaard ‘An Introduction to Economic Development in Western Cape: A primer for Elected Office Bearers, Government Officials and Citizens’ (2006) 2.

human rights but also SDGs and priority areas and goals of Agenda 2063.¹⁵⁷ In this study, I consider the impact of the tax incentives on the revenue for the realisation of ESRs especially the right to basic education through financing for UPE in Uganda. Below I review the literature on the impact of tax incentives on revenue for public expenditure.

1.8.2 The impact of tax incentives on tax revenue for public expenditure

Given that tax incentives may not necessarily contribute significantly towards attracting or retaining FDI, but are largely inspired by tax competition between states, in this part I ascertain their impact on public revenue. Some studies indicate that tax incentives cause fiscal degradation in the form of reduced revenue without corresponding benefits. In India for example, between 2006/07 and 2014/15 approximately USD 700 000 million was forgone as a result of the grant of tax holidays to the electricity sector only.¹⁵⁸ Even in the absence of proper data for an empirical evaluation, there was no finding of a direct nexus between the tax incentives and an upsurge in private investment in the power sector in India.¹⁵⁹ This particular case study found instead that the real beneficiaries of the tax holidays remained the benefiting companies and to a smaller extent the urban rich and middle-class citizens of India who could afford the power.¹⁶⁰ This position is summarised thus:¹⁶¹

Clearly, the loss of revenue from the tax incentives is real and substantial ... there is no evidence of any real benefits accruing to the economy either in the form of increased FDI flows, GFCF or growth in the electricity sector *vis-à-vis* other sectors ... or in the economy as a whole.

This demonstrates that the loss of direct revenue from tax incentives is not speculative but real. Tax incentives do not benefit many citizens but instead have the effect of increasing the ordinary taxpayers' tax incidence, narrowing the tax base and increasing the tax rates.¹⁶²

The literature above does not detail the real impact of the whole tax incentive regime on the tax base or tax revenue in India. It analyses the impact of tax holidays to specifically the power

¹⁵⁷ I Ozturk 'The Role of Education in Economic development: A Theoretical Perspective' (2001) *SSRN Electronic Journal* 3 available at http://www.researchgate.net/publication/24116294_The_Role_of_Education_in_Economic_Development_A_Theoretical_Perspective (accessed 21 August 2019). see also Agenda 2063 goals and linkage to SDGs available on <https://au.int/agenda2063/sdgs> & <https://au.int/agenda2063/goals> (accessed 16 July 2022).

¹⁵⁸ S Shankar 'Direct Tax Incentives to Power Sector in India: A Case Study' (2017) 63.1 *Indian Journal of Public Administration* 104 -123.

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ Shankar (n 158 above) 115.

¹⁶² BA O'Hare 'Tax and the right to health' (2018) 20.2 *Health and Human Rights* 57 59; J Kangave 'Taxing' TWAIL: 'A preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment' (2008) 10 *International Community Law review* 389 392.

sector in terms of revenue forgone. I build on these findings to establish the impact of tax incentives granted to different sectors in Uganda, on the revenue for the realisation of ESRs such as financing for UPE as a component of the right to basic education.

The other negative effects of tax incentives include fiscal degradation that reduces revenue and eventually public expenditure on social welfare or may lead the government to seek funds from elsewhere for such expenditure.¹⁶³ External assistance could be from development assistance or foreign debts.¹⁶⁴ These have a downside too that includes conditionalities and the high servicing costs, the burden of which ultimately falls on the current and future generations.¹⁶⁵ As a result, countries have been warned that excessive reliance on tax incentives will ultimately ‘impede the establishment of even the most rudimentary welfare state’.¹⁶⁶ This is the concern of the original theory of fiscal sociology although this study applies a more progressive modified approach that incorporates a human rights assessment.¹⁶⁷ The situation is worsened by long tax holidays, as the principle of diminishing returns sets in as benefits reduce with time.¹⁶⁸ As is discussed in detail in chapters two and three, tax incentives affect the ability of the state to prioritise not only the welfare of its citizens but the realisation of rights.¹⁶⁹ This could partly be because fiscal policy framers have ignored the human rights discourse in tax incentives policies.¹⁷⁰ Chapters three and five unpack this concern.¹⁷¹

The challenges associated with tax incentives extend to those contained in double tax agreements (DTAs) and development cooperation agreements (DCAs) in Uganda. Although such incentives could attract FDI, they have a negative impact not only for third world states but also their people.¹⁷² The revenues lost through concessions in these DTAs and DCAs are always recovered through shifting the tax incidence to another group of taxpayers in the form of higher taxes, the introduction of new taxes, or through the imposition of wrong tax assessments.¹⁷³ These particular tax incentives are however out of the scope of this thesis.

¹⁶³ Easson (n 60) 103 & OECD (n 90) 16.

¹⁶⁴ BA O’Hare ‘Tax and the right to health’ (2018) 20.2 *Health and Human Rights* 57 57.

¹⁶⁵ As above.

¹⁶⁶ Easson (n 60) 104.

¹⁶⁷ This discussion is detailed in sect 2.2.1 of the thesis.

¹⁶⁸ Easson (n 60) 136.

¹⁶⁹ See sect 2.1 and 3.4 of the thesis.

¹⁷⁰ O’Hare (n 164 above) 58.

¹⁷¹ See sect 3.1, 3.2, 3.3, 5.1, 5.3 and 5.4 of the thesis.

¹⁷² J Kangave ‘Taxing’ TWAIL: ‘A preliminary Inquiry into TWAIL’s Application to the Taxation of Foreign Direct Investment’ (2008) 10 *International Community Law review* 389 392.

¹⁷³ As above.

The other challenges associated with the over-reliance on tax incentives include shrinking the tax base and increasing the tax incidence of a smaller group of taxpayers, which eventually leads to distortions.¹⁷⁴ Tax evasion or avoidance can ultimately arise as beneficiaries may pose as new investors to continue enjoying the tax benefits.¹⁷⁵ This could be exacerbated by sophisticated tax fraud, and transfer pricing.¹⁷⁶ Specifically, tax avoidance could arise when former tax holiday beneficiaries re-organise, change face, and appear as new investors when their original benefits expire and are due for tax.¹⁷⁷ Overtime, tax incentives create a community of investors that are dependent on preferential tax treatment such that ‘once granted, it is extremely difficult to wean businesses off them without expending a huge amount of political capital’.¹⁷⁸ The article reviewed focusses, on the one hand, on the general motivation, purpose, political considerations, and administration of tax incentives. I, on the other hand, analyse the legal and policy framework of tax incentives, and the impact of the same on the realisation of ESRs, specifically the financing of free and compulsory UPE as an element of the right to basic education in Uganda. This article focusses on the political economy of tax incentives with the human rights dimensions to the subject largely missing. I argue in chapters two, three, and five that an assessment of fiscal policy should go beyond economics and politics for a holistic approach.¹⁷⁹ This is using the human rights-based theory of fiscal sociology as adopted for this study. The fiscal degradation discussed above should not be seen as mere statistics but as resources that could improve the lives of vulnerable persons.

Elsewhere for instance, the loss of revenue from taxation-related violations in developing countries is estimated at USD 100 billion which deprives poor countries of vital resources.¹⁸⁰ The impact of such loss has been summarised by the World Bank thus,¹⁸¹

¹⁷⁴ S James ‘Incentives and Investments: Evidence and Policy Implications’ (2009) *Investment Climate Advisory Services of the World Bank Group*.

¹⁷⁵ As above.

¹⁷⁶ As above 21.

¹⁷⁷ As above.

¹⁷⁸ James (n 174) 27.

¹⁷⁹ See sect 2.1, 3.1 and 5.4 of the thesis. The UN Committee on the Rights of the Child (CRC), *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, Para 55, available at: <https://www.refworld.org/docid/51ef9cd24.html> (accessed 16 August 2019) for example finds that the issue of ineffective tax policies, corruption, coupled with improper use of government funds by both the state and private actors are factors that limit the fulfilment of the rights under the CRC and hence needed to be addressed.

¹⁸⁰ S Mulyani Indrawati ‘Speech by World Bank Managing Director and COO S Mulyani Indrawati at Event on Tax Evasion and Development Finance’ (2015) available at <https://www.worldbank.org/en/news/speech/2015/04/17/speech-wb-md-coo-sri-mulyani-event-tax-evasion-development-finance> (accessed 15 August 2019).

¹⁸¹ As above.

For the school child in Haiti, the new mother in Malawi, or the farmer in Bangladesh, these losses have a real impact: they result in classrooms that are overcrowded, health clinics that are never built, and water that is never delivered, people's opportunities are being stolen from them- because tax revenues are not collected.

This situation ultimately has a bearing on fiscal legitimacy. The definition of taxation as an obligation to pay tax without a corresponding mandate on government to use the tax revenue collected for the benefit of citizens is a double-edged sword.¹⁸² It could allow government flexibility to channel tax revenue to strategic public expenditure or place the taxpayer in a precarious situation with a low public goods and services' bargaining power.¹⁸³ Both consequences have a bearing on fiscal legitimacy. It is important to note that government legitimacy, informed by the tax approach adopted, affects fiscal policy and *vice versa*.¹⁸⁴ Fiscal legitimacy is the level of trust that citizens have in a government's fiscal performance and public expenditure.¹⁸⁵ Revenue collection and the level of public expenditure on ESRs are fundamental in attaining fiscal legitimacy. Consequently, fiscal policy and public finance choices are leading determinants of the state of fiscal legitimacy. To achieve fiscal legitimacy, there is need for the expenditure on public goods and services to be commensurate with the tax collected,¹⁸⁶ since taxation is central to the social contract between the government and the citizens.¹⁸⁷ It is equally pivotal to the level of fiscal legitimacy of the state.¹⁸⁸

Fiscal legitimacy requires that a fiscal system must respond to principles of good governance (transparency, accountability and responsibility) as well as being an effective, efficient, fair and just system ... To achieve fiscal legitimacy, principles and canons of taxation are used in national budgets and fiscal systems.

For the benefit of appreciating the subject of fiscal legitimacy and how fiscal policy affects it, there is varied literature across the globe.¹⁸⁹ Part of the literature canvasses the concept from the financing of the health sector angle, the other from the need to earmark tax revenue to specific public expenditure, and building fiscal legitimacy by strengthening African states

¹⁸² I Gunadi & H Rosdiana 'Earmarking Tax Policy on Local Taxation in Indonesia: Towards Pro Fiscal Legitimacy and Budget Flexibility Policy' (2016) *International Conference on Social and Political Issues (ICSPI)* 373, available at <https://www.knepublishing.com/index.php/KnE-Social/article/view/2922> (accessed 31 March 2022).

¹⁸³ As above.

¹⁸⁴ As above. See also A Waris 'Developing Fiscal Legitimacy by Building State Societal Trust in African Countries' (2018) 4.2 *Journal of Tax Administration* 103.

¹⁸⁵ As above. See also A Waris 'Developing Fiscal Legitimacy by Building State Societal Trust in African Countries' (2018) 4.2 *Journal of Tax Administration* 105.

¹⁸⁶ Gunadi & Rosdiana (n 182) 374.

¹⁸⁷ A Waris 'Developing Fiscal Legitimacy by Building State Societal Trust in African Countries' (2018) 4.2 *Journal of Tax Administration* 103.

¹⁸⁸ A Waris & LA Latiff 'Towards Establishing Fiscal Legitimacy Through Settled Fiscal Principles in Global Health Financing' (2015) 23.4 *Health Care Analysis* springer 376 377 available at <https://link.springer.com/article/10.1007/s10728-015-0305-z> (accessed 21 June 2019).

¹⁸⁹ See Waris and Latiff, Waris, Gunadi and Rosdiana above.

broadly. This study therefore borrows principles and concepts from the literature stated herein to extend the application to tax incentives policies and how the same affect revenue for public expenditure on free and compulsory UPE. Seeing that the level of public expenditure on rights affects fiscal legitimacy, below I review Uganda's obligations in respect of ESRs broadly and the right to basic education particularly.

1.8.3 Reconciling states' obligations under the minimum core obligations and the reasonable approach in the context of economic and social rights

This study analyses the interconnection between tax incentives and ESR realisation. In this part I interrogate the critical human rights principles and standards applicable to the study. This discussion draws from the nature of states' obligations for the realisation of ESRs introduced in section 1.1 of this chapter and detailed in sections 3.2 and 4.1 of the study. By way of background, although ESRs can be progressively realised using the maximum available resources, certain obligations require immediate realisation.¹⁹⁰ The principle of progressive realisation of ESRs has exceptions such as the minimum core obligations principle that is of particular relevance to this study. This exception compensates for the challenges faced by stakeholders including the neglect and delay in realising ESRs.¹⁹¹ This is by 'defining non-derogable minimum core obligations that establish a minimum set of protections that are immediately applicable ... and not subject to the flexibilities permitted by progressive realization'.¹⁹² The minimum core was equally an attempt to bridge the gaps created by the categorisation of rights into first and second generation with less importance placed on the latter.¹⁹³ The development of the minimum core obligation concept is partly attributed to the contextual understanding of articles 4 and 5 of the International Covenant on Economic, Social and Cultural Rights (CESCR).¹⁹⁴ It equally flows from scholarship on development, human rights and philosophy, the constitutional laws in Turkey and Germany, and Henry Shue's

¹⁹⁰ For the detailed discussion of this, see sect 3.1 and 4.1 of the thesis. See also Para 3 & 10 of General Comment 3 of the Committee on ESCR.

¹⁹¹ O'Hare (n 164 above) 57. See also L Forman 'Conceptualising Minimum Core Obligations under the Right to Health. How Should We Define and Implement the Morality of the Depths?' in S Klotz, H Bielefeldt, M Schmidhuber, A Frewer (eds.) *Healthcare as a Human Rights Issue Normative Profile, Conflicts and Implementation* (2017) 95 98; according to Forman et al, the discussion of minimum core obligations emerged in the early 1980's. See also L Forman 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2016) 47.2 *Ottawa Law Review* 561 564.

¹⁹² As above.

¹⁹³ Forman (n 191 above) 103.

¹⁹⁴ Forman (n 191 above).

principle of basic rights.¹⁹⁵ This discussion was later concretised by the 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (Limburg Principles) and the works of the then Special Rapporteur for the Committee on Economic, Social and Cultural Rights, Mr Phillip Alston.¹⁹⁶ Despite these progressive efforts, the debate on the subject is far from over.

Although the concept of the minimum core obligations was developed to fill the gap created by the principle of progressive realisation of ESRs, it has generated more questions than solutions as follows:¹⁹⁷

Is the core fixed or moveable, non-derogable or restrictable, universal or country-specific? Is its function to guarantee specified bundles of the most essential health facilities, goods and services, or is it to require governments to act reasonably to progressively realize these minimal health entitlements? Is the concept a legitimate interpretation in terms of international law rules of treaty interpretation? And what are acceptable methods to further develop the content of these entitlements and duties?

Additionally, debates at the international level have revolved around questions such as whether the minimum core is absolute or relative, whether it imposes an obligation of results or of conduct, or whether it is important to consider the reasonableness approach in the interpretation and enforcement of the obligation.¹⁹⁸ To respond to some of these inquiries, it is important to note that the interpretation of General Comment 3 of the Committee on ESCR imputes an obligation of conduct.¹⁹⁹ It requires the states relying on a failure to realise the minimum core due to the non-availability of resources to demonstrate at the very least that all resources at their disposal were used to fulfil the minimum core obligations as a matter of urgency.²⁰⁰ For the right to health, an interpretation of General Comment 14 of the Committee on ESCR points to a movement towards ‘non derogable core obligations of results’.²⁰¹ Other scholars see both the obligations of conduct and of results under the minimum core obligations as wishful thinking given the economic realities in many low income and developing states, and as such recommend the reasonable approach that I review in detail below.²⁰² As a result, both international human rights bodies and scholarly works have not resolved the conflict around

¹⁹⁵ As above.

¹⁹⁶ Forman (n 191) 4, 99 & 100.

¹⁹⁷ Forman (n 191) 4 & 96.

¹⁹⁸ Forman (n 191) 108 & 109.

¹⁹⁹ Forman (n 191) 109.

²⁰⁰ As above.

²⁰¹ As above. This is understood to ‘include largely structural outcomes as well as essential medicines, minimum essential food, basic shelter, housing, sanitation, and safe and potable water. In the context of the right to health, the obligation of results imposes on states a ‘duty to provide basic health services or create conditions under which individuals have adequate and sufficient access to health services’.

²⁰² Forman (n 191) 110, & 111.

the treatment of the minimum core obligations *vis-à-vis* the principle of progressive realisation of rights.²⁰³ However, some African countries like South Africa have progressive jurisprudence that analyse the interpretation of the minimum core obligations in the context of the reasonableness approach.

I follow through on the South African jurisprudence on the subject below. From my assessment, the literature below points to the fact that the concept of the minimum core obligations in itself is not absolute. South Africa has developed vast jurisprudence, especially on the concept of minimum core obligations in the African context. Some of it analyses the concept of minimum core obligations in the South African cases of *Soobramoney v Minister of Health, Kwazulu-Natal (Grootboom case)*,²⁰⁴ *Ministry of Health v Treatment Action Campaign, (TAC Case)*,²⁰⁵ and *Khosa v Minister of Social Development*.²⁰⁶ From these cases, it appears that when courts are adjudicating ESRs claims, they will inquire into the reasonableness of the measures adopted for the realisation of the ESR in issue.²⁰⁷ Even then, courts will still give states a margin of appreciation in policy and budgetary choices, while scrutinising the same to ascertain whether they comply with the purpose and values enshrined in the Constitution.²⁰⁸ From the broad minimum core obligations principle therefore arises the reasonableness approach that allows states a margin of discretion in ESRs policy decisions. It takes into account the social, economic, and political circumstances of the state while considering the capacity of the relevant institutions that are charged with the implementation of the said programmes.²⁰⁹ If not taken with caution, in my view, the redefined reasonableness approach could dilute the very essence of the concept of minimum core obligations.

True to the caution above, the reasonableness approach has received much criticism even in South Africa where it has been applied extensively.²¹⁰ This study interrogates the status of the

²⁰³ Forman (n 191) 114.

²⁰⁴ 1998 1 SA (200).

²⁰⁵ 2002 5 SA 721.

²⁰⁶ 2004 6 SA 505 (CC).

²⁰⁷ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 309; See also L Forman 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2016) 47.2 *Ottawa Law Review* 561 562.

²⁰⁸ Liebenberg (n 207) 310. This is in line with para 20 & 71 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) (available at <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>) (accessed 23 July 2021).

²⁰⁹ As above.

²¹⁰ Liebenberg (n 204) 314.

realisation of the right to basic education as a minimum core obligation of the right to education. Basic education is broad and includes privately provided primary education. However, the study focusses on the realisation of free and compulsory UPE. In chapter four I reconcile the two positions especially in the context of Uganda by establishing the obligation of the state to realise ESRs, particularly the right to basic education for UPE learners.²¹¹ I seek to establish Uganda's obligation and whether it should be assessed from the minimum core obligation angle or using the reasonableness approach? The question to bear in mind is 'would Uganda be in compliance using any of the above principles'?

For a better understanding of the government's obligations for the realisation of ESRs, especially the minimum core obligations I find the *TAC* case to be instructive.²¹² This case challenged the restriction of nevirapine for the prevention of mother to child human immunodeficiency virus (HIV) transmission to only designated research sites as a violation of the right to basic health care, among other rights. Essential primary health care is a minimum core obligation of the right to health or an adequate standard of living.²¹³ In determining whether the restrictions were reasonable, the court relied on the following considerations:²¹⁴

the degree and extent of denial of the right that the government is meant to realise, ... a reasonable programme must be one that is balanced and flexible ... must pay attention to short, medium and long term needs and must not exclude a significant sector of society.

In its findings, the court held that the restriction of the potential life-saving nevirapine was unreasonable and a breach of established constitutional state obligations, including the minimum core obligations.²¹⁵ In determining whether the decision taken by the government of South Africa was rational, regard was given to whether the measures taken were 'reasonable attempts to realise progressively the right in question. Such an inquiry requires content to be given to the right'.²¹⁶ This literature under review is specific to the right to health care. It is important to note that in the South African Constitution, the reasonableness of the measures taken by the state is central in determining whether or not there is a violation of an ESR.²¹⁷ This is contrasted to the Ugandan provision on limitation which does not mention

²¹¹ Sect 4.1 & 4.2 of the thesis.

²¹² 2002 (5) SA 721.

²¹³ Para 10 of General Comment 10 of the Committee on ESCR.

²¹⁴ 2002 (5) SA 721.

²¹⁵ As above.

²¹⁶ D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) *South African Journal on Human Rights* 8.

²¹⁷ Bilchitz (n 216 above) 9. See sect 36 of the 1996 Constitution of the Republic of South Africa, available at <https://www.gov.za/documents/constitution/chapter-2-bill-rights#37> (accessed 28 April 2022).

reasonableness of measures taken as an allowable exception.²¹⁸ In South Africa, the minimum core obligation principle has as such been constitutionally modified to allow for an inquiry into the reasonableness of government efforts. Consequently, to find the government in violation of a particular ESR using this approach, it is important that the right in issue is given content while at the same time inquiring into the reasonableness of attempts to realise the same.²¹⁹

In the human rights discourse and debates, several criteria have been expounded to determine whether or not a government policy is reasonable. These include: ‘consideration of the urgency of the need’, ‘balance and flexibility’, and taking into account the short, medium, and long terms needs of society.²²⁰ The measures taken must also not exclude the majority of society and must consider those who cannot pay for the service.²²¹ These considerations are critical to this study as those who attend UPE schools, in search for basic education in Uganda, are usually those on the margins of society. In determining whether the steps taken by the government to realise basic education in Uganda are reasonable in chapter four, it might be important to consider the above factors including the needs of Ugandans, the urgency of the needs especially in these post Covid-19 economic hard times and how inclusive the measures are for those who may not afford the privately available options. This is the essence of human rights as inclusive and inherent entitlements.

It is equally important to note that although *TAC* analyses the reasonableness approach in detail, care should be taken to distinguish this case from those where courts were dealing with stated and clear minimum core obligations:²²²

The recognition of the minimum core of social and economic rights that must be realised without delay attempts to take into account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.

It is critical to note that the notion of minimum core obligations was introduced to avoid a scenario where states hide behind the principle of progressive realisation to avoid the realisation of essential ESRs.²²³ The minimum core obligation is the starting point for the

²¹⁸ See Art 43 of the Constitution of the Republic of Uganda, 1995.

²¹⁹ Bilchitz (n 216 above) 9.

²²⁰ As above.

²²¹ As above.

²²² Bilchitz (n 216 above) 11 & 12.

²²³ As above.

realisation of ESRs.²²⁴ Accordingly, care should be taken not to confuse the concepts of minimum core obligations and the reasonableness approach:²²⁵

The minimum core does not gloss the notion of reasonableness; rather, reasonableness is assessed in terms of whether a government has complied with its minimum core obligations in terms of the right.

From the foregoing discussion, I find that the reasonableness approach is intended to compliment the minimum core obligation and not to be interpreted as doing away with the same. Forman partly takes the same approach:²²⁶

It is important to emphasize that despite rejecting the core, in both *Grootboom* and *Treatment Action Campaign*, the Court found the state in violation of the reasonableness standard. These outcomes suggest that the reasonableness standard might do similar work to the minimum core to the extent that it forces courts to focus on basic and urgent needs of the most vulnerable, marginalized, and poor people in society.

I reconcile the two positions by highlighting that although the minimum core obligation is the ideal and all states should strive to attain the same for the various ESRs, states could still be in violation even if the reasonableness approach was used as a yardstick to measure compliance.

Undeniably, arising from the extensive litigation on ESRs in South Africa, has been the dilemma of whether to apply the principles of progressive realisation, or the minimum core obligation, or the reasonableness approach which has generated great debate and controversy. I seek through this study to determine the application of this debate to the Ugandan context, given the unequivocal and unqualified domesticated right to basic education, a component of which I focus on. To do this, in chapter four, I analyse in detail whether the development in jurisprudence to encompass the reasonableness approach affects the normative content and the realisation of the right to basic education in Uganda.²²⁷ Before this, it is important to underscore the role of budgets in the realisation of the ESR obligations discussed above. As will be discussed in detail in chapter two, the framers of the original theory of fiscal sociology saw budgets as ‘skeletons of the state’ that depict the government spending priorities.²²⁸ Accordingly, it could be true that without ESR compliant budgets, the ESR obligations of states could only remain on paper and the tests enunciated above would be of little relevance.

²²⁴ As above.

²²⁵ As above.

²²⁶ L Forman ‘Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2016) 47.2 *Ottawa Law Review* 561 570.

²²⁷ Sect 4.1 & 4.2 of the thesis.

²²⁸ See sect 2.2.1 of the thesis.

1.8.4 The role of budgeting in the realisation of economic and social rights

Aside from safeguarding revenue resources from unjustified wastages and losses, public finance policy is concerned with budgeting. This is based on calls on states to pay keen attention to prioritisation in resource appropriations as they do with resource mobilisation.²²⁹ In this study, the focus is on ESRs budgeting for the realisation of rights such as financing for UPE as a component of the right to basic education. It is important to note from the onset that many scholars have analysed the concept of public budgeting from a technical economic angle.²³⁰ This part reviews some of the scholarly works that may be more relevant to the central theme of the study. Ideally, the public budgeting process should start with a classification of public wants and the distinguishing of social goods from merit wants.²³¹ This is because consumer sovereignty or democracy is cardinal in the budget allocation of social goods as compared to merit wants/goods.²³² The satisfaction of merit goods/wants is by its very nature an interference with the concept of consumer sovereignty and democracy, given their nature and importance.²³³

Beyond these classifications, public goods generally are needs that require ‘joint and non-rival utility to a group of individuals’.²³⁴ The realisation of some categories of public goods requires public resources while others rely on regulations shaped by appropriate policy.²³⁵ Public goods as opposed to private ones are too vital to be left to the whims of the unregulated market forces of demand and supply.²³⁶ As such, the need for the government to remain in charge of the supply and realisation of public goods recognises the different externalities that exist, which would negatively affect their realisation if the same were left to the sole discretion of the private sector.²³⁷ In fact, the theories of public expenditure developed by Musgrave, Wagner, Wiseman

²²⁹ D Olowu, ‘Human Development Challenges in Africa: A Rights-Based Approach,’ (2004) 5 *San Diego International Law Journal* 179 209.

²³⁰ These scholars include JE Ryu ‘The Public Budgeting and Finance Primer: Key concepts in Fiscal Choice’ (2014), KG Willoughby ‘Public Budgeting in Context: Structure, Law, Reform, and Results’ (2014) & RD Lee & RW Johnson ‘Public Budgeting Systems’ (1977).

²³¹ RA Musgrave *The Theory of Public Finance: A study in public Economy* (1959) 3 & 14.

²³² As above.

²³³ JG Head ‘On Merit Goods’(1966) 25 *FinanzArchiv / Public Finance Analysis* 1 2 available at <https://www.jstor.org/stable/40909986> (accessed 31 March 2022).

²³⁴ S Collignon ‘The Three Sources of Legitimacy for European Fiscal Policy’ (2007) 28.2 *International Political Science Review* 155 156.

²³⁵ As above.

²³⁶ Collignon (n 234 above) 157 & 158.

²³⁷ Collignon (n 234) 158.

and Peacock recognise the need for increased state expenditure on public goods and services to ‘enhance economic welfare’.²³⁸

Public goods are divided into social and merit goods as introduced above in this section. Merit goods are ‘commodities which have beneficial external effects on people other than the actual consumer have... (these include) education’.²³⁹ They are branded ‘meritorious’ because ‘their satisfaction is provided for through the public budget, over and above what is provided for through the market and paid for by private buyers’.²⁴⁰ Examples of such goods include public services such as ‘furnished school luncheons, subsidized low-cost housing, and free education’ among others.²⁴¹ Even in developed democracies where taxpayer sovereignty and participation in budget allocation are more advanced, these principles may not be relevant where merit goods are concerned.²⁴² This is the reason the state’s responsibility is pivotal in the realisation of merit goods such as education through the state’s budgetary process.²⁴³ Merit goods need to be provided by the state irrespective of the citizens’ preferences that inform the realisation of social goods. Regardless, democratically planned budgets are ideal.²⁴⁴

The budgeting process is the responsibility of three branches: the allocation branch,²⁴⁵ the distribution branch,²⁴⁶ and the stabilisation branch.²⁴⁷ Although the distinction between social and merit goods may be relevant in the Ugandan context, the distinctions in the branches of the budgetary process may be superficial as these roles are fulfilled by a single agency. In chapter five, I seek to establish if such an agency in Uganda has the requisite expertise and political will to implement an ESR-based budget, amidst resource constraints partly caused by revenue

²³⁸ IO Oseni *et al* ‘Government spending and school enrolment in sub-Saharan Africa: A system GMM approach’ (2020) 40.2 *Journal of Economics & Management* 91 94 available at <https://doi.org/10.22367/jem.2020.40.05> (accessed 20 July 2022).

²³⁹ K Basu ‘Retrospective Choice and Merit Goods’ (1976) *FinanzArchiv / Public Finance Analysis New Series* 220 220 available at <https://www.jstor.org/stable/40911199> (accessed 31 March 2022).

²⁴⁰ Musgrave (n 231) 13. See also AG Pulsipher ‘The Properties and Relevancy of Merit Goods (1971) 30. 2’ *FinanzArchiv / Public Finance Analysis* 266 266 available at <https://www.jstor.org/stable/40910860> (accessed 31 March 2022).

²⁴¹ Musgrave (n 231) 13.

²⁴² Musgrave (n 231) 14; Head (n 230 above) 2 & 3.

²⁴³ As above; Basu (n 239) 221.

²⁴⁴ Musgrave (n 231) 118; Basu (n 239) 221.

²⁴⁵ Musgrave (n 231) 6, this branch ensures that market forces of demand and supply are neutralised to ensure the satisfaction of public services.

²⁴⁶ Musgrave (n 231) 17, this branch caters for the additional social and economic consequences of budgeting rather than satisfying public services, such as the distribution of income and wealth.

²⁴⁷ Musgrave (n 231) 22, which aims at ‘maintaining a high level of resource utilization and stable value of money.’ This is done through managing employment and price stability which directly guards against inflation and deflation.

losses and leakages from tax incentives.²⁴⁸ I argue that the realisation of merit goods and proper budgeting can only be achieved if the resource basket is sufficient to balance the revenue with the expenditure priorities of such goods. This study builds on this literature to demonstrate the impact of tax incentives on the resource basket for the realisation of critical merit goods.

Although an ESR-based budget is ideal for any country, there are processes and conceptual challenges for its realisation.²⁴⁹ These include, firstly, the conceptual understanding and determination of human rights terms such as maximum available resources and minimum core obligations: ‘Is the minimum core an obligation of conduct or result? Is it relative or absolute?’²⁵⁰ The discussion in section 1.8.3 above settles these questions by highlighting the fact that the reasonableness approach is only complementary, and should not be interpreted as doing away with the minimum core obligation. The value to be placed to the minimum core obligation or reasonableness approach should be assessed on a case-by-case basis drawing from the constitutional and legislative standards a country has committed to domestically. Secondly, the tripartite obligation to respect, protect, and fulfil has been criticised for having overlapping obligations, which factors make it hard to come up with an appropriate ESR monitoring methodology for budgeting purposes.²⁵¹

Of great importance is a recommendation that as these challenges are being addressed, the Committee on ESCR needs to properly define what amounts to regressive measures with regards to progressive realisation.²⁵² Could for example regressive tax incentives policies that have the effect of causing revenue leakages and losses be specifically classified as such? Although the Committee on ESCR has clarified the ‘objective criteria’ to be adopted to determine whether member states’ actions in cases of economic crisis or financial difficulty are regressive or not, the term is not expressly defined.²⁵³ This is especially so as the measures that seem to be problematic according to the Committee on ESCR are the deliberate ones or those that affect the realisation of the minimum core obligations. This discussion is thus relevant in

²⁴⁸ Sect. 5.1.2 of the thesis.

²⁴⁹ A Nolan ‘Putting ESCR-Based Budget Analysis into Practice: Addressing the conceptual Challenges’ in A Nolan, R O’Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 41-57.

²⁵⁰ A Nolan ‘Putting ESCR- Based Budget Analysis into Practice: Addressing the conceptual Challenges’ in A Nolan, R O’Connell & C Harvey (n 249) 45.

²⁵¹ A Nolan ‘Putting ESCR- Based Budget Analysis into Practice: Addressing the conceptual Challenges’ in A Nolan, R O’Connell & C Harvey (n 249) 46.

²⁵² As above.

²⁵³ A Nolan ‘Putting ESCR- Based Budget Analysis into Practice: Addressing the conceptual Challenges’ in A Nolan, R O’Connell & C Harvey (n 249) 47.

times of economic crisis that many nations, especially developing ones, are currently in.²⁵⁴ The discussion is timely since Uganda like other resource-constrained countries often experiences budget cuts that affect the realisation of ESRs including UPE as a component of the right to basic education. This study sets out to interrogate how such cuts would be justified given the revenue leakages and losses from unjustified and nonstrategic tax incentives.

Part of this literature, on the one hand, concentrates on the methodological and conceptual understanding of technical terms as they relate to the budgetary process. This study, on the other hand, uses these concepts, bearing in mind their limitations, to make the necessary deductions on the several budgetary processes for ESRs financing over time. In this study, I place tax incentives in the public budgeting, public expenditure, and human rights matrix to gauge their impact on the realisation of ESRs, especially the unqualified right to basic education, more so for UPE learners.

1.8.5 Conclusion on the literature reviewed

Tax incentives as part of fiscal policy predominantly remain prevalent especially in developing nations because of the concept of tax competition. The literature reviewed points to no other logical explanation. Below I summarise the effects of the tax competition induced tax incentives. Firstly, tax competition leads to the loss of would be revenue from taxation as tax incentives do not meaningfully contribute to economic growth, development, sustainable development, or the realisation of ESRs. Secondly, tax incentives erode the revenue base for the realisation of ESRs using the known human rights principles of progressive realisation of rights, minimum core obligations, and the reasonableness approach. Thirdly, tax incentives narrow the tax base, lead to higher consumption taxes that hurt the vulnerable most, and shift the tax incidence to the poor and marginalised. The entire basket of the foregoing affects the capacity of especially those on the margins of society to afford public goods and services. It is evident therefore, that the dangers of tax incentives are multipronged. Tax incentives reduce the revenue basket for the realisation of ESRs such as the right to basic education, which includes free and compulsory UPE, and heighten the tax burden of the poor and marginalised thus reducing their disposable income with which they could have afforded the rights privately. As a consequence, these challenges negatively affect fiscal legitimacy and further complicate

²⁵⁴ A Nolan 'Putting ESCR- Based Budget Analysis into Practice: Addressing the conceptual Challenges' in A Nolan, R O'Connell & C Harvey (n 249) 48.

DRM. Attendant issues include the dilemma of achieving an ESRs-based budget amidst resource constraints which are worsened by revenue losses and leakages from tax incentives. This study fills the gaps identified by making a case for a human rights-based analysis of the fiscal policy and legal framework on tax incentives. The study does this by scrutinising the themes and concepts from a human rights perspective with the ultimate objective of ensuring a framework that generates enough resources for the realisation of ESRs especially the right to basic education, which is partly realised through UPE. In chapter four, the status of the realisation of basic education in Uganda is presented in much detail pointing out the glaring challenges facing UPE, and the place of resources in the discourse.²⁵⁵ Below I give a brief of what each chapter in the thesis covers.

1.9 Chapter summary

Chapter one introduces the study, details the background of tax incentives, as well as the financing obligation on states for the realisation of ESRs. The chapter distinguishes general obligations from the minimum core obligations in respect of ESR realisation. Further, the place of the reasonableness approach as recently developed in response to the minimum core obligations principle is discussed. In addition, the effects of resource constraints on the realisation of ESRs and the right to basic education as a minimum core of the right to education are highlighted especially from the context of UPE financing. The chapter establishes the largely negative role tax incentives play in the generation of resources for the realisation of ESRs. In this chapter, the concept of tax competition is unpacked in explaining the prevalence of tax incentives globally. And finally, the chapter details the relevant literature on the concepts and themes under investigation, and highlights the methodology to be adopted to respond to the research questions in the subsequent chapters.

In chapter two I explore the theoretical grounding of the study. The study is based on Schumpeter and Goldscheid's theory of fiscal sociology, and the developments to the theory to include a human rights approach as developed and expounded by Waris, Mumford, Webber, and Wildavsky, Lee, Johnson, O'Connor, McLure, and Campbell among other scholars. The theory is analysed in connection with the main themes of the study. The study ultimately adopts the modified human rights-based theory of fiscal sociology.

²⁵⁵ Sect 4.1, 4.2, & 4.3 of the thesis.

Having dealt with the concepts and theoretical grounding of the study in the previous chapters, chapter three analyses the relationship between tax incentives and the realisation of ESRs broadly. I explore the relationship between fiscal policy and ESRs realisation, before analysing the several human rights concerns that arise from tax incentives. I further investigate the states obligations for ESRs realisation notably from the financing angle before considering how the same is affected by tax incentives.

In chapter four I dig deeper and explore the extent of realisation of the right to basic education in Uganda with specific emphasis on the obligation to provide free and compulsory UPE and the contribution of resources to the status quo. In the course of the exploration, I critically study the global, regional, and domestic legal obligations regarding the realisation of the right to education, and the right to basic education especially. I analyse the status of UPE funding, and how the same affects the realisation of particularly the right to basic education for the poor and vulnerable.

Chapter five commences with a historical walk through of the developments in public finance and fiscal policy that have informed the current framework. Subsequently, the legal and policy framework on tax incentives in Uganda is analysed. I review the global, regional, sub-regional laws, policies, treaties, and soft law instruments applicable to the discourse. The laws are analysed from the human rights-based theory of fiscal sociology perspective. I additionally establish the extent of revenue loss and leakages from tax incentives over the years under investigation. This I compare with the financing gaps in UPE presented in chapter four.

To crown it all, chapter six presents the conclusion and recommendations to the study highlighting appropriate legal, policy, and administrative reforms in fiscal and public policy and ESRs realisation. The recommendations are classified to specifically target the different actors such as the government and policymakers, CSOs, NGOs, academicians, sub-regional, and international economic blocs.

Chapter Two

The theoretical framework of the study: Human rights-based theory of fiscal sociology

2.0 Introduction

The introductory aspects of tax incentives, budgeting, states' economic and social rights (ESRs) obligations, and their relationship with resources discussed in chapter one largely explain the theoretical basis of the study. The fiscal policy of many states, Uganda inclusive, is primarily influenced by tax competition, which is the greatest motivation for the prevalence of tax incentives.¹ Tax competition affects the state's capacity to realise ESRs, especially the minimum core obligations such as the right to basic education, even when assessed from the reasonableness approach angle. The role of ESRs-compliant budgets in the realisation of rights is underscored as dependant on the adequacy of resources.² As such, there is a need to plug the revenue losses and leakages gaps that result from tax incentives policies and laws, which ignore the human rights obligations of states. This majorly explains the theoretical grounding of the study.

In this chapter I discuss the origin and understanding of the theory of fiscal sociology as modified by Waris to include a human rights-based approach, which I adopt as the theoretical grounding for the study. I go ahead to analyse the relevance of the theory to the different fiscal and public finance processes that influence the realisation of ESRs. The theory is notably relevant to financing for free and compulsory universal primary education (UPE) as a component of the right to basic education. I opine that the theory of fiscal sociology as originally expounded by Goldscheid and Schumpeter,³ was appropriate to the circumstances at

¹ AW Oguttu 'International Tax Competition, Harmful Tax Practices and the 'Race to the Bottom': A Special Focus on Unstrategic Tax Incentives in Africa' (2018) *The Comparative And International Law Journal Of Southern Africa* 294; M Andrew & M Lotta 'Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2012) 4.1 *Columbia Journal of Tax Law* 5.

² See sect 1.8.4 of the thesis.

³ The term 'fiscal sociology' was expounded by Rudolf Goldscheid who is seen as the father and the first classical scholar of the theory that was later expounded by an Austrian Economist Joseph Schumpeter. Moore, on the other hand sees Schumpeter's understanding of fiscal sociology not as a theory, nor a concept, but as 'simply an approach, a paradigm, or a way of looking at things. (E Henderson translator) 'A sociological Approach to Problems of Public Finance' in RA Musgrave & AT Peacock for the International Economics Association, *Classics in the theory of Public Finance* (1958) 202, Goldshied views the origin and legal basis of the state as the necessity to come together for defence and fiscal related needs. It is surprising to Goldscheid that issues of fiscal

the time, before the prominence of human rights.⁴ With the emergence of the human rights discourse, the theory had to be modified accordingly. Fiscal policies and public finance choices cannot be said to only affect the social welfare and wellbeing of citizens in light of the human rights obligations that currently bind states. The human rights discourse is broader and encompasses not only the social welfare and wellbeing of citizens but more rights and principles for a holistic and fulfilled life. Below, I delve into the theory in detail.

2.1 Fiscal sociology and human rights

2.1.1 The historical background of the theory

Much as the study adopts the human rights-based theory of fiscal sociology, it is important to trace its evolution from the original theory of fiscal sociology. Historically, the theory of fiscal sociology was the first attempt to make a multidisciplinary appreciation of public finance policies and choices.⁵ It is argued that this theory gains meaning as a separate field ‘only once economics and sociology have parted ways, leaving a void in between’.⁶ The theory was timely as the dilemma of balancing government revenue and expenditure choices had persisted since the time of Khaldun and the maxims of Adam Smith, when scholars of public finance attempted to establish criteria through which such could be evaluated.⁷ Khaldun who wrote before Smith

or ‘financial sociology’ lacked a strong ‘sociological foundation’. Goldscheid underscores the importance of sociology in determining the social conditions of public needs, the mode of their satisfaction, and the shaping of the relationship between public expenditure and revenue. Goldscheid sees a close relationship between the revenue and expenditure side of the budget and the same ultimately having an impact on the lives of people in society.

⁴ Although the human rights discourse has its origin from the the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791), it is not until 1948 with the adoption of the Universal Declaration of Human Rights that nations start to have a semblance of a real human rights discourse.

⁵ See (n 3 above).

⁶ J Backhaus ‘Fiscal Sociology What For?’ (2002) *American Journal of Economics & Sociology* 55 57 & 63 available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1536-7150.00151> (accessed 23 October 2019); In Europe where the theory first developed, the first branch of study to get fully developed was economics as there was no need then for a specialty in fiscal sociology. Economics was mainly aimed at fostering the ‘wealth and happiness’ of nations which was the preoccupation then. This could be achieved as a result of ‘prudent state economic policy’. The need to bridge the differentiation between the different social sciences became more pronounced with the gap created towards the end of World War 1. This was due to the effects of the war financing that had greatly depleted state resources and adversely affected the economies and societies of countries such as German and Austria. There was, therefore, urgent need to do things better, and hence the development of the term fiscal sociology (*Finanzsoziologie*).

⁷ A Waris ‘Developing Fiscal Legitimacy by Building State Societal Trust’ (2018) 4.2 *Journal of Tax Administration* 106 available at <http://jota.website/index.php/JoTA/article/view/199/142> (accessed 6 November 2019); RA Musgrave & AT Peacock for the International Economics Association, *Classics in the theory of Public Finance* (1958) xiii.

called for the infusion of the concepts of fairness and justice in all taxation principles.⁸ This later became the backbone of the principle of fiscal legitimacy, on which this study is largely hinged.⁹

According to the theory of fiscal sociology therefore, the modern state was formed out of financial needs as demonstrated by the movement from the feudal state to the current dispensation.¹⁰ As a result, the direction of the state can be predicted from its tax policies, and public finance serves as a governance tool.¹¹ I argue that even from a historical perspective, this theory contributes to the understanding of whose interests tax incentives serve. It is also a litmus test for the government's priorities through an analysis of its budgets. Consequently, the theory challenges fiscal sociology scholars to treat taxation as both a sign and origin of large-scale societal changes by approaching it from both a historical and comparative perspective.¹² Analysing the changes in tax codes over time and having a comparative assessment with other jurisdictions can provide great insights into the direction of the fiscal state. That aside, public finance plays a critical role in the understanding of the society especially from a political perspective.¹³ Arguably, from the foregoing, public finance choices are a summation of social, political as well as economic objectives. In chapter three I argue that fiscal and public finance policies are a part of public policy and need to be cognisant of the need to have people at their centre, through ensuring public participation in policy and legal formulation.¹⁴ Furthermore, the modified theory as adopted for this study, views fiscal policies and public finance as critical to the human rights dispensation, mainly because of the processes required for their effective adoption and the role they play in the realisation of ESRs especially. Some of these processes and role in ESRs realisation can best be appreciated during the budgeting procedure and the resultant annual/periodic budgets.

As such, from the public budgeting perspective, a 'budget is the skeleton of the state stripped of all misleading ideologies'.¹⁵ Policy makers and political leaders communicate their funding

⁸ A Waris 'Developing Fiscal Legitimacy by Building State Societal Trust' (2018) 4.2 *Journal of Tax Administration* 106 available at <http://jota.website/index.php/JoTA/article/view/199/142> (accessed 6 November 2019).

⁹ As above.

¹⁰ JA Schumpeter 'The Crisis of the Tax State' in R Swedberg (ed) *Joseph A. Schumpeter: The Economics and Sociology of Capitalism* (1918) 108

¹¹ As above, see also page 110.

¹² IW Martin *et al* *The New Fiscal Sociology: Taxation in Comparative and Historical Perspectives* (2009) 3.

¹³ As above.

¹⁴ Sect 3.1 of the thesis.

¹⁵ Martin (n 12) 5 & 6. Schumpeter was quoting Goldscheid in his book *The Crisis of the Tax State*.

priorities, strategic direction, and political ideology through periodic budgets.¹⁶ In Uganda for example, the 2021/22 budget passed during the global Covid-19 pandemic prioritises the security, works and transport sectors, with budget cuts to the health and education sectors.¹⁷ This is an indication of the government's priorities at a time when innovation is required to fight the pandemic while ensuring essential rights such as basic education are respected and realised. The theory of fiscal sociology therefore enables citizens to appreciate the policy, strategic and political direction of the state by a reflection on the budgets. With the evolution of the theory to the human rights-based theory of fiscal sociology, the level of the states' commitment to the realisation of rights such as ESRs can still be depicted from how human rights compliant the budget is. This is confirmed by other scholars whose works are discussed below.

Drawing from the theory of fiscal sociology, other scholars such as Webber and Wildavsky also hold the view that 'budgeting is implicated in the controversies of how people live their lives'.¹⁸ From the foregoing discussion, I argue that a critical analysis of the revenue and expenditure side of a national budget can thus give an indication of whose interests the state seeks to protect. It can also reflect the status of the socio-economic lives of different stakeholders in a given country. Applying this theory to Uganda's budgets for selected years, one may ascertain trends in the grant of tax incentives, revenue forgone, and ESRs' expenditure patterns especially for basic education, as against the sectoral estimates to make the necessary deductions for future policy and legislative reforms. This I do in chapters four, five and six.¹⁹ Aside from public budgeting, the theory provides vital insights into states' fiscal policies and reflects the tension between the expenditure and revenue sides of the budgets. It is important to note that before the theory of fiscal sociology of taxation, fiscal decisions were considered from a purely economic angle, which resulted in misleading results as these policies affect people, and hence the need for a comprehensive and inclusive approach.²⁰ The adoption of the

¹⁶ As above.

¹⁷ See <https://www.finance.go.ug/sites/default/files/The%20Budget%20Speech%20for%20FY%202021-2022.pdf> (accessed 13 October 2021).

¹⁸ RE Wagner *Fiscal Sociology and the Theory of Public Finance - An Exploratory Essay* (2007) 190.

¹⁹ See sect 4.3, 5.5, & 6.2.2 of the thesis.

²⁰ IW Martin *et al* 'The Thunder of History: The origins and development of the New Fiscal Sociology' in IW Martin, AK Mehrotra, M Prasad (Eds) *The New Fiscal Sociology: Taxation in Comparative and Historical Perspective* (2009) 10. The effect of a purely economic analysis of public finance policies is highlighted by the fact that as late as the aftermath of World War II, one of the greatest victories of economists is seen as the development of advanced tools for analysing the economic effects of taxation. There was, however, a consistent neglect of studies on how taxation affected the social and cultural lives of people.

original theory of fiscal sociology collapsed the strong invisible wall between economics and sociology when the close analysis of social and economic processes was underscored, in a paper originally presented at the Sociological Association in Vienna.²¹ Schumpeter opines that:²²

An enormous influence on the fate of nations emanates from the economic bleeding which the needs of the state necessitates, and from the use to which its results are put ... The spirit of a people, its cultural level, its social structure, the deeds its policy may prepare – all this and more is written in its fiscal history stripped of all phrases. He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else ... [which provides insight] into the laws of social being and becoming and into the driving forces of the fate of nations ... The public finances are one of the best starting points for an investigation of society.

The above demonstrates that firstly, the starting point to understanding the fiscal and public finance policies of a nation is from its history. Secondly, the present and future of a people can be depicted from the public finance policies of the state especially through the budget, which is a reflection of the government priorities. Tax incentives are or should be part of the expenditure side of budgets but equally have a bearing on the revenue side. Furthermore, the theory initially considers the articulation of public finance from a sociological angle as capable of producing results that would propel the better realisation of a welfare state. Accordingly, a critical introspection and analysis of the state's public finance history and policies using a sociological lens would reveal the direction of the state: 'The public finances are one of the best starting points for an investigation of society, especially though not exclusively of its political life'.²³ As is discussed in detail later in this section, although the sociological inquiry into public finance choices and policies was a great innovation by the propounders of the theory, the same could not adequately address the current societal challenges since human rights is broader than social welfare.

The above shortcoming notwithstanding, using the original theory of fiscal sociology, a country could reflect on its fiscal history and present public finance choices and priorities, while

²¹ B Smart 'Fiscal crisis and creative destruction: Critical reflections on Schumpeter's contemporary relevance' (2012) 12(3-4) *Journal of Classical Sociology* 526-534 available at <https://journals-sagepub-com.uplib.idm.oclc.org/doi/pdf/10.1177/1468795X12454472> (accessed 14 October 2019). At this conference, Schumpeter underpinned the extent to which matters of fiscal policy had a strong sociological dimension, which gave birth to a new field of study known as 'financial sociology' or 'fiscal sociology'. Goldscheid who was in favor of in-depth sociological knowledge of finance was expected to come up with a more detailed outlook on the development of social and democratic welfare states. They find that only sociology was capable of demonstrating how social factors determine public desires and the way of 'their satisfaction by more direct or indirect means, and how ultimately the pattern and evolution of society determine the shaping of the interrelations between public expenditure and public revenue'.

²² Schumpeter (n 10) 100 & 101, Smart (n 21) 535.

²³ JA Schumpeter "The Crisis of the Tax State," reprinted in *International Economic Papers*, No. 4 (1954) 7.

gauging the likely consequences of the approaches suggested to avert a possible fiscal crisis. Consequently, the works of Goldscheid, Schumpeter, and other scholars in fiscal sociology led to the effective movement of tax from the realm of public finance and economics to sociology.²⁴ The term ‘social function of taxation’ starts to emerge and become prominent.²⁵ However, as already mentioned above, this shift was not sufficient to address the public finance concerns of the day as sociology has limitations, especially while dealing with the realisation of human rights such as ESRs. With time the establishment of the welfare state ceases to be the ideal, especially with the development of the human rights discourse. Hence there was a need for the metamorphosis of the theory as discussed below.²⁶

Given the background above, the later scholars begin to infuse human rights dimensions into the original theory. From the human rights perspective, it is, for example, crucial to ascertain how the economy and the state institutions charged with the economy operate.²⁷ An inquiry into whether these can deliver the desired legal outcomes such as sustainability and distributive justice is one that the legal, and particularly the human rights inquiry brings on board.²⁸ This is the discussion I engage with in chapters three and five mainly.²⁹ I argue that although the theory of fiscal sociology was a great starting point for advancing the social welfare issues of people to the forefront, the human rights addition reinforces the original theory even better.

2.1.2 The role of the human rights-based theory of fiscal sociology in attaining fiscal legitimacy

In the preceding section, it was established that although the original theory of fiscal sociology was a great attempt at introducing sociology into the public finance realm, this was not without limitations. These shortcomings contributed to the later evolution of the theory to encompass human rights. The human rights-based approach to the theory builds onto the original one by

²⁴ Backhaus (n 6) 57; M Leroy ‘Tax Sociology: Sociopolitical Issues for a Dialogue with Economists’ (2008) 3 *Socio-logos [En ligne]* para 3 available at <http://journals.openedition.org/socio-logos/2073> (accessed 23 October 2019).

²⁵ M Leroy ‘Tax Sociology: Sociopolitical Issues for a Dialogue with Economists’ (2008) 3 *Socio-logos [En ligne]* para 3 available at <http://journals.openedition.org/socio-logos/2073> (accessed 23 October 2019).

²⁶ A Waris *Tax and Development: Solving Kenya’s Fiscal Crisis through Human Rights* (2013) 10, 12, 20 & 21; J Tweedy & A Hunt ‘The Future of the Welfare State and Social Rights: Reflections on Habermas’ (1994) 21.3 *Journal of Law and Society* 288 289 & 290 available at <https://www.jstor.org/stable/1410737> (accessed 13 March 2022). Other authors such as Mumford, O’Connor, and McLure have adopted the modified theory in their scholarship.

²⁷ A Mumford *Fiscal Sociology at the Centenary* (2019) 108.

²⁸ As above.

²⁹ See sect 3.1 & 5.1 of the thesis.

introducing and connecting the latter with human rights at a theoretical level, while establishing a practical application of the same.³⁰ According to the modified theory, taxation, revenue collection, and redistribution are traditionally discretionary functions of the state, which are mostly executed without any form of consultation with the ruled.³¹ The lack of consultation significantly undermines the capacity of the state to execute these critical functions. In response, the modified theory advocates for fiscal legitimacy as a way of managing state expenditure since as nations grow, their demands proliferate against a limited resource envelope.³² Consultation and having people at the centre of fiscal policy then become key to attaining fiscal legitimacy. Fiscal legitimacy is the confidence that the governed have in the state demonstrated by their desire to pay their tax liability.³³ Without fiscal legitimacy, the ability of the state to optimally tax its citizens would be greatly undermined which would in turn substantially reduce revenue and government expenditure on public goods and services.

Accordingly, fiscal legitimacy and fiscal crisis stand on either ends of the scale with the confidence in the fiscal state as the pivot point.³⁴ For the state to achieve fiscal legitimacy and thereby avert a possible fiscal crisis, the fiscal state has to be trusted.³⁵ People ought to be treated as real stakeholders who should to be consulted on fiscal decisions, including tax bargains and expenditure priorities for the state to gain fiscal legitimacy and avert a fiscal crisis.³⁶ To appreciate the performance of the fiscal state, an assessment of how the current tax incentives decisions and policies are made is key. This would also enhance the confidence of citizens in the fiscal state. Are the tax incentives decisions and policies fair? Are they inclusive? Do they benefit the economy? Do they speak to the needs of the most vulnerable? If so, how? These are critical questions to ask to determine the level of people's confidence in the state, and are equally essential to avert a fiscal crisis. It is equally recognised that whereas the fiscal bargain between the ruled and ruler keeps changing by way of various tax codes and policies, the same will be perceived as legitimate and a fiscal crisis averted if the governed consider

³⁰ Waris (n 26) 15.

³¹ Waris (n 26) 4.

³² As above.

³³ A Waris 'Solidarity Taxes in the Context of Economic Recovery Following the COVID-19 Pandemic' (2021) *Center for International Cooperation* 7 available at <https://cic.nyu.edu/publications/solidarity-taxes-context-economic-recovery-following-covid-19-pandemic> (accessed 9 January 2022); Waris (n 7) 105.

³⁴ Waris (n 26) 19.

³⁵ Waris (n 7) 107.

³⁶ As above.

them to be fair and equitable.³⁷ Consultation is key in achieving this. As earlier pointed out, fiscal legitimacy entails an:³⁸

... accountable, responsible and transparent fiscal system that is effective and efficient and just and fair. The movement away from this description is a movement away from fiscal legitimacy and towards fiscal crisis.

Ultimately fiscal legitimacy would propel the confidence citizens have in the state, which should spur tax compliance and reduce revenue losses.³⁹ To achieve this, there is need for meaningful participation in policy and legal formulation. The participation should target the right stakeholders, including civil society organisations (CSOs), citizens and their representatives. In chapter five, I test the fiscal policies, particularly on tax incentives in Uganda, against this definition to gauge how accountable, responsive, transparent, effective, efficient, and equitable they are.⁴⁰ I establish if they are contributing to fiscal legitimacy or a crisis.

There are inherent dangers in the violation of the principles of fiscal legitimacy. These include the tax incidence unfairly shifting to a few taxpayers, which negatively affects compliance and reduces revenues for social services.⁴¹ Indeed when tax breaks, reliefs, waivers, and other incentives are granted, the likely revenue forgone is recovered by shifting the tax incidence to other categories of taxpayers, who are mostly the vulnerable.⁴² This could be an unintended consequence that many policy makers ignore during tax incentives laws and policy formulation. Therefore, to avert a possible fiscal crisis, it is equally important to pay attention to the level of perception by citizens of the different fiscal laws, policies, and spending patterns, to gauge their level of satisfaction with the state.⁴³ In chapter five, I seek to establish, through key informant interviews (KIIs), the views concerning the adequacy of the legal and policy framework, administration, and the management of tax incentives in Uganda for partly the same reason.⁴⁴

³⁷ Waris (n 26) 19.

³⁸ Waris (n 33 above); Waris (n 26) 20; Waris (n 7) 105.

³⁹ Waris (n 33 above).

⁴⁰ Sect 5.3, 5.4 & 5.5 of the thesis.

⁴¹ Waris (n 7) 105.

⁴² B Burrows 'Why tax is a human rights issue: empowering communities living in poverty to hold governments to account for public services' 70 available at <https://sas-space.sas.ac.uk/6209/1/10burrows.pdf> (accessed 13 June 2021).

⁴³ Waris (n 26) 20.

⁴⁴ See sect 5.3 & 5.4 of the thesis.

Relatedly, achieving fiscal legitimacy is the responsibility of everyone including the international community, government, citizens, and non-governmental organisations (NGOs), among others.⁴⁵ In chapter five, I analyse the concerns regarding the legitimacy of tax incentives policies in Uganda. Are the people consulted before these fiscal decisions, which directly affect them, are made? What about at the budgeting stage? How are the consultations made? Do they inform the final policy positions? How are government priorities ascertained? And how do all these decisions affect the realisation of the different ESRs that are critical to the lives of people? Do these particularly affect the right to basic education for UPE learners? These questions are answered in this study.

Having made a case for the need for fiscal legitimacy and its relevance in fiscal policy, it is important to highlight the following that are essential to attaining the same: They include strengthening ‘transparency and accountability’, ensuring fairer and more just public spending practices, widening the tax base, and making tax systems fair and balanced.⁴⁶ Equally of importance is the need to have independent and qualified individuals involved in scrutinising fiscal policies.⁴⁷ Drawing from the human rights-based theory of fiscal sociology, caution should be sounded that the expertise required should go beyond economics and sociology to include human rights related competencies for better outcomes.

Equally essential is the need to increase development expenditure on public services like infrastructure, health, education, and social security among others that are crucial in enhancing the confidence of the governed in the state, and attaining fiscal legitimacy.⁴⁸ As such, fiscal laws, policies, tax revenue collections, and the level of development expenditure are prime indicators that states need to pay attention to.⁴⁹ The theory is relevant since it advocates for ‘a human rights approach to taxation to achieve fiscal legitimacy through better fiscal policies’.⁵⁰

Aside from the discussion above on fiscal legitimacy, the issue of tax exploitation and its effects on citizens is of paramount importance to this discussion. Evidence points to the fact

⁴⁵ Waris (n 7 above) 105.

⁴⁶ As above. See also M Barlow & A Milciades Peña ‘The Politics of Fiscal Legitimacy in Developmental States: Emergency Taxes in Argentina Under Kirchnerism’ (2021) 4 *New Political Economy*, available at <https://doi.org/10.1080/13563467.2021.1961215> (accessed 13 March 2022).

⁴⁷ Waris (n 26) 24.

⁴⁸ Waris (n 26) 20; Barlow (n 46 above) 4.

⁴⁹ As above.

⁵⁰ Waris (n 26) 23 (*emphasis mine*).

that higher levels of tax exploitation lead to increased government expenditure.⁵¹ In the Ugandan context, tax incentives, especially discretionary ones, are granted in ways that segregate and discriminate against the ordinary taxpayers who may not have access to the decision-making power bases.⁵² Given this concern, proper and equitable expenditure on social welfare is therefore no longer the only caution to avoid a fiscal crisis. As already noted above in this section, the human rights-based approach to fiscal sociology would yield better results by ensuring proper consultations that would point out such anomalies.⁵³

Accordingly, the main human rights issues of concern to this study include the right to citizen participation and democracy in policy and legal formulation, transparency, accountability, fairness and equity in tax incentives policies and laws. These ought to be cognisant of the likely consequences of the laws and policies on the most vulnerable. The discussion on fiscal legitimacy is relevant to this study which seeks to establish how Uganda's fiscal laws and policies on tax incentives affect revenue collection and expenditure patterns for the realisation of critical ESRs. The central question which arises that I address in chapters four and five is whether Uganda is not sliding into a fiscal crisis as a result of tax incentives policies, and what could be done to avoid the undesirable.⁵⁴

Equally relevant to this discourse is the fact that tax imposition and revenue distribution are some of the discretionary preserves for any given state as pointed out earlier in this section.⁵⁵ States are however conflicted by the growing need for more public services that is not commensurate with an increase in the resource envelope, which calls for both prioritisation and innovation in the expenditure and revenue decisions respectively.⁵⁶ Consequently, there is an urgent need to bridge the gap between the state's and the society's priorities and choices, and to strike a compromise between the varied objectives.⁵⁷ Since the budget and tax policies are a reflection of the character of the state, the same ought to reflect the binding human rights standards.⁵⁸ Relatedly, and of equal relevance is the government's level of human rights

⁵¹ A Nolan; R O'Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets & The Promotion of Economic and Social Rights* (2013) 211 available at <https://www.bloomsbury.com/uk/human-rights-and-public-finance-9781782251743/> (accessed 11 November 2019).

⁵² This has been confirmed in many of the KIIs whose views are presented in chapter five.

⁵³ Sect 2.1 of the thesis.

⁵⁴ See sect 4.3, 5.3, 5.4 and 5.5 specifically.

⁵⁵ Waris (n 26) 4.

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ A Budoo 'The Role of Gender Budgeting in Implementing the Obligation to Provide Resources to Realise Women's Human Rights in Africa' (2016) unpublished PhD thesis, University of Pretoria, 95.

compliance as it executes its discretionary functions.⁵⁹ This is because the human rights-based theory of fiscal sociology is the foundation of making governments accountable for the equitable distribution of public resources.⁶⁰ The state can exercise this discretionary role ably by being cautious about its human rights obligations, and involving people in fiscal processes and policy formulation, through meaningful citizen participation. I elucidate this point further in chapter five of the study.⁶¹ After addressing citizen participation gaps in legal and policy formulation for fiscal legitimacy, states ought to ensure adequacy of resources as the human rights processes discussed above will be irrelevant with a constrained revenue basket. As such, in the section below I present the place of resources in this discourse.

2.1.3 The role of resources in attaining fiscal legitimacy

Having justified the growing need to infuse human rights processes into fiscal policy formulation, I now discuss the relevance of resources in attaining fiscal legitimacy in more detail. One of the critical functions of taxation is the generation of ‘maximum available resources’ for the realisation of ESRs.⁶² In fact, the ‘resourcing, redistributive, and accountability functions of taxation’ came under human rights scrutiny during the global financial crisis, and the failure to meet many of the Millennium Development Goals (MDGs).⁶³ Notably, resources are more critical in the realisation of ESRs than civil and political rights.⁶⁴ This is because many ESRs are positive rights that require action as opposed to negative entitlements such as civil and political rights where refrainment from violation is mostly expected.⁶⁵ To realise ESRs, financial resources are essential and as such states ought to be

⁵⁹ Budoo (n 58) 96.

⁶⁰ As above.

⁶¹ See sect 5.1 of the thesis.

⁶² See para 26 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) available at <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (accessed 23 July 2021); N Reisch ‘Taxation and human Rights: Mapping the landscape’ in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 4; I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets & The Promotion of Economic and Social Rights* (2013) 77.

⁶³ As above, G Huerlimann, WE Brownlee & E Ide ‘The Political Economy of Taxing, Spending, and redistribution since 1945: An Introduction’ in G Huerlimann, WE Brownlee & E Ide (eds) *Worlds of Taxation: The Political Economy of Taxing, Spending, and redistribution since 1945* 1.

⁶⁴ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 78; L Forman ‘Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2016) 47.2 *Ottawa Law Review* 561 563.

⁶⁵ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 78.

cautious even in times of economic and fiscal crisis, where any regressive measures taken must be strictly justifiable.⁶⁶ Even in such times, efforts must be made to ensure at the very least the realisation, as a matter of priority, of the minimum core obligations.⁶⁷ Unjustifiable and non-strategic tax incentives could be interpreted as such regressive measures. It is therefore imperative that states adopt a human rights-based approach not only to public budgeting but also to taxation to achieve the desires of the propounders of the theory of fiscal sociology, as further developed by subsequent scholars.⁶⁸ Resources are key to this theory.

Having established the importance of resources in attaining the desires of the original advocates of the modified theory, it is important to note that hitherto, ‘less attention has traditionally been paid to the revenue side of the fiscal policy equation from a human rights perspective’.⁶⁹ This could partly be because human rights law grants states a wide margin of appreciation in socio-economic policy, bearing in mind that they face unenviable choices for resource allocation to satisfy societal priorities, using limited resources.⁷⁰ This may partly explain why there is a ‘traditional reluctance of human rights adjudication and oversight mechanisms to weigh in on the politically contentious aspects of fiscal policy such as taxation’.⁷¹ Over the years, this position is however slowly changing as human rights scholars appreciate the role of resources in the realisation of human rights.⁷² Aside from the role progressive taxation policies play in the resource discourse, the same is also known to create accountability, citizen social consciousness, and ‘responsive governments’ as a way of reinforcing the social contract nature of the tax bargains between the state and the governed.⁷³ These are vital discussions from the

⁶⁶ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 64) 79.

⁶⁷ As above.

⁶⁸ Budoo (n 58) 96.

⁶⁹ Waris (n 26) 8 & 9, Article 2(1) of the International Convention on Economic, Social and Cultural Rights (CESCR) and Article 4 of the UN Convention on the Rights of the child (CRC) for example, ignore taxation as a means of resource generation and instead pay more attention to budget allocation and international assistance, see also I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 80 & 81.

⁷⁰ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 81. See para 20 & 71 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) (available at <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (accessed 23 July 2021)).

⁷¹ As above.

⁷² I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 81 & 82.

⁷³ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 83.

human rights angle that I canvass in detail in chapter three.⁷⁴ For example, I review how international oversight bodies like the Committee on Economic, Social and Cultural Rights (Committee on ESCR) have interpreted this relationship. I additionally analyse what experts such as the special rapporteurs and the reports of the committee of experts contained in concluding observations find with regards to the same.

In terms of practical application, the theory and discussion is timely since currently more than 20 low-income countries including Uganda are still struggling with a tax to gross domestic product (GDP) ratio of less than 15%.⁷⁵ The solution partly lies in the recent trends in the human rights discourse, for a ‘rights-based budget analysis’ for greater accountability and transparency in policy formulation and public funds appropriation.⁷⁶ Expanding the theory of fiscal sociology to include a human rights approach can achieve this since ‘(t)he analysis of a national budget from a human rights perspective can be done either through revenue or through expenditure analysis’.⁷⁷ It is therefore important for the public finance analysis to scrutinise the revenue and expenditure side of the budget, and to reflect on the impact of tax incentives on both. In chapter five I interrogate the effect of tax incentives as part of the tax expenditure on the revenue side of the budget.⁷⁸ The accruing benefits from this analysis include progressive realisation of ESRs, including the realisation of the minimum core obligations.⁷⁹ Other advantages include a proper assessment of rights, states compliance with the principles of maximum available resources, non-retrogression, and the provision of information relevant for impact evaluation.⁸⁰ Thus infusing a fiscal sociology scrutiny with a human rights dimension would be a more appropriate approach to better realise ESRs, using tax resources. I contend in chapters three, four, and five that tax incentives policies should not be scrutinised only from a purely economic or sociological angle.⁸¹ An assessment of how they affect the human rights obligations of states should be an equally relevant dimension.

⁷⁴ Sect 3.1, 3.2, & 3.3 of the thesis.

⁷⁵ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 84.

⁷⁶ I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell & C Harvey (n 62) 80.

⁷⁷ Buddo (n 58) 98.

⁷⁸ Sect 5.5 of the thesis.

⁷⁹ Buddo (n 58) 100 & 101.

⁸⁰ As above.

⁸¹ Sect 3.1, 3.2, 3.3, 3.4, 4.3 & 5.5 of the thesis.

Ultimately, it is important to note that wrong fiscal legitimacy perceptions negatively affect revenue collection. Although this is worse in developing countries where citizens experience tax as a burden without corresponding social-economic goods and services, relatively large economies have not been spared either.⁸² This perception has facilitated tax evasion and avoidance.⁸³ Government policies and practices that fuel a lack of transparency and accountability, corruption, and irresponsible collection and use of revenue resources are blamed for this.⁸⁴ Tax incentives policies that are perceived as unfair could contribute to this challenge too.⁸⁵ Yet again, a technical legal analysis has usually failed to put people and society at the centre, by challenging the discretionary state fiscal policies that affect their day-to-day lives.⁸⁶ Drawing from the foregoing discussion, this study makes a case for a human rights-based theory of fiscal sociology in analysing public finance policies and laws related to tax incentives in Uganda. Below I apply the theory to specific themes under investigation.

2.2 The relevance of the human rights-based theory of fiscal sociology to the study

2.2.1 The budgeting process

The human rights-based theory of fiscal sociology is relevant to different aspects of public finance. The theory's application has been extended to public budgeting in more detail. Accordingly, '[b]udgets are important "signalling devices", capable of conveying, amongst other messages, important indicators about the relationship between different branches of government'.⁸⁷ Budgets are a summary of 'policy documents' that depict governments' 'current priorities'.⁸⁸ Although budgets are posited both as a result of economic and social processes, according to fiscal sociologists, budgeting is more of a social process, or at least should be.⁸⁹ The human rights leaning fiscal sociologists would emphasise that budgets should be viewed as a result of human rights processes and equally essential in ESRs realisation. According to the adopted theory, budgets should additionally reflect critical human rights standards and obligations that bind states. As such, I argue that budgets should be analysed

⁸² Waris (n 26) 1.

⁸³ Waris (n 26) 1 & 2.

⁸⁴ Waris (n 26) 2.

⁸⁵ Waris (n 26) 24.

⁸⁶ Waris (n 26) 8 & 9.

⁸⁷ Mumford (n 27) 47.

⁸⁸ Mumford (n 27) 48.

⁸⁹ Mumford (n 27) 112.

from the perspective of their possible social, political, cultural, and environmental effects on people, in addition to economic parameters.⁹⁰

It is against this background that scholars such as Webber and Wildvasky take budgeting as an important reflection of how people live together.⁹¹ Budgets reflect ‘some notion of citizen preferences ... or of just whose preferences are being reflected in budgetary outcomes’.⁹² Accordingly, some proponents of the human rights-based theory of fiscal sociology assert that:⁹³

Finally, budgets are statements of preferences. Whether intended or not, the allocation of resources among different agencies, and/or among different activities, and/or among different accomplishments reveals preferences of those making the allocations ... This preference schedule reflects, if not any one individual’s values, an aggregate of choices that become the collective value judgment for the local government, state or nation.

From the foregoing, periodic budgets that include a tax expenditure side speak volumes about the political preferences and direction of nations. Thus the fiscal sociology concerning budgeting is an interaction between the mind and society, where societal formulations are a result of some sort of feedback from the mind.⁹⁴ This interaction is known as fiscal culture, which should reflect the relevant human rights aspirations the state is bound by.⁹⁵ Such commitments include budget thresholds for specific ESRs developed over time by international human rights soft law standards.

Further, the theory has also expanded to include legal and institutional influences on the budget as well as the analysis of policy constraints on the same.⁹⁶ The theory recognises the scarcity of resources amidst the ever-increasing public needs, and the tendency of the expenditure side of government to outweigh the revenue one.⁹⁷ This in turn reinforces the fiscal crisis of the state.⁹⁸ Currently, many states are at crossroads as government expenditure supersedes tax

⁹⁰ See also K Hagemeyer & W Scholz *Social budgeting* (2021) 320 & 321 available at https://pub.h-brs.de/frontdoor/deliver/index/docId/5807/file/Handbook_Social_Protection_Systems_chapter17.pdf (accessed 14 July 2022) & W Scholz *et al Social budgeting* (2000) 5 available at: <https://www.social-protection.org/gimi/gess/RessourcePDF.action?id=8022> (accessed 14 July 2022).

⁹¹ Wagner (n 18) 190.

⁹² As above.

⁹³ RD Lee Jr., & RW Johnson *Public Budgeting Systems*- second edition (1977) 13.

⁹⁴ Wagner (n 18) 190.

⁹⁵ As above.

⁹⁶ M McLure ‘Approaches to Fiscal Sociology’ (2003) 2.2 *The European Journal of Management and Public Policy* 2.

⁹⁷ R O’Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets & The Promotion of Economic and Social Rights* (2013) 2.

⁹⁸ As above.

revenue, which causes deficits without a solution in sight.⁹⁹ Chapters three, four, and five assess Uganda's status and compliance with the theory, in its legal and policy formulation of tax incentives, and how the same affects its public finance choices.¹⁰⁰ Public finance choices ultimately influence how people live by affecting their tax burden as well as social service benefits. The situation speaks to what the then English Prime Minister Gladstone's position on budgets was: '...budgets are not merely matters of arithmetic, but in a thousand ways go to the root of the prosperity of individuals, and relations of classes, and the strength of Kingdoms'.¹⁰¹ The several scholars cited in this chapter and the study confirm this assertion.¹⁰² I find the theory instrumental in highlighting the relevance of ESRs budgeting and stakeholder participation in the realisation of rights. I use this theory and understanding to draw trends from the treatment of ESRs, especially the funding for UPE as a component of the right to basic education over time as against the revenue foregone from the grant of tax incentives in chapters four and five.¹⁰³

2.2.2 On tax policy

Taxation is as essential as budgeting for the realisation of ESRs. In fact, taxation could well be equated to the lifeline of public expenditure depicted through periodic budgets. The human rights-based understanding of the theory of fiscal sociology by Waris has been instrumental in a number of ways. The theory has led to the clarity that the determinants of taxation and public expenditure are separate and not synonymous with each other. Taxation is seen as the 'source of life' and its determinants quite distinct from the expenditure ones, though many scholars tend to treat them as the same.¹⁰⁴ The study of the effects of tax policy is therefore as important as that of expenditure for the proper understanding of public finance.¹⁰⁵

Having established the relevance of taxation to public finance, below I highlight some of the factors that affect taxation. From a theoretical view these include the country's ideological leaning.¹⁰⁶ The fiscal policies of a state will reflect the ideology a particular country adopts.

⁹⁹ A F Burns, Statement to the Joint Economic Committee, July 26, 1972, Federal Reserve Bulletin, August 1972 699.

¹⁰⁰ See sect 3.1, 3.2, 3.3, 3.4, 4.3, 5.3, 5.4 & 5.5 of the thesis.

¹⁰¹ O' Connor (n 97 above).

¹⁰² A deeper analysis of this in the Ugandan case is made in chapter five of the thesis.

¹⁰³ See sect 4.3 & 5.5 of the thesis.

¹⁰⁴ O' Connor (n 97).

¹⁰⁵ As above.

¹⁰⁶ JL Campbell 'The State and Fiscal Sociology' (1993) 19 *Annual Review of Sociology* 163 172 available at https://www.jstor.org/stable/2083385?seq=1#metadata_info_tab_contents (accessed 5 October 2019).

This I discuss in detail in chapter five as I trace the background of tax incentives to the Washington consensus that introduced the Structural Adjustment Programme (SAPs) and liberalisation of the economy among other changes.¹⁰⁷ The SAPs have additionally negatively affected government expenditure on public services in favour of privatisation.¹⁰⁸ Specific to the education sector, ‘SAP introduced reduced budgetary cost and spending on education and practically initiated free but fee-paying education policies’.¹⁰⁹ This in effect introduced a ‘human capital perspective to issues like education dwelling on private investment and returns as opposed to the intricacy of the right to education’.¹¹⁰ This neo-liberalism ideology incidentally contradicts with the theoretical objective of the rational choice theory that is motivated by the theory of fiscal sociology and aims at ‘bring(ing) people back in’ the study of tax policy.¹¹¹ This is in line with the proposals that find political systems and culture as influential to the type of tax system a country adopts.¹¹² People are central to this discussion. The challenges with Uganda’s political ideology aside, a state’s philosophy is generally relevant to tax policy formulation as are geopolitical, economic, and fiscal factors and crises as they may be a stimulus to its transformation.¹¹³ The geopolitical considerations may, for example, account for the role of tax competition in the persistence of tax incentives. Equally important to note is that the balance of power between the different social groups is a determinant in how political elites respond to the pressure to craft appropriate tax policies.¹¹⁴ This was confirmed by McLure who once observed that, ‘[i]t is always important to recognise who or whose interest it is that sets the machine of state in motion and speaks through it’.¹¹⁵ One can therefore read the choices of government by scrutinising the tax legislation and policy on tax expenditure and tax incentives especially.¹¹⁶ I analyse these issues in detail in chapter five of this study.¹¹⁷

Aside from a country’s ideological leaning, tax incentives are influenced by the concept of tax privilege. Historically, those in power have taken advantage of their position to better their

¹⁰⁷ Sect 5.1 of the thesis.

¹⁰⁸ I engage with this discussion in detail in chapters three, four and five of the thesis.

¹⁰⁹ A.C. Onuora-Oguno *Development and the Right to Education in Africa* (2019) 131.

¹¹⁰ As above.

¹¹¹ Campbell (n 106) 172.

¹¹² As above.

¹¹³ As above.

¹¹⁴ Campbell (n 106) 174.

¹¹⁵ McLure (n 99) 3.

¹¹⁶ Mumford (n 27) 90.

¹¹⁷ See sect 5.1, 5.3 & 5.4 of the thesis.

economic and social standing through tax privilege.¹¹⁸ This has not been without consequences which include having a heavier tax burden on laypeople,¹¹⁹ which discriminatory tendencies further widen the economic differences in society.¹²⁰ At a theoretical level, the tax competition between states leads to low levels of taxation of capital, as the tax privilege is available to the highest bidder, who can afford the most competitive tax package.¹²¹ This affects the taxation of capital income disproportionately as it is mobile.¹²² Tax competition and privilege are as such interrelated. To address these challenges, tax rate harmonisation and regional cooperation are suggested.¹²³ I discuss the viability of these options in chapters five and six.¹²⁴ In chapter five, I analyse the category of taxpayers that could take advantage of tax incentives, in assessing the application of the concept of tax privilege in Uganda.¹²⁵

2.3 Conclusion

This chapter set out to analyse the theoretical basis of the study. I find that although the theory of fiscal sociology traces the evolution of public finance from the realm of economics to sociology, the same has since developed and been modified to incorporate a human rights perspective, which I adopt for this study. The modified theory of fiscal sociology that incorporates a human rights approach plays a critical role in the appreciation of the status quo of public finance policy, and devising means out of the current lacuna to avert a possible fiscal crisis. It additionally ensures that tax policies and expenditure priorities are crafted in a way that bears in mind their needs and effects on the real lives of people and on the realisation of ESRs. The modified theory of fiscal sociology, if adopted in public finance policies and choices, would enhance fiscal legitimacy and deter a fiscal crisis. This is especially so when a human rights approach to fiscal sociology is adopted in public finance, taxation, public

¹¹⁸ FK Mann 'The Sociology of Taxation' (1943) 5.2 *The Review of Politic* 225 229 available at https://www.jstor.org/stable/1404264?seq=1#metadata_info_tab_contents (accessed 16 October 2019).

¹¹⁹ As above.

¹²⁰ Mann (n 118) 230.

¹²¹ H Peukert 'Richard Abel Musgrave and Joseph Alois Schumpeter: Two intellectual authorities in economics and their shared and different frameworks, read through the lenses of the Perlman dichotomies' (2015) 25 *Journal of Evolution Economics* 253 259.

¹²² RA Musgrave 'Schumpeter's crisis of the tax state: an essay in fiscal sociology' (1992) *Journal of Evolutionary Economics* 89 107 available at [https://link-springer-com.uplib.idm.oclc.org/content/pdf/10.1007%2FBF01193535.pdf](https://link.springer.com/uplib/idm.oclc.org/content/pdf/10.1007%2FBF01193535.pdf) (accessed 12 October 2019).

¹²³ As above.

¹²⁴ See sect 5.2 and 6.2.1 & 6.2.3 of the thesis.

¹²⁵ Sect 5.4 of the thesis.

budgeting, and public expenditure. Given this background, in the subsequent chapter, I discuss in broad terms, the relationship between tax incentives and the realisation of ESRs.

Chapter Three

The relationship between tax incentives and the realisation of economic and social rights

3.0 Introduction

The human rights-based theory of fiscal sociology introduced in chapter two should enable states to formulate laws and policies that align with the various human rights obligations and commitments that bind them. States can achieve this by being cognisant of a couple of realities. Firstly, adopting transparent, inclusive, participatory, fair, and equitable legal and policy formulation processes. Secondly, by recognising that the fiscal policies and laws that majorly reflect economic perspectives cannot solve the current public finance challenges, especially regarding tax incentives. Thirdly, states are reminded that they have specific resource mobilisation and economic and social rights (ESRs) financing obligations arising from the international and domestic human rights instruments they are bound by. Fulfilling these several aspirations requires fiscal decisions and approaches that reflect the obligations. States as such need to be cognisant of this theory in policy and legal formulation, programming, and implementation for the fiscal policy framework to contribute sufficiently to domestic revenue mobilisation (DRM). Having analysed the importance of the human rights-based theory of fiscal sociology in public finance processes including fiscal policy and legal formulation, this chapter seeks to establish broadly the relationship between tax incentives and the realisation of ESRs. The chapter provides the contextual basis for chapters four and five that analyse the extent of the realisation of the right to basic education in Uganda through financing for free and compulsory universal primary education (UPE) and tax incentives framework respectively. To start off the discussion, below I establish the place of the fiscal policy framework in ESRs realisation.

3.1 Fiscal policy and economic and social rights: Two sides of the same coin?

I must state from the onset that fiscal policy and ESRs are two sides of the same coin. The tendency to treat taxation and human rights as distinct fields with no intersectionality is slowly

fading away, as the globe realises that fiscal policies have a bearing on rights.¹ Human rights conscious fiscal policies play a multi-faceted role in the realisation of ESRs. Key to this role is the generation of resources to finance rights, and the redistribution of incomes for the poor and marginalised to afford ESRs privately.² The latter objective resonates with the reality in many low income countries where governments have abdicated their primary responsibility to realise ESRs in favour of a private sector-led economy.³ In this economy, the realisation of social goods and services is subject to the market forces of demand and supply.⁴ This is partly premised on the several benefits that are presumed to accrue from a flourishing private sector such as increased employment opportunities and the enhanced financial capacity of the citizens to realise ESRs.⁵ Unfortunately, this presumption is at times a misconception as the enjoyment

¹ N Reisch 'Taxation and human Rights: Mapping the landscape' in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 33. See for example the address by Ms Winnie Byanyima, Executive Director of Oxfam International in January 2018 where she warned business leaders and politicians at the World Economic Forum that, 'Tax avoidance isn't just about euros, yens and dollars: it's about human rights. It's about people who are denied services to help them lift themselves out of poverty because of tax avoidance'. (Beyond the Paradise Papers, World Economic Forum, 25 January 2018, 08:49, available online at <https://www.weforum.org/events/world-economic-forum-annual-meeting-2018/sessions/a0W0X00000AgoNmUAJ?tab=LiveBlogs&stream=day-3-2018&stream-item=coming-up-the-crypto-asset-bubble> (accessed 9 June 2021); OD Schutter 'Taxing for the Realization of Economic, Social and Cultural Rights' (2017) *Institute for Interdisciplinary Research in Legal sciences (JUR-I) Centre for Philosophy of Law (CPDR)* 5, available at <https://resourcingrights.org/api/files/152702480681692shtidkd0nc9181gobeasjor.pdf> (accessed 4 June 2021).

² P Alston & N Reisch 'Fiscal Policy as Human Rights Policy' in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 3; OD Schutter 'Taxing for the Realization of Economic, Social and Cultural Rights' (2017) *Institute for Interdisciplinary Research in Legal sciences (JUR-I) Centre for Philosophy of Law (CPDR)* 5, available at <https://resourcingrights.org/api/files/152702480681692shtidkd0nc9181gobeasjor.pdf> (accessed 4 June 2021); See also United Nations general Assembly, Human Rights Council, twenty sixth session, Report of the Special Rapporteur on extreme poverty and human rights, Ms Magdalena Sepúlveda Carmona 'Taxation and Human Rights' (2014) para 1 & 3 available at https://www.researchgate.net/publication/327755773_Taxation_and_Human_Rights (accessed 7 June 2021); the Lima Declaration on Tax Justice and Human Rights; The Lima Declaration emerges from the international strategy meeting, 'Advancing Tax Justice through Human Rights', held in Lima, Peru in 2015, convened by the Center for Economic and Social Rights, the Global Alliance for Tax Justice, Oxfam, Red Latinoamericana sobre Deuda, Desarrollo y Derechos (LatinDADD), Red de Justicia Fiscal de América Latina y el Caribe and the Tax Justice Network 1 available at https://www.cesr.org/sites/default/files/Lima_Declaration_Tax_Justice_Human_Rights.pdf (accessed 8 June 2021). See also A Christians 'Taxation as a Basic Human Right' (2009) *Research gate* 225 available at https://www.researchgate.net/publication/228135840_Fair_Taxation_as_a_Basic_Human_Right/link/5b0d7d8b0f7e9b1ed7007eb3/download (accessed 13 June 2021).

³ United Nations Human Rights Office of the High Commissioner 'Realizing Human Rights Through Government Budgets' (2017) 29 available at <https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf> 65; See also RE López & EB Figueroa 'On the nexus between Fiscal Policies and Sustainable Development' (2016) 24 *Sustainable Development (Sust. Dev.)* 201 202 available at https://login.research4life.org/tacsgr1onlinelibrary_wiley_com/doi/epdf/10.1002/sd.1622 (accessed 20 June 2021).

⁴ As above.

⁵ As above. See also Para 1 of General Comment 24 of the Committee on ESCR. Adopted on 10 August 2017, E/C.12/GC/24, available at: <https://www.refworld.org/docid/5beaecba4.html> (accessed 14 March 2021) & KII with Mr. Festus Akunobera held in Kampala on 21 April 2021.

of ESRs in a private sector-led economy is usually sacrificed to the whims of the market forces, which is against the principles of social and redistributive justice.⁶ In fact, I argue that the challenges of such an approach have been evidenced during the Covid-19 pandemic, which evidently exposed the inadequacies related to the capacity of a number of states, including Uganda, to realise ESRs especially in emergency situations. Indeed, the pandemic only exposed a dire situation that had persisted for way too long. I highlight some of these concerns below.

Firstly, the challenges of the approach referred to above include, the effects of relying on a largely unregulated private sector-led economy which violates, in many respects, the obligation on states to protect, respect, and fulfil ESRs.⁷ Secondly, experts warn that the traditional economic approach to fiscal policy generates a structure that may not accommodate the needs of the poor and marginalised in society.⁸ Thirdly and related to the above, the approach worsens the income inequality gaps and the capacity of the most vulnerable to afford ESRs.⁹ These obstacles call for an integrated approach that incorporates human rights in fiscal and broader public finance policy.¹⁰ The proposed approach in the long run would challenge relevant stakeholders ‘to be engaged more effectively in the pursuit of improvement in the quality of life of the poor as a matter of entitlement rather than charity’.¹¹ It follows from the above therefore that since the poor and marginalised are the most affected by financial constraints in the pursuit of ESRs realisation, they are better protected when states take their primary human rights obligations seriously. In this study, I underscore the primary obligation on states as duty bearers to ensure ESRs realisation regardless of the economic system and ideological leaning of a country. I argue that states can achieve better results if they are intentional about the fiscal policies adopted, by ensuring that these choices and the direction adopted thereof are not an abdication of their critical ESRs obligations. With that, those at the peripheral of society would

⁶ See sect 4.2 and 4.3 of the thesis.

⁷ See section 3.2 of the thesis for a detailed discussion on this obligation.

⁸ RE López & EB Figueroa ‘On the nexus between Fiscal Policies and Sustainable Development’ (2016) 24 *Sustainable Development (Sust. Dev.)* 201–202 available at <https://login.research4life.org/tacsgr1onlinelibrary.wiley.com/doi/epdf/10.1002/sd.1622> (accessed 20 June 2021); A Christians ‘Taxation as a Basic Human Right’ (2009) *Research gate* 228 available at https://www.researchgate.net/publication/228135840_Fair_Taxation_as_a_Basic_Human_Right/link/5b0d7d8b0f7e9b1ed7007eb3/download (accessed 13 June 2021); See also the detailed discussion on the meaning and relevance of the human rights-based theory of fiscal sociology in chapter two of this thesis.

⁹ As above.

¹⁰ As above.

¹¹ A Christians ‘Taxation as a Basic Human Right’ (2009) *Research gate* 229 available at https://www.researchgate.net/publication/228135840_Fair_Taxation_as_a_Basic_Human_Right/link/5b0d7d8b0f7e9b1ed7007eb3/download (accessed 13 June 2021).

be able to realise ESRs as a matter of entitlement and not just charity. It goes without saying that these benefits could also extend to the citizenry at large.

It is worth noting, on the other hand, that the ultimate benefit that accrues from human rights-based fiscal policies is the guarantee of processes that emphasise the principles of accountability, transparency, public participation, and access to information, which positively impact the realisation of ESRs.¹² For better impact, these principles ought to be applied in all public finance processes such as policy and legal formulation, budgeting, implementation, monitoring, and evaluation.¹³ It has been postulated that ‘effective and meaningful participation... dependent on the right to seek, receive and impart information’ are key to fiscal policy formulation.¹⁴ This is because ‘tax policy is public policy’, and ought not to be left to the unfettered discretion of states.¹⁵ To guard against this, public finance policy decisions should bear in mind the need for transparency and participation through national dialogue, engaging with civil society organisations (CSOs), and those most likely to be affected by the fiscal outcomes.¹⁶

Fiscal policies should be subjected to the scrutiny of the population during design, implementation and evaluation stages, with the various interests transparently identified. This will require capacity-building

¹² OD Schutter ‘Taxing for the Realization of Economic, Social and Cultural Rights’ (2017) *Institute for Interdisciplinary Research in Legal sciences (JUR-I) Centre for Philosophy of Law (CPDR)* 5; A Shahid ‘For Want of Resources: Reimagining the State’s Obligation to Use ‘Maximum Available Resources’ for the Progressive Realisation of Economic, Social and Cultural Rights’ (2016) PhD thesis, University of Sydney 143 available at https://ses.library.usyd.edu.au/bitstream/handle/2123/14369/shahid_a_thesis.pdf?sequence=5&isAllowed=y (accessed 5 June 2021); See also United Nations general Assembly, Human Rights Council, twenty sixth session Report of the former Special Rapporteur on extreme poverty and human rights, Ms Maria Magdalena Sepúlveda Carmona ‘Taxation and Human Rights’ (2014) para 1 & 20 available at https://www.researchgate.net/publication/327755773_Taxation_and_Human_Rights (accessed 7 June 2021). Specific to access to information, see para 18 of General Comment 34 of the Human Rights Committee of the International Covenant on Civil and Political Rights adopted at the 102 session (2011) available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed 9 June 2021).

¹³ United Nations General Assembly, Human Rights Council, twenty sixth session Report of the former Special Rapporteur on extreme poverty and human rights, Ms Maria Magdalena Sepúlveda Carmona ‘Taxation and Human Rights’ (2014) para 20 available at https://www.researchgate.net/publication/327755773_Taxation_and_Human_Rights (accessed 7 June 2021).

¹⁴ Universal Declaration of Human Rights, art 19; International Covenant on Civil and Political Rights, art 19, see also para 21 of the report of the former Special Rapporteur on extreme poverty (n 13 above).

¹⁵ The Lima Declaration on Tax Justice and Human Rights, The Lima Declaration emerges from the international strategy meeting, ‘Advancing Tax Justice through Human Rights’, held in Lima, Peru in 2015, convened by the Center for Economic and Social Rights, the Global Alliance for Tax Justice, Oxfam, Red Latinoamericana sobre Deuda, Desarrollo y Derechos (LatinDADD), Red de Justicia Fiscal de América Latina y el Caribe and the Tax Justice Network 1 available at https://www.cesr.org/sites/default/files/Lima_Declaration_Tax_Justice_Human_Rights.pdf (accessed 8 June 2021). As part of public policy, taxation is also seen as a social tool that creates social priorities and entitlements, thus justifying the same as a human rights policy too. See P Alston & N Reisch ‘Fiscal Policy as Human Rights Policy’ in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 19.

¹⁶ Para 22 of the report of the former Special Rapporteur on extreme poverty and human rights in (n 13 above).

and fostering fiscal literacy in the population. The population should have access to all relevant information in an accessible and understandable format, and inclusive mechanisms should be put in place to ensure that they are actively engaged in devising the most appropriate policy options. Owing to the asymmetries of power, expertise and interests in this debate, specific measures should be taken to ensure equal access and opportunities to participate, particularly for people living in poverty.

The above proposition therefore, reinforces the need for meaningful public participation especially of the vulnerable that ought to be preceded by transparent access to information and appropriate capacity building initiatives. Public participation is re-echoed in the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (Limburg Principles).¹⁷ In chapter five I argue that fiscal policy issues are technical, with capacity gaps across the board within ministries, departments and agencies (MDAs) charged with their enforcement and with CSOs and citizens, especially the poor, vulnerable, and marginalised.¹⁸ These capacity inadequacies are most likely to lead to the state side-lining key stakeholders in policy and legislative formulation or it carrying out a largely perfunctory process. Access to timely and appropriate information before consultation and participation is therefore key at ensuring that informed views are sought and considered by policy formulators. This practice is not only prudent, but a human rights obligation, as it is an expectation of the human rights-based theory of fiscal sociology.

To further the ‘two sides of the same coin’ relationship between fiscal policy and ESRs, I argue that taxation and fiscal policy broadly impact fiscal sovereignty as is discussed in chapter one,¹⁹ which in turn affects the right to self-determination. It is for this reason that, consultation and participation with free, prior, and informed consent on issues of tax policy have been deemed crucial in the realisation of the right to self-determination.²⁰ Resultantly, fiscal policies that are oblivious of these processes are said not to be in touch with reality, only benefitting a few constituencies such as multinationals and politicians.²¹ As already noted above, the following processes need to be underscored for proper outcomes. First and foremost, there must be access to information as a prerequisite for meaningful participation which in turn will generate views for stakeholders to consider at the policy, legal formulation, and implementation stages.²²

¹⁷ Para 11 of the Limburg Principles available at <https://www.escri-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (accessed 23 July 2021).

¹⁸ See sect 5.1 of the thesis.

¹⁹ Sect 1.8.1(b) of the thesis.

²⁰ Principle 5.5 of the GPs on HRs in FP.

²¹ See sect 5.4 of the thesis.

²² S Tapan ‘Effective Tax Policy Reform through Strategic Stakeholder Communication: Lessons from Australia’ (2011) *Bulletin for International Taxation* 586, available at <https://www.ibfd.org/bulletin-international-taxation> (accessed 12 April 2022).

Second in queue and equally essential to the process is the need to consider and value the input of stakeholders and not to simply execute these processes perfunctorily.²³ It is critical to know that transparency and accountability are equally key.²⁴ Ultimately, effective public participation is important for fiscal planning to achieve policies that serve the public interest for ESRs realisation.

Unfortunately, for many developing countries the fiscal policies on tax incentives have been classified as ‘harmful preferential tax regimes’ mainly due to non-compliance with the above mentioned processes.²⁵ Uganda, the focus of this study, is no exception as public participation in policy and legal formulation falls short of the desired standards.²⁶ It is evident that the tax structure and public finance management framework (PFMF) is shrouded in transparency, accountability, participation and access to information inadequacies.²⁷ These inadequacies have in practice affected affects both tax incentives and budget-specific decisions.²⁸ The mechanisms adopted in the course of tax incentives and budget-specify decisions appear to be aimed at rubber stamping executive decisions and not informing or influencing the processes.²⁹ This could partly explain why the framework has not yielded the necessary revenue for public expenditure on ESRs even when the provision of public goods and services forms the moral and social contract basis for states to impose taxes.³⁰

The situation has worsened with the recent adoption of ‘regressive fiscal policies’ that threaten the capacity of the most vulnerable to afford basic ESRs.³¹ The regressive policies mainly take the form of consumption taxes such as value added tax (VAT) that shift the tax incidence to the poor.³² Often times, countries are forced to rely on consumption taxes to counter the effects of wasteful tax incentive policies that negatively affect the capacity of the state to raise revenue for public expenditure.³³ This is evidenced by statistics that show that in low income countries

²³ As above.

²⁴ As above.

²⁵ See sect 1.8.1 and 5.1 of the thesis.

²⁶ See sect 5.1 and 5.4 of the thesis.

²⁷ See sect 5.1 of the thesis.

²⁸ See sect 5.1 and 5.3 of the thesis.

²⁹ See sect 5.1 of the thesis for a detailed discussion of this.

³⁰ J Frecknall-Hughes ‘The Moral Basis for Taxation’ in RF van Brederode (ed) *Ethics and Taxation* (2020) 24.

³¹ The Lima Declaration (n 15 above).

³² B Burrows ‘Why tax is a human rights issue: empowering communities living in poverty to hold governments to account for public services’ 70 available at <https://sas-space.sas.ac.uk/6209/1/10burrows.pdf> (accessed 13 June 2021). In the Ugandan situation, these include a high VAT rate compared to the countries in the region, VAT and Excise duty on essential commodities, among other manifestations.

³³ The Lima Declaration (n 15 above) para 6.

even when foreign direct investment (FDI) grew from 7-20% between 1990s and 2010, corporate income tax (CIT) revenue continuously contributed the same percentage of tax revenue.³⁴ This stagnation can partly be attributed to tax incentives targeting FDI, as the increase in the latter is not commensurate with enhanced taxation especially of corporate income. I find this to be the most logical explanation to the stagnation since increased FDI should essentially lead to more CIT revenue. Consequently, the situation highlighted above indicates that firstly, the poor are disproportionately bearing a heavier tax burden that is not commensurate with the ESRs at their disposal, a clear violation of the social contract between the ruler and the governed.³⁵ Secondly, that the national budget may not necessarily benefit from FDI.³⁶ These scenarios above could be partly why developing countries collect only 12% of their gross domestic product (GDP) through taxation given the several incentives for FDI.³⁷ Thirdly and related to the above, it is evident that the current fiscal framework targeting FDI leads to a reduced contribution of the private sector to the public revenue, with no evidence that the sector is enabling the poor and marginalised to afford ESRs privately; this is ultimately a double loss. Consequently, the private sector continues to benefit from both the tax incentives and the public goods and services that are financed largely through a regressive tax structure, which hurts the poor and marginalised the most.

Equally of concern are the findings in chapter one, that the indirect benefits from tax incentives for FDI, if any, are incapable of being ascertained using the current framework.³⁸ Further, as discussed in chapter one above, existing literature shows that the revenue leakages and losses arising from tax incentives are incomparable to the benefits accruing from FDI.³⁹ These predicaments are evidence of a framework where fiscal policy and ESRs are at opposite sides of the spectrum, with each competing for mastery; in other words ‘sides of two different coins’. Given this background, what then needs to be done to ensure that fiscal policy impacts positively on ESRs realisation?

³⁴ Burrows (n 32 above).

³⁵ As above; see United Nations Human Rights Office of the High Commissioner ‘Realizing Human Rights Through Government Budgets’ (2017) 13 available at <https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf> (accessed 13 June 2021).

³⁶ Burrows (n 32 above) 70.

³⁷ E Donald ‘Revenue Mobilization Accountability: Combating Harmful Tax Regimes with the Law of Human Rights’ (2019) 5 *Georgetown Journal of International Law* 545 available at <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/10/GT-GJIL190032.pdf> (accessed 21 June 2021).

³⁸ See section 1.8.2 of the thesis.

³⁹ As above.

Given the findings above, the main solution lies in the need for deliberate efforts that link fiscal policies to human rights principles. In the Caribbean and Latin America, for example, international non-governmental organisations (NGOs) and experts passed the Guiding Principles of Human Rights in Fiscal Policy (GPs on HRs in FP), in recognition of the intrinsic connection between the two fields.⁴⁰ Although the principles are not binding, they highlight essential aspects that could be considered both as best practice and also for future authoritative efforts. The GPs on HRs in FP are based on the realisation that sound fiscal policies ought to be hinged on human rights principles notwithstanding the need to pursue other economic objectives.⁴¹ To achieve this, fiscal policy should be based on the principle of cohesion, which recognises the need for MDAs to be cognisant of their human rights mandate during policy, and legal formulation and implementation process.⁴²

There could be concerns for countries like Uganda where the technical MDAs in charge of fiscal formulation and implementation may not necessarily think they have an express human rights mandate. The structures may equally lack human rights compliance experts who would in the circumstances and as a matter of mandate deliberately look out for these concerns in fiscal policies and laws. Furthermore, although the Constitution of the Republic of Uganda 1995 requires ‘all organs and agencies’ of government to respect, uphold, and promote human rights, this, as a direct obligation may not be interpreted to include the indirect effects of fiscal policies on ESRs realisation.⁴³ That aside, the constitutional human rights enforcement mandate lies with the Uganda Human Rights Commission (UHRC).⁴⁴ As discussed in detail in chapter five, this commission does not play a significant role in fiscal policy and legal formulation, implementation, monitoring or evaluation.⁴⁵ This is a major setback in the quest for human rights compliant fiscal policies and laws. The technical MDAs further lack the specialised capacity in human rights as discussed in chapter five.⁴⁶ With the current legal, policy, and institutional structure, it is difficult to realise ESRs compliant fiscal policies and laws. Unfortunately, these are not the only pressing concerns.

⁴⁰ See the Principles for Human Rights in Fiscal Policy (2021) available at <https://derechosypoliticafiscal.org/images/ASSETS/Principles for Human Rights in Fiscal Policy-ENG-VF-1.pdf> (accessed 20 June 2021).

⁴¹ Principle 1 of the GPs on HRs in FP above.

⁴² Principle 1.3 of the GPs on HRs in FP above.

⁴³ Art 20(2) of the Constitution of the Republic of Uganda, 1995.

⁴⁴ See Art 52 of the Constitution of the Republic of Uganda, 1995.

⁴⁵ See sect 5.1 of the thesis.

⁴⁶ As above.

As I opined in chapter five, at times, the challenges that affect the capacity of a legal framework to raise revenue for ESRs realisation, are interpretative in nature.⁴⁷ Relatedly, the GPs on HRs in FP guide states to consider broader human rights obligations while interpreting fiscal policies, and for the same take precedence over other international law obligations.⁴⁸ Consequently, even when human rights obligations are missing in the black letter of the law, a legal interpretation by courts or tribunals could apply them at the dispute resolution stage. Unfortunately some of the cases highlighted in chapter five that relate to tax incentives did not apply human rights principles or reflect on Uganda's several human rights obligations.⁴⁹ If this had been done, cases such as *Hon. Issa Kikungwe and Hon. Ken Lukwamuzi v AG* would have been decided differently.⁵⁰ Even the positive judgements like the *International School of Uganda v The Commissioner General of the Uganda Revenue Authority*⁵¹ were not necessarily decided based on the likely implications to the realisation of ESRs, even when this could have been a relevant *ratio decidendi*. This was a missed opportunity to build jurisprudence along these principles.

By way of recommendation and flowing from the discussion above, there is a general call on states to ensure human rights compliant tax incentives policies for fiscal policy to play its rightful role in the realisation of ESRs.⁵² This can be achieved using various approaches. This could include the Ministers of Finance and other relevant stakeholders ensuring that the states' fiscal and public finance choices do not only consider macroeconomic factors while ignoring human rights considerations.⁵³ This is a mandate that should flow from the fact that almost all African countries have ratified the major global and regional human rights instruments that

⁴⁷ See sect 5.4 of the thesis.

⁴⁸ Principle 1.4 of the GPs on HRs in FP.

⁴⁹ See for example the case of *International School of Uganda v The Commissioner General of the Uganda Revenue Authority* TAT No. 016 of 2016 available at <https://ulii.org/ug/judgment/tax-appeals-tribunal-uganda/2018/4-0> (accessed 14 June 2021) and *Hon. Issa Kikungwe and Hon. Ken Lukyamuzi v AG* (Constitutional Petition No. 30 of 2006), discussed in detail under sect 5.4 of the thesis.

⁵⁰ *Hon. Issa Kikungwe and Hon. Ken Lukyamuzi v. AG* (Constitutional Petition No. 30 of 2006). This case is discussed in detail in sect 5.4 of the thesis.

⁵¹ TAT No. 016 of 2016 available at <https://ulii.org/ug/judgment/tax-appeals-tribunal-uganda/2018/4-0> (accessed 14 June 2021).

⁵² Schutter (n 12 above) 5; ST Tessema 'Competition to attract foreign direct investment through tax incentives as a threat for the realisation of socio-economic rights in Africa' (2008) LLM thesis University of Pretoria 8 available at <https://repository.up.ac.za/bitstream/handle/2263/8064/tessema.pdf?sequence=1&isAllowed=y> (accessed 6 June 2021).

⁵³ United Nations Human Rights Office of the High Commissioner (n 3) 64.

establish numerous obligations for ESRs realisation.⁵⁴ Even when fiscal policies or taxation may not be explicit in these instruments, they are implied in as far as they relate to the generation of resources for ESRs realisation.⁵⁵ This is particularly relevant during the period of ‘economic globalisation’ characterised by tax competition as states are required to balance several interests such as their human rights obligations *vis-à-vis* the need to be competitive economically.⁵⁶ Fortunately, many states have domesticated human rights obligations, including in their constitutions.⁵⁷ This speaks to a commitment to protect, respect and fulfil the human rights obligations and states should go beyond just speaking to and actually demonstrate the commitment through human-rights sensitive fiscal policies and implementation.

To sum up the role of fiscal policies in the realisation of ESRs, the former Special Rapporteur on extreme poverty and human rights notes that:⁵⁸

...actions or omissions that diminish public revenues by allowing...tax structures that have a disproportionate impact on the poorest segments of the population could constitute violations of human rights obligations, such as the obligation to allocate the maximum available resources to the enjoyment of economic, social and cultural rights or to eliminate discrimination.

The above waters down the arguments fronted by states, Uganda inclusive, that focus on the perceived economic benefits of fiscal policies including tax incentives related ones, at the

⁵⁴ ST Tessema ‘Competition to attract foreign direct investment through tax incentives as a threat for the realisation of socio-economic rights in Africa’ (2008) LLM thesis University of Pretoria 8 available at <https://repository.up.ac.za/bitstream/handle/2263/8064/tessema.pdf?sequence=1&isAllowed=y> (accessed 6 August 2022). Almost all African states are members to most international and regional human rights instruments that protect socio-economic rights. For example, according to <https://indicators.ohchr.org/> only 3 African countries have not yet ratified the CECSR, and all African states have adopted the Universal Declaration of Human Rights. All African countries have ratified that United Nations Convention on the Rights of the Child (CRC), see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4 (accessed 12 August 2022). Only one state of the African Union is not a party to the African Charter on Human and Peoples’ Rights as per <https://www.achpr.org/ratificationtable?id=49> (accessed 6 August 2022).

⁵⁵ A Christians ‘Taxation as a Basic Human Right’ (2009) Research gate 224 available at https://www.researchgate.net/publication/228135840_Fair_Taxation_as_a_Basic_Human_Right/link/5b0d7d8b0f7e9b1ed7007eb3/download (accessed 13 June 2021); W Khan ‘Improving Tax Strategy Transparency in the Extractive Industries Sector for the Advancement of Human Rights’ in I Feichtner, M Krajewski & R Roesch (eds) *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (2019) 3 Interdisciplinary Studies in Human Rights Springer 149.

⁵⁶ W Khan ‘Improving Tax Strategy Transparency in the Extractive Industries Sector for the Advancement of Human Rights’ in I Feichtner, M Krajewski & R Roesch (eds) *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (2019) 3 Interdisciplinary Studies in Human Rights Springer 150; Q Li ‘Fiscal decentralization and tax incentives in the developing world’ (2016) 23.2 *Review of International Political Economy* 232 233.

⁵⁷ Tessema (n 54 above). Uganda is not an exception as the several ESRs have been incorporated in the Constitution of the Republic of Uganda 1995 and several domestic legislations such as the Education (pre-primary, primary and post primary) Act No. 13 of 2008 that provides for the right to education and the right to basic education. The other domestic laws include the Employment Act 2006 that domesticate the right to work under favourable terms, the Land Act Chapter 227, as amended on the right to property, the Public Health Act Chapter 281 on the right to health, etc.

⁵⁸ Para 5 of the report of the former Special Rapporteur on extreme poverty and human rights in (n 13 above).

expense of their human rights obligations. The perceived economic benefits argument is unfortunate. As a matter of fact, section 1.8.1 of the study demonstrates that the justifications fronted for tax incentives are doubtful. It is important, therefore, to consider the position taken by recent tax and human rights scholars who hold that ‘fiscal policy and human rights policy are inextricably linked and that it is time to overcome the artificial barriers that have separated the two fields’.⁵⁹ This calls for the infusion of human rights in fiscal policy for the latter to adequately contribute to ESRs realisation.

3.2 Tax incentives and state obligations to realise economic and social rights: Applicable human rights principles

Having established that fiscal policy, ESRs and applicable human rights principles should ideally be in harmony, in the section above, I now subsequently and specifically review how tax incentives impact on states ESRs obligations. Traditionally, the obligation on states to guarantee human rights including ESRs is three fold; to respect, protect, and fulfil.⁶⁰ The adherence to this tripartite obligation would ensure human rights compliant tax incentive policies. As such, this obligation is relevant to the ‘design, implementation, and monitoring of revenue-raising policies’.⁶¹ To this end, the tripartite obligations ought to be reflected in all fiscal policy processes including tax incentives specific ones as envisaged by the human rights-based theory of fiscal sociology. To break it down:⁶²

The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights ... The obligation to protect requires States to prevent violations of such rights by third parties ... The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights ...

These obligations have been restated with clarity in General Comment 24 of the Committee on Economic, Social, and Cultural Rights (Committee on ESCR) that draws inspiration from, among others, the United Nations Guiding Principles on Business and Human Rights (UNGPs)

⁵⁹ P Alston & N Reisch ‘Fiscal Policy as Human Rights Policy’ in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 25; Christians (n 55 above) 212.

⁶⁰ See para 3, 25 & 7 respectively of the Limburg Principles (n 15 above). See also A Waris *Tax and Development: Solving Kenya’s Fiscal Crisis through Human Rights* (2013) 136.

⁶¹ Para 11 of the report of the former Special Rapporteur on extreme poverty and human rights in (n 13 above).

⁶² Para 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, available at http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html (accessed 12 June 2021). These drew inspiration from the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) available at <https://www.escri-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (accessed 12 June 2021). See also para 10 of General Comment 24 of the Committee on ESCR. Adopted on 10 August 2017, E/C.12/GC/24, available at: <https://www.refworld.org/docid/5beaeca4.html> (accessed 14 March 2021).

2011.⁶³ Accordingly, businesses play a fundamental role in the realisation of ESRs by creating employment opportunities and contributing to the development of the countries where they are based.⁶⁴ However, many times states have failed to adequately monitor the activities of these businesses with the effect that their operations have negatively affected the realisation of ESRs.⁶⁵ This amounts to an abdication of the states' obligation to protect. It goes without saying therefore, that it is crucial that the obligations of state parties in such situations are clarified to ensure that business activities do not adversely affect ESRs.⁶⁶ General Comment 24 emphasises that business actors are obliged to observe the rights in the International Covenant on Economic, Social and Cultural Rights (CESCR) whether the same are effectively implemented in the countries of their operations or not.⁶⁷ States will equally be in violation of the obligation to respect if they pursue policies that adversely affect ESRs, or prioritise the interests of business actors without reasonable cause at the expense of rights.⁶⁸ As discussed in section 1.8.2 of chapter one, tax incentives largely serve the interests of the businesses and to some extent the regime. Furthermore, in chapter five, I discuss how the current legal and policy framework on tax incentives in Uganda has impacted ESRs realisation.⁶⁹ That analysis reveals whether or not Uganda is in violation of the provisions of General Comment 24 of the Committee on ESCR. Preliminarily, the discussion above points to the relegation of the obligation to protect and respect.

Furthermore, a state's tax incentives framework impacts the state's capacity to realise the tripartite obligation in various other ways. Firstly, the substantial reduction in revenue due to unjustified tax incentives directly affects the state's capacity to realise ESRs since these are positive rights that require resources. Secondly, and as earlier pointed out in section 3.1 above, in the unregulated neo-liberal economies where public services provision has largely been left to the unfettered discretion of the private sector, tax incentives shift the tax incidence to the poor and vulnerable citizens, thereby negatively affecting their ability to afford ESRs. Neo-liberalism challenges the very nature of human rights.⁷⁰ In Uganda, the failure of the state to

⁶³ Para 2 of General Comment 24 of the Committee on ESCR.

⁶⁴ Para 1 of General Comment 24 of the Committee on ESCR.

⁶⁵ As above.

⁶⁶ As above.

⁶⁷ Para 5 of General Comment 24 of the Committee on ESCR.

⁶⁸ Para 12 of General Comment 24 of the Committee on ESCR.

⁶⁹ Sect 5.3, 5.4 & 5.5 of the thesis.

⁷⁰ KD Beiter 'Why neoliberal ideology, privatisation, and other challenges make a reframing of the right to education in international law necessary' (2022) *The International Journal of Human Rights* 28. See also AC Onuora-Oguno *Development and the Right to Education in Africa* (2019) 131& 132.

adequately regulate the private sector, coupled with the lack of a strong legislation on minimum wage as well as one on corporate accountability for human rights have left the poor and marginalised in a precarious situation.⁷¹ These gaps ultimately lead to a relegation on the obligation of states to respect ESRs. Thirdly, tax incentives granted to companies that violate human rights would amount to the state's violation of the obligation to respect.⁷² It is therefore important to examine the human rights record of would-be or the actual beneficiaries of tax incentives, and additionally consider such factors in the qualifying criteria. This would be in line with the human rights-based theory of fiscal sociology. Relatedly, according to the preamble to the CESCR, the rights in the covenant should be enjoyed by all through the respect of the principles of equality and universality.⁷³ Consequently, 'tax failures' that lead to an unfair tax burden being borne by the poor while the rich and the deserving of taxation are exempted, are a violation of rights under the CESCR, particularly the obligation to respect.⁷⁴ Chapter five explores the adequacy of the current tax incentives framework in Uganda and how it affects the tripartite obligations in more specific details.⁷⁵

Moving on to the obligation to protect, the Committee on ESCR recognises that many of the states' business relationships are contained in trade and investment treaties, and thus calls upon state parties to undertake human rights assessments before entering into such undertakings.⁷⁶ This is in line with the human rights-based theory of fiscal sociology. Some treaties like double taxation agreements (DTA) and development cooperation agreements (DCA) contain tax incentives relevant provisions.⁷⁷ The Committee on ESCR takes further steps to establish a couple of standards that would inform best practice. Firstly, that the human rights assessment should indicate the treaties' varied impacts on ESRs realisation.⁷⁸ Secondly that there is a need for regular monitoring and assessment of the trade and investment treaties.⁷⁹ Thirdly and equally relevant is the requirement for any future interpretation of treaties to bear in mind the human rights obligations on states.⁸⁰ Fourthly, that treaties should contain clauses that allow

⁷¹ KII with Mr. Festus Akunobera above.

⁷² Principle 2.2 of the GPs on HRs in FP.

⁷³ Donald (n 37 above) 561.

⁷⁴ As above

⁷⁵ Sect 5.3 & 5.4 of the thesis.

⁷⁶ Para 13 of General Comment 24 of the Committee on ESCR.

⁷⁷ As above.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ As above.

for human rights conscious dispute resolution.⁸¹ Uganda, the focus-country of this study is a party to many such treaties that in effect create tax incentives.⁸² Under this General Comment is an obligation requiring that a human rights-based impact assessment is undertaken before execution of any such treaties. Quite essential and in addition to the standards proposed by the Committee on ESCR is subsequent continuous monitoring and evaluation of implementation of the treaties. Uganda has had domestic and international tax disputes arising out of the interpretation of both tax laws and tax treaties.⁸³ The resolution of such disputes usually adopts the black letter of the law without assessing the impact the decisions could have on the realisation of ESRs.⁸⁴ This is in violation of the human rights-based theory of fiscal sociology and human rights obligations. Importantly, the obligation to protect, if respected, would change the perspective through which tax disputes are resolved, which in the long run would save revenue for ESR realisation.

Aside from the issues arising from international tax treaties, domestically, I argue that a framework that exempts taxpayers from paying their fair share of taxes, and thus causing a substantial reduction in revenue for ESRs financing, is a breach of the obligation to protect. This is equally a departure from the intention of the framers of the human rights-based theory of fiscal sociology. It is worse when the benefiting entities are violators of human rights, in which case the government would have been implicit in their actions or omissions through the fiscal support.⁸⁵ Furthermore, by granting tax incentives for FDI, states legally exempt corporations, mainly multinationals from contributing fairly to the tax revenue that would have gone to the realisation of ESRs. The FDIs should not only enjoy these ESRs, but should in equal measure have an obligation to facilitate their generation. Worse still, it is of concern that states pass such regressive tax incentives policies due to pressure from multinationals, a

⁸¹ As above.

⁸² According to Price Water House Coopers (PwC), by 1 February 2019, Uganda had DTAs and bilateral agreements with the following countries: Denmark, India, Italy, Mauritius, Netherlands, Norway, South Africa & United Kingdom available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKewj4nISCnYTkAhUL6qQKHfO8BhIQFjABegQICxAE&url=http%3A%2F%2Ftaxsummaries.pwc.com%2FID%2FUganda-Individual-Foreign-tax-relief-and-tax-treaties&usg=AOvVaw1pT8UVM-rpBoNT0yD1z7Bs> (accessed 15 August 2019), current list is also available the Uganda Revenue Authority online portal at <https://www.ura.go.ug/header/headerMain.jsp?viewPageNo=7> (accessed 14 October 2019).

⁸³ See the cases of *Heritage & Gas Limited v Uganda Revenue Authority*, Tax Appeals Tribunal Tax Application No 26/2010 & *Tullow Uganda Ltd v Heritage Oil and Gas Ltd, Heritage Oil plc*, (2013) EWHC 1656 (Comm).

⁸⁴ See the judgements in the disputes cited above.

⁸⁵ Principle 2.3 of the GPs on HRs in FP.

demonstration of a conflict of interest.⁸⁶ To avoid a conflict of interest, states are called upon to amplify citizen participation, transparency, due diligence, and accountability mechanisms in policy and legal formulation so as to make appropriate decisions that are free of bias.⁸⁷ All these would by implication enable the public to directly participate and have a say in the resultant tax incentives policy and legal framework. In chapter five, I assess the extent of Uganda's fulfilment of the obligation to protect given the policy on tax incentives for FDI.⁸⁸ Essentially, this study posits that states' tax incentives policies that deplete would-be revenue for ESRs realisation are a violation of the obligation to protect.

The final and final obligation to fulfil requires states to take appropriate positive steps to realise ESRs. Public finance policy, legislative, and budgetary measures, are covered under this obligation.⁸⁹ It entails state parties taking steps 'to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights'.⁹⁰ Resource mobilisation through, among others, a progressive taxation is central to this obligation.⁹¹ To this end, business cooperation is key.⁹² The cooperation in question should go beyond the financial cooperation to as far as the extraterritorial obligations of states, for the realisation of ESRs.⁹³ States should thus be concerned about the human rights violations by business enterprises happening outside their jurisdictions, in places where these businesses operate.⁹⁴ The extraterritorial obligation is critical and cuts across all tripartite obligations.⁹⁵ Trade and investment treaties, tax, and other financial treaties come under scrutiny under this obligation.⁹⁶ As is discussed in section 1.8.1, 1.8.2 of chapter one and 5.4 and 5.5 of chapter five, Uganda is particularly faulted for adopting a tax incentives legal framework that facilitates unjustified revenue leakages and losses, which would have otherwise been channelled to ESRs financing. The gaps I highlight, in the PFMF and tax incentives framework discussed in detail in section 5.1, confirm the breach of the obligation to fulfil.

⁸⁶ As above.

⁸⁷ As above.

⁸⁸ See sect 5.3 & 5.4 of the thesis.

⁸⁹ Principle 2.4 of the GPs on HRs and FP.

⁹⁰ Para 23 of General Comment 24 of the Committee on ESCR.

⁹¹ As above. See also para 26 of the Limburg Principles (n 15 above).

⁹² Para 23 of General Comment 24 of the Committee on ESCR.

⁹³ Para 27 of General Comment 24 of the Committee on ESCR.

⁹⁴ As above.

⁹⁵ Para 29 of General Comment 24 of the Committee on ESCR. The extra territorial obligation to respect calls upon state parties to refrain from interfering with the enjoyment of ESCRs by persons outside their territories, in other states.

⁹⁶ As above.

Relatedly, the triplicate obligation requires states to adopt a certain level of proactiveness, and to use discretion with caution in respect to fiscal policy.⁹⁷ This notably requires states to reflect the tripartite obligation as they ‘design, implement and assess fiscal policy’ so as to limit the wrongful use of discretion in fiscal processes.⁹⁸ This is in line with the human rights-based theory of fiscal sociology. In chapter five, I analyse Uganda’s level of success to this end.⁹⁹ Below, I discuss how other soft law initiatives have interpreted and applied the tripartite obligation.

Essential to this discussion on the tripartite obligation are the Maastricht Guidelines on Violations of Economic, Social, and Cultural rights 1997 (The Maastricht Guidelines). These have expounded on the obligations by introducing other parameters for assessing ESRs violations, which I discuss below in the context of tax incentives policies. These are the obligations to conduct and of results. The obligation to conduct requires governments to take positive reasonable actions to achieve ESRs.¹⁰⁰ I equate the obligation to conduct to the obligation to act positively towards achieving a set outcome. These steps relate largely to the procedure and administrative approaches that should be adhered to for the adoption and implementation of set policies.¹⁰¹ The obligation is based on the realisation that a rather progressive policy could yield little in terms of resource mobilisation if adopted and implemented in total disregard of the human rights processes. The expounders of the human rights-based theory of fiscal sociology could not agree more. These processes include participation, accountability, equality, non-discrimination, and transparency that are central to the theme of this study.¹⁰² To realise the right to food for example, the following were found to be key: impact assessments, the need to initiate ‘process, impact and outcome indicators, and establish “appropriate benchmarks” to be “achieved in the short, medium and long

⁹⁷ Principle 2 of the GPs on HRs and FP.

⁹⁸ Principle 2.1 of the GPs on HRs and FP.

⁹⁹ See sect 5.1, 5.3 & 5.4 of the thesis.

¹⁰⁰ Para 7 of the Maastricht Guidelines (n 62 above).

¹⁰¹ S Skogly ‘The Requirement of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12.3 *Human Rights Law Review* 10.

¹⁰² As above. See for example para 23 of the Committee on ESCR General Comment 12: The right to adequate food (art. 11), 12 May 1999, E/C.12/1999/5 (1999); 6 IHRR 902 (1999) that provides that the formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realisation of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

term.”¹⁰³ These should be complemented by public participation in ‘information gathering, management, analysis, interpretation and dissemination’.¹⁰⁴ Finally, the effective use of appropriate administrative processes would lead to the generation and efficient use of the maximum available resources for the realisation of ESRs, and the compliance with the obligation to conduct.¹⁰⁵ In this study, the actions of concern are those geared towards raising enough internally generated revenues, by adopting human rights conscious tax incentive policies to finance ESRs. The need for the deliberate positive actions geared towards achieving the processes discussed above cannot be over emphasised in the generation of such human rights compliant tax policies. This is the preoccupation of the obligation to conduct and in line with the human rights-based theory of fiscal sociology.

The second aspect of the Maastricht Guidelines is the obligation of results. This necessitates countries ‘to achieve specific targets to satisfy a detailed substantive standard’.¹⁰⁶ To assess whether a country like Uganda is fulfilling the obligation of results in the context of ESRs financing, there is need to consider the several international human rights and soft law funding standards, which set benchmarks for fulfilment. As previously mentioned in chapter one,¹⁰⁷ according to the Muscat Agreement, countries are expected to devote at least a 4-6% expenditure of their GDP on education.¹⁰⁸ In the alternative, states should apportion at least 15-20% budget share to the education sector by 2030.¹⁰⁹ Other standards such as the Abuja Declaration on HIV/AIDS, Tuberculosis, and other related Infectious Diseases require at least a 15% expenditure of the national budget on the health sector.¹¹⁰ Accordingly, Uganda would still unfortunately be in violation even when assessed from the obligations of results as it has not met the above set targets, especially with regard to the funding for the education sector, as elucidated in chapter one and four of the study.¹¹¹ A higher budgetary allocation to the education sector, in line with these standards, would boost the financing for free and

¹⁰³ Guideline 17.1 Food and Agricultural Organisation (FAO) of the United Nations, Voluntary Guidelines to support the progressive realization of the rights to adequate food in the context of national food security, adopted by the FAO Council in November 2004 (Rome: FAO, 2005).

¹⁰⁴ As above, guideline 17.2.

¹⁰⁵ Skogly (n 101) 11.

¹⁰⁶ Para 7 of the Maastricht Guidelines (n 62 above).

¹⁰⁷ See sect 1.0 of the thesis.

¹⁰⁸ United Nations Educational, Science and Cultural Organisation (UNESCO) (2014) Target 7, available at <https://unesdoc.unesco.org/ark:/48223/pf0000228122> (accessed 21 August 2019).

¹⁰⁹ As above.

¹¹⁰ See the Abuja Declaration on HIV/AIDS, Tuberculosis and other related Infectious Diseases (2001) available at <https://au.int/sites/default/files/pages/32894-file-2001-abuja-declaration.pdf> (accessed 13 October 2021), see also <https://www.who.int/healthsystems/publications/Abuja10.pdf> (accessed 13 October 2021).

¹¹¹ Sect 1.0, 1.2 of chapter one & 4.4.2 of chapter four of the thesis.

compulsory UPE as a component of basic education, which takes the biggest share of the sectoral budget as is argued in chapter four.¹¹²

Furthermore, the Maastricht Guidelines provide that a state will be in violation if by its ‘action or omission, a policy or practice deliberately contravenes or ignores obligations of the CESCR, or fails to achieve the required standard of conduct or result’.¹¹³ I find that the several challenges discussed in chapter five relating to the legal, policy framework, and administration of tax incentives, amount to such actions.¹¹⁴ This is in so far as the gaps therein affect the resource envelope necessary to progressively realise ESRs. They equally violate the minimum core obligations of rights, such as the right to basic education, by negatively affecting the financing of UPE as is elucidated in chapter four.¹¹⁵ Violations may occur through ‘acts of commission or omission’.¹¹⁶ The former arise when states adopt laws or policies that are inconsistent with their ESRs obligations or are deliberately regressive thereby negating the realisation of rights.¹¹⁷ The latter arises from the failure to take the obligatory steps or to meet the internationally set minimum standards for ESRs realisation.¹¹⁸ Accordingly the acts or omissions may be implied through the interpretation of the state’s laws, policies, or practice, such as ones on tax incentives, which this study focuses on. The state’s approach towards these normative issues will by implication affect ESR financing obligations. The effects will be worse for states that ignore the human rights-based theory of fiscal sociology.

Related to the discussion above is another human rights principle of ‘margin of discretion’, also known as the margin of appreciation, where the benefit of doubt or burden of proving that a country is taking progressive steps to realise ESRs lies with the state.¹¹⁹ Even within this discretion, states are cautioned not to hide behind the provision of ‘progressive realisation’, which is discussed below, to justify unreasonable ‘non compliance’.¹²⁰ In chapter five, I analyse the several challenges relating to tax incentives, particularly the non-statutory (discretionary) ones.¹²¹ These concerns would create doubt in the minds of any human rights

¹¹² Sect 4.3 of the thesis.

¹¹³ Para 11 of the Maastricht Guidelines (n 62 above).

¹¹⁴ See sect 5.1, 5.4 & 5.4 of the thesis.

¹¹⁵ See sect 4.1, 4.2 & 4.3 of the thesis.

¹¹⁶ Para 14 and 15 of the Maastricht Guidelines (n 62 above).

¹¹⁷ Para 14 of the Maastricht Guidelines (n 62 above).

¹¹⁸ Para 15 of the Maastricht Guidelines (n 62 above).

¹¹⁹ Para 8 of the Maastricht Guidelines (n 62 above). See also para 20 & 71 of the Limburg Principles (n 60 above).

¹²⁰ Para 8 of the Maastricht Guidelines (n 62 above).

¹²¹ Sect 5.1.1, 5.3.1 & 5.4.3 of the thesis.

oversight body as to whether Uganda is doing enough to generate sufficient resources to finance ESRs. In my view, the avoidable revenue leakages and losses from tax incentives would be an indictment on any country seeking to rely on the margin of appreciation principle. The Maastricht Guidelines restate the minimum core obligation principle for the realisation of ESRs with emphasis on the need to prioritise the same irrespective of resource or other constraints.¹²² This I discuss in detail in chapters one and four.¹²³ Having established the broader state obligations and applicable human rights principles relating to tax incentives and the challenges affecting the realisation of the same, below I specifically explore states' financing obligations for ESRs realisation. This is still within the expectations of the human rights-based theory of fiscal sociology.

3.3 States' financing obligations for economic and social rights realisation

3.3.1 Historical perspectives: The movement from lip service towards formal recognition

Before I delve into understanding the specific ESRs financing obligations on states, it is important to trace the background of the commitments from a historical perspective. The discussion about the role of resources in the realisation of social wellbeing, social welfare, and eventually human rights has only taken central stage recently.¹²⁴ As mentioned earlier, public finance, and fiscal policy on one hand and human rights on the other hand were traditionally treated as distinct fields. The French Constitution of 1789 (French Declaration of the Rights of Man) was the first attempt to create a link between the initial aspects of social wellbeing and welfare, largely because the French revolution was based on that conflict.¹²⁵ Even with the later formal recognition of human rights, the role of resources in the realisation of ESRs remained illusory partly due to the precedence attached to civil and political rights, as compared to ESRs.¹²⁶

The categorisation of rights is equally apparent in the International Bill of Human Rights, which recognises the two broad categories of entitlements in the different instruments, with the

¹²² Para 9 of the Maastricht Guidelines (n 62 above).

¹²³ See sect 1.8.3 & 4.1.1 of the thesis.

¹²⁴ A Waris *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) 132.

¹²⁵ Waris (n 124) 133.

¹²⁶ As above; See P Alston & N Reisch 'Fiscal Policy as Human Rights Policy' in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 22 & 23.

implication that the two should be treated as distinct.¹²⁷ Although the initial legal recognition was a positive step towards human rights protection, the international community still avoided reference to the resources, such as tax revenue, for the realisation of the rights.¹²⁸ The principle of state sovereignty is partly to blame for this.¹²⁹ I find that for a long time states were allowed a wide margin of discretion to decide which measures to take to realise rights. These measures largely excluded reference to the fiscal or public finance policy.¹³⁰ There was a general lack of appreciation of the fact that fiscal choices directly affect the realisation of the rights. The CESCR, for example, has ‘only a very limited extraterritorial application, it does not obligate states to alter their tax laws that might negatively affect other states’.¹³¹ With such a shortcoming, it becomes hard to use the states’ human rights obligations to resolve issues such as tax competition or other interstate tax abuses. These flaws in the long run negatively affect the states’ pursuit for ESRs realisation using the maximum available resources. When Waris stated that ‘a legal right exists in fiscal reality, only when and if it has budgeted costs’,¹³² she underscored the need for resources to realise ESRs.¹³³

The gap in human rights financing, especially for ESRs, was partly caused by the lack of an express mandate in many human rights instruments, to that effect.¹³⁴ The only international human rights instrument that has made efforts to this end, for example, is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003 (Maputo Protocol).¹³⁵ The Maputo Protocol comes out strongly to require states to reduce their military expenditure ‘significantly’ in favour of ‘social development’, especially for women

¹²⁷ The International Bill of Rights contains the Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights 1996 and the International Covenant on Economic, Social and Cultural Rights, 1996 available at <https://www.escr-net.org/resources/international-bill-human-rights> (accessed 20 June 2021); Waris (n 124) 136.

¹²⁸ Waris (n 124) 136.

¹²⁹ As above.

¹³⁰ As above.

¹³¹ Donald (n 37 above) 545.

¹³² Waris (n 124) 143.

¹³³ D Elson, R Balakrishnan & J Heintz ‘Public Finance, Maximum Available Resources and Human Rights’ in A Nolan, R O’Connell & C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 13.

¹³⁴ A Waris & W Kohonen *Linking Taxation to the Realisation of the Millennium Development Goals in Africa* (2011) 17 available at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/39962/waris-109.pdf?sequence=1&isAllowed=y> (accessed 15 May 2019).

¹³⁵ Art 10(3), adopted on 23 March 2003, came into force on 11 July 2003, Uganda ratified on 22 July 2010 available at https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (accessed 4 August 2019).

and girls.¹³⁶ Though a welcome development, the same has a restricted gender application and as such cannot be applied to all ESRs for all persons.

Related to the lack of an express provision on ESRs financing, I note that ideally when a state signs onto an international covenant like the CESCRCR, it takes on the duty to protect, promote, and respect the obligations therein.¹³⁷ Unfortunately, there has not been any explicit declaration that requires countries to reorganise their fiscal policies for the realisation of ESRs.¹³⁸ The international instruments have instead provided for the principle of progressive realisation, behind which most states hide to concentrate on rights that require immediate realisation like the civil and political rights.¹³⁹ According to some scholars, it was not until the United Nations Declaration on the Right to Development 1986 (DRD) that the discussion on the resources required for the realisation of ESRs came to the forefront.¹⁴⁰ Accordingly, the DRD highlights the issue of financing for human rights, especially ESRs.¹⁴¹ I however hold a contrary view as I find that the DRD does not expressly tackle the resource issue. It in broad terms calls upon states to overcome the constraints to development that affect the realisation of ESRs,¹⁴² and to ensure that all have access to ‘basic resources’, ensuring social justice while at it.¹⁴³ Indeed, fiscal policies could indeed be presumed in the development constraints however more would have been expected of such a declaration.

My contrary view is based on the fact that firstly, the DRD is largely preoccupied with the right to development and its relationship with other human rights including ESRs. Secondly, it mentions resources in passing and in respect of aspects not connected to finances or revenue.

¹³⁶ As above. See also K Tomasevski *Education denied: Costs and Remedies* (2003) 14.

¹³⁷ A Waris & LA Latiff ‘Towards Establishing Fiscal Legitimacy Through Settled Fiscal Principles in Global Health Financing’ (2015) 23(4) *Health Care Analysis* springer 376 378 available at <https://link.springer.com/article/10.1007/s10728-015-0305-z> (accessed 21 June 2019).

¹³⁸ Waris and Latiff (n 137 above) 379, the same point is made underscored in BA O’Hare ‘Perspective, Human Rights and the Social Determinants of Health’ (2018) 20.2 *Health and Human Rights Journal* 57 58 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293362/pdf/hhr-20-057.pdf> (accessed 26 September 2019).

¹³⁹ As above.

¹⁴⁰ As above; see also United Nations General Assembly Declaration on the Right to Development (1986), adopted by General Assembly resolution 41/128 of 4 December 1986 available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightToDevelopment.aspx> (accessed 15 August 2019).

¹⁴¹ A Waris *Tax and Development: Solving Kenya’s Fiscal Crisis through Human Rights* (2013) 150. See art 10 for instance that provides for steps that should be taken by states to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

¹⁴² Art 6 (3) of the DRD.

¹⁴³ Art 8(1) of the DRD.

And thirdly, taxation is not mentioned anywhere in the DRD. This is a big lacuna since resources are as essential as an enabling legal and policy framework in any discussion on ESRs realisation and the right to development.¹⁴⁴ It is impossible to achieve the right to development without the realisation of ESRs through adequate financing. For all intents and purposes, ‘mobilizing revenue might even be of more importance than others rights traditionally addressed in international law’.¹⁴⁵ Unfortunately, the DRD ignores this perspective and yet resources are critical to the working of the human rights-based theory of fiscal sociology.

Flowing from the above, there is therefore a general call on states to adopt policies that enhance financial contributions, especially from the private sector through proper tax structures, for the better implementation and eventual realisation of ESRs.¹⁴⁶ This would be achieved through tax incentives policies that are cognisant of their likely impact on the realisation of ESRs, in line with the human rights-based theory of fiscal sociology. As such, states need to adopt proper legal and policy frameworks that reflect the international human rights standards, specifically regarding resources.¹⁴⁷ I find that the DRD neither captures nor appreciates the role of tax resources in the general discussion on the right to development, and their impact on ESRs realisation. The DRD aside, the absence of a clear, unequivocal provision on resources in most of the international human rights instruments, gives states a leeway to use discretionary powers in resource mobilisation and allocation.¹⁴⁸ This is unfortunate as resources are decisive in the attainment of the rights, responsibilities, and obligations in such covenants.

To underscore the importance of resources, it is useful to note that in the more recent past, resources were fundamental to the realisation of the then Millennium Development Goals (MDGs), which formed the basis of the United Nations Sustainable Development Goals (SDGs) as is stated:¹⁴⁹

... a higher tax per GDP ratio also allows for the provision of free primary education. It was once again only in the countries with a tax per GDP ratio higher than 20% that a significant jump is being seen in youth literacy rates. Literacy has an impact on all categories of achieving MDGs.

¹⁴⁴ Skogly (n 101 above) 2; T Eskelinen & A Laitinen ‘Taxation: Its Justification and Application to Global Contexts’ in H P Gaisbauer, G Schweiger & C Sedmak (eds) *Philosophical Explorations of Justice and Taxation: National and Global Issues* (2015) 227.

¹⁴⁵ Donald (n 37) 571.

¹⁴⁶ Skogly (n 101 above) 10.

¹⁴⁷ Skogly (n 101) 11.

¹⁴⁸ YM Dutton ‘Commitment to International Human Rights Treaties: The role of enforcement mechanisms’ (2012) 34.1 *University of Pennsylvania International Law Journal* 17-18. <https://www.corteidh.or.cr/tablas/r31682.pdf> (accessed 26 July 2022).

¹⁴⁹ Waris & Kohonen (n 134) 17.

As Uganda strives to achieve SDG four on equitable education and the aspirations of the African Union Agenda 2063: The Africa We Want (Agenda 2063), the role of resources, especially tax revenue, will without a doubt be of high priority, and I assess the same in detail in chapter four.¹⁵⁰

Against this backdrop, the discourse on resources for the realisation of ESRs started to emerge more prominently in the aftermath of the 2008 economic recession.¹⁵¹ The recession resulted in the reduction in foreign aid, which necessitated an introspection by developing countries on the sufficiency of their DRM strategies.¹⁵² These discussions were at the fore in the successive SDGs and Agenda 2063 discourse as fiscal reforms that enable DRM were the crux of the Addis Ababa Action Agenda of the Financing for Development Conference, held in July 2015.¹⁵³ These are discussed in detail in section 5.2.¹⁵⁴ Specifically goal 17 on the partnership for the realisation of the SDGs notably recognises DRM as the first target.¹⁵⁵ The SDGs capture many ESRs, and in essence, the realisation of the former and the right to development, have a substantial bearing on the actualisation of the latter. It is therefore not surprising that DRM strategies, and the efforts aimed at fighting illicit financial flows (IFF) feature prominently in the adopted SDGs.¹⁵⁶ Regrettably, despite these progressive efforts over the years, to date, there exists no binding human rights treaty that concretely handles international tax competition, nor an international tax treaty with emphasis on human rights or their financing.¹⁵⁷ This portrays

¹⁵⁰ See sect 4.1, 4.2 & 4.3 of the thesis especially.

¹⁵¹ N Reisch 'Taxation and human Rights: Mapping the landscape' in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 39.

¹⁵² As above.

¹⁵³ A Budoo 'Adoption of a Human rights Approach to Budgeting as a Step to realise the right to Education in African Countries' in A.C. Onuora-Oguno et al. (eds) *Education Law, Strategic Policy and Sustainable Development in Africa* (2018) 29.

¹⁵⁴ Reisch (n 151 above); W Khan 'Improving Tax Strategy Transparency in the Extractive Industries Sector for the Advancement of Human Rights' in I Feichtner, M Krajewski & R Roesch (eds) *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (2019) 3 Interdisciplinary Studies in Human Rights Springer 147.

¹⁵⁵ SDGs available at https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCCQjw5auGBhDEARIsAFyNm9FxFxVyzSSLla2MhEyRp9Bn7tm1cAZi1tA0TCw_ugMLzCEKb5SzlHU2EaAr0jEALw_wcB (accessed 17 June 2021).

¹⁵⁶ See https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCCQjw5auGBhDEARIsAFyNm9FxFxVyzSSLla2MhEyRp9Bn7tm1cAZi1tA0TCw_ugMLzCEKb5SzlHU2EaAr0jEALw_wcB (accessed 17 June 2021), N Reisch 'Taxation and human Rights: Mapping the landscape' in P Alston & N Reisch (eds) (n 151 above) 39.

¹⁵⁷ Donald (n 37 above) 5.

the disconnect that persists and the fact that these international processes to date are delinked. I therefore opine that states as such have to be innovative with the current international human rights framework to give it an interpretative value that meets the purpose and effect of its framers. The framers of the CESCRC, for example, expressly expected states to generate ‘maximum available resources’ using all ways possible for the realisation of ESRs, and the non derogable minimum core obligations in particular.

Further to the above, the resources discourse, which is in line with the theory of fiscal legitimacy through the wellbeing of people, as discussed in chapters one and two above, requires the provision of social goods and services to be treated as rights not mere gifts or favours by the rulers to the governed.¹⁵⁸ Using the Kenyan case study on the issue of funding for the right to education, it is noted that:¹⁵⁹

Education was to be considered a social right and was underscored by early guarantees and efforts toward free and compulsory schooling up to grade four and, by the early 1980s, through seventh grade. Similarly, the state underwrote higher education by providing tuition waivers and living stipends that helped many who would otherwise not have been able to attend universities or other institutions of higher learning. The state’s priority on education was reflected in its annual budget allotment of 40% (or six percent of GDP) to public education. Of this, 57% was spent on primary schooling, while 20% was directed at university education.

Kenya’s chosen practice is evidently in line with the human rights-based theory of fiscal sociology that sees the priorities of a government as depicted in its spending priorities contained in the budgets.¹⁶⁰ Below I unpack the obligation on states to generate maximum available resources for ESRs financing, and how the same relates with tax incentives policies.

3.3.2 Maximum available resources: Economic and social rights financing and tax incentives

Away from the broader human rights obligations, there is need to analyse the specific financing obligations introduced by article 2 of the CESCRC. Before I turn to the specifics, it is important to note broadly that the CESCRC was the first instrument to focus on ESRs and recognise that, unlike civil and political rights, the former could be realised progressively and not as immediately as the latter.¹⁶¹ The recognition of progressive realisation of ESRs is premised on

¹⁵⁸ Waris (n 124) 47, see also sect 1.8.2 and 2.1 of the thesis.

¹⁵⁹ Waris (n 124) 104.

¹⁶⁰ JA Schumpeter ‘The Crisis of the Tax State’ in R Swedberg (Ed) *Joseph A Schumpeter: The Economics and Sociology of Capitalism* (1991) 100.

¹⁶¹ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (eds) in *Research Handbook on*

of the rights themselves. Civil and political rights on the one hand are perceived to be cost-free, negative rights, possible of immediate realisation, and justiciable among other attributes.¹⁶² ESRs on the other hand are considered as positive rights, expensive, not justiciable, and subject to the principle of progressive realisation.¹⁶³ There is however an exception for ESRs that are classified as minimum core obligations.¹⁶⁴ The other exceptions that have been developed by jurisprudence especially from South Africa is the fact that courts will assess the reasonableness of the measures adopted to realise ESRs in determining whether or not to hold a state in violation.¹⁶⁵ This is known as the reasonableness review approach.¹⁶⁶ Regardless of the approach or principle adopted, it is important to highlight that many of the ESRs instruments create obligations that require implementation, which calls for the availability of resources, with fiscal policies and laws as imperative in their generation.¹⁶⁷ ‘In this context, there is a concern that fiscal policy and tax laws, through tax incentives, lead to countries effectively giving up some of their potential financial resources’.¹⁶⁸ The concern is even more amplified when many policy framers and implementing stakeholders do not take fiscal policy specifically regarding tax incentives as human rights issues. The CESCR decisively provides that (own emphasis):¹⁶⁹

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to *the maximum of its available resources*, with a *view to achieving progressively the full realization* of the rights recognized in the present Covenant by *all appropriate means*, including particularly *the adoption of legislative measures*.

Of relevance to this discourse is the issue of what amounts to ‘maximum available resources’, ‘progressive realisation of rights’, and ‘all appropriate means’ as well as how tax incentives

International Law and Social Rights 19. All instruments providing for civil and political rights indicate urgency or the requirement to realise these rights immediately as opposed to those providing for ESRs. The ESRs exception is with rights classified as minimum core obligations as discussed in chapter one, sect 1.8.3 of the thesis.

¹⁶² V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder (n 161 above) 20; A Titus & T Gutuza ‘The Relationship between Tax Incentives and Human Rights Obligations in the Drive to Attract Foreign Direct Investment: Are Developing Countries in Africa Getting it Right? Foreign Direct Investment and the Law: Perspectives from Selected African Countries’ (2018) *Acta Juridica* 149 156 & C Mbazira ‘A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa’s Development’ (2004) 4 *African Human Rights Law Journal* 37 & 38.

¹⁶³ As above, Waris & Kohonen (n 134 above) 2, 7 & S Darcy “‘The Elephant in the Room’”: Corporate Tax Avoidance & Business and Human Rights’ (2017) 2 *Business and Human Rights Journal* 1 88.

¹⁶⁴ See discussion under sect 1.8.3 of chapter one of this thesis.

¹⁶⁵ This I discuss in detail in sect 1.8.3 of the thesis.

¹⁶⁶ As above.

¹⁶⁷ A Titus & T Gutuza ‘The Relationship between Tax Incentives and Human Rights Obligations in the Drive to Attract Foreign Direct Investment: Are Developing Countries in Africa Getting it Right? Foreign Direct Investment and the Law: Perspectives from Selected African Countries’ (2018) *Acta Juridica* 149 155.

¹⁶⁸ As above.

¹⁶⁹ Art 2(1) of the CESCR, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, (accessed 13 March 2021). (Own emphasis).

affect these principles. These concepts are critical to establishing the level of compliance yet they inherently have interpretation challenges. The first two phrases, ‘maximum available resources’ and ‘progressive realisation’ are problematic especially with regards to how to measure states’ compliance since they are incapable of definite interpretation.¹⁷⁰ The above highlighted provision has been interpreted to mean that it requires states to prove both progressive (as there must be a demonstration of progress with the realisation of the rights) and the conditional (on available resources).¹⁷¹ I find this to be contradictory.

The contradiction aside, there have been attempts to expound on the concept of ‘maximum available resources’ using the broader human rights context beyond the ‘fiscal and monetary space used by economists’.¹⁷² The concept is considered to relate to public revenue, expenditure, borrowing, development assistance, among other aspects.¹⁷³ The focus of the study is largely on public revenue, and expenditure. Notably, there is a call on states to pay particular attention to how the concept is applied, especially in times of resource scarcity, with a focus on ESRs realisation.¹⁷⁴ The concept has been interpreted by several committees and experts, including some that consider the role of taxation in the discourse.¹⁷⁵ Relatedly, several approaches have been adopted to explain the meaning of these terms. For example, regarding the term ‘progressive realisation of ESRs’, a formula for determining government expenditure priorities has been advanced.¹⁷⁶ This is done by comparing the ratio of public expenditure on particular economic or social rights as a ratio of GDP, as compared to civil and political rights.¹⁷⁷ Accordingly the results would be a good litmus test in determining the public finance priorities of any given government.

Aside from the principle of ‘progressive realisation of ESRs’, taxation plays an important role in the realisation of the ‘maximum available resources’ domestically, and as such tax

¹⁷⁰ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 21.

¹⁷¹ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 20.

¹⁷² As above.

¹⁷³ As above. See also para 26 of the Limburg Principles (n 60 above).

¹⁷⁴ As above.

¹⁷⁵ D Elson, R Balakrishnan & J Heintz ‘Public Finance, Maximum Available Resources and Human Rights’ in A Nolan, R O’Connell & C Harvey (n 133) 14-17.

¹⁷⁶ D Elson, R Balakrishnan & J Heintz ‘Public Finance, Maximum Available Resources and Human Rights’ in A Nolan, R O’Connell & C Harvey (n 133) 22.

¹⁷⁷ As above.

avoidance, evasion, and tax havens undermine the same.¹⁷⁸ There however exists challenges as to the way an assessment of the term ‘maximum available resources’ is made.¹⁷⁹ Questions arise as to who is qualified to make that evaluation, how is it made, and what is the impact of scarcity measures on the evaluation?¹⁸⁰ In response to the above inquiries, there is general consensus by scholars and the Committee on ESCR that states are given the ‘margin of appreciation’ in deciding the steps to take to achieve ESRs obligations.¹⁸¹ While the ‘margin of appreciation’ considers the individual governments’ circumstances, the assessment on whether the steps taken are sufficient should be left to the Committee on ESCR.¹⁸² At the national level, the Committee on ESCR notes that such decisions should not be left to the politicians, but that the judiciary would be an appropriate forum to assess compliance, hence making these questions justiciable.¹⁸³ In my view, this position presumes that public interest or human rights enforcement cases will be instituted to challenge resources related actions and omissions. It additionally assumes that the judiciary will be independent enough and substantially grounded in matters human rights to adjudicate the same fairly and competently, especially from a human rights perspective. The same also presumes capacity on the part of the judiciary to make the connection between fiscal policy and ESRs realisation. I review some of these cases in chapter five to establish the truth in these assumption.¹⁸⁴

The above standards aside, resources in this context are not limited to internally generated ones, but include others at the states’ disposal such as from international assistance.¹⁸⁵ Relying on international assistance should, however, be taken with caution as domestic resources have been found to be more sustainable.¹⁸⁶ It must be emphasised here that the focus of this study is not on resources from international assistance. The question on how the evaluation of

¹⁷⁸ D Elson, R Balakrishnan & J Heintz ‘Public Finance, Maximum Available Resources and Human Rights’ in A Nolan, R O’Connell & C Harvey (n 133) 26 & 27.

¹⁷⁹ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil’ In C Binder *et al* (n 161 above) 26.

¹⁸⁰ As above.

¹⁸¹ This is in line with para 20 of the Limburg Principles (n 60 above); V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 27.

¹⁸² As above.

¹⁸³ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 27.

¹⁸⁴ See for example the case of *Hon. Issa Kikungwe and another Vs. AG* Constitutional Petition No. 30 of 2006 discussed in detail in sect 5.3 of this thesis.

¹⁸⁵ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 24, see also para 26 of the Limburg principle (n 60 above).

¹⁸⁶ O’Hare (n 138 above) 1.

‘maximum available resources’ is made is answered by looking at the sufficiency (resource mobilisation) and efficiency (resource usage).¹⁸⁷ These two critical aspects are at the heart of this study and essential to the human rights-based theory of fiscal sociology.

Still with the principle of ‘maximum available resources’, a three criteria test has been developed to assess the realisation of the principle. The first test is based on ‘quantitative, calculable criteria’ largely relying on GDP and financial resource allocations in national budgets.¹⁸⁸ The second approach is qualitative and employs soft indicators like the level of development, and the economic situation of the country among others.¹⁸⁹ And the third approach emphasises the procedural aspects and considers the decision-making process at the national level.¹⁹⁰ This assesses how transparent and participatory the decision making processes are.¹⁹¹ All the three approaches have their merits and challenges. It is therefore recommended that an integrated approach is adopted so as to maximise the merits and at the same time mitigate the challenges. The quantitative approach is, for example, considered to be easier to apply but structurally costly while the qualitative approach may be more comprehensive and yet subjective.¹⁹² The procedural approach is presumed to ignore the substantive indicators and thus leaves much discretion with the state.¹⁹³ Without a proper method of assessment, it will be difficult for states to ascertain their compliance with the principle of ‘maximum available resources’.

Equally relevant to this discussion is the impact of the scarcity of resources on the assessment of the ‘maximum available resources’ approach. Scholars have stressed that even in the situations of lack, there are obligations that must be met.¹⁹⁴ These include the obligation ‘to take steps’, obligation not to discriminate, the realisation of the minimum core obligations of the rights, and to ensure that the rights of the vulnerable persons including children are respected.¹⁹⁵ The concept of ‘maximum available resources’ has hence been seen as a great contradiction since ‘maximum’ connotes an ideal situation while ‘available’ demonstrates the

¹⁸⁷ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 27.

¹⁸⁸ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 28.

¹⁸⁹ As above.

¹⁹⁰ As above.

¹⁹¹ As above.

¹⁹² As above.

¹⁹³ As above.

¹⁹⁴ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 29.

¹⁹⁵ As above.

reality.¹⁹⁶ Resultantly, the human rights enthusiast will normally rely on and push for the aspect of ‘maximum’ while the state will most likely rely on and strongly argue for ‘available’ inevitably causing a conflict.¹⁹⁷ Poorly crafted tax incentives policies will affect both aspects of the principle. In Uganda’s context, chapter five examines these issues in a bid to establish the sufficiency of the current policy and legal framework in the generation of the ‘maximum available resources’ for the realisation of ESRs and the financing for UPE specifically.¹⁹⁸

Incidentally, the legislative obligation in a way also reinforces the financing obligations. The Committee on ESCR underscores the need to take all the appropriate steps including legislative measures as a starting point for the realisation of the rights under the covenant.¹⁹⁹ In the current context, tax policy and legislation play a critical role in the generation of resources for the realisation of ESRs. Regressive tax policies and laws lead to wasteful tax expenditure and are as such a violation of this obligation. In chapters four and five, I analyse how these have affected the financing for UPE, particularly as a component of the right to basic education.²⁰⁰

Furthermore, the concept of ‘maximum available resources’ requires the use of all appropriate means at the disposal of a state party to progressively realise the rights under the covenant, which are not classified as the minimum core obligations.²⁰¹ The CESCR makes a distinction between the rights that should be realised immediately on one hand and those to be progressively realised on the other.²⁰² The Committee on ESCR additionally calls upon state parties to be cautious, and to examine any regressive steps taken which should be last resort measures, bearing in mind the principle of ‘maximum available resources’.²⁰³ Indeed states may be called upon by the Committee on ESCR to justify whether the grant of the tax incentives was the ‘least restrictive option available’ in case a country undertakes budgetary cuts that would have financed ESRs.²⁰⁴ The discussion on tax incentives in chapter five demonstrates that Uganda has not realised the ‘maximum available resources’ using the fiscal structure and

¹⁹⁶ V Bilkova ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligation to respect, protect and fulfil.’ In C Binder *et al* (n 161 above) 30.

¹⁹⁷ As above.

¹⁹⁸ Sect 5.3 & 5.4 of the thesis.

¹⁹⁹ Art 2 of CESCR is interpreted in General Comment 3 of CESCR. Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23), available at <https://www.refworld.org/pdfid/4538838e10.pdf> (accessed 13 March 2021). See Paragraph 3 of the General Comment 3 of the Committee on ESCR.

²⁰⁰ Sect 4.3 & 5.5 of the thesis.

²⁰¹ Para 9 and 10 of General Comment 3 Committee on ESCR. See also para 26 of the Limburg (n 60 above).

²⁰² Titus & Gutuza (n 168 above)154.

²⁰³ Para 9 of General Comment 3 of the Committee on ESCR.

²⁰⁴ Titus & Gutuza (n 168 above) 158.

policy.²⁰⁵ This shortfall is partly blamed on fiscal policies on tax incentives, which ignore the human rights-based theory of fiscal sociology.

Moving on to the third principle, the question of what amounts to ‘all appropriate steps’, is buttressed by the background information contained in the *travaux préparatoires* of the CESCR. Emphatically, the phrases ‘all necessary measures’ and by implication ‘maximum available resources’ were to include sound fiscal policies.²⁰⁶ These aim at ensuring the realisation of the rights by, for example, granting tax incentives that ensure the realisation of ESRs.²⁰⁷ Amidst resources scarcity, I argue that it would be more strategic for tax incentives to be granted to investments that contribute to the realisation of ESRs. This does not seem to be a policy consideration currently as the motivation continues to be largely economic, or political as is discussed in chapter five.²⁰⁸ In the past, income tax related incentives were granted to investors of private schools, but this, as discussed in detail in chapter four, did not make basic education affordable. This was subsequently scrapped, although in the 2021 tax bills discussion some legislators attempted to re-introduce the same proposal past the committee stage, with little success.²⁰⁹

Comparably, the *travaux préparatoires* provides that ‘a clear goal of the treaty was to hold states accountable for their failing policies, like those of the UK, which deprive the poor of economic, social, and cultural rights’.²¹⁰ The United Kingdom (UK) adopted a flat rate on consumption taxes that was regressive and hurt the poor more.²¹¹ Consequently, a fiscal policy that does not yield enough resources for the realisation of ESRs is a violation of the covenant.²¹² It is my considered opinion that, a state would be in breach for the failure to use its fiscal policy to generate enough resources for its citizens to have access to, for example, health care or education, while it prioritises the grant of tax incentives to FDI. The failure to make resources

²⁰⁵ See sect 5.5 of the thesis.

²⁰⁶ See the U.N. ESCOR, Comm’n on Human Rights, 8th Sess., Summary record of the 294th meeting held at headquarters, New York, U.N. Doc. E/CN.4/SR.294 (May 14, 1952); U.N. ESCOR, Comm’n on Human Rights, Summary record of the 21st meeting held at 7 Palais des Nations, Geneva, U.N. Doc. E/CN.4/SR.221 (7 June 1951) & U.N. ESCOR, Comm’n on Human Rights, Summary record of the 294th meeting.

²⁰⁷ (n 202 above).

²⁰⁸ See sect 5.1 & 5.4 of the thesis.

²⁰⁹ See Parliamentary Hansards of 29 April 2021 available at <https://www.parliament.go.ug/documents/5064/hansards-2021-april> (accessed 29 November 2021).

²¹⁰ Donald (n 37) 562.

²¹¹ As above.

²¹² As above

available due to poor tax incentives policies is as good as a failure to ensure the realisation of ESRs.

3.4 The effect of tax incentives on the financing obligation for economic and social rights

Drawing from the discussion above, the concept of ‘maximum available resources’ under article 2 of the CESR places public finance in the human rights realm because the obligation on states affects their DRM and expenditure priorities.²¹³ This is what the proponents of the modified human rights-based theory of fiscal sociology envisaged. Although revenue for the realisation of ESRs can be generated through several alternative ways besides taxation, the latter is critical in many aspects but especially since it establishes the civic social contract. This justifies the calls by citizens for greater accountability from the state.²¹⁴ From the social contract, ‘human rights provide the content of that contract *while* taxation provides the means of its implementation’.²¹⁵ It is partly because of this concept that tax revenue for the realisation of ESRs becomes crucial to this study. It would, for example, be a breach of the social contract if a few people are left to contribute heavily to the revenue base simply because of many potential taxpayers being unjustifiably exempted in ways that affect the capacity of the state to deliver on its side of the bargain. In this regard, the effects of tax incentives include; firstly, that they negatively affect the capacity of the state to deliver on its social contract which breeds taxpayer apathy and subsequent revenue losses and leakages.

Secondly, the concept of ‘maximum available resources’ discussed in detail above is understood to mean that until states have done their best to progressively amend and implement their PFMF, fiscal policy, and processes, it cannot be said that all steps were taken by such states to realise ESRs.²¹⁶ To this end, progressive tax incentives policies are pivotal for states to demonstrate that everything within their means and power has been done to realise ESRs, through appropriate financing. Additionally, prudent tax mobilisation strategies are reasonably

²¹³ Schutter (n 12 above) 5.

²¹⁴ Schutter (n 12 above) 6, See also the Lima Declaration on Tax Justice and Human Rights, The Lima Declaration emerges from the international strategy meeting, ‘Advancing Tax Justice through Human Rights,’ held in Lima, Peru in 2015, convened by the Center for Economic and Social Rights, the Global Alliance for Tax Justice, Oxfam, Red Latinoamericana sobre Deuda, Desarrollo y Derechos (LatinDADD), Red de Justicia Fiscal de América Latina y el Caribe and the Tax Justice Network 1 available at [https://www.cesr.org/sites/default/files/Lima Declaration Tax Justice Human Rights.pdf](https://www.cesr.org/sites/default/files/Lima%20Declaration%20Tax%20Justice%20Human%20Rights.pdf) (accessed 8 June 2021) & O’Hare (n 138) 57.

²¹⁵ P Alston & N Reisch ‘Fiscal Policy as Human Rights Policy’ in P Alston & N Reisch (eds) *Tax, Inequality and Human Rights* (2019) 19.

²¹⁶ Donald (n 37) 560.

available measures for states to ensure the realisation of ESRs regardless of the level of development.²¹⁷ States can therefore not continue to rely on their level of development as an excuse to justify the failure to actualise and ensure the realisation of ESRs, amidst evident wasteful tax expenditure. Tax incentive policies that violate/ignore human rights principles as such can be said to contribute to a regressive tax system and the violation of the principles of the social contract. The human rights-based theory of fiscal sociology is aimed at rectifying such.

Thirdly, accountability is central to tax incentive policies as it has implications for the realisation of states' ESRs obligations that their citizens are dependent on. Experts posit that 'the obligation of progressive realization means that resources allocated to the realisation of rights should increase proportionally to any overall increase in resources'.²¹⁸ The resource allocation progression depends on the increment in revenue, which tax incentives negatively affect. Based on the afore mentioned realisation and the other principles discussed above, a normative framework has been suggested for the Committee on ESCR to adopt, in assessing whether state parties' fiscal policies are human rights compliant.²¹⁹ Although this framework is on taxation broadly, tax incentives are relevant to this assessment as is discussed herein below.

The need to widen the tax base is critical for the generation of sufficient domestic resources for the realisation of ESRs.²²⁰ This comes from appreciating that:²²¹

...if all developing countries were able to raise 15 percent of their national income in tax, a commonly accepted minimum figure (the OECD average is 37 percent), they could realize at least an additional \$198 billion per year more than all foreign development assistance combined.

Accordingly, 'eliminating entirely, favourable fiscal treatment granted to foreign investors in order to attract capital', would go a long way in achieving a wider tax base since, as discussed

²¹⁷ As above.

²¹⁸ UN OHCHR (n 35) 53.

²¹⁹ Schutter (n 12) 6.

²²⁰ As above.

²²¹ Schutter (n 12) 6 & 7, See also Para 56 of the Report of the former Special Rapporteur on extreme poverty and human rights, (n 13 above) (citing ActionAid, *Accounting for Poverty: How international tax rules keep people poor*, 2009, 5).

before, tax incentives are largely inconsequential in FDI decisions.²²² It has, therefore, been suggested that:²²³

...if there is one means through which revenues from taxation could increase rather painlessly (and at a relatively low administrative cost), it is by raising the taxes owed by foreign corporations operating in the country, or by closing loopholes, such as price transfer mechanisms, allowing such corporations to escape local taxes, if not entirely, at least to a very large extent.

Tax incentives as part of a country's fiscal policy, especially for FDI, conclusively contradict the efforts to widen the tax base through taxing foreign investors appropriately. Such policy aspects and practises negatively affect taxpayers' morale as the tax burden is unfairly left to small pockets of the population.²²⁴

Fourthly, as has been underscored before, wasteful tax expenditure in the form of tax incentives affects the capacity of the state to meet its 'maximum available resources' obligations for the realisation of ESRs.²²⁵ Without proper justification for exempting or incentivising foreign investors, tax incentives become unreasonably discriminatory at the expense of revenues for the realisation of ESRs, including financing for UPE as a component of basic education. The GPs on HRs in FP advocate for granting of tax incentives that 'eradicate discrimination and promote substantive equality, and the effective use of resources or fiscal exemptions that favour these (*marginalised*) groups'.²²⁶ Relatedly, states are called upon to desist from irrational and discriminatory fiscal policy and instead use tax incentives for affirmative action to lift vulnerable groups in 'public interest'.²²⁷ Even then, 'Criteria must be established by means of an appropriate public consultation; they must be transparent and subject to public scrutiny, and, in case of controversy, to legal review in order to avoid discrimination'. Chapter five assesses the extent to which Uganda's legal and policy framework on tax incentives complies with the above conditions.²²⁸

²²² Schutter (n 12 above) 7, A Shahid 'For Want of Resources: Reimagining the State's Obligation to Use 'Maximum Available Resources' for the Progressive Realisation of Economic, Social and Cultural Rights' (2016) PhD thesis, University of Sydney 145 available at https://ses.library.usyd.edu.au/bitstream/handle/2123/14369/shahid_a_thesis.pdf?sequence=5&isAllowed=y (accessed 5 June 2021). See also sect 1.8.1 of the thesis.

²²³ Schutter (n 12 above) 7.

²²⁴ KII with Mr. Festus Akunobera held in Kampala on 21 April 2021. See also KII with Ms. Regina Navuga of SEATINI.

²²⁵ UN OHCHR (n 35) 29.

²²⁶ Principle 5.1 of the GPs on HRs in FP.

²²⁷ Principle 5.2 of the GPs on HRs in FP.

²²⁸ See sect 5.3 & 5.4 of the thesis.

Lastly on the effects of tax incentives on ESRs realisation and connected to the above are the effects of tax incentives on the desired progressive tax structure. Tax incentives that assist the haves against the have nots in society contribute to a regressive tax structure, which further reduces incomes of the poor and vulnerable households.²²⁹ Experts advocate for tax incentives to be granted to marginalised tax payers who have ‘suffered from historical or persistent discrimination’.²³⁰ This is seen as a form of affirmative action.²³¹ In a private sector-led economy such as Uganda, disposable income is essential for the realisation of ESR obligations. Accordingly, the former United Nations Special Rapporteur on extreme poverty and human rights notes that tax incentives decisions affect income and assets allocations between people and as such contribute to the level of fairness and ESRs realisation.²³²

In chapter five I argue that despite the affirmative action considerations aimed at attracting local investors into particular sectors, these have not achieved the desired outcomes as the capital thresholds are still high for an average citizen owned or controlled small and medium enterprise (SME).²³³ As a result, the legal and policy framework on tax incentives has mainly benefited foreign investors, at the expense of vulnerable taxpayers and the loss of potential revenue for ESRs financing.²³⁴ The Committee on ESCR has emphasised the need for states to scrutinise their tax policy so that they do not contribute to social inequality or negatively affect the ability of the state to generate sufficient revenue for ESRs realisation.²³⁵ Elsewhere, examples are given of the UK, which as a result of reducing the CIT and increasing the VAT rates, the poor and marginalised were negatively affected most.²³⁶ The effects were in the form of increases in the tax incidence and ultimately, negatively affecting the capacity of the vulnerable to realise ESRs.²³⁷ Decisively, DRM strategies are as pivotal as the spending policies and priorities for ESRs realisation, as it is possible that even with a fair tax structure,

²²⁹ Schutter (n 12 above) 7; See para 17 of the report of the former Special Rapporteur Special Rapporteur on Extreme Poverty and Human rights, Mr Philip Alston, to the 29th session of the Human Rights Council (A/HRC/29/31) (26 May 2015).

²³⁰ Schutter (n 12 above)7; Para 16 of the report of the former Special Rapporteur on Extreme Poverty and Human rights, Mr Philip Alston.

²³¹ Schutter (n 12 above) 7.

²³² Para 53 of the report of the former Special Rapporteur Special Rapporteur on Extreme Poverty and Human rights, Mr Philip Alston.

²³³ See sect 5.4 of the thesis.

²³⁴ As above.

²³⁵ See Committee on Economic, Social and Cultural Rights, Concluding Observations: The United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016), para. 16.

²³⁶ As above.

²³⁷ As above.

the revenues generated may not be utilised for the benefit of the poor and vulnerable.²³⁸ The principles of transparency, accountability, access to information, and public participation discussed in section 3.1 of the study thus become essential. These are at the heart of the human rights-based theory of fiscal sociology. Ultimately, tax incentives have both direct and indirect negative impacts on ESRs realisation.

3.5 Conclusion

Central to this chapter is the relationship between tax incentives and ESRs realisation. To establish this, it is important to note that the fiscal policy on tax incentives is part and parcel of states' public policy, and ought to be human rights compliant for it to meet its objectives. These include DRM and ensuring that the poor and marginalised have enough resources for ESRs realisation, among others. This is central especially in economies, such as Uganda where the state largely relies on the private sector to realise ESRs. The need for the fiscal policies on tax incentives to be human rights compliant thus becomes more crucial as this goes beyond the financing obligations on states, to the capacity of citizens to afford ESRs in an unregulated neo-liberal economy. Fiscal policies on tax incentives that violate core human rights principles affect the realisation of human rights in two ways: by either reducing the states' finances and/or the citizens' disposable income for ESRs realisation. The study highlights the need to respect the principles and processes of accountability, transparency, public participation, and access to information in fiscal policy formulation, implementation, monitoring, and evaluation. These processes ought to reflect critical human rights standards as the human right-based theory of fiscal sociology recommends.

Specific to tax incentive policies, I find that there are several human rights obligations relevant to this discussion. These include the tripartite obligation to respect, protect, and fulfil, and the obligations to conduct and of results. The obligation to progressively realise ESRs using the maximum available resources and other appropriate measures, the right to citizen participation and self-determination are other overarching human rights principles that cannot be avoided during tax incentives policy discussions. As such, tax incentive policies or laws that are oblivious of such principles ultimately lead to ESRs violations either directly or indirectly.

²³⁸ Schutter (n 12 above) 7.

Lastly, the international human rights obligation to progressively realise ESRs using the maximum available resources, is dependent on the kind of fiscal policy choices, especially the ones on the tax incentives that states adopt. It is therefore important that states interpret their domestic fiscal policy and legal framework bearing in mind wider human rights obligations that they have committed to and are bound by. This is what the promoters of the human rights-based theory of fiscal sociology envisaged. The failure to do so leads to the violation of human rights as the financing of ESRs is as critical as the legal and policy framework for ESRs realisation. For purposes of this study, financing is interpreted both as an implied obligation on states as well as a necessity for the substantive realisation of ESRs.

Chapter Four

The right to basic education in Uganda: The status of the realisation of free and compulsory universal primary education and the role of resources

4.0 Introduction

Given the intrinsic relationship between tax incentives and economic and social rights (ESRs) discussed in the preceding chapter,¹ the failure to prioritise the realisation of the latter as justiciable rights that require substantial resources, continues to hurt states including Uganda. The failure to prioritise has affected the fiscal policy narrative, especially the domestic revenue mobilisation (DRM) strategy. The current tax incentives framework as discussed in chapter three relegates the state's obligation to protect, respect, and fulfil ESRs through adequate financing majorly.² It additionally breaches critical human rights standards and obligations, which in turn negatively affect the realisation of ESRs.³

To highlight the impact of such fiscal decisions, in this chapter, I navigate through the focus of this study which is the right to basic education in Uganda. Specific focus is placed on the status of the free and compulsory universal primary education (UPE), and how resources affects its realisation. This reflects the solid conclusion in chapter three that a right only becomes a reality if and when there are corresponding resources for its actualisation.⁴

To respond to the specific research question, this chapter adopts the approach of reviewing primary and secondary sources, and one key informant interview (KII). An in-depth purposive KII was conducted with the Commissioner of Basic Education in the Ministry of Education and Sports (MoES) to establish the extent of the realisation of the free and compulsory UPE, as a component of the right to basic education in Uganda, the challenges faced, and the status of financing. The KII was instrumental in triangulating the data on UPE financing given the difficulties of ascertaining the actual appropriations from the primary sources. Before I discuss the focus of the chapter, I start by reviewing the applicable legal framework on the right under study below.

¹ See sect 3.2, 3.3 & 3.4 of the thesis.

² Sect 3.1, 3.2 & 3.3.1 of the thesis.

³ See sect 3.4 of the thesis specifically.

⁴ Sect 3.3.1 of the thesis.

4.1 The legal obligation of the right to basic education in Uganda

The right to basic education is part and parcel of the right to education, although the former entails higher obligations as a minimum core obligation.⁵ As such, the discussion in this chapter may refer to the broader right to education where appropriate. The right to education has, for example, traditionally been treated as a special ESR because of its pivotal role in the realisation of civil and political rights, and since it ‘epitomizes the indivisibility and interdependence of all the human rights’ principle.⁶ Below I review the international instruments and soft law standards that provide for the right to education, and those that elaborate the specific obligations that accrue from the right to basic education distinctively.

4.1.1 The International legal framework on the right to basic education

a) The Universal Declaration of Human Rights⁷

The Universal Declaration of Human Rights 1948 (Universal Declaration) though a declaration, has attained the status of international customary law since its provisions are replicated in several international and domestic instruments.⁸ Before the Universal Declaration,

⁵ Para 10 of General Comment No. 3 of the Committee on Economic, Social and Cultural Rights (Committee on ESCR) introduces the concept of the right to basic education as a component of the right to education which must be immediately realisable as a minimum core obligation. See definition of the minimum core obligations in the glossary of terms.

⁶ UN Committee on Economic, Social, and Cultural Rights (Committee on ESCR), General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), 10 May 1999, E/1992/23 para 2 available at <https://www.refworld.org/docid/4538838c0.html> (accessed 16 September 2019); see also KD Beiter ‘Why neoliberal ideology, privatisation, and other challenges make a reframing of the right to education in international law necessary’ (2022) *The International Journal of Human Rights* 10, available at <https://www.tandfonline.com/doi/pdf/10.1080/13642987.2022.2131773?needAccess=true> (accessed 9 November 2022) and K. Tomaševski ‘Human rights obligations: making education available, accessible, acceptable and adaptable’ (2001) *Right to Education Primers No. 3* 8 available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf (accessed 18 September 2019).

⁷ Adopted by the United Nations General Assembly at its third session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France available at <https://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx> (accessed 1 September 2019).

⁸ See KD Beiter ‘Why neoliberal ideology, privatisation, and other challenges make a reframing of the right to education in international law necessary’ (2022) *The International Journal of Human Rights* 3 & 4, available at <https://www.tandfonline.com/doi/pdf/10.1080/13642987.2022.2131773?needAccess=true> (accessed 9 November 2022) & H Hannum ‘The UDHR in National and International Law’ (2014) 3.2 *Health and Human Rights, JSTOR* 144 148 available at <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/04/16-Hannum.pdf> (accessed 19 September 2019); see also H Hannum ‘The Status of the Universal Declaration Of Human Rights in National and International Law’ (1996) 25 *Georgia Journal of International and Comparative Law* 287 289 available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1396&context=gjicl> (accessed 1 April 2022); Art 38(1) of the Statute of the International Court of Justice

the right to education was largely viewed as a natural and legal right rather than a human entitlement.⁹ The Universal Declaration pays special focus on elementary and fundamental education being free and compulsory for all.¹⁰ This is in line with the obligations that arises towards ensuring the right to basic education and is the basis for free and compulsory primary education. The focus of the right to education partly stems from the significant role that it plays in the realisation of other human rights. The role includes the full development of one's personality, strengthening the respect for human rights, building peace, friendship, and avoiding discrimination.¹¹ Human rights and social justice education at all levels become critical to this end.¹² Furthermore, education positively contributes to the global economy, human welfare, democracy, the realisation of the health of populations, and income and wealth redistribution.¹³ As such, education contributes to the realisation of the human rights-based theory of fiscal sociology especially given its role in enhancing citizens' welfare and the attainment of other human rights. Notably, primary education is essential in instilling the values of hard work for the good of all, and encouraging harmonious living. Given these overarching roles, primary education should not be viewed only as a vehicle to secondary education.¹⁴ Once such values mentioned above are not attained at primary school level, further education,

available at <https://www.icj-cij.org/en/statute> (accessed 5 September 2019); FW Juuko & C Kabonesa 'Universal Primary Education (U.P.E) in Contemporary Uganda: Right or Privilege?' (2007) *HURIPEC Working Paper* 8 12.

⁹ R Lindahl 'The Right to Education in a Globalized World' (2006) 10.1 *Journal of Studies in International Education* 5 6 available at <https://journals-sagepub-com.uplib.idm.oclc.org/doi/pdf/10.1177/1028315305283308> (accessed 23 September 2019).

¹⁰ Art 26(1) of the Universal Declaration, see also J Spring *The Universal Right to Education Justification, Definition, and Guidelines* (2000) 1 & 2.

¹¹ Art 26(2) of the Universal Declaration, see also See Para 4 of General Comment 13 of the Committee on ESCR (adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999) available at <https://www.refworld.org/pdfid/4538838c22.pdf> (accessed 2 September 2019) and J Spring *The Universal Right to Education Justification, Definition, and Guidelines* (2000) 1 & 2; See also Para 33 of the Vienna Declaration and Programme of Action, 1993 available at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 13 November 2021).

¹² Para 33 and 80 of the Vienna Declaration and Programme of Action, 1993 available at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 13 November 2021); See also para 2 of the Plan of Action for the United Nations Decade for Human Rights Education, 1995-2004 (1996) available at [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionfortheUnitedNationsDecadeforHumanRightsEducation,1995-2004\(1996\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionfortheUnitedNationsDecadeforHumanRightsEducation,1995-2004(1996).aspx) (accessed 13 November 2021).

¹³ AC Onuora-Oguno *Development and the Right to Education in Africa* (2019) 56 & J Spring *The Universal Right to Education Justification, Definition, and Guidelines* (2000) 1.

¹⁴ J Ekaju 'The impact of the 1997 universal primary education (UPE) policy on lifelong learning in Uganda: a decade of UPE reforms (1997-2007)' (2011) 30.1 *International Journal of Lifelong Education* 37 39 available at <https://www.tandfonline-com.uplib.idm.oclc.org/doi/pdf/10.1080/02601370.2011.538172?needAccess=true> (accessed 13 November 2021).

including secondary training may not contribute that much. Consequently, basic education should be fulfilling rather than viewed as a quick stepping stone to secondary school.

Despite the normative framework discussed above, it is important to note that the Universal Declaration was negotiated and adopted in haste without much thought on how the right would apply to people of different historical backgrounds and cultures.¹⁵ To date, the universal nature of the Universal Declaration has affected its understanding and implementation.¹⁶ For example, the focus in article 26(2) is not what the primary education curriculum is preoccupied with in Uganda.¹⁷ Although the state has made strides to incorporate human rights in the curriculum, these are still not deliberate, they are meagre and are in their infancy. The other gaps with the existing international law framework on the right to education which include the failure to cover inclusive education more expressly, not underscoring the right to long-life learning, and neglect of early childhood education.¹⁸

With the shortcomings of the Universal Declaration mentioned above, scholars have attempted to gauge the intentions of its drafters by clothing the right with content. It is, for example, noted that although the Universal Declaration mentions ‘education’ and not ‘schools’, both terms are essential in achieving the right as there is more to education that happens in schools.¹⁹ The more includes health and feeding, among others, and yet much of ‘education’ happens out of school, in homes and communities.²⁰ As a result, focus should be placed on the adequacy of physical schools, as well as recognising the role of families and communities in the realisation of the right to education.

¹⁵ Spring (n 13 above) 4.

¹⁶ As above.

¹⁷ Art 26(2) provides that ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 16 July 2022).

¹⁸ KD Beiter ‘Why neoliberal ideology, privatisation, and other challenges make a reframing of the right to education in international law necessary’ (2022) *The International Journal of Human Rights* 2, available at <https://www.tandfonline.com/doi/pdf/10.1080/13642987.2022.2131773?needAccess=true> (accessed 9 November 2022).

¹⁹ T McCowan ‘Reframing the universal right to education’ (2010) 46.4 *Comparative Education* 509 512 available at <http://www.jstor.org/uplib.idm.oclc.org/stable/25800021> (accessed 20 March 2019).

²⁰ McCowan (n 19 above); Berger, E ‘The Right to Education under the South African Constitution’ (2003) *Columbia Law Review* 103.

Given the different aspects of the right to education, parents are critical stakeholders in deciding the type of education their children are to receive.²¹ This encompasses the civil and political aspects of the right, that is, freedom of choice.²² This choice could be a fallacy in the rural, remote, and poor parts of Uganda where the government's investment in primary schools is limited and there is a general lack of the bare economic minimum means to afford it privately.²³ Despite these shortcomings, the Universal Declaration is comprehensive and many of the subsequent international law standards on the right to education broadly and basic education specifically draw their inspiration from it as is discussed below.²⁴

b) The United Nations International Covenant on Economic, Social, and Cultural Rights²⁵

The International Covenant on Economic, Social and Cultural Rights 1966 (CESCR) devotes two articles to the right to education with article 13 being the most comprehensive provision on the subject in international human rights law.²⁶ It replicates the provision of the Universal Declaration on the right to education.²⁷ For its realisation, states should take steps including making primary education freely available and compulsory for all,²⁸ and encouraging fundamental education for persons who drop out before completing the cycle.²⁹ Equally essential is the development of schools at all levels, and improvement of the working conditions

²¹ Art 26(3) of the Universal Declaration, see also Spring (n 13 above) 1 & 2.

²² K Tomaševski 'Human rights obligations: making education available, accessible, acceptable and adaptable' (2001) *Right to Education Primers No. 3* 9 available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf (accessed 18 September 2019).

²³ N Mayengo *et al* 'The testimony of neoliberal contradiction in education choice and privatisation in a poor country: the case of a private, undocumented rural primary school in Uganda' (2015) 10.3 *Ethnography and Education* 293 294 available at <https://www.tandfonline-com.uplib.idm.oclc.org/doi/pdf/10.1080/17457823.2015.1050687?needAccess=true> (accessed 1 April 2021).

²⁴ McCowan (n 19 above) 511; Berger (n 20 above).

²⁵ International Covenant on Economic, Social and Cultural Rights (CESCR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of on 16 December 1966, entry into force 3 January 1976, Uganda ratified on 21 January 1987 available at <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (accessed 30 July 2019).

²⁶ See Para 2 of General Comment 13 of the Committee on ESCR (adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999) available at <https://www.refworld.org/pdfid/4538838c22.pdf> (accessed 1 August 2019). See also F Coomans 'Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches' (2004) 50 *Persona & DERECHO* 65.

²⁷ Art 13(1) of CESCR.

²⁸ Art 13(2)(a) of CESCR. See Beiter (n 18 above) 4.

²⁹ Art 13(2)(d) of CESCR.

of teachers.³⁰ The parental and legal guardian's freedom of choice for private schools, which are approved by the state, and the teaching of religious and moral education in accordance with learners' beliefs and conviction, are permitted.³¹ Equally permissible is the introduction of privately owned schools in accordance with the domestic set standards and the respect of the provisions in article 13(1) above.³² Despite this allowance, it ought to be emphasised that the primary obligation to ensure the realisation of basic education that is free and compulsory remains with the state.³³ In Uganda, the liberalisation of public education has raised critical concerns and affected the realisation of the right to basic education, majorly for the vulnerable. Among the concerns is: affordability by the vulnerable, the capacity of the state to regulate and supervise the private actors, including regulating the fees charged, and the quality and standard of teaching and the teaching facilitates, among others.³⁴ Liberalisation leads to a general laxity of the state to better the conditions in public schools given the availability of viable alternatives to the citizens.³⁵ Yet, it must be emphasised that these same alternatives are not affordable nor accessible to the poor and marginalised.³⁶ Of equal concern is the fact that the government of Uganda additionally embarked on a public-private partnerships (PPPs) model for the realisation of the right, which strategy has in equal measure been counterproductive especially for the learners on the margins.³⁷ Worse still, there has been a failure for adequate state control and

³⁰ Art 13(2)(e) of CESCR. See AC Onuora-Oguno *Development and the Right to Education in Africa* (2019) 56.

³¹ Art 13(3) of CESCR. See Beiter (n 18 above) 4.

³² Art 13(4) of CESCR.

³³ The Global Initiative for Economic, Social and Cultural Rights (GIESCRs) and the Initiative for Social and Economic Rights (ISER) 'Privatisation, Discrimination and the Right to Education in Uganda' Alternative Report Submitted by the Initiative for Social and Economic Rights and the Global Initiative for Social and Economic Rights (2015) 14 available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiN26Obg_fzAhVjhv0HHXu6CicQFnoECAIQAAQ&url=https%3A%2F%2Fwww.iser-uganda.org%2Fimages%2Fdownloads%2Fprivatisation_discrimination_and_right_to_education.pdf&usg=AOvVaw0e2si9ON-8BYgbhTZ03dFa (accessed 1 November 2021); See also K Tomaševski Manual on rights-based education, UNESCO (2004) 55.

³⁴ See F Higenyi & G Arinaitwe 'Impact of Privatization of Education Services in Uganda: Case study of Rural Women in Ibanda District' (2020) available at https://www.researchgate.net/publication/339536349_Impact_of_Privatization_of_Education_Services_in_Uganda_Case_study_of_Rural_Women_in_Ibanda_District (accessed 26 July 2022).

³⁵ As above.

³⁶ F Barrera-Osorio *et al* 'Impact of Public-Private Partnerships on Private School Performance Evidence from a Randomized Controlled Trial in Uganda' (2016) *Background Paper to the 2018 World Development Report 2 & 3* available at <https://documents1.worldbank.org/curated/en/470851480966927631/pdf/WPS7905.pdf> (accessed 13 August 2022) & GIESCRs & ISER (n 33 above) 5, 6 & 7.

³⁷ F Barrera-Osorio *et al* 'Impact of Public-Private Partnerships on Private School Performance Evidence from a Randomized Controlled Trial in Uganda' (2016) *Background Paper to the 2018 World Development Report 2 & 3* available at <https://documents1.worldbank.org/curated/en/470851480966927631/pdf/WPS7905.pdf> (accessed 13 August 2022); GIESCRs & ISER (n 33 above) 5 & 6. See also R Kyagulanyi & J Tumwebaze 'Effects of public private partnerships on education service delivery in Uganda: A comparative analysis of technical efficiency of secondary schools in Mukono district' 2 available at https://ucudir.ucu.ac.ug/bitstream/handle/20.500.11951/127/Kyagulanyi_Effects%20of%20public%20private%20

supervision of the government aided schools, as the founding bodies, by law, retain higher decision making powers despite the huge financial contribution from the national treasury.³⁸

To positively contribute to the realisation of the right to education, maintenance of standards, adequacy of supervision, and clear accreditation processes are key for privatisation of the education sector as demonstrated below:³⁹

Allowing anybody to set up an institution, call it a ‘school,’ carry out a programme called ‘education,’ and issue to learners pieces of papers called ‘diplomas’ which may turn out to be worthless is not the purport of international human rights law; it would constitute dereliction of governmental human rights obligations.

The above would be a violation of the obligations to respect, protect and fulfil the right to education.

The challenges highlighted above notwithstanding, education is essential to the lives of the most vulnerable such as women and children.⁴⁰ It protects them from sexual and labour related exploitation, contributes to population control, and promotes democracy, rule of law, good governance, as well as the protection of human rights and the environment, among others.⁴¹ States should value the investment in education given such ripple effects.⁴² Furthermore, education is part and parcel of the ‘empowerment rights’ that enable citizens to enjoy other rights by ensuring setting own goals and determining their sense of direction in life.⁴³ The foregoing explains the choice of the case study as the right to education and basic education are distinct hallmarks for the realisation of other rights more so for the vulnerable. Given the importance attached to education and basic education specifically, below I seek to establish the specific obligations on states to realise these rights; especially the latter which is the focus of this study.

Central to this discussion is the nature of obligations on states for the realisation of the right to basic education. It is important to note that originally, the strict interpretation of articles 13(2)(a), 14 and 2(1) implied that the right to free and compulsory primary education as a

[Opartnerships%20on%20education%20service%20%20%20delivery%20in%20Uganda_2015.pdf?sequence=1&isAllowed=y](#) (accessed 13 August 2022).

³⁸ KII with Dr. Mugenyi, Commissioner Basic Education, MoES, held in Kampala on 21 April 2021.

³⁹ Tomaševski (n 22 above) 18.

⁴⁰ See Para 1 of General Comment 13 of the Committee on ESCR (n 26 above).

⁴¹ As above.

⁴² As above, see also S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa* 1994 – 2008 (2009) 117.

⁴³ S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa* 1994 – 2008 (2009) 117.

component of basic education was subject to the principle of progressive realisation.⁴⁴ The developments at international fora through the works of the United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR) and the United Nations Committee on the Rights of the Child (Committee on the CRC), through studying state reports and their expertise in the field changed this position.⁴⁵ The resultant General Comments in effect establish free and compulsory primary education a component of basic education and as such an immediately realisable right.⁴⁶ Presently, General Comments are treated as binding and of great jurisprudential value because of the almost universal ratifications of the Convention of the Rights of the Child (CRC) and the CESCR.⁴⁷ The jurisprudence of their respective committees forms part of international law.⁴⁸ Many scholars and judicial decisions take this view, and many countries have domesticated the standards therein.⁴⁹ This view is also reinstated by the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1986 (Limburg Principles) that find these interpretative efforts by committees, Special Rapporteurs and other specialised agencies binding.⁵⁰ This study is based on this understanding as earlier pointed out in section 1.8.3 of chapter one.

Aside from the issue on which aspects of the right require immediate realisation, states are equally faced with the dilemma of determining what the right to education entails. To alleviate this, the Committee on ESCR has developed the ‘four As test’ to aid interpretation.⁵¹ The four As are availability, accessibility, acceptability, and adaptability. Below, I consider the understanding and nature of the application of each of these in the context of Uganda independently, especially with regard to how they affect the realisation of free and compulsory UPE.

⁴⁴ LN Murungi ‘Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation’ (2015) 18.1 *PER / PELJ* 3178 available at <http://www.scielo.org.za/pdf/pej/v18n1/08.pdf> (accessed 2 September 2019).

⁴⁵ As above.

⁴⁶ As above.

⁴⁷ Murungi (n 44) 3179. See also F Coomans ‘Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches’ (2004) 50 *Persona & DERECHO* 64.

⁴⁸ Para 5 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) (available at <https://www.escri-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (accessed 23 July 2021) & Murungi (n 44) 3179. See also art 38 of the Statute of the International Court of Justice 1945 available at https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (accessed 16 July 2022).

⁴⁹ As above.

⁵⁰ Para 5 of the Limburg Principles (n 48 above).

⁵¹ Para 6 of General Comment 13 of the Committee on ESCR (n 26 above). These were later developed by [Katarina Tomasevski](#), the United Nations Special Rapporteur on the Right to Education 1988-2004, who contributed to their wide visibility.

i) *Availability*

Availability presupposes the presence of ‘functioning’ schools and programmes at all levels that should be in ‘sufficient quantity’.⁵² Depending on the state’s level of development, the following is required to realise this component:⁵³

...buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.

Since the inception of UPE, Uganda has had challenges related to a poor learning environment characterised by inadequate infrastructure including poor sanitation, lack of sufficient furniture, classrooms, non-textbook teaching materials, and poor nutrition.⁵⁴ Resultantly, UPE schools face perennial learners’ absenteeism and high school dropout rates.⁵⁵ Also the shortage of classrooms is dire as learners are at times forced to take lessons from under trees or in open spaces.⁵⁶ This is predominant in the eastern and northern parts of the country.⁵⁷ The preceding shortage is only comparable to the teachers’ shortage, both of which negatively affect learning.⁵⁸ ‘The classroom situation is more serious than indicated by the limited evidence from

⁵² Para 6(a) of General Comment 13 (n 26 above).

⁵³ As above.

⁵⁴ K Nabuzale ‘Poor performance: Let’s stop the blame game and act’ *New vision* (Kampala) 23 January 2018 available at https://www.newvision.co.ug/new_vision/news/1469611/poor-performance-stop-blame-game-act (accessed 9 September 2019); see also NDP II (Adopted in July 2020 by the National Planning Authority (NPA). This is the third successive plan after NDP I and NDP II) 37; see also R Mugabe ‘How School Management Committees monitor the implementation of Universal Primary Education in Uganda’ (2018) University of Pretoria 3.

⁵⁵ As above.

⁵⁶ Uwezo Uganda ‘Are Our Children Learning? Illuminating the Covid-19 learning losses and gains in Uganda’ (2021) Uwezo National Learning Assessment Report, 202132 available at https://uwezo.org/wp-content/uploads/2022/01/Uwezo-2021Report-FINAL_Version.pdf (accessed 16 July 2022). See also Monitor ‘Gulu pupils study under trees’ 19 September 2015 available at <https://www.monitor.co.ug/uganda/news/national/gulu-pupils-study-under-trees-1624516> (accessed 13 August 2022) & Monitor ‘Butaleja pupils study under trees over lack of classrooms’ 28 January 2022 available at <https://www.monitor.co.ug/uganda/news/education/butaleja-pupils-study-under-trees-over-lack-of-classrooms--3697702> (accessed 13 August 2022).

⁵⁷ As above.

⁵⁸ The Independent ‘Bushenyi district battling shortage of primary school teachers’ 28 January 2022 available at <https://www.independent.co.ug/bushenyi-district-battling-shortage-of-primary-school-teachers/> (accessed 14 August 2022); Monitor ‘Shortage of teachers hits schools’ 13 January 2022 available at <https://www.monitor.co.ug/uganda/news/education/shortage-of-teachers-hits-schools-3681168> (accessed 14 August 2022) & Uwezo Uganda ‘Are Our Children Learning?’ (2016) Uwezo Uganda Sixth Learning Assessment Report 31 available at <http://www.uwezo.net/wp-content/uploads/2016/12/UwezoUganda2015ALAREport-FINAL-EN-web.pdf> (accessed 9 September 2019).

official sources'.⁵⁹ Because the original strategy was for the government to support four children per family, the change to free and compulsory primary education for all meant that all children could enrol for UPE which resulted into a strain on the infrastructure, teachers, and instructional materials.⁶⁰ The strain can be traced to a lack of corresponding infrastructure to cater for the extra numbers which lack is traced to resource constraints.⁶¹ Two and a half decades later, there is no solution in sight.⁶²

The infrastructural related challenges have been worsened by the school closures due to the Covid-19 pandemic.⁶³ The closure left furniture destroyed by termites, textbooks stolen, and classrooms dilapidated by the vagaries of nature like floods and hailstorms.⁶⁴ An estimated 51 primary schools were affected, mainly in the central and western regions. Comparatively, to illustrate the importance of infrastructure, it is essential to point out that the South African case of *Section 27 and others v The Minister of Basic Education and Others*, successfully challenged the lack of textbooks in some classes in public primary schools as a violation of the right to basic education.⁶⁵ The absence of a conducive learning environment for UPE learners or would be learners as such, is a violation of the availability aspect of the right. These have been worsened by resource constraints that majorly affect the infrastructure required to deliver a decent basic education.

Related to infrastructure, the government has for instance not met its target of having at least one UPE school per parish.⁶⁶ Recent statistics reveal that only 31% of Ugandans have a primary

⁵⁹ Uwezo Uganda 'Are Our Children Learning?' (2016) Uwezo Uganda Sixth Learning Assessment Report 31 available at <http://www.uwezo.net/wp-content/uploads/2016/12/UwezoUganda2015ALAREport-FINAL-EN-web.pdf> (accessed 9 September 2019).

⁶⁰ KII with Dr. Mugenyi (n 38 above).

⁶¹ As above.

⁶² As above.

⁶³ As above.

⁶⁴ As above.

⁶⁵ (24565/2012) available at <http://www.saflii.org/za/cases/ZAGPPHC/2012/114.html> (accessed 20 September 2019).

⁶⁶ Initiative for Social and Economic Rights (ISER) 'Status of Implementation of SDG 4 on Education: Is Uganda on Track?' (2019) 10 available at https://www.iser-uganda.org/images/downloads/Status_of_Implementation_of_SDG_4_on_Education_Is_Uganda_on_Track.pdf (accessed 25 August 2019).

school within their village and 67% within their communities though these are outside the Local Council (LC) 1 village.⁶⁷ Additionally,⁶⁸

...556 parishes in the 13 regions do not have a government school. The 13 regions include: Acholi, Ankole; Buganda; Bukedi; Bunyoro; Busoga; Elgon; Karamoja; Kigezi; Teso; Toro; Lango; and West Nile. Buganda has 132 parishes with no government school, followed by Elgon region at 88 parishes.

Other sources indicate that at least 92% of parishes in Uganda have one government aided primary school.⁶⁹ This could partly be due to the PPPs. Regardless, there is still a failure to make basic education available, given that having one primary school in a parish is already too bare a minimum. This is especially so when the geographical size of many of the rural parishes is considered. This is worsened by the absence of affordable alternatives. These concerns have been exacerbated by the post Covid-19 economic related hardships that have left many parents resorting to public education.⁷⁰ Preliminary information indicates that UPE schools registered higher enrolments after the lockdown and yet they still had to rely on the same capitation grants advanced earlier, at least until the financial year 2022/2023.⁷¹ It should also be noted that the short term increase in enrolment was against the same meagre or no infrastructure that was in place prior to the outbreak. With the already constrained financial resources and infrastructure for the schools, this only creates additional strain; and by implication a retrogression on the realisation of the basic education.

These overarching issues notwithstanding, primary school learners' enrolment levels have skyrocketed to 8,655,924 compared to the approximately 3,000,000 learners at the onset of UPE, largely due to the privatisation of the sector.⁷² Indeed the government acknowledges that the proliferation in enrolment rates is more attributable to the private sector than the conditions in the public schools.⁷³ The learners on the margins thus continue to be excluded due to the availability bottlenecks. Conclusively, it important to note that 'the requirements of the availability and accessibility of education, clearly borne out by the existing formulations of the right, have their locus in the social aspect'.⁷⁴ The social nature of the other Four As of the right

⁶⁷ Uganda Bureau of Statistics (UBOS) Uganda National Household Survey 2016/2017 (2017) 45 available at https://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/UNHS_VI_2017_Version_I_%2027th_September_2017.pdf (accessed 28 August 2019).

⁶⁸ NPA 'Comprehensive Evaluation of the Universal Primary Education (UPE) Policy: Thematic Report 5: Financing and Costing of UPE' (2018) 35, available at <http://npa.go.ug/wp-content/uploads/2019/02/Thematic-Report-5-Financing-and-Costing-of-UPE-080119.pdf> (accessed 22 July 2021).

⁶⁹ NDP III (n 54 above) 4.

⁷⁰ KII with Dr Mugenyi (n 38 above).

⁷¹ As above.

⁷² NDP III (n 54 above) 4.

⁷³ As above.

⁷⁴ Beiter (n 18 above) 7.

is equally recognised.⁷⁵ Below I now shift to exploring the second limb of the Four As and examine whether the learning environment is accessible.

ii) *Accessibility*

Under this tenet, the schools and learning programmes must be accessible to all, without discrimination.⁷⁶ Additionally, special efforts should be made to include the most vulnerable such as persons with disabilities, girls, forced migrants, working children, ethnic minorities, and nomads, among others, in the programmes.⁷⁷ Physical and economic accessibility are key.⁷⁸ Although UPE schools are historically economically accessible, except for a few prohibitive costs such as feeding, transport uniform, and scholastic materials among others, private schools are too expensive to be afforded by the marginalised.⁷⁹ The high cost in private schools is partly blamed on the scrapping of income tax exemptions originally granted to the private schools:⁸⁰

Tax incentives for private schools had led to a general reduction in school fees. Schools were also more transparent to government with regards to their enrolments. Benefiting schools were also able to afford more social services in schools and pay teachers better. The removal of the exemptions, has led to dishonesty by school management in attempt to avoid paying tax. The tax is also finally borne by the parents in the form of increased fees and levies. This is double standards. A Ugandan who is interested in investing in education should be supported instead of focusing only on foreigners.

This statement probably makes the best case for the human rights-based theory of fiscal sociology that calls on fiscal policy makers to consider the impact of fiscal decisions on both the social welfare and human rights of people. The policy of incentivising investors in the education sector could be reconsidered while addressing the general lack of regulation on school fees and supervision that could have led to its abuse previously

Equally critical to the accessibility tenant is the issue of inclusive education and reasonable accommodation as discussed in detail under the Convention of the Rights of Persons with Disabilities (CRPD) in section 4.2.1(d). The schools within physical proximity to the communities should be economically affordable, and inclusive to reasonably accommodate the needs of learners with disabilities or other categories of vulnerable and marginalised persons. For this tenant to be achieved, schools must be physically, and economically accessible as well

⁷⁵ As above.

⁷⁶ Art 3(3) and (4) of the World Declaration on education for All.

⁷⁷ As above.

⁷⁸ Para 6(b) of General Comment 13 (n 26 above).

⁷⁹ KII with Dr Mugenyi (n 38 above) & GIESCRs & ISER (n 33 above) 16-18 & 21.

⁸⁰ KII with Dr Mugenyi (n 38 above) & Higenyi & Arinaitwe (n 34 above).

as inclusive for all, especially for learners with disabilities. This is in line with the United Nations Sustainable Development Goals (SDGs) theme of leaving no one behind and SDG four on inclusive education.⁸¹ Relatedly, the Committee on ESCR considers disparities in the spending policies that lead to a difference in the quality of education between learners in different geographical locations as discriminatory.⁸² Below I analyse how acceptable the schools and programmes are especially for the most vulnerable.

iii) Acceptable (quality)

This tenet covers the form and content of education, including the curriculum, which must be acceptable culturally and of good quality.⁸³ The need for a learner-centred and appropriate curriculum is underscored.⁸⁴ The content should not only emphasise respect for human rights but broadly aim at the full development of the human personality.⁸⁵ Although UPE was introduced to improve literacy levels, reduce poverty, and income inequalities, it has faced several setbacks:⁸⁶

... the 1997 UPE policy has not eliminated the inequalities between regions, rural versus urban areas, gender and ethnicity in the past decade of the implementation (1997–2007). The regional inequalities are most conspicuous between the affluent Southern (Central and Western) regions and the poor Northern (North and North-eastern) regions of the country.

Inequality is prevalent in learning and performance between children from northern and eastern Uganda compared to their peers from the western, central and southern regions due to economic differences.⁸⁷ The economic status of parents determines whether or not they seek alternative private education which causes these discrepancies.

The challenges highlighted are worsened by income inequalities, marginalisation, and poverty, which UPE was introduced to remedy.⁸⁸ UPE is also considered as elitist, not appropriate for adult learners, legitimising inequality, and not prioritising ‘lifelong and life-wide learning, non-formal education and adult education’.⁸⁹ It is equally criticised for producing graduates who

⁸¹ See <https://sdgs.un.org/goals> (accessed 13 November 2021).

⁸² Para 35 of General Comment 13 (n 26 above).

⁸³ Para 6(c) of General Comment 13 (n 26 above).

⁸⁴ Lindahl (n 9 above) 13.

⁸⁵ Woolman and Flesich (n 43 above) 134.

⁸⁶ Ekaju (n 14 above) 48.

⁸⁷ Uwezo Uganda 2016 (n 58 above) 36.

⁸⁸ Ekaju (n 14 above) 50 & 51.

⁸⁹ Ekaju (n 14 above) 51.

upon inability to proceed to higher education, may fail to fit in or be productive in their communities due to the ‘modern’ education acquired.⁹⁰

Notably, the government additionally lacks proper monitoring mechanisms to identify and redress shortcomings, which in turn affects the quality of the UPE graduates.⁹¹ Consequently, many graduates do not acquire the required basic numeracy and literacy skills.⁹² Children from rural backgrounds have been disproportionately affected, thereby denying them equal opportunity and chances to eradicate poverty among other benefits.⁹³ The standards have been worsened by the automatic promotion policy.⁹⁴ The policy could be informed by resource constraints evident in the limitations of the capitation grants. Furthermore, there is poorer performance for children in rural and slum areas than in urban schools, which is largely blamed on the lack of proper facilities and the absenteeism of teachers.⁹⁵

Learning outcomes are predominantly low nationally although learners in urban areas performed better in literacy and numerical competencies.⁹⁶ The difference in performance between rural and urban schools ranges between ten to 20% in the three areas of assessment of English literacy, local language literacy, and numeracy.⁹⁷ At least two out of ten pupils complete primary education without the capacity to answer basic primary two questions of literacy and numeracy.⁹⁸ Similarly, the percentage of primary three to seven pupils that can comprehend primary two numeracy and literacy work per category of school are as follows: 60% of private schools, 49% of government schools and 45% for community schools.⁹⁹ This percentage improves by 10-20% if the learner is attending privately paid remedial classes.¹⁰⁰ In other cases, privately arranged remedial classes could alter the performance of pupils by about 10-14% but are also seen as a way in which teachers abdicate their core roles for an extra income.¹⁰¹ This is of great concern given that many of the rural or slum parents cannot afford

⁹⁰ As above; see also McCowan (n 19 above) 513.

⁹¹ R Mugabe ‘How School Management Committees monitor the implementation of Universal Primary Education in Uganda’ (2018) University of Pretoria 5.

⁹² Ekaju (n 14 above) 45; Mayengo (n 23 above) 295.

⁹³ Ekaju (n 14 above) 46. See also AC Onuora-Oguno *Development and the Right to Education in Africa* (2019) 126.

⁹⁴ As above.

⁹⁵ Nabuzale (n 54 above).

⁹⁶ Uwezo Uganda (n 58 above) 6.

⁹⁷ Uwezo Uganda (n 58 above) 27.

⁹⁸ Uwezo Uganda (n 58 above) 36.

⁹⁹ Uwezo Uganda (n 58 above) 7.

¹⁰⁰ <http://www.uwezo.net/wp-content/uploads/2016/12/UwezoUganda2015ALAREport-FINAL-EN-web.pdf> & As above.

¹⁰¹ Uwezo Uganda (n 58 above) 26.

these classes. I belabour to present these statistics to demonstrate the evident gaps in the fulfilment of the acceptability tenant that lead to demonstrably poor performance, especially for rural learners that largely depend on UPE. Financing for free and compulsory UPE plays a critical role in the attainment of the aspects discussed above.

Furthermore, although learners that attend pre-primary education or early childhood development (ECD) programmes are more likely to have better literacy and numeracy skills, the government does not prioritise them.¹⁰² Pre-primary education and ECD initiatives are still private arrangements that the government does not invest in even when they may not be affordable for the majority of the parents.¹⁰³ This could partly explain why at least 7% of children of school-going ages of 6-12 years are out of school, and the increasing incidents of late enrolment for primary one.¹⁰⁴ It is for instance estimated that three out of ten learners in primary one are aged eight years and another three out of ten are 11 years.¹⁰⁵ Given the correlation between late school enrolment on one hand, and the poor performance and school dropout rates on the other, this is worrying.¹⁰⁶ Primary education enrolment before the age of nine elevates the chances of primary cycle completion.¹⁰⁷ Fortunately, with the introduction of UPE and the elimination of school fees, the probability of children enrolling for school after their ninth birthday reduced tremendously though much still remains to be done.¹⁰⁸ It was hoped that this would reduce the dropout rates that are connected to late enrolment.¹⁰⁹ Late enrolment is not a major concern in urban schools because of the predominance of private schools.¹¹⁰

¹⁰² See NPA ‘Comprehensive evaluation of the UPE Policy: Thematic Report 1: Policy, Legal, Regulatory and Institutional Framework 34 & 35 available at <http://npa.go.ug/wp-content/uploads/2019/02/Thematic-Report-1-Policy-Legal-Regulatory-and-Institutional-Frameworks-080119.pdf> (accessed 20 March 2021); See Sec 10(2)(a) of the Education Act 2008 & Uwezo Uganda (n 58 above) 8.

¹⁰³ NPA ‘Comprehensive evaluation of the UPE Policy: Thematic Report 1: Policy, Legal, Regulatory and Institutional Framework 34 & 35 available at <http://npa.go.ug/wp-content/uploads/2019/02/Thematic-Report-1-Policy-Legal-Regulatory-and-Institutional-Frameworks-080119.pdf> (accessed 20 March 2021); See Sec 10(2)(a) of the Education Act 2008.

¹⁰⁴ Uwezo Uganda (n 58 above) 8.

¹⁰⁵ As above.

¹⁰⁶ L Grogan ‘Universal Primary Education and School Entry in Uganda’ (2009) 18.2 *Journal of African Economies* 192 available at <https://academic.oup.com/jae/article/18/2/183/730074> (accessed 1 June 2022).

¹⁰⁷ Grogan (n 106 above) 196.

¹⁰⁸ Grogan (n 106 above) 198.

¹⁰⁹ Grogan (n 106 above) 198 & 203. In rural areas, which comprise two-thirds of Uganda’s population, a 3.4% increase in the probability of attending school before the age of nine is associated with the advent of UPE in January 1997.

¹¹⁰ Grogan (n 106 above) 203.

On another note, it is pointed out that ‘UPE acted to reduce the gap in school attendance across socioeconomic groups’.¹¹¹ However, fees elimination did not have much effects on children coming from wealthier backgrounds most of whom were already attending private schools.¹¹² Furthermore, initially parents never switched learners from public to private schools because of scepticism with the quality of education in UPE schools.¹¹³ Even when there are genuine concerns about the quality of UPE, parents in rural areas do not have much of a choice.¹¹⁴ The related other challenges include prevalence of private remedial classes for learners which points to poor learning outcomes, lack of textbooks, high pupil-teacher ratios and high learners’ dropout rates.¹¹⁵ Conclusively, for education to be acceptable, the state should prioritise financing free and compulsory UPE and ECD given their role in the attainment of the four As of the right. When the tax incentives framework ignores the human rights-based theory of fiscal sociology, this has a direct bearing on the state’s capacity to realise the right to basic education, due to the violations discussed above stemming from inadequate financing.

Worse still, the situation is dire for learners with disabilities as they are more likely not to attend pre-primary education or enrol later as compared to their counterparts.¹¹⁶ Even with the automatic promotion policy, 14.4% repeat primary two to seven as compared to the 11.8% of learners without disabilities.¹¹⁷ The challenges above are resource constraint related as is discussed in detail in section 4.3. Regrettably schools with learners with disabilities are not given affirmative action and or accommodated by higher capitation grants and yet the facilities required for an inclusive education are costly.¹¹⁸

Aside from the peculiar challenges faced by learners with disabilities, generally the inspection function is equally challenged by the lack of human and financial resources, suffers transparency concerns, and as a result, schools are inspected, if so, only once a term as opposed to the required three times.¹¹⁹ According to the MoES, some UPE schools are inspected only

¹¹¹ Grogan (n 106 above) 204.

¹¹² As above.

¹¹³ Grogan (n 106 above) 207.

¹¹⁴ As above.

¹¹⁵ See WR Mukisa ‘Universal Primary Education and the Uganda’s Economy’ (2019) 2, 3 available at <https://files.eric.ed.gov/fulltext/ED616904.pdf> (accessed 26 July 2022) & Uwezo (n 58 above) 9 & 16.

¹¹⁶ As above.

¹¹⁷ Uwezo Uganda (n 58 above)22.

¹¹⁸ See sect 4.3 of the thesis.

¹¹⁹ Second National Development Plan 2015/16–2019/20 (NDP II) 36 available at <http://npa.go.ug/wp-content/uploads/NDPII-Final.pdf> (accessed 26 July 2022).

once a year.¹²⁰ It is also more likely that a private school will be inspected more often than a UPE one as the former will usually financially facilitate the process.¹²¹ Due to financial resource constraints, the inspection function has deteriorated with some inspectors performing perfunctory ‘flying visits’ just to tick boxes.¹²² This is partly attributed to the high inspector to school ratio standing at 1:80.¹²³ The MoES plans to bridge this to at least 1:40.¹²⁴ The challenges above have worsened the teachers’ absenteeism, which is estimated at 20% with some teachers being away from school as often as twice a week.¹²⁵ The absenteeism has partly been explained by the lack of morale for teaching due to poor remuneration, since a primary teacher in a public school earns about United States dollars (USD) 110 per month.¹²⁶ Consequently, they are forced to take on other jobs to make ends meet.¹²⁷ This is worsened by a high staff turnover.¹²⁸

The long list above is but of some of the enormous challenges that affect the realisation of the acceptability parameter of basic education under the current UPE dispensation. It is critical to note that although the policies in place are fairly sufficient to deliver an acceptable public free and compulsory basic education, implementation is hampered by financial resources constraints. These challenges are mostly caused by the adoption of fiscal policies on tax incentives, which ignore the human rights-based theory of fiscal sociology. And yet again, the warning of the propounder of the theory that a right only exists in fiscal reality only when it has sufficient resources for its realisation is a true reflection of the discussion thus far in this chapter.¹²⁹

iv) *Adaptability*

This fourth parameter of the ‘Four As test’ envisages an educational system and curriculum that is adaptable to the changing community, and the societal and cultural contexts of a given

¹²⁰ KII with Dr Mugenyi (n 38 above).

¹²¹ As above.

¹²² As above.

¹²³ As above.

¹²⁴ As above.

¹²⁵ As above; See also ISER (n 66 above) 49.

¹²⁶ As above; See also ISER (n 66 above) 50.

¹²⁷ As above.

¹²⁸ ESSP 2017/18-2019/20 101, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiz1p7I8dP0AhUHnhQKHZ7HAS0QFnoECAIQAAQ&url=http%3A%2F%2Fnpa.go.ug%2Fwp-content%2Fuploads%2F2018%2F11%2FEDUCATION-AND-SPORTS-SECTOR-STRATEGIC-PLAN.pdf&usq=AOvVaw31Jgb3OodZGRS67XDKMnFk> (accessed 8 December 2021), As above.

¹²⁹ A Waris *Tax and Development: Solving Kenya’s Fiscal Crisis through Human Rights* (2013) 143.

group of people.¹³⁰ It is interpreted to include the ‘best interest of the student’ principle in the decisions involving learners.¹³¹ It further encompasses reasonable accommodation for learners with disabilities.¹³² Concerns regarding the appropriateness of the current curriculum to produce graduates with the kind of knowledge and skills, which basic education for all envisages, are central to this discussion. Two approaches have been suggested. Firstly, the globalisation of the curriculum to a ‘highly homogenized educational curriculum worldwide, reflecting the economic, social, and cultural homogenization resulting from globalization’.¹³³ Alternatively the modification of the approach to include an education that suits the localised cultural, political, social, and other appropriate contexts as well as the values of a particular society.¹³⁴ Accordingly, an appropriate curriculum should include the following:¹³⁵

The knowledge, skills, values, and processes that constitute primary education, including such areas as reading and writing; mathematics; basic science, including natural science, social science, and life skills; rights and responsibilities; numeracy and literacy; social skills; life skills; core (global) values such as respect, honesty, and responsibility; an understanding of the right to privacy; and conflict resolution.

Although there is likely to be tension between the local and global curriculum, universal *vis-à-vis* individual, modern *vis-à-vis* traditional, any appropriate curriculum must consider the unique cultural, traditional context, knowledge, and skills.¹³⁶ This requirement is in line with the need to decolonise the curriculum. In Uganda, some of the adopted proposals relevant to this discourse include the use of local languages as a mode of instruction in lower primary for better comprehension and learning outcomes.¹³⁷ The challenges highlighted in this chapter would affect the fulfilment of the adaptability parameter. Many of these challenges revolve around the issue of inadequate finance resources. Indeed, it has been argued that for the Four A’s of the right to education to create impact, policy makers should incorporate them in the budgeting processes.¹³⁸

From the foregoing discussion, given the central role played by financial resources in the attainment of the ‘Four-A scheme’, a more substantive and appropriate standard has been

¹³⁰ Para 6(2) of General Comment 13 (n 26 above); see also Woolman and Flesich (n 43 above)135.

¹³¹ Para 7 of General Comment 13 (n 26 above).

¹³² Woolman and Flesich (n 43 above)135.

¹³³ Lindahl (n 9 above) 10.

¹³⁴ As above.

¹³⁵ Lindahl (n 9 above) 11.

¹³⁶ Lindahl (n 9 above) 12.

¹³⁷ NPA (n 103 above) 40.

¹³⁸ A Budoo ‘Adoption of a Human rights Approach to Budgeting as a Step to realise the right to Education in African Countries’ in A.C. Onuora-Oguno et al. (eds) *Education Law, Strategic Policy and Sustainable Development in Africa* (2018) 35.

developed based on the New York Court of Appeal in *Campaign For Fiscal Equity v the State of New York (CFE II case)*.¹³⁹ This test considers the fiscal requirements of delivering a sound basic education. Accordingly the ‘*legal construct of fiscal and instrumental adequacy* better serves the purpose of basic education’.¹⁴⁰ (Own emphasis) Accordingly, basic education is “the actual cost of providing a sound basic education”—teachers, materials, facilities and the provision of the fiscal and governance structure that’s necessary to deliver it’.¹⁴¹ Certainly, the actual realisation of adequate basic education requires a genuine assessment of the sufficiency of the resources for its delivery.¹⁴² This is in line with the human rights-based theory of fiscal sociology adopted for this study. The court in the case above points out three critical ‘inputs’ for the realisation of the right to basic education: teaching; school facilities, and classrooms; and instruments of learning which I discuss in detail below.¹⁴³

Regarding teaching, the quality and qualification of teachers, and the teacher pupil ratio are critical, whereas under school facilities, logistics such as furniture, utilities and hygiene are important.¹⁴⁴ Textbooks, chalkboards, computers, and stationery are covered under instruments of learning.¹⁴⁵ It is important that all these necessities are available as having some and not the others would still compromise the quality of education.¹⁴⁶ Additionally, it is important in determining whether or not basic education is achieved, to look at some other extrinsic factors such as the performance results and dropout rates over time.¹⁴⁷ On the issue of adequate funding, objective standards could as well be set and used to hold the relevant stakeholders accountable.¹⁴⁸ This explains why I belabour to present the Ugandan situation in this section. These are critical areas of assessment in determining the adequacy of the right to basic education. I additionally focus on elements that have financial implications. There is therefore the need to distinguish the ‘realistic or achievable adequacy standard’ from the Four A’s framework by recognising the need for the state to provide sufficient funding to achieve

¹³⁹ Woolman & Flesich (n 42 above) 135. Case summary is available at <https://www.nyclu.org/en/cases/campaign-fiscal-equity-v-state-new-york-challenging-states-failure-provide-nyc-children-sound> (accessed 13 November 2021).

¹⁴⁰ Quoted in Woolman & Flesich (n 43 above) 135, *emphasis mine*.

¹⁴¹ As above.

¹⁴² As above.

¹⁴³ As above.

¹⁴⁴ Woolman & Flesich (n 43 above) 135 & 136.

¹⁴⁵ As above.

¹⁴⁶ Woolman & Flesich (n 43 above) 136.

¹⁴⁷ As above.

¹⁴⁸ Woolman and Flesich (n 43 above) 137.

‘meaningful standards for teachers, learning materials and facilities’.¹⁴⁹ This is the connection I make in section 4.3 of the study. Indeed, it has been argued that given the realities in many states, the revision of General Comment 13 is long overdue.¹⁵⁰ Below I expound on the issues above in an international instrument specific to children.

c) The United Nations Convention on the Rights of the Child¹⁵¹

The Convention on the Rights of the Child 1990 (CRC) was the first international instrument to comprehensively provide for the rights of children as a special group. It provides for the broader right to education in the same terms as the CESCRC. The right to education is subject to the principle of progressive realisation,¹⁵² with emphasis placed on the need for financial assistance for the needy children.¹⁵³ The latter in the context of Uganda could be covered under the UPE arrangement. Specific to the CRC is the requirement that measures are adopted to ensure regular attendance of school by learners and the reduction in school dropout rates.¹⁵⁴ This involves addressing the precursors to increased school dropout rates such as high teacher pupil ratios, teacher absenteeism, school feeding and nutrition challenges, the supervision function gaps at the local governments in the Ugandan context. To address these challenges, adequate resources are a must have.

Notably, education should be based on the need for the development of a child’s full potential, including personality, talents, mental and physical abilities.¹⁵⁵ Equally essential is the respect of the parent’s or child’s cultural heritage including language, norms, culture and values,¹⁵⁶ ¹⁵⁷ as well as preparing a child for responsibility in life by respecting diversity, peace, tolerance, respect, and friendship with all people irrespective of difference,¹⁵⁸ and the respect for the environment.¹⁵⁹ Instilling these values and skills would require an education that is all round and resources are essential to this end. The values are in line with the discussion above in section 4.1.1(b)(iv) that requires basic education to be adaptable. As with the CESCRC,

¹⁴⁹ As above.

¹⁵⁰ Beiter (n 18 above).

¹⁵¹ 1990.

¹⁵² Art 28 of the CRC available at <https://www.refworld.org/pdfid/4538838c22.pdf> (accessed 1 September 2019).

¹⁵³ Art 28(1)(b) of the CRC.

¹⁵⁴ Art 28(1)(e) of the CRC.

¹⁵⁵ Art 29(1)(a) of the CRC.

¹⁵⁶ Art 29(1)(b) of the CRC.

¹⁵⁷ Art 29(1)(b) of the CRC.

¹⁵⁸ Art 29(1)(c) of the CRC.

¹⁵⁹ Art 29(1)(e) of the CRC.

individuals and bodies are at liberty to establish private institutions of learning in line with the minimum standards set by the state.¹⁶⁰ The CRC also provides for the right for children with disabilities to education including vocational training though not in much detail.¹⁶¹ The CRC as such does not establish any additional new standards but reinstates the position in previous instruments. It also does not pay specific attention to basic education which is a major shortcoming since this is the primary legal framework with regards to the rights of children. This could be because the discussion on basic education starts to take central stage just after its adoption in 1990.

*d) The United Nations Convention on the Rights of Persons with Disabilities*¹⁶²

In this section, I review the United Nations Convention on the Rights of Persons with Disabilities 2006 (CRPD) with the view of ascertaining the obligations, and the extent of realisation of the right to inclusive basic education for learners with disabilities. I seek to establish whether basic education includes an obligation to make the same inclusive, and if so, to ascertain the specific obligations that ensue as a result.

The CRPD provides for the right to education for persons with disabilities with emphasis on ‘inclusive education at all levels’, and ‘lifelong learning’.¹⁶³ Education is aimed at the full development of the individual, their dignity and self-worth, strengthening the respect of other human rights,¹⁶⁴ development of talent, creativity, personality,¹⁶⁵ and enabling their effective participation in society.¹⁶⁶ To achieve the objectives above, respect of the principles of inclusive education, non-discrimination, and full participation irrespective of disability, are key.¹⁶⁷ The specific obligation on states is to include all persons with disabilities in the general education system on an ‘equal basis with others’, and to ensure that children with disabilities

¹⁶⁰ Art 29(2) of the CRC.

¹⁶¹ Art 23 of the CRC.

¹⁶² 2006.

¹⁶³ Art 24(1) of the CRPD.

¹⁶⁴ Art 24(1)(a) of the CRPD.

¹⁶⁵ Art 24(1)(b) of the CRPD.

¹⁶⁶ Art 24(1)(c) of the CRPD.

¹⁶⁷ See Arts 5, 7 & 24 of the CRPD. The CRPD principles on inclusive education are premised on the UNESCO Salamanca Statement on Principles, Policy and Practice in Special Needs Education and a Framework for Action which emphasises inclusive education with placement in the special school only justified for the benefit of learner with disability or in the interest of other learners (See Framework for Action Adopted by the World Conference On Special Needs Education: Access and Quality Salamanca, Spain, 7-10 June 1994 available at http://www.unesco.org/education/pdf/SALAMA_E.PDF (accessed 25 July 2021)).

access ‘free and compulsory primary and secondary education on equal basis with others’.¹⁶⁸ Specific to the realisation of the right to education for persons with disabilities are the following measures: access to an ‘inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live’,¹⁶⁹ and reasonable accommodation of the individual learner’s needs.¹⁷⁰ Equally essential is extra support required within the general system to achieve an effective education,¹⁷¹ and effective individualised support measures for academic and social development to achieve full inclusion.¹⁷² It is important that inclusive basic education bears in mind the principle of reasonable accommodation of the needs of all learners including learners with disabilities. Equally essential is the need for children with disabilities to attend schools within the communities in which they live, for easy accessibility, and the extra support needed in order to achieve an effective inclusive education. These obligations would definitely require substantial financial investment. The human rights-based theory of fiscal sociology enables and obligates states to recognise such peculiar human rights obligations as they craft fiscal policy and the interrelatedness of the two.

Arising from the broader obligation above are specific obligations including provisions for the ‘learning of braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring’.¹⁷³ Equally essential is the need to facilitate the learning of sign language and promoting linguistic identity for learners with hearing disabilities.¹⁷⁴ The use of appropriate language, modes, and means of communication for learners in particular for children with visual and hearing impairment, in order to maximise their academic and social development are equally essential.¹⁷⁵ These require extra financial support and yet as indicated in the discussion in section 4.3 below, the government releases the same capitation grant for all UPE

¹⁶⁸ Art 24(2)(a) of the CRPD. This is emphasised by the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, although the choice of word used: ‘integrated’ environment is more limiting than the ‘inclusive’ approach adopted by the CRPD. (See Rule 6 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Resolution adopted by the General Assembly, on the report of the Third Committee (A/48/627)], Forty-eighth session Agenda item 109 (1994) available at <https://www.un.org/disabilities/documents/gadocs/standardrules.pdf> (accessed 21 September 2019).

¹⁶⁹ Art 24(2)(b) of the CRPD.

¹⁷⁰ Art 24(2)(c) of the CRPD.

¹⁷¹ Art 24(2)(d) of the CRPD.

¹⁷² Art 24(2)(e) of the CRPD.

¹⁷³ Art 24(3)(a) of the CRPD.

¹⁷⁴ Art 24(3)(b) of the CRPD.

¹⁷⁵ Art 24(3)(c) of the CRPD.

learners regardless of disability. An extra block amount of approximately USD 80 is granted for each school, whether public or private to cater for the procurement of special needs education materials like braille paper and other logistics.¹⁷⁶ For the avoidance of doubt, this is the amount given to the whole school for all the needs of learners with disabilities for a financial year. To say that the amount is inadequate is an understatement.

The other specific obligations in respect of the right to education for persons with disabilities include taking appropriate measure to employ teachers, including teachers with disabilities, with qualifications in appropriate communication.¹⁷⁷ Of equal importance is the need to grant teachers at all levels disability appropriate training for awareness and capacity building for the task.¹⁷⁸ Resources, and especially financial ones, are critical to this end.

The obligations created by article 24 of the CRPD have generated debate on whether the same are of an immediate nature or are subject to progressive realisation.¹⁷⁹ This is especially so far the right to inclusive basic education.¹⁸⁰ According to the *travaux préparatoires* of the CRPD, the right to education under article 24 of the CRPD was intended to be progressively realised.¹⁸¹ The record indicates that the principle of progressive realisation was originally under article 24.¹⁸² However, it was later agreed upon that there should be a general provision that covers the principle for all ESRs.¹⁸³ This is provided for under article 4(2) as follows: (Own emphasis).

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, *without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.*

I find that although article 4(2) provides for progressive realisation of ESRs under the convention, this is subject to rights that are immediately realisable under international human rights law. The right to basic education is already provided for as an immediately realisable

¹⁷⁶ NPA (n 68 above) 25 &26.

¹⁷⁷ Art 24(4) of the CRPD.

¹⁷⁸ As above. Such training shall incorporate disability awareness and the use of the appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

¹⁷⁹ Murungi (n 44 above) 3179.

¹⁸⁰ As above.

¹⁸¹ As above.

¹⁸² As above.

¹⁸³ As above.

one under General Comment 13 of the Committee on ESCR and could, therefore, not be covered under article 4(2) of the CRPD. Emphatically, article 4(4) provides that:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

By implication, the appropriate law applicable for the realisation of the right to basic education for all persons including learners with disabilities is the CDESCR and General Comment 13 of the Committee on ESCR, which provide for the right to basic education as an unqualified right. Furthermore, since article 24(2)(b) provides for free and compulsory primary education for learners with disabilities ‘on equal basis with other learners’ in the community in which they live, the same standards should be applied, with the necessary inclusion and reasonable accommodation.¹⁸⁴

The crux of the CRPD on the right to education for persons with disabilities is having learners with disabilities access inclusive education and be reasonably accommodated on the same terms as other learners.¹⁸⁵ It would therefore defeat that purpose if the right to free and compulsory education for children or learners with disabilities would be subject to progressive realisation when the same is an immediately realisable right for others.¹⁸⁶ This would amount to discrimination and a clear violation of the right as well as the immediately realisable obligations that include an obligation not to discriminate. On this argument I defer from the position of Murungi who argues that the interpretation of the CRPD together with the CDESCR and General Comment 13, mean that the right to inclusive education should be realised progressively while the right to basic education is immediately realisable.¹⁸⁷ I argue as above that it is possible to have a right to inclusive basic education if resources are made available, by adopting proper fiscal decisions that minimise revenue leakages and wastages. This is the preoccupation of the human rights-based theory of fiscal sociology. I also opine that basic education would be illusory to learners with disabilities if the same is not inclusive. Below I review how the right has been understood in other international instruments and soft law standards.

¹⁸⁴ Murungi (n 44) 3180.

¹⁸⁵ As above.

¹⁸⁶ As above.

¹⁸⁷ See for example Murungi (n 44 above) 3167.

e) Other relevant instruments

The United Nations Convention on the Elimination of All forms of Discrimination Against Women 1979 (CEDAW)¹⁸⁸ provides for the right to education.¹⁸⁹ Emphasis is placed on gender equality, elimination of gender stereotypes in the curriculum, availability of textbooks, school programmes, teaching methods, and efforts to reduce female school dropouts.¹⁹⁰ Equally important is the need to establish alternative programmes for female learners who are unable to finish school, among others.¹⁹¹ In Uganda, gender equality and equity as key aspirations of the UPE policy have been largely achieved by closing the disparity gap.¹⁹² By 2016, the percentage of female learners was at 50.4% compared to 47% in 1999 and 39% in 1970.¹⁹³ However, female learners still stand a higher probability of dropping out of school at a percentage rate of 22% compared to their male counterparts who were at 20% in 2018.¹⁹⁴ These statistics point to the gender inhibitions that disproportionately affect female learners' completion rates. These inhibitions need to be addressed to achieve an equitable and inclusive basic education. Policy gaps such as a weak school feeding programme, the lack of a school health policy to address the unique circumstances of female learners especially, have a direct bearing on their capacity to enrol and remain in and complete school.¹⁹⁵ These gaps could have a direct bearing on dropout rates that are attributable to hunger, pregnancies, sexual violence in schools, and menstrual hygiene related challenges.¹⁹⁶ The adoption of policies alive to the above realities has been limited by resource constraints.

The other relevant instruments include the United Nations Educational, Scientific and Cultural Organisation (UNESCO)'s Convention against Discrimination in Education 1960 (CDE).¹⁹⁷ The

¹⁸⁸ Adopted in 1979, came into force on 3 September 1981, ratified by Uganda in 1985 available at <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> (accessed 21 September 2019).

¹⁸⁹ Art 10 of the CEDAW.

¹⁹⁰ As above.

¹⁹¹ As above; See Art 10(h) that provides for access to information especially health and family planning related information for families is seen as important and with potential to impact the realisation of the right to education, especially for female learners.

¹⁹² NPA (n 103 above) 18 & 99.

¹⁹³ NPA (n 103 above) 19.

¹⁹⁴ NPA (n 103 above) 23.

¹⁹⁵ See WR Mukisa 'Universal Primary Education and the Uganda's Economy' (2019) 2, 3, 21 & 22 available at <https://files.eric.ed.gov/fulltext/ED616904.pdf> (accessed 26 July 2022).

¹⁹⁶ As above.

¹⁹⁷ The treaty adopted was by UNESCO on 14 December 1960 in Paris and came into effect on 22 May 1962, Uganda accepted on 9 September 1968. Art 1(1) of the CDE define discrimination as any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.

CDE outlaws discrimination in education programmes and schools. However, it does not include disability among the grounds for discrimination probably given that at the time of its passing disability was still considered from the medical model. The state is given leverage to establish and run separate schools of different sexes as long as the content, facilities, and quality of education are the same.¹⁹⁸ Equally permissible are special religious and linguistic schools to cater for the wishes of parents,¹⁹⁹ and private schools that are approved and monitored by the state as long as they do not exclude learners.²⁰⁰ In Uganda, the weak regulation, monitoring and inspection framework of private schools has resulted into the unabated charging of exorbitant fees which in effect leads to the exclusion of children from the rural and poor backgrounds.²⁰¹ This has a direct bearing on the capacity to realise the right to basic education given the huge indictment on the current UPE programme. Equally affected is the quality of teachers recruited in private schools as these are not competitive.²⁰² The CDE calls for free and compulsory primary education, standardisation of quality and opportunities in all public schools at the different levels, alternative education for persons who never acquired basic education, and professional training of teachers.²⁰³ Many of these are yet to be achieved under the current UPE programme largely because of resource constraints. The CDE draws inspiration from the provisions of the Universal Declaration.²⁰⁴

Equally relevant to this discussion is the SDG four on attaining quality and inclusive education by 2030 with its corresponding Agenda 2063 that focuses on education, skill development, innovation and revolution.²⁰⁵ There is a global recognition of progress towards attaining SDG four characterised by gross enrolments rates (GER). This is evidenced by the GER that arose up to 91% in developing countries by 2015, with primary education enrolment rising from 52% in 1990 to 78% in 2012 in sub-Saharan Africa, among other accomplishments.²⁰⁶ This progress is however still affected by disparities between rural and urban areas with rural based learners more likely to drop out of school.²⁰⁷ This study partly seeks to establish how UPE financing affects this narrative in addition to the challenges discussed above. Before that, below I review the obligations under the regional human rights instruments that Uganda is party to.

¹⁹⁸ Art 2(a) of the CDE.

¹⁹⁹ Art 2(b) of the CDE.

²⁰⁰ Art 2(c) of the CDE.

²⁰¹ A case challenging exorbitant school fees has currently been instituted before the constitutional court in Uganda (*Aboneka Michael & Ors v AG HCMA 15 of 2022*). See Framework for Action Adopted by the World Conference On Special Needs Education: Access and Quality Salamanca, Spain, 7-10 June 1994 available at http://www.unesco.org/education/pdf/SALAMA_E.PDF (accessed 23 January 2022).

²⁰² NPA (n 103 above) 64.

²⁰³ Art 4 of the CDE.

²⁰⁴ Art 5 of the CDE.

²⁰⁵ SDGs are available at https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCCQjwl_SHBhCQARIsAFIFRVXazKjbpoeb_L01xNn0k4HX7Dlm6LyW-sSodMhPZnPj7ZQzO00swJ0aAjVtEALw_wcB#quality-education (accessed 25 July 2021) see also Agenda 2063 goals and linkage to SDGs available on <https://au.int/agenda2063/sdgs> & <https://au.int/agenda2063/goals> (accessed 16 July 2022).

²⁰⁶ As above. (SDG site).

²⁰⁷ As above.

4.1.2 The African human rights instruments on the right to basic education

The African Charter on Human and Peoples' Rights 1981 (ACHPRs),²⁰⁸ has a narrow provision on the right to education that attaches importance to culture, community life, and participation in the morals and values of a particular community.²⁰⁹ While echoing the provisions of the CESCRC and the CRC, the African Charter on the Rights and Welfare of the Child 1990 (ACRWC),²¹⁰ considers the preservation of African morals, values, traditions, and cultures as pertinent.²¹¹ The ACHPRs has been recognised for being more progressive in its recognition of ESRs as it avoids the progressive realisation of rights principle and 'is devoid of inbuilt limitations otherwise known as "claw-back clauses"'.²¹² Other objectives of education as reflected in the ACRWC include the preservation of national independence and territorial integrity,²¹³ the preservation of the achievements of African unity and solidarity,²¹⁴ and the promotion of the understanding of primary health care.²¹⁵ These two instruments attempt to decolonise the understanding of the purpose of education to fit the African context, which is a welcome addition given the preceding discussion in section 4.1.1(a) on globalisation of the education curriculum. The African instruments introduce the aspect of cultural relativism which is an appropriate and welcome addition to the meaningful realisation of the rights generally and ESRs specifically.

In addition to the obligations provided for in the CESCRC and the CRC, states are mandated to take appropriate special measures to assist 'female, gifted and disadvantaged children' to attain equal access to education for all sections of the community.²¹⁶ Additionally, parents and guardians are called upon to take cognisance of the evolving capacities of children while

²⁰⁸ Adopted on 27 June 1981 and entered into Force on 21 October 1986 available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (accessed 1 September 2019).

²⁰⁹ Art 17 of the Banjul Charter.

²¹⁰ Adopted on 11 July 1990, came into force on 29 November 1999, ratified by Uganda on 17 August 1994 available at https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf (accessed 1 September 2019).

²¹¹ Art 11(2)(c) of the ACRWC.

²¹² C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides'(2006) 6 *African Human Rights Law Journal* 340 & D Olowu 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10.2 *International Journal of Children's Rights* 127 130. Mbazira however argues that it is risky for the African continent to adopt this approach given the economic and other political realities in my countries.

²¹³ Art 11(2)(e) of the ACRWC.

²¹⁴ Art 11(2)(f) of the ACRWC.

²¹⁵ Art 11(2)(h) of the ACRWC.

²¹⁶ Art 11(3)(e) of the ACRWC.

considering the nature of school to enrol them into.²¹⁷ This is a unique provision not covered in the earlier discussed instruments. Notably, the ACRWC is the first instrument to provide for the rights of girls who conceive while in school, which include according them an opportunity to return to school after birth in accordance with their individual abilities.²¹⁸ This is relevant especially in the African and Ugandan contexts as the struggles of teenage pregnancies, child ‘marriages’ and resultant school drop outs are real.²¹⁹ In a recent study in Uganda for example, pregnancies among female learners contributed to 10% of additional reasons for school drop outs.²²⁰ These challenges have been worsened by the Covid-19 pandemic and the resulting restrictions, which left schools in Uganda closed for almost two years in what was seen as the longest closure period in the world.²²¹ As schools reopened, there were numerous contestations on how to handle the question of the pregnant learners and those that had birthed during the course of the closure. While the government and human rights activists insisted that they should be allowed back in schools, this was met with protests in the private and religious founded schools.²²² This stand-off brings to the fore the limited control the state has on schools including the government aided ones especially the faith-based ones, which provide a public service.

Additionally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (Maputo Protocol) focuses on the rights of women and girls.²²³ It requires state parties to take the following measures to realise the right to education: Enabling equal opportunity and access to education by addressing precursors to discrimination,²²⁴ and addressing media, curriculum, and syllabus related stereotypes that advance such

²¹⁷ Art 11(4) of the ACRWC.

²¹⁸ Art 11(6) of the ACRWC.

²¹⁹ See NPA ‘Comprehensive Evaluation of the Universal Primary Education (UPE) Policy: Thematic Report 6: Education Modelling and Forecasting’ (2018) 29, 30 & 57 available at npa.go.ug/wp-content/uploads/2019/02/Thematic-Report-6-Education-Modelling-and-Forecasting-110119.pdf (accessed 10 June 2021).

²²⁰ NPA (n 219 above) 57.

²²¹ Aljazeera ‘Schools reopen in Uganda after nearly two year Covid closure’ *Aljazeera* 10 January 2022 available at <https://www.aljazeera.com/news/2022/1/10/ugandan-children-back-to-school-after-nearly-2-year-covid-closure> (accessed 23 January 2022). See also; The Ministry of Education and Sports ‘Revised guidelines on Prevention and management of teenage pregnancy in school settings in Uganda’ 2020 available at <https://www.ungei.org/sites/default/files/2021-02/Revised-Guidelines-Prevention-Management%20-Teenage-Pregnancy-School-Settings-Uganda-2020-eng.pdf> (accessed 23 January 2022).

²²² R Kabanza ‘Leaders clash over directive to keep pregnant girls in school’ *Daily Monitor, Kampala*, 19th January 2022 available at <https://www.monitor.co.ug/uganda/news/national/leaders-clash-over-directive-to-keep-pregnant-girls-in-school-3686768?view=htmlamp> (accessed 23 January 2022).

²²³ Adopted on 23 March 2003, came into force on 11 July 2003, Uganda ratified on 22 July 2010 available at https://www.un.org/en/africa/osaaf/pdf/au/protocol_rights_women_africa_2003.pdf (accessed 4 August 2019).

²²⁴ Art 12(1)(a) of the Maputo Protocol.

discrimination.²²⁵ Essentially, the protection of women and girls from all forms of sexual exploitation including sexual harassment and providing penalties in case of breach are crucial.²²⁶ Equally beneficial is the provision of psychosocial counselling for and rehabilitation of women and girls who face these societal ills.²²⁷ Additionally, there is the need to infuse gender and human rights relevant capacity building sessions and education at all relevant levels.²²⁸ The specific state obligations include the enhancement of literacy among females,²²⁹ the promotion of girl child and women education at all levels,²³⁰ especially in science and innovation, and encouraging the retention of females in schools by reducing avoidable dropouts.²³¹ As discussed earlier in this part, Uganda has made progressive efforts to reduce the gender disparities in enrolment and school completion. Much more can still be done to this end including government taking over the school feeding policy and passing the school health policy. These initiatives would address some of the challenges female learners face in exercising their right to basic education. These recommendations have resource implications, which this study seeks to connect to the state's revenue leakages and losses from tax incentives.

Lastly on the relevant human rights instruments on the continent, although the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018 (African Disability Protocol) is yet to come into force, the same has useful provisions to the right to education. These include the right to live in community with others and enjoy the right to education on equal basis with others with reasonable accommodation in place for learners with disabilities.²³² The right to education of persons with disabilities is provided for in almost the same terms as the CRPD.²³³ Emphasis is placed on equality, and the need for the adoption of measures to realise quality and inclusive access to free and compulsory basic education and secondary education.²³⁴ The rest of the relevant provisions mirror the standards contained in the CRPD discussed in section 4.1.1(d) above.

²²⁵ Art 12(1)(b) of the Maputo Protocol.

²²⁶ Art 12(1)(c) of the Maputo Protocol.

²²⁷ Art 12(1)(d) of the Maputo Protocol.

²²⁸ Art 12(1)(e) of the Maputo Protocol.

²²⁹ Art 12(2)(a) of the Maputo Protocol.

²³⁰ Art 12(2)(b) of the Maputo Protocol.

²³¹ Art 12(2)(c) of the Maputo Protocol.

²³² Art 14(2)(g) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018 available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed on 16 July 2022).

²³³ See Art 16 of the African Disability Protocol. See also Art 28(4)(j) of the African Disability Protocol.

²³⁴ Art 16(2) & (3) of the African Disability Protocol.

Surprisingly, the African Disability Protocol under its general obligations and in the entire framework remains silent on the principle of progressive realisation of ESRs or other rights.²³⁵ The African Disability Protocol specifically calls upon states to set aside resources including in budgets to fulfil the provisions of the protocol.²³⁶ I find the African Disability Protocol more progressive compared to the CRPD. It avoids the discussion on progressive realisation of rights with all the resulting confusion and instead emphasises the need for persons with disabilities to enjoy the rights in the protocol on equal terms with others. The express mandate on states to appropriate resources and ensure proper budgetary appropriations for the realisation of the rights therein is also a great addition.

The discussion above demonstrates a clear framework for the right to basic education with emphasis on free and compulsory primary education for the vulnerable. The peculiar needs of vulnerable learners like women and girls, learners with disabilities, and learners from rural and poor backgrounds are analysed, and appropriate standards for compliance crafted. The need for the setting of standards, and the continuous monitoring and supervision of private actors in the sector is underscored. Below I review how Uganda has domesticated and complied with the international human rights standards and expectations discussed above.

4.1.3 The domestic policy framework on the right to basic education

In this part, I analyse how the international standards presented in the preceding part are reflected in the policy aspirations of Uganda. I start by noting that although UPE has been implemented for almost 25 years, the same is not based on any written policy framework.²³⁷ The closest Uganda has gone is by passing guidelines on policy, planning, roles and responsibilities of stakeholders in the implementation of UPE for districts and urban councils in 2008, (UPE guidelines). The UPE guidelines define UPE as the ‘provision of basic education to all Ugandan children of primary school-going age (6+years)’.²³⁸ They emphasise ‘access, equity, quality and relevance of this education which should be affordable by the government

²³⁵ See Art 4 of the African Disability Protocol.

²³⁶ Art 4(i) of the African Disability Protocol.

²³⁷ NPA (n 103 above) 7, 15.

²³⁸ Guideline 1.1 on Guidelines on: Policy, Planning, Roles and Responsibilities of Stakeholders in the implementation of Universal Primary Education (UPE) for Districts and Urban Councils 2008. UPE was introduced in 1997 and was originally aimed at achieving the following: enable entry into school for every child by making the facilities and conditions conducive, primary school completion by learners, achieve equitable education by eradicating ‘disparities and inequities, ensure an affordable education and skills equipping so as to reduce poverty. (See 1992 White Paper on Education, NPA, Comprehensive review of UPE, Legal and Policy, 3).

and the majority of the people’.²³⁹ From the guidelines, UPE aims at providing ‘the minimum necessary facilities and resources to enable Ugandan children of school-going age to enter and remain in school compulsorily and complete the primary education cycle’.²⁴⁰ This is the basis for the conclusion that in Uganda, the free and compulsory primary education obligation is implemented through UPE.

Regarding the government investment in UPE, initially, the state was to provide tuition fees of approximately USD 1.5 per pupil from primary one to three, and USD 2.3 per pupil from primary four to seven.²⁴¹ This was in addition to provisions for instructional materials, teachers’ salaries, capacity building, and the construction of teaching facilities like classrooms.²⁴² To date, the financial commitments towards achieving these indicators leaves much to be desired. This yet again beckons the earlier recommendation that a right can only exist with sufficiency of resources to realise it.²⁴³ The human rights-based theory of fiscal sociology calls upon policy and law makers to scrutinise fiscal policy from economic, sociological, and human rights angles since these policies affect real lives of people and their human rights. These financing gaps aside, the MoES has adopted many policies on specific educational aspects which I do not consider in this study due to the scope limitations.²⁴⁴ Below I consider the National Development Plan III that recognises the role of basic education in the broader national development agenda and the realisation of the priority areas of Agenda 2063 and SDGs.

a) **The Third National Development Plan 2020/21 – 2024/25**²⁴⁵

The Third National Development Plan (NDP III) is hinged on the desire to attain the various development agendas such as Uganda Vision 2040, East Africa’s Vision 2050, the African

²³⁹ Guideline 1.1 (n 238 above).

²⁴⁰ As above

²⁴¹ As above.

²⁴² As above.

²⁴³ Waris (n 129 above).

²⁴⁴ These include the Early Childhood Development (ECD) Policy 2008, National Physical Education and Sports Policy 2004, The Uganda Students’ Higher Education Financing Policy 2012, Education and Sports Sector HIV Prevention Strategic Plan 2011-2015, among others.

²⁴⁵ Adopted in July 2020 by the National Planning Authority (NPA). This is the third successive plan after NDP I and NDP II.

Agenda 2063, and the SDGs.²⁴⁶ The NDP III proposals are partly premised on the challenges still faced by the education sector, which have led to low quality education characterised by low numeracy and literacy competencies, and high learners' dropout rates.²⁴⁷ The gains registered such as attaining 92% of parishes with primary schools, a GER of 8,655,924 are recognised.²⁴⁸ Unfortunately, this proliferation in GER has not been facilitated by the conditions in UPE schools but by the privatisation of the sector, with all its challenges especially to the marginalised and vulnerable populations. The plan acknowledges a regression in per capita spending on the education sector from 3% in 2017/18 to 2.3% in 2018/19.²⁴⁹ This retaliates the fiscal sociology theory, which asserts that the priorities of the government can be depicted from its spending priorities as reflected in the national budgets.²⁵⁰ In this study, I establish a correlation between the funding situation for basic education, specifically UPE and how the same affects the realisation of Uganda's obligations. I compare this with the revenue losses and leakages caused by tax incentives, before making appropriate conclusions and recommendations. Critical to note that at a policy level, there is an acknowledgement that the GER is largely attributed to the privatisation of the education sector. This speaks volumes about the direction the state is taking in the realisation of the basic education especially for the vulnerable.

Suffice to note that UPE has not been without merits. Since the inception of UPE in 1997, some of the achievements so far recorded include the GER tripling from 2.8 million learners in 1997 to 8.8 million in 2018.²⁵¹ Equally significant is the improvement in the pupil classroom ratio from 1:87 in 2003 to 1:55 in 2018, and the teacher recruitment from 185,548 in 2013 to 207,238 in 2018.²⁵² There has been a slight improvement in the GER and Net Enrolment Ratio (NER) at primary levels from 117%, and 93% in 2015/16 to 111% and 94% in 2018, respectively.²⁵³ In spite of this progress, much still needs to be done especially from the financing angle to

²⁴⁶ Pg 1 of NDP III.

²⁴⁷ Pg xx, 8 of NDP III. The dropout rates are still high at 38.5% though the same came down from the previous 50.9 % over the last 14 years.

²⁴⁸ Pg 4 of NDP III. These and other initiatives are said to have uplifted the aggregate literacy rates (of persons aged 10 years and above) from 70% in FY 2012/13 to 74% in 2016/17, and average years of schooling from 4.7 in FY2 012/13 to 6.1 in FY 2016/17.

²⁴⁹ Pg 6 of NDP III.

²⁵⁰ This is discussed in detail in sect 2.1 of the thesis.

²⁵¹ Pg 167 of NDP III. See also NPA (n 68 above) 2.

²⁵² Pg 167 of NDP III.

²⁵³ As above.

ensure the realisation and optimisation of quality free and compulsory UPE as a component of the right to basic education for the vulnerable.

According to the NDP III, some of the challenges that the basic education subsector still faces include poor access and enrolment at ECD centres, which stood at 15.6% in 2015/16. Even where the ECD centres services existed, the same were poor.²⁵⁴ This was largely because they are privately owned and the state's plans to intervene in the provision of ECD services are at their infancy.²⁵⁵ Primary education on the other hand was equally affected with the following:²⁵⁶

...poor quality and efficiency of primary education as evidenced by low literacy rates (49.9 percent at P.3, and 53.1 percent at P.6), low numeracy rates (55.2 percent at P.3, and 50.9 percent at P.6) and low survival rates in primary at 38 percent in 2018 due to high drop-out. These challenges are exacerbated by among others: weak school management; limited teacher capacity; absence of school feeding; limited parental/community participation; low financing and poor assessment methods.

These challenges cannot be divorced from the resource constraints; as is pointed out earlier in chapters two and three a right can only be a reality when adequate resources are appropriated for its realisation.²⁵⁷

The discussion in this part points to a policy framework that is not at par with the international human rights standards on basic education. The absence of a clear UPE policy is a big gap. The silence in the policy available documents on the link between the state's obligations and the adequacy of resources is telling of the level of state prioritisation and commitment to the realisation of free and compulsory UPE as a component of basic education. The policy framework is shaky and does not reflect the progress in the domestic legal provisions analysed below. Could this be attributed to the liberalisation and privatisation of the education sector? Could this be an indication of the future of basic education as a public good? Whatever the answers to these questions, I find that the direction the state might be taking is not in line with the international human rights obligations that Uganda has ratified and substantially domesticated as discussed below.

²⁵⁴ Pg 168 of NDP III.

²⁵⁵ See the MoES 'Early Childhood Care and Education Policy' (2018) available at <https://www.education.go.ug/utsep/wp-content/uploads/2020/03/4.-Reviewed-Draft-Early-Child-Care-Education-Policy-Approved-by-ME-WG-Dec-2018.pdf> (accessed on 16 July 2022).

²⁵⁶ Pg 168 of NDP III.

²⁵⁷ Waris (n 129 above).

4.1.4 The domestic legal framework on the right to basic education in Uganda

The Constitution of the Republic of Uganda 1995 (Constitution) has a short provision on the right to education. It simply provides that ‘all persons have a right to education’.²⁵⁸ The right places obligations on both the state and the parents and guardians, with different roles as enunciated in the primary legislation.²⁵⁹ Equally protected is the right to equal rights, opportunities, and access to education.²⁶⁰ Furthermore, the preamble to the Constitution recognises the obligation on the state to realise free and compulsory basic education, with opportunities to attain the highest educational standards guaranteed.²⁶¹ Private entities are allowed to operate and run schools in line with the government policy and set standards.²⁶² The challenges of the privatisation of basic education have already been highlighted in this study.²⁶³ These have made private schools economically inaccessible especially to vulnerable and marginalised learners while the available public options have structural and financial inhibitions that affect their capacity to deliver a sound and inclusive basic education. These limitations notwithstanding, the Constitution domesticates the right to basic education and some of the critical provisions essential for its realisation such as the establishment of privately run schools, among others. Some of these internationally recognised standards are provided for in the national objective and directive principles of state policy that are justiciable.²⁶⁴

The other relevant laws include the Children’s Act that does not equally provide for the right to education or basic education in much detail.²⁶⁵ It however recognises that a child is entitled to enjoy all the rights stipulated in other global and regional human rights instruments such as the CRC and the ACRWC.²⁶⁶ These two instruments, discussed in section 4.2.1, do not categorically provide for the right to basic education.

²⁵⁸ Art 30 of the Ugandan Constitution.

²⁵⁹ Art 34(2) of the Ugandan Constitution.

²⁶⁰ Obj XIV(ii) of the National Objectives and Directive Principles of State Policy.

²⁶¹ Obj XVII(i) & (ii) of the NODPSPs.

²⁶² Obj XVII(iii) of the NODPSPs.

²⁶³ Sect 1.2, 1.6, 2.2.2, 4.1.1 & 4.1.3 of the thesis.

²⁶⁴ See Art 8(A) of the Ugandan Constitution. See also FW Juuko & C Kabonesa ‘Universal Primary Education (U.P.E) in Contemporary Uganda: Right or Privilege?’ (2007) *HURIPEC Working Paper* 8 14.

²⁶⁵ Chapter 59 as amended by Act of 2016.

²⁶⁶ Sect 4 (1)(l) of the first schedule to the Children’s Act as amended.

It is through the Education (Pre-Primary, Primary, and Post-Primary) Act 2008 (Education Act)²⁶⁷ that the detailed legislative attempts are made to give effect to the constitutional and international human rights standards on the right to basic education.²⁶⁸ The Act defines basic education though in a vague and limiting way.²⁶⁹ However, special attention is placed on the same being a minimum education package, for both formal primary and informal education.²⁷⁰ UPE is also defined with emphasis placed on ‘tuition fees’ being paid by government, equitable access for all, quality and affordability by all.²⁷¹ As such, from the onset, free and compulsory UPE was meant to be sound, accessible and inclusive. The other contraction is that although UPE is portrayed as free for all, the Education Act only waives tuition fees and yet related charges such as the cost of the feeding programme, uniform, scholastic materials, and transport costs are equally prohibitive.²⁷² Relatedly, even though the tuition waiver was aimed at enabling parents to contribute to other education related expenses, poverty and the high cost of scholastic materials, due to a lack of government subsidies, have undermined this objective.²⁷³ These costs have affected the quality of basic education delivered to the vulnerable through UPE.²⁷⁴

Specifically, the right to basic education for all is provided for in the Education Act though not in much detail still.²⁷⁵ Notably, the Act details the several ways to raise funds for the financing of education: ‘Financing of education shall be through fees, grants, donations, training levies, education tax, and any other means as deemed appropriate by Government’.²⁷⁶ This provision has inherent shortcomings. Firstly, the Act is silent on the express obligation of government to finance public basic education even when charging fees is expressly prohibited in UPE schools. This is as equally confusing as telling. From this I can conclude that the national appropriations from the budget are covered

²⁶⁷ Act 13 of 2008, commenced on 29 August 2008, available at <https://ugandalaws.com/statutes/principal-legislation/86-education-pre-primary-primary-and-post-primary-act.html> (accessed 22 September 2019).

²⁶⁸ Sect 1 of the Education Act.

²⁶⁹ Sect 2 of the Education Act defines basic education the minimum education package of learning made available to each individual or citizen through phases of formal primary education and non-formal education system to enable him or her be a good and useful person in society.

²⁷⁰ As above.

²⁷¹ Sect 2 of the Education Act.

²⁷² Woolman & Fleisch (n 43 above) 221; see also Mukisa (n 195 above).

²⁷³ NPA (104 above) 13, 18.

²⁷⁴ As above.

²⁷⁵ See sect 4(2) of the Education Act.

²⁷⁶ Sect 4(3) of the Education Act.

under ‘any other means as deemed appropriate by Government’. This is clearly a departure from the primary obligation imposed on the state to realise free and compulsory primary education by international human rights law discussed in detail in the preceding section.²⁷⁷ Secondly, the education tax envisaged under the section has never been levied. This would essentially increase the revenue earmarked probably for the financing of free and compulsory UPE. Thirdly, the Education Act places an undue burden on several stakeholders including parents and guardians to provide food, clothing, medical care, transport, and the provision of ‘community support’ to the schools.²⁷⁸ What amounts to community support is not defined. UPE is as such presented as free and yet with several prohibitive costs that may not be afforded by the vulnerable parents and guardians which affects definitely its affordability. Ironically, the imposition of ‘charges’ in UPE schools is prohibited though the community or parents may be called upon to make voluntary contributions to the school in cases of emergency.²⁷⁹ Even then no learner should be denied an education for failing to pay such levy.²⁸⁰ Contravening these provisions attracts criminal sanctions.²⁸¹ The general framework in the primary legislation is confusing and can be summarised as the government attempting to give with one hand while taking away with the other.

The other challenge is that although the Minister of Education is mandated to pass statutory instruments to ease the enforcement of the provisions, this has still not been done more than a decade and a half after the passing of the Act.²⁸² These would regulate issues such as school feeding, school uniform, and school management committees, among others.²⁸³ Moreover, there have been challenges related to this decentralisation of the primary education subsector particularly without the proper finances at the local governments to implement the requisite standards.²⁸⁴ Some of these challenges have been litigated on in other jurisdictions.

For instance, in the American case of *Hartzell & Connell*,²⁸⁵ where the constitutionality of the fees waiver policy for extracurricular activities was in issue (even when the school recognised basic education as free and parents were only required to pay for the extracurricular activities),

²⁷⁷ See sect 4.1.1 of the thesis.

²⁷⁸ Sect 5(2) of the Education Act.

²⁷⁹ Sect 9(1), (2), (3) of the Education Act.

²⁸⁰ Sect 9(1), (2), (3) of the Education Act.

²⁸¹ Sect 9(4) of the Education Act.

²⁸² See sect 3 (2)(b) & 57 of the Education Act and NPA (n 103 above) 13.

²⁸³ NPA (n 103 above) 15.

²⁸⁴ See part 2(1) of the second schedule to the Local Government Act Cap 243 as amended.

²⁸⁵ 679 P2d 35 (Cal 1984) 43.

the appellant court held that the charging of tuition even with a waiver policy on extra curriculum activities violated the right to basic education. It stated as follows:²⁸⁶

The free school guarantee reflects the people's judgement that a child's public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and non needy families. Individual families needy or not, may value education more or less depending upon conflicting budget priorities.

This is relevant to the Ugandan context where the MoES has proposed a study, to establish the willingness and readiness for parents to pay fees in UPE schools, in an attempt to do away with the state's primary obligation to realise free and compulsory basic education for the most vulnerable.²⁸⁷ Given the recently witnessed trends and the flaws in the Education Act, it would not be surprising if free and compulsory UPE is done away with in violation of the human rights obligations on the state.

Of equal concern is that the state, in the course of legislation, has also not prioritised ECD learning nor pre-primary education, funding for which is by law the responsibility of parents and guardians.²⁸⁸ Such a scenario is challenging since research, as indicated in this section, demonstrates a strong correlation between ECD and pre-primary education with better performance in primary school.²⁸⁹ Resource constraints have affected the implementation of ECD initiatives since many parents are financially incapacitated, and thus unable to afford the same without assistance from government. The state supports learners from the age of six for seven years in primary education leaving ECD centres uncovered by the legal framework.²⁹⁰ Equally of concern is that although the government undertook to ensure that learners who drop out before completing primary school are given alternative basic training, this has not yet been implemented.²⁹¹ Given the obligation clarified above, the status of the realisation of UPE as a critical component of the right to basic education, the future proposals, and the challenges therein, I highlight the components of the right in Uganda below.

²⁸⁶ As above.

²⁸⁷ See Business Focus Reporter, 'Study On-going To Determine Fees Payment For UPE, USE Learners' Kampala 19 March 2022 available at <https://businessfocus.co.ug/study-on-going-to-determine-fees-payment-for-upe-use-learners/> (accessed 15 April 2022). See also C Kiiza 'Gov't Studying Scrapping Fees In UPE, USE School' Kampala 18 March 2022 available at <https://chimpreports.com/govt-studying-scrapping-fees-in-upe-use-schools/> (accessed 15 April 2022).

²⁸⁸ Sect 10(1)(a) of the Education Act.

²⁸⁹ Sect 4.1.1 of the thesis.

²⁹⁰ Sect 10(3) of the Education Act.

²⁹¹ As above.

4.2 The tenets of the right to basic education in Uganda

Although the conceptualisation of the right to basic education is critical to its effective implementation,²⁹² Uganda has had its own share of policy and legislative contradictions regarding this obligation. These include the conflict over the funding of ECD, how to deal with informal education or ‘other education’ for drop out learners, and the implementation of distance or remote learning during the Covid-19 pandemic.²⁹³ It is thus essential for this study to clarify the state’s obligation to this end. Before I delve into the specifics, in this part I seek to elaborate the understanding of basic education in the Ugandan context.

The term ‘basic education’ came to prominence during the United Nations Educational, Scientific and Cultural Organisation (UNESCO) World Declaration on Education for All and its accompanying Framework for Action to Meet Basic Learning Needs, adopted by the World Conference on Education for All (EFA).²⁹⁴ Initially the right emerged as a result of soft law, but later gained prominence as a stand-alone entitlement, with distinct obligations from the broader right to education as is elucidated in section 4.1 of the study.

Significant to the right is the actual learning through tangible outcomes rather than a focus ‘exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements’.²⁹⁵ In the preceding section I argue that the several assessment criteria of the extent of the realisation of the right to basic education in Uganda overly focus on enrolment, retention and survival rates, level of numeracy and literacy skills attained at particular educational levels, and completion rates of primary school. I find that an objective and informed assessment for ascertaining whether actual learning takes place in schools is still lacking. This could partly be as a result of the varied expectations of the various stakeholders and a failure to arrive at a consensus on the same. The realisation of actual learning, and its monitoring and assessment both require substantive financial investment. Certainly, getting learners to enrol, stay in school, and complete the programme is essential, but these should not

²⁹² McCowan (n 19 above) 510.

²⁹³ These are discussed in section 4.4 above.

²⁹⁴ Jomtien, Thailand, March 1990 available at http://www.unesco.org/education/pdf/JOMTIE_E.PDF (accessed 2 September 2019); C Simbo ‘Defining the term basic education in the South African Constitution: An international law approach’ (2012) 16 *Law, Democracy and Development* 16 available at <http://www.ldb.org.za/by-type/refereed-articles/128-articles-vol-16/382-defining-the-term-basic-education-in-the-south-african-constitution-an-international-law-approach.html> (accessed 29 July 2019). Simbo finds that the declaration is a part of international soft law that aids interpretation.

²⁹⁵ Art 4 of the World Declaration on education for All; Murungi (n 43 above) 3161.

be an end in themselves.²⁹⁶ In the Ugandan context, there is default even at its bare minimum level.

To attain the requisite quality basic education, for example, its meaning and the scope should be broadened to include ECD initiatives and learning centres in communities.²⁹⁷ Unfortunately, in Uganda, ECD is not compulsory and free thus dependant on the financial capacity and willingness of the parents and guardians to have their children attain it. This has perpetrated an exclusion of children from poor and marginalised backgrounds and forced them to enrol straight into UPE schools after their sixth birthday having skipped pre-primary education. The exclusion has definitely left some deficiencies in the learners.

Equally of concern is the emphasis placed on learning outcomes without interrogating the desired process of achieving the same.²⁹⁸ This ignores 'a rights-based approach to education (which) calls for simultaneous attention to outcome and processes'.²⁹⁹ Indeed, quality is essential to achieving meaningful learning outcomes.³⁰⁰ To underscore the role of primary education in achieving the EFA goals,³⁰¹ a two years deadline was given, from the adoption of the recommendations of General Comment 11 of the Committee on ESCR, for countries to adopt and share a plan of action for the implementation of free and compulsory primary education.³⁰²

Uganda's implementation of the obligation enunciated above has greatly been hampered by infrastructural inadequacies that are as a direct result of resource constraints. Improving the terms and conditions of the service of teachers,³⁰³ the role of a supportive political, policy, and

²⁹⁶ K Tomasevski *Education denied: Costs and Remedies* (2003) 15 & 18.

²⁹⁷ Art 5 of the World Declaration on education for All.

²⁹⁸ McCowan (n 19 above) 519.

²⁹⁹ As above.

³⁰⁰ AC Onuora-Oguno *Development and the Right to Education in Africa* (2019) 56.

³⁰¹ The UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), General Comment 11: Plans of Action for Primary Education (Art 14 of the Covenant) adopted on 10 May 1999, E/1992/23, available at: <https://www.refworld.org/docid/4538838c0.html> (accessed 10 September 2019). Under Art 3(3) and (4) of the World Declaration on education for All, the following are essential for achieving EFA: Universalising access and promoting equity by paying special emphasis to girls and women education, handling gender stereotypes that affect education, removing barriers to education affecting the most vulnerable such as the poor, street and working children, nomads, refugees, migrants and internally displaced children, indigenous persons and persons from ethnic minorities among others.

³⁰² Art 14 of CESCR and para 1, 4-10 of General Comment 11 of the Committee on ESCR. This deadline did not apply to Uganda as the free and compulsory education for all had been adopted in 1997 two years before the general comment.

³⁰³ Art 7 of the World Declaration on education for All.

fiscal framework,³⁰⁴ and the importance of fiscal resources and budget prioritisation for UPE are equally essential.³⁰⁵ The realisation of the right largely depends on the political will that ensures an enabling policy and legal framework, backed by the financial resources through appropriate domestic revenue mobilisation (DRM) strategies and the prioritisation in the budget allocations.³⁰⁶ This position is the thread that runs throughout the thesis and is in line with the human rights-based theory of fiscal sociology. A decade after the Declaration, the Dakar Framework for Action: Education for All – Meeting Our Collective Commitments 2000 (Dakar Framework) recognised the challenges that many countries still faced in determining the meaning, scope, purpose, and content of basic education.³⁰⁷ Suffice to note that there are other gaps affecting the realisation of the right to education generally. These include poverty, the effects of privatisation of education, the Covid-19 pandemic and its impact on education, limited financial resources, exclusion and inequality, among others.³⁰⁸ In the Ugandan context, these concerns have been exacerbated by the gaps relating to UPE financing as is elaborated below.

4.3 The status of financing for free and compulsory universal primary education in Uganda and its impact on the right

Globally, the primary responsibility for financing basic education is on states.³⁰⁹ Even then, the global financing gap for financing for basic education of all a decade ago stood at USD 26 billion and was expected to rise by USD 38 billion annually if the obligation was extended to include secondary education.³¹⁰ Domestically, over the years of UPE implementation, several milestones especially with the elevated learners' enrolment have been registered. These have come with more logistical and financing challenges such as a shortage of classrooms, trained teachers, text books, and other logistics.³¹¹ The ten year education sector strategic plan (ESSP)

³⁰⁴ Art 8 of the World Declaration on education for All.

³⁰⁵ Art 9 of the World Declaration on education for All.

³⁰⁶ See A Budoo 'Adoption of a Human rights Approach to Budgeting as a Step to realise the right to Education in African Countries' in AC Onuora-Oguno et al. (eds) (n 138 above) 30.

³⁰⁷ Dakar Framework of Action, viii.

³⁰⁸ Beiter (n 18 above) 3.

³⁰⁹ MR Balsera *et al* 'Financing education: why should tax justice be part of the solution?' (2018) 48.1 *Compare: A Journal of Comparative and International Education* 147 available at <https://login.research4life.org/tacsgr1www.tandfonline.com/doi/pdf/10.1080/03057925.2017.1394743?needAccess=true> (accessed 21 July 2021).

³¹⁰ As above.

³¹¹ NPA (n 68 above) 2.

of 2004 - 2015 as subsequently amended was partly introduced to counter these challenges.³¹² Some of these challenges are enunciated below with the view of appreciating the place of finances in the discourse.

Initially, a year after the introduction of UPE, in 1998, school fees and other financial contributions such as Parents Teachers Association (PTA) were abolished in public schools.³¹³ As discussed earlier, initially the government paid a capitation grant of approximately USD 1.5 for each learner in primary one to three and USD 2.2 for learners from primary four to seven.³¹⁴ Later, a uniform figure of approximately USD 2 per learner per year was adopted, which was later raised to about USD 3.³¹⁵ From 1997 to 2018, the state has paid a capitation grant for 135 million learners.³¹⁶ From the foregoing, it can be argued that there has been progressive financing in the form of an enhanced capitation grant over time. However, this amount is too little to cater for the recurrent costs of delivering a sound and inclusive basic education for learners from marginalised backgrounds. It is also challenging that no affirmative action in the form of capitation grant is available to learners with disabilities, whose training requires more resources so as to achieve reasonable accommodation in school. Rural, urban schools, and learners with disabilities attending main stream schools all receive the same capitation grants irrespective of their different circumstances.³¹⁷ The extra USD 80 granted to all schools annually to cater for disability related needs as discussed above is insufficient.³¹⁸

Relatedly, due to resource constraints, generally, expenditure on non-wage expenses like text books, and teaching and learning materials has been reducing to cater for the cost of the instruction of extra learners and the escalating capitation grants.³¹⁹ Although the classroom to pupil ratio has improved from 1:106 in 1997 to 1:69 in 2016, the same has not kept pace with the upgrade in enrolment rates and has also been negatively affected by the decline in the school facilities grant (SFG).³²⁰ Also inadequate are sanitary places and teachers' houses.³²¹

³¹² As above.

³¹³ NPA (n 68 above) 6.

³¹⁴ As above. See also sect 4.1.1(b) of the thesis.

³¹⁵ As above.

³¹⁶ As above.

³¹⁷ NPA (n 103 above) 14.

³¹⁸ See sect 4.1.1 of the thesis.

³¹⁹ NPA (68 above) 8.

³²⁰ As above.

³²¹ NPA (n 68 above) 9,10.

The other area of concern is that although government has enhanced the teachers' salary in a phased manner, this has been at the expense of non-wage recurrent expenses,³²² the reduction of which ultimately affects the realisation of the right to basic education for UPE learners.³²³ Even with the intensified training and enrolment of teachers, teacher shortages still exist as it has not matched the increment in the learners' enrolment rates.³²⁴ As a matter of fact, the expenditure on education as a share of total expenditure has kept declining from 18.6% in 2005/6 to 13.3% in 2017/18 which is below the 14% policy target, and way below the 20% standard of the Global Partnership for Education (GPE), and of the several soft law standards discussed earlier in chapter one of this study.³²⁵ At the peak of UPE, in 2000, the expenditure stood at 30% and even when it reduced, it still remained within agreeable targets of 20% by 2003/4. However, government spending priorities have since changed as witnessed with the recent 8.6% appropriation in the current 2022/23 budget dropping from 12% allocation in the 2016/17 budget.³²⁶ The impacts of the budget decline are worsened by inflation which greatly eroded the value of money.

Furthermore, the budget allocations to the sector as a fraction of gross domestic product (GDP) reduced from 3.5% in 2005/6, 2.7% in 2016/17 and 2.7 2021/22.³²⁷ This is clearly regressive and against the principle of the progressive realisation of the right to education. Ultimately this affects the capacity of the state to achieve basic education as an immediately realisable right. Worse still, as a result of the introduction of universal secondary education (USE) and universal post O-level education and training program (UPOLET), there has been a budget decline towards the primary education subsector which implements UPE.³²⁸ In the financial year 2005/6 for example, primary education as a subsector was allocated 68% as compared to the 52% a decade later in 2016/17.³²⁹ This is despite the spurt in GER. It is therefore not surprising

³²² NPA (n 68 above) 10.

³²³ NPA (n 68 above) 10.

³²⁴ NPA (n 68 above) 11.

³²⁵ NPA (n 103 above) 13, 14. See sect 1.0, 1.1 & 1.2 of the thesis. This decline has continued with the financial year 2019/20 being at 11.47% and 2020/2021 at 11.25%. (See <https://www.macrotrends.net/countries/UGA/uganda/education-spending> accessed on 14 August 2022). The current expenditure on education to GDP percentage is at 2.7% (See <https://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS?locations=UG> accessed on 14 August 2022).

³²⁶ See <https://www.finance.go.ug/sites/default/files/press/Budget%20Speech%20June%202022.pdf> 18 (accessed on 14 August 2022 and compare with NPA (n 100 above) 38).

³²⁷ NPA (n 103 above) 14. The current expenditure on education to GDP percentage is at 2.7% (See <https://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS?locations=UG> accessed on 14 August 2022).

³²⁸ As above.

³²⁹ As above.

when the standards in UPE schools continue to deteriorate despite the increase in enrolment since the GER is not matched in the budgetary allocations.

Similarly, most of the expenditure to the education sector has been directed towards wage related expenses, with the gap between the wage and non-wage and the government development budget lines broadening annually.³³⁰ Even with the primary education subsector getting a bigger share of the sector budget consistently, this has largely been as a response to the surge in enrolment rates, and has not adequately been matched with the enabling infrastructure of a sound basic education.³³¹ The several gaps and challenges affecting the realisation of a sound basic education in Uganda, as discussed in this chapter, can be largely attributed to resource constraints.³³² The same affect UPE learners disproportionately.

Relatedly, according to the Education Sector Strategic Plan of 2017/18 - 2019/20, although 53.95% of the funding to the sector goes to the primary education sub-sector, there are still glaring funding gaps.³³³ The sub-sector suffers the highest funding gap as compared to secondary, university, and other subsectors. The plan has an estimated funding gap of approximately USD 2.840 million with an annual funding gap of about USD 946.668 million of which USD 2.270 million is the gap for the primary education subsector alone for the three years.³³⁴ This is about 80% of the funding gap for the primary education subsector alone, which is worsened by inflation.³³⁵ Suffice to note that financing determines the quantity in terms of the levels of enrolment, infrastructure, quality of basic education, the execution of the inspection function, and the capacity development for teachers.³³⁶

³³⁰ JM Arinaitwe, *et al* 'Public Expenditure in Uganda's Education Sector: Application of an innovative Assessment Framework' (2015) 9,10.

³³¹ Arinaitwe (n 330 above) 11.

³³² See sect 4.1 of the thesis.

³³³ ESSP 2017/18-2019/20 30, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiz1p7I8dP0AhUHnhQKHZ7HAS0QFnoECAIQAO&url=http%3A%2F%2Fnpa.go.ug%2Fwp-content%2Fuploads%2F2018%2F11%2FEDUCATION-AND-SPORTS-SECTOR-STRATEGIC-PLAN.pdf&usg=AOvVaw31Jgb3OodZGRS67XDKMnFk> (accessed 8 December 2021).

³³⁴ <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiz1p7I8dP0AhUHnhQKHZ7HAS0QFnoECAIQAO&url=http%3A%2F%2Fnpa.go.ug%2Fwp-content%2Fuploads%2F2018%2F11%2FEDUCATION-AND-SPORTS-SECTOR-STRATEGIC-PLAN.pdf&usg=AOvVaw31Jgb3OodZGRS67XDKMnFk>; as above.

³³⁵ Interview with Dr. Mugenyi (n 38 above).

³³⁶ As above

The ESSP recognises that the funding gap cannot be bridged through budgetary resources from government but through the reduced expenditure and public-private partnerships (PPPs).³³⁷ This contradicts the government's international and domestic human rights obligation on financing for rights. The plan recognises a failure by the government to meet the 4% of GDP expenditure to the sector less donor support, and proposes incremental ways for progressively realising the same.³³⁸ The proposals were 2.46% for the financial year 2016/17, 2.6% for 2017/18, 2.74% for 2018/19, 2.88% for 2019/20, and 3.02% for 2020/21.³³⁹ Uganda still lags behind these set targets as indicated above that the current education sector expenditure to GDP ratio still stands at 4%.

To bridge the financing gap, the MoES relies on development partners.³⁴⁰ The donor contribution is substantial.³⁴¹ The challenge though seems to be with the prevailing impasse between government and the development partners, which has led to the suspension of some donor funded activities resulting in the donor partners dealing with NGOs directly as opposed to the government.³⁴² Ultimately, these challenges live Uganda in a precarious position where donor dependence is not sustainable. The discussion above paints a dire situation of the inadequacies in the financing for free and compulsory UPE, which affects the realisation of the right to basic education for UPE learners.

4.4 Conclusion

In answering the research question pertaining to Uganda's status of realisation of free and compulsory primary education as a component of basic education and the contribution of resources to the status quo, the following was established in the chapter. Although the right to basic education flows from the right to education, the former imposes higher obligations. These include the requirement for basic education to be sound, inclusive, of good quality, and with primary education as a critical vehicle for its realisation. Equally important is the need to ensure actual learning in the schools and other learning programmes rather than obsessing over enrolment and perfunctory accreditations and awards. This obligation extends to learners who

³³⁷ ESSP (333 above) 31.

³³⁸ ESSP (333 above) 32.

³³⁹ As above.

³⁴⁰ Interview with Dr. Mugenyi (n 38 above).

³⁴¹ As above.

³⁴² As above.

drop out of the school system before completion of the primary cycle to ensure that measures are in place for them to attain basic education. Financial resources are critical to this end.

The international legal framework is extensive, detailed and clear on the right to basic education and the obligations on states. The initial contradictions were ably resolved by the works of the relevant committees as is evidenced in the countries' domestic legislative efforts, which recognise basic education as a fundamental human right. Uganda has taken this trajectory. However, in the Ugandan context, although basic education is the only constitutionally and concretely domestically provided for minimum core obligation of the various ESRs, its realisation faces several challenges particularly within the UPE context. These are insurmountable as compared to other sectors and rights, yet basic education is critical to the realisation of other entitlements. The challenges include poor and insufficient infrastructure that does not match the ever growing GERs, the quality, sufficiency, and motivation of teachers, which affect their commitment and often leads to perennial absenteeism. Worse still, the state has had to rely on parents and donors to bridge the financing gaps which has equally been challenging. The challenges related to the delivery of basic education to the vulnerable in Uganda are enormous. In this chapter I only analyse a few to demonstrate how the same ultimately affect the capacity of the state to realise a sound and inclusive basic education for all, especially through the free and compulsory UPE. The basic education subsector funding challenges have been blamed largely for these gaps. Notably, to determine whether an education is available, accessible, acceptable, and adaptable, the cost of delivery of a sound and inclusive basic education must be evaluated. This is where Uganda largely defaults.

The situation above has been exasperated by budgetary cuts and insufficient allocations to the education sector as a whole, and the basic education subsector distinctly. There is as such urgent need to scrutinise fiscal decisions as they have a bearing on the ultimate realisation of the rights of citizens. In this study, the right to basic education through free and compulsory UPE is reviewed to mirror how fiscal policy decisions can impact the realisation of critical ESRs notably for the vulnerable. The following chapter illustrates in concrete terms the effects of Uganda's fiscal policy decisions on revenue for the realisation of ESRs including financing for free and compulsory basic education.

Chapter Five

Legal and policy framework on tax incentives in Uganda

5.0 Introduction

Resources are important for the realisation of economic and social rights (ESRs) including free and compulsory universal primary education (UPE) as a component of the right to basic education. Thus, inadequate budgetary allocations coupled with the challenges of relying on parental and external support from development partners, have negatively affected the realisation of a sound, quality, and inclusive basic education for UPE learners. This could explain the study commissioned by the Ministry of Education and Sports (MoES) aimed at establishing the readiness of parents and guardians to pay fees for UPE learners, which is in violation of Uganda's human rights obligations.¹ The fact that the government is considering this option alone indicates a dwindling political will to use fiscal policy to generate sufficient domestic revenue for the realisation of essential rights such as a free and compulsory UPE. This confirms that fiscal policy decisions have a bearing on ESRs as the expounders of the human rights-based theory of fiscal sociology find. In this chapter, I analyse the adequacy of the policy and legal framework on tax incentives in Uganda with the view of establishing their potential impact on the resources for the realisation of ESRs.

To establish the above connection, I largely relied on key informant interviews (KIIs) with purposively selected participants, and the review of primary and secondary sources such as tax laws, policies, and scholarly works. In this chapter I detail the views of the following key informants: A representative from the fiscal policy department of the Ministry of Finance, Planning, and Economic Development (MoFPED). From this participant I sought to establish the tax incentives policy motivations, their views on the adequacy of the current framework, the administration and management of the non-statutory tax incentives, and any policy and legal recommendations for the better management of tax incentives. From the Uganda Revenue

¹ See Business Focus Reporter, 'Study On-going To Determine Fees Payment For UPE, USE Learners' Kampala 19 March 2022 available at <https://businessfocus.co.ug/study-on-going-to-determine-fees-payment-for-upe-use-learners/> (accessed 15 April 2022). See also C Kiiza, 'Gov't Studying Scrapping Fees In UPE, USE School' Kampala 18 March 2022 available at <https://chimpreports.com/govt-studying-scrapping-fees-in-upe-use-schools/> (accessed 15 April 2022).

Authority (URA), I interviewed two participants: An expert in the legal and policy framework and an implementer. This was to facilitate the better appreciation of the status of implementation of both statutory and non-statutory tax incentives. Additionally, the interviews at URA were to solicit views on the adequacy of the current legal and policy framework on tax incentives, as well as the implementation challenges and gaps. I also interviewed a representative from the Uganda Investment Authority (UIA) as the agency in charge of investment matters to appreciate the relationship between tax incentives and foreign direct investment (FDI) in Uganda from a policy and practical perspective. This interview was also essential in clarifying the concerns raised by URA about the policy inconsistencies, regarding strategic sectors that benefit from tax incentives, which the UIA was best suited to respond to. I also sought to appreciate UIA's position on the current framework as former implementers of tax incentives. Other participants interviewed included the then representative from the budget committee and the public accounts committee of the parliament of Uganda, to appreciate how effectively parliament executes its legislative and oversight role on tax incentives matters. A representative from the Private Sector Foundation Uganda (PSFU) was interviewed to ascertain the views of the private sector on the adequacy of the legal and policy framework on tax incentives, and how appropriate it is for the sector. I interviewed an expert on taxation for a balanced view on the issues under discussion. The expert additionally raised broader perspectives that I had not previously considered, which better shaped the direction of the study. These included the history and status of tax holidays in Uganda, the connection of tax incentives with the Structural Adjustments Programmes (SAPs), among others. I interviewed three non-governmental organisations (NGOs) specialising in tax justice, public finance, budgeting, and human rights. These are the Civil Society Budget Advocacy Group (CSBAG), the Southern and Eastern African Trade, Information and Negotiation Institute (SEATINI), and the Initiative for Social and Economic Rights (ISER). In addition to seeking their broad views on the issues under study, I set out to appreciate the level of involvement of the civil society in policy and legal formulation. These interviews greatly enriched the doctrinal method as is evident in the discussion below.

To start off the discussion, I trace the background and general tax incentives system and public finance management framework (PFMF) by way of introduction. I later review the international framework including soft law standards applicable, the Ugandan policy and legal framework on tax incentives and the statistics that confirm the revenue forgone from the grant of tax incentives for the period of study.

5.1 Uganda's tax incentives system and public finance management framework

5.1.1 Tracing the evolution of tax incentives in Uganda from a historical perspective

Tax incentives, like taxation, have existed since time immemorial. Their form, purpose, and structure have evolved depending on the nature of governance and the economic situation at the time. The history of tax incentives in Uganda like elsewhere demonstrates the relationship between tax and class or the concept of tax privilege.² For instance, during the pre-colonial and colonial era, many African countries struggled with various classes of people that devised ways of avoiding tax liability and thereby reduce the volume of state coffers.³ Even then, several motives were advanced for granting tax incentives at various times. For example, during colonial times, tax incentives were justified largely for strategic production of exports.⁴ Despite the progressive objective, I find that the tax incentives favoured non-Africans more and were discriminatory against Africans. In Uganda for example, non-Africans enjoyed more than 20 years of little or no taxation before 1919 as Africans shielded the bulk of the tax burden.⁵ The incidents of the special treatment enjoyed by non-Africans is summarised below:⁶

When a tax was finally imposed on non-Africans in 1919 it was in the form of a poll tax, and the rate (Sh 30 per adult male) was only twice the African rate. This rate remained unchanged for fifteen years when it was replaced by a sliding rate in which the minimum tax was Sh 30 for incomes of less than 200 (indian rupees) and the maximum 500 (indian rupees) for incomes in excess of 10,000 (indian rupees). This was not until 1945 that an income tax proper was finally introduced in Uganda.

It can be argued that historically, ordinary citizens have not benefited as much from preferential tax treatment as compared to foreigners. The discussion in section 5.4 seeks to partly determine if this eventually changed. Furthermore, preferential tax treatment was extended to crops grown by non-Africans such as coffee, cotton, and rubber even though they were more profitable compared to crops of Africans.⁷ It can therefore be said that the colonial masters were strategic at ensuring that their interests and those of their citizens were protected through the tax incentives policy to the detriment of the natives.

² FK Mann 'The Sociology of Taxation' (1943) 5.2 *The Review of Politic* 225 229 available at https://www.jstor.org/stable/1404264?seq=1#metadata_info_tab_contents (accessed 16 October 2019). See also prior discussion on tax privilege in sect 2.2.2 of the thesis.

³ A Waris *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) 24.

⁴ L Gardner *Taxing Colonial Africa: The Political Economy of British Imperialism* (2012) 1 & 2.

⁵ V Jamal 'Taxation and inequality in Uganda, 1900-1964' (1978) 38.2 *The Journal of Economic History* 418 420,421 & 422 available at <http://www.jstor.org/stable/2119833> (accessed 4 February 2020) 422.

⁶ As above.

⁷ As above.

This discrimination went on unabated to the extent that despite the introduction of the export tax on coffee, and the marketing board surplus taxes in the 1940s, coffee grown in large estates remained ‘untaxed and uncontrolled’ even though most of these belonged to non-Africans.⁸ As a result, Africans bore the bulk of the tax burden, contributing the most to the tax revenue and yet benefiting the least from government expenditure.⁹ In later years, several indirect taxes such as cattle branding fees, bicycle registration fees, and government registration fees, were introduced but even then, Africans continued to pay more levies than non-Africans.¹⁰ Besides, from 1927-1937, non-Africans benefited the most from the duty-free imports they commonly consumed.¹¹ This was in pretext of exempting essential items such as drugs and school items, though the list included goods that were most relevant to non-Africans. The exempt list additionally contained items such as ‘rice, fresh fish, fresh fruit, newspapers and periodicals, rat traps, salt for curing, plumbing fittings, and mosquito nets’ that were doubtfully essential.¹² This situation went on unabated for quite some time as more taxes were introduced for Africans.

By the late 1950s, in addition to the poll tax for Africans, a graduated tax had been introduced and was to be paid to local governments.¹³ Other taxes such as poll taxes, excise duties, and taxes on cotton and coffee had their rates raised as a result of the economic boom.¹⁴ Consequently, more tax revenue was collected, even when the tax incidence remained heavy on Africans despite the introduction of the income tax payable by non-Africans.¹⁵ This went on until 1974 when Uganda enacted the first Income Tax Decree that gave the Minister of Trade the discretion to declare any income as exempt, and introduced the first codified income tax exemptions.¹⁶ Tax incentives had additionally been introduced to compensate new investments for potential market distortions.¹⁷ This was the official start of the discretionary

⁸ As above.

⁹ Jamal (n 5 above) 422 & 423.

¹⁰ Jamal (n 5 above) 425.

¹¹ Jamal (n 5 above) 427.

¹² As above.

¹³ Jamal (n 5 above) 429.

¹⁴ As above.

¹⁵ Jamal (n 5 above) 430.

¹⁶ See the Income Tax Decree, 1974 (this decree had been a replacement of the East African Income Tax Act of 1970); MS Ulriksen & MW Katusiimeh ‘The History of Resource Mobilisation and Social Spending in Uganda’ (2014) *United Nations Research Institute for Social Development Working Paper* 6 available at <http://www.unrisd.org> (accessed 21 February 2020).

¹⁷ S Mayende ‘The Effects of Tax Incentives on Firm Performance: Evidence from Uganda’ (2013) 6.4 *Journal of Politics and Law* 95 95 available at https://heinonline.org/HOL/Page?handle=hein.journals/jpola6&div=78&g_sent=1&casa_token=&collection=journals (accessed 18 November 2019).

ministerial incentives that later became problematic and were eventually outlawed in 1997.¹⁸ The outlaw was largely because of the abuse that was inherent in the nature of the tax incentives, which materialised and caused challenges, especially with tax administration. This was further worsened by the conflicting roles of the Minister of Trade and the URA as discussed in detail below.

Given this background, it can be argued that the 1997 Income Tax Act chapter 340 (ITA) was the first attempt at ensuring that all tax incentives were granted by law, for proper accountability, implementation, and transparency. In section 5.4, I discuss the level of success in achieving this objective. The developments in the framework discussed above can best be appreciated after analysing the public finance management situation and political ideological situation at the time. The discussions in chapter two connect, at a theoretical level, tax incentives to the political ideology of the state.¹⁹

Further and from the broader public finance management perspective, hitherto, in 1987, there had been efforts by the then new government to revamp the economy through monetary and fiscal reforms.²⁰ This was to counter the high taxes, challenges arising from discretionary tax incentives, double taxation, and a weak tax administration among others.²¹ Relatedly, the later 1990s witnessed the introduction and implementation of the SAPs.²² These arose from the ‘Washington Consensus’ and were prominent for their classical neo-liberal policies.²³ These policies aimed at encouraging a private sector-led economy with reduced public expenditure on social services.²⁴ The introduction of discretionary tax incentives in the early 1990s was part

¹⁸ See sect 21 of the Income Tax Act cap 340.

¹⁹ See sect 2.2.2 of the thesis.

²⁰ Mayende (n 17 above).

²¹ As above.

²² F Heidhues & G Obare ‘Lessons from Structural Adjustment Programmes and their Effects in Africa’ (2011) 50.1 *Quarterly Journal of International Agriculture* 55 58 available at <https://ageconsearch.umn.edu/record/155490/> (accessed 31 May 2021).

²³ As above. The SAPs solved the high inflation rates by encouraging the enactment of macroeconomic stabilisation policies, encouraged privatisation and free market development, contributed to controlling budget deficits by eliminating subsidies and cutting public support for social services. ‘A typical SAP called for devaluation and trade liberalisation to improve the country’s balance of payments and control its foreign indebtedness; debt rescheduling and stricter debt management were regularly part of the prescribed policy set.’ Reduction of export tax was one of the SAPs conditionalities. See also KK Gogo ‘The Impacts of the World Bank and IMF Structural Adjustment Programmes On Africa: The Case Study of Cote D’Ivoire, Senegal, Uganda, and Zimbabwe’ (2011) 1.2 *Sacha Journal of Policy and Strategic Studies* 120 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2056391 (accessed 31 May 2021).

²⁴ As above. The SAPs have been criticized for paying little attention to the social aspects of development and the weaknesses of institutions in poor states. In the education sector, SAP restructured the right to education as a preserve for the rich and elite. (See AC Onuora-Oguno *Development and the Right to Education in Africa* (2019) 132).

of this grand plan.²⁵ The 1990s public finance management related reforms should, therefore, be understood in this context. As highlighted in chapters three and four, Uganda still grapples with the challenges of an unregulated private sector, one where the provision of essential public services like education and health are left to the market forces.²⁶ This has made the realisation of critical ESRs expensive, and yet with reduced government expenditure on public services, there is a negative impact on the quality of the few public options available. This ultimately negatively affects the poor and vulnerable most.

That aside, the SAPs are said to have had a few advantages such as boosting economic recovery as statistics reveal that by the year 1999/2000 private investment contributed 14% of gross domestic product (GDP).²⁷ It is worth noting that up until this time, most of the private investment was in the form of FDI.²⁸ This has not changed much to date. Thus, the SAPs related reforms could be said to have boasted FDI more than local investment. With the desire to fast track economic recovery and achieve economic growth, some reforms had to be undertaken to ameliorate tax administration, widen the tax base, and enhance tax revenue among others.²⁹ Consequently, different fiscal, institutional, policy, and legal reforms were adopted to achieve the different objectives.³⁰ These included firstly, the establishment of the UIA by an Act of Parliament; the Investment Code Act 1991 (ICA) to streamline and ease the growth of private sector investments.³¹ Secondly, the URA was also established in 1991 as a separate and independent body to improve tax administration, and enhance tax collection and compliance among other objectives.³² Despite these institutional and legal initiatives, it is doubted whether the subsequent growth could directly be attributed to them. It is for example noted that although the tax to GDP percentage rose from 7% in 1991 to 10% in 1997, there is no evidence to link this improved economic performance to the SAP related reforms, as these were post-civil war initiatives and such progress would have been expected anyway.³³ What is most pertinent to this study though, is the fact that these reforms were rushed and did not consider the human

²⁵ IMF 'Enhanced Structural Adjustment Facility Policy Framework Paper, 1997/98–1999/2000' (1997) 3 available at <https://www.imf.org/external/np/pfp/uganda/uganda.pdf> (accessed 31 May 2021).

²⁶ See sections 3.1, 3.2, 3.3, 3.4 and 4.1 of the thesis.

²⁷ D Kwagala-Igaga 'Tax Reform in Uganda: Missed Opportunities and Prospects for State-Building' (2012) 6 available at SSRN: <https://ssrn.com/abstract=2609357> or <http://dx.doi.org/10.2139/ssrn.2609357> (accessed 18 October 2019).

²⁸ As above.

²⁹ Kwagala-Igaga (n 27 above) 7.

³⁰ As above.

³¹ As above; The ICA commenced on 25 January 1991; Mayende (n 17 above).

³² Commenced on 5 September 1991; Mayende '(n 17 above).

³³ Ulriksen & Katusiimeh (n 16 above) 6.

rights-based approach to fiscal sociology leading to gaps which are still witnessed to date as discussed in section 5.4 below.

Suffice to note that before the ITA, and the other legislative initiatives around that time such as the promulgation of the Constitution of the Republic of Uganda 1995 (Constitution) and the Value Added Tax Act 1996 (VAT), Uganda largely relied on discretionary tax incentives. These were provided for by several laws that have since been repealed.³⁴ The 1974 Income Tax Decree, for example, as mentioned earlier in this section, was the first post-independence domestic law that granted the Minister of Trade discretion to declare any income exempt from income tax, introducing the first codified (discretionary) income tax exemptions.³⁵ In addition, the repealed ICA³⁶ was the first concrete legislative effort post the 1987 economic recession to introduce favourable investment terms for both local and foreign investors, and to establish a coordinating body, the UIA.³⁷ The ICA contained tax incentives provisions and was the main piece of legislation on the subject until the 1997 ITA. The ICA's preoccupation was the creation of an enabling environment for local and foreign investment, and the establishment of the UIA to oversee its implementation.³⁸ The ICA related tax incentives included import duty concessions for investors importing machinery, plants, vehicles, equipment of construction materials, and others as would be determined from time to time by the Finance Acts.³⁹ These were expected to accelerate FDI and stimulate economic growth.⁴⁰ This discussion points to the struggle for an optimum fiscal and public finance management framework. The findings later in this chapter point to a continuous conflict, from which unfortunately the state has not drawn many lessons from, from a historical perspective.⁴¹

In conclusion, the historical tax incentives legal regime had several disadvantages. These included; firstly excluding local investors even though their investment capital threshold was

³⁴ The 1974 Income Tax Decree, Custom Tariffs Act, 1970, among other Acts.

³⁵ Ulriksen & Katusiimeh (n 16 above) 8.

³⁶ Cap 92 of 1991, commenced on 25 January 1991, available at <https://ulii.org/ug/legislation/consolidated-act/92> (accessed 4 June 2020).

³⁷ Long title to the ICA.

³⁸ Long title to the ICA (repealed)

³⁹ Sect 21 of Cap 92 (repealed).

⁴⁰ Sect 22 and 12 of Cap 92 (repealed). The incentives provided for in the Act were granted to investors who invested at least USD 500 000 for foreigners and USD 50 000 for local investors and whose investments fulfilled at least two of the following objectives: the 'generation of new earnings or savings of foreign exchange through exports, resource-based import substitution or service activities; the utilization of local materials, supplies and services; the creation of employment opportunities in Uganda; the introduction of advanced technology or upgrading of indigenous technology; the contribution to locally or regionally balanced socioeconomic development'.

⁴¹ See sect 5.3, 5.4 & 5.5 of the thesis.

lower.⁴² The most affected were the locals involved in agricultural production and processing.⁴³ Secondly, transparency challenges have been cited as the tax incentives were awarded in secrecy and in discriminatory ways, since existing companies were benefited 50% while companies that were incorporated after 1991 enjoyed full benefits.⁴⁴ Thirdly, this differential treatment could have led to outcomes not originally envisaged by the framers of the law, such as old companies closing only to be re-established so as to gain more benefits.⁴⁵ Fourthly, the lack of transparency led to costly litigations as the UIA did not provide URA with the details of the incentives granted, leading to the latter querying some of them through litigation, which could have been avoided.⁴⁶ Relatedly, this was worsened by the lack of coordination between UIA and URA resulting in the revocation of some incentives that were largely misunderstood by the URA at the implementation stage.⁴⁷ Lastly, the UIA's capacity as a one-stop-shop for the grant of investment licenses and incentives was doubted. This included the institutional capacity to translate the government's plan into reality.⁴⁸ 'There is wide discrepancy between the rhetoric in the Code and the reality of the application processes'.⁴⁹ UIA also lacked a monitoring mechanism for supervising the incentives, to ensure efficiency and as such, it is alleged that some of the 'foreign investors' engaged in petty trade in competition with the locals, a violation of the law.⁵⁰ The challenges above related to not only the institutional capacity but also resulted from policy and legal framework reforms that did not take into account human rights considerations. This led to discrimination in their application, transparency concerns, a framework that was perceived as favouring foreigners more than locals, and costly litigations.

⁴² MB Obwona 'Determinants of FDI and their Impact on Economic Growth in Uganda' (2001) *African Development Bank* 58 & 59 available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.00030> (accessed 2 March 2020); Kwagala-Igaga (n 27 above)7.

⁴³ As above.

⁴⁴ As above.

⁴⁵ A Klemm 'Causes, Benefits, and Risks of Business Tax Incentives' (2009) *International Monetary Fund* 11 available at: <https://www.imf.org/external/pubs/ft/wp/2009/wp0921.pdf> (accessed 14 July 2022).

⁴⁶ Kwagala-Igaga (n 27 above) 13, See for example the case of The Commissioner General of URA v Meera Investment LTD SCCA No. 3 of 2009 that was appealed up to the supreme court (available at www.ulii.org/ug (accessed 17 May 2021).

⁴⁷ As above.

⁴⁸ Obwona (n 42 above) 60.

⁴⁹ As above.

⁵⁰ Kwagala-Igaga (n 27 above) 14 & 2. Coincidentally, around this time there was improvement in economic growth evidenced by the fact that 'T(t)he tax to GDP ratio rose from 3.3% in 1991 to 13% in 2004'. There was, however, no evidence that linked the improvement to the tax reforms since they were being implemented during a post-civil war crisis and it is believed that the growth was bound to happen.

It was therefore not surprising that the enactment of the 1997 ITA,⁵¹ which repealed the Income Tax Decree of 1974 substantially altered the position of the tax incentives under the ICA.⁵² The ITA attempted to streamline tax incentives administration by abolishing discretionary tax incentives.⁵³ As mentioned earlier in section 1.8.2, and 2.2.2 some tax experts attribute these legal changes to the SAPs and other conditionalities from the World Bank, which required heavily indebted countries, especially those in sub-Saharan Africa to improve domestic revenue mobilisation (DRM), among other proposals.⁵⁴ The then discretionary tax holidays were seen as barriers to that progression.⁵⁵ It is believed that the Income Tax Bill was prepared at the peak of the aforementioned thinking.⁵⁶ The ITA still recognised the need for tax incentives to steer a private sector led economy but preferred statutory tax incentives to reduce the negative effects of the discretionary ones.

The above notwithstanding, the mid-1990 tax reforms have equally been criticised as having been rushed and as such short of addressing the then and future fiscal issues as follows:⁵⁷

...the tax reforms carried out in Uganda in the 1990s were not very successful because of a failure to take into account the social, economic and political context. It is further argued that the incoherent approach of the government to tax policy and indeed policy formulation makes it difficult to discern the long term goals or themes.

The above justifies the human rights-based theory of fiscal sociology in the fiscal reforms as proposals or codes that ignore the same may not achieve the desired results. The failure to incorporate human rights then could partly be blamed on the infancy of the discourse at that time. Consequently, although the fiscal reforms boosted FDI and investment broadly, this was not commensurate with the revenues accumulated due to the several tax incentives and weaknesses in tax administration.⁵⁸ These challenges were worsened by corruption as it has been stated that ‘corruption is a tax, which reduces the return to private capital and slows growth, but even as a tax it does not end up as public revenue’.⁵⁹

⁵¹ Commenced on 1 July 1997.

⁵² Ulriksen & Katusiimeh (n 16 above) 6.

⁵³ Kwagala-Igaga (n 27 above) 7, see also sect 163 of the Income Tax Act Chapter 340 which repealed sect 25 of the ICA Cap 92 of 1991. The repealed law provided for some tax incentives granted at the discretion of the Minister of Planning and Economic Development.

⁵⁴ KII with Mr. Festus Akunobera, Advocate and Tax expert held in Kampala on 21 April 2021.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ Kwagala-Igaga (n 27 above) 9.

⁵⁸ Kwagala-Igaga (n 27 above) 15.

⁵⁹ S Sejjaaka ‘A Political and Economic History of Uganda, 1962–2002’ (2004) 107 available at <https://www.researchgate.net/publication/304737518> (accessed 20 May 2021).

To date, despite the historical background and challenges highlighted above, Uganda offers both statutory⁶⁰ and non-statutory (discretionary) tax incentives as discussed in section 5.4. The framework has also to date failed to appropriately benefit the local investors as is discussed in the same section. Since the study interrogates how tax incentives affect the realisation of ESRs through public expenditure, below, I review the PFMF to place the legal and policy discussion on tax incentives in context.

5.1.2 Uganda's Public Finance Management Framework

For the proper generation and utilisation of tax and other resources, Uganda has had a series of public finance management (PFM) legal and policy reforms. For purposes of this study, I review the current framework contained in the Constitution and the Public Finance Management Act 2015 (PFMA) below:

a) The Constitution of the Republic of Uganda⁶¹

Under this framework, I review the manner in which funds may leave the consolidated fund. Suffice to note that some of the pertinent constitutional provisions on PFM include the establishment of the consolidated fund into which all revenues due to government are paid.⁶² Withdrawals from the consolidated fund must either be to support expenditure provided by the Constitution, or an Act of Parliament, or funds approved by an Appropriation Act or a supplementary Appropriation Act.⁶³ In any case, any withdrawal must be approved by the Auditor General in accordance with the National Audit Act 7 2008.⁶⁴ These provisions are relevant to the discussion on discretionary tax incentives in this chapter. As is discussed later, the MoFPED's budget appropriation initially contained a budgetary vote for the payment of discretionary incentives on behalf of tax payers. These arrangements were unsuccessfully challenged in the constitutional case of *Hon. Issa Kikungwa and Another v Attorney General*

⁶⁰ Statutory tax incentives are provided for in the several tax statutes including ITA, Cap 340 of the Laws of Uganda, the VAT Act, Cap 349 of the Laws of Uganda, the EACCMA, 2004, the FZA, 2004, among others. These are discussed in detail under sect 5.4 of this chapter.

⁶¹ Available at https://ulii.org/akn/ug/act/statute/1995/constitution/eng%402018-01-05#chp_Nine (accessed 16 January 2022).

⁶² Art 153 of the Constitution.

⁶³ Art 154 (1) of the Constitution. There are exceptions where the president may approve emergency withdrawals to meet urgent government spending from the CF outside that framework in cases where the Appropriation Acts are not passed on time. (See Art 154 (4) of the Constitution).

⁶⁴ Art 154 (3) of the Constitution.

discussed later in the chapter.⁶⁵ Among the issues in contention was the payment of taxes for BIDCO Company Limited from the consolidated fund without the approval of the Auditor General. The other relevant laws are discussed in the part below as part of the PFM process.

b) The Public Finance Management Act⁶⁶

The PFMA provides for public financial management by establishing, among others, ‘proper principles and procedures for a sound fiscal policy and macroeconomic management, the processes for the preparation, approval, and management of a transparent, credible, and predictable annual budget’, and proper procedures and systems for accounting, reporting, and internal control of public funds.⁶⁷ The PFMA acknowledges that the role of any fiscal policy should ultimately be to ensure macroeconomic stability and economic growth within the set national development parameters.⁶⁸ Suffice to note that Uganda has had several development plans with the recent being the National Development Plan (NDP III) (2020/21-2024/25) that underscores the role of DRM in achieving the goals therein.⁶⁹ At the heart of NDP III is human capital development and the role tax incentives play in achieving this objective.⁷⁰ The fiscal objectives of the PFMA include sufficiency in revenue mobilisation for the financing of government expenditure while maintaining the public debt in control, prudent management of fiscal risk, and ensuring value for money in public expenditure among others.⁷¹ These objectives ultimately affect the welfare of people and the realisation of the ESRs whether this impact is intended or not. Accordingly, these objectives must be reflected in the Charter for Fiscal Responsibility (CFR) and the annual Budget Framework Paper (BFP).⁷² This is to ensure their implementation. Even with the above detailed provisions, there is a lack of a deliberate requirement for these critical processes to reflect the state’s ESRs obligations. This violates the human rights obligation the states need to fulfil. The recognition of the sufficiency of revenue

⁶⁵ Constitutional Petition No. 30 of 2016.

⁶⁶ Act 3 of 2015, commenced on 6 March 2015, available on https://www.ugandainvest.go.ug/wp-content/uploads/2016/02/Uganda_Public_Finance_Management_Act_2015_3.pdf (accessed 14 June 2020). According to the long title, the Act was to ease fiscal policy, public finance management, and transparency mechanisms. The Act repealed the Public Finance and Accountability Act, 2013.

⁶⁷ Sect 2 of the PFMA.

⁶⁸ Sect 4(1) of the PFMA.

⁶⁹ Available at www.upa.go.ug (accessed 13 March 2021).

⁷⁰ NDP III (Adopted in July 2020 by the National Planning Authority (NPA). This is the third successive plan after NDP I and NDP II).

⁷¹ Sect 4(2) (a), (b), (e) & (g) of the PFMA respectively.

⁷² Sect 4(3) of the PFMA.

collection to fund public expenditure cannot suffice for a state to be cognisant of its ESRs obligations, and how fiscal policy and the PFMF affect them.

That aside, procedurally, the Minister of Finance is required to present the CFR to parliament for approval. The same ought to include measurable objectives for the first three years⁷³ and the methodology to be adopted for measuring the progress and performance.⁷⁴ Also critical is how to report progress, and a demonstration on how the fiscal objectives are consistent with the broader objectives of the Act, using verifiable data to generate an economic and fiscal update.⁷⁵ Among its fiscal objectives is:⁷⁶

...sufficiency in revenue mobilisation to finance Government programmes... consistency of the Medium Term Expenditure Framework with the National Development Plan... and efficiency, effectiveness and value for money in expenditure.

In August 2021, the CFR for the years 2021/22 to 2025/26 was presented and approved by the parliament of Uganda.⁷⁷ Its objectives include firstly keeping the public debt at bay by reducing it to less than 50% of GDP by 2026.⁷⁸ Secondly ‘the Overall Fiscal Balance including grants should gradually adjust to a deficit not exceeding 3.0% of non-oil GDP by financial year 2025/26’, by among others closing the revenue collection gaps. Despite these ambitious objectives, the CFR has been criticised for lacking the mechanisms and programmes aimed at increasing the sufficiency of DRM.⁷⁹ The challenges uniquely posed by tax incentives are pointed out as negatively affecting DRM and the several CFR objectives.⁸⁰ It is noted, for

⁷³ Sect 5(1)(a)(i) of the PFMA. This should be done before the expiry of three months of the new parliament after a general election. The new CFR for the 11th parliament is expected by mid-August 2021. The objectives should be in line with the objectives and spirit of the Act.

⁷⁴ Sect 5(1)(a)(ii) of the PFMA.

⁷⁵ Sect 5 (1)(b) and 5(2) of the PFMA; Sect 5 (2) of the PFMA. The current CFR was approved by parliament on 21 January 2016 per sect 5(2) of the PFMA. The same is available at <https://budget.go.ug/sites/default/files/National%20Budget%20docs/Charter%20for%20Fiscal%20Responsibility.pdf> (accessed 12 April 2021). Under the law, the CFR and the economic and fiscal update must be published by the Minister of Finance within a month after parliamentary approval or within such a time as parliament might direct.

Sect 3.1 (i), (vi) and (vii) of the CFR.

⁷⁶ Sect 3.1 (i), (vi) and (vii) of the CFR.

⁷⁷

See

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjVOn09sfzAhUS3IUkHZUsBeoQFnoECAIQAAQ&url=https%3A%2F%2Fbudget.go.ug%2Fsites%2Fdefault%2Ffiles%2FNational%2520Budget%2520docs%2FCharter%2520for%2520Fiscal%2520Responsibility.pdf&usg=AOvVaw1QJnQC6khiZxhQeUgtNAag> (accessed 13 October 2021).

⁷⁸ As above.

⁷⁹ See Opposition’s response to the Charter available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjVOn09sfzAhUS3IUkHZUsBeoQFnoECAkQAQ&url=https%3A%2F%2Fparliamentwatch.ug%2Fwp-content%2Fuploads%2F2021%2F09%2FOpposition-Response-to-Charter-of-Fiscal-Responsibility.pdf%3F87184&usg=AOvVaw2XiOJ8ARjhVpTH8NY0zT14> (accessed 13 October 2021).

⁸⁰ As above.

example, that annually about United States dollar (USD) 1.944 billion is lost in tax incentives, which is the same amount required for debt servicing per year.⁸¹ I opine that the legal, and policy framework on tax incentives ought to reflect the commitment towards achieving the CFR objectives.

Broadly, the PFMF recognises internally generated revenue as critical in the implementation of government programmes, which translate into ESRs realisation. This, coupled with initiatives that ensure value for money, are great strides towards the attainment of the NDP III goals. The downside of the PFMF includes the lack of a human rights-based assessment of its several objectives and aspirations. This affects the capacity of the state to realise a human rights complaint budget.⁸² To rectify this, it is desired that firstly, this assessment is deliberately incorporated and not simply presumed into the rather economic and technical objectives. This way, the government's ESRs commitments are not dependent on the whims of the interpreters or implementers but become integral to the whole fiscal and public finance policy. The PFMF in its current form is a rather technical economic framework except for scattered reference to the NDPs. Thus, it violates the human rights obligation to fulfil and does not adopt a rights-based approach, which is the central concern of this study. Secondly, the executive should equally comply with the principles in the CFR while discharging public finance decisions, determining, formulating, and implementing government policies, and performing any other services.⁸³ This is why the CFR must be human rights compliant, so as to guide the state in realising the ESRs through its fiscal and public finance policies.

These recommendations aside, it is important to note that the CFR allows for flexibility in its implementation. The Minister of Finance is allowed, with the approval of parliament, to deviate from the objectives of the CFR in cases of unforeseen circumstances, as long as the deviation is published in the gazette and MoFPED website at least 30 days after the fact.⁸⁴ This could,

⁸¹ AA Wadero 'Parliament quizzes URA on tax holidays' *Monitor, Kampala*, 23 January 2022 available at <https://www.monitor.co.ug/uganda/news/national/parliament-quizzes-ura-on-tax-holidays-3690870> (accessed 25 January 2022).

⁸² A Budoo 'Adoption of a Human rights Approach to Budgeting as a Step to realise the right to Education in African Countries' in A.C. Onuora-Oguno et al. (eds) *Education Law, Strategic Policy and Sustainable Development in Africa* (2018) 36 & 37.

⁸³ Sect 6 of the PFMA.

⁸⁴ Sect 7(1) & (2) of the PFMA. These include natural disasters, an unanticipated severe economic shock, or any other significant unforeseen event that cannot be funded from the Contingency Fund or other funding mechanism provided for in this Act or using prudent fiscal policy adjustments.

however, be susceptible to abuse as the test above is subjective and parliament may lack the independence to protect the interests of the citizens and the intentions of the legislation.

In terms of implementation, to achieve the objectives of the CFR, the MoFPED lays tax and revenue bills before parliament on proposals of how to collect revenue through the various modes including taxation.⁸⁵ As detailed as this process may appear, there is no statutory requirement that the tax bills should comply with any human rights-related standards. This is a fundamental concern for the realisation of the ESRs, through appropriate financing. While it is slightly different on the expenditure side, the same still lacks in various respects. For example, accounting officers are required to prepare budget framework papers (BFPs) for their respective dockets in consultation with relevant stakeholders before submitting them to the MoFPED.⁸⁶ The BFPs must take into account the need for balanced development, equity, and gender responsiveness.⁸⁷ There is no express requirement for the BFPs to reflect the several human rights commitments of the state. This falls below the requirement for a human rights-based consideration to PFM, which would contribute to addressing issues related to the ESRs realisation. This could be achieved by making human rights an integral part of fiscal and PFM planning.⁸⁸ This is what the human rights-based theory of fiscal sociology would partly rectify.

That aside, the MoFPED relies on the information in the sectoral BFP to compile a national BFP in line with NDP goals and the objectives of the CFR.⁸⁹ The master BFP is submitted to parliament, with the approval of the cabinet.⁹⁰ Meanwhile, the MoFPED in consultation with the Equal Opportunities Commission (EOC) must confirm that the national BFP is equity and gender-inclusive by outlining the measures to be adopted to equalise opportunities for all gender and vulnerable groups.⁹¹ This is a progressive provision that ensures that the BFP considers the needs of the vulnerable and marginalised groups. There is however a gap as the role of the Uganda Human Rights Commission (UHRC) in this process is ignored legally and practically. Before parliament considers the national BFP, it is reviewed by the budget

⁸⁵ As above. This process is in line with Art 155(1), (5), and (6) of the Constitution.

⁸⁶ Sect 9(1) of the PFMA.

⁸⁷ As above.

⁸⁸ Sect 9(2) of the PFMA. This process should be complied with by the 15 November of the year preceding the financial year that the BFP relates.

⁸⁹ Sect 9(3) of the PFMA.

⁹⁰ Sect 9(5) of the PFMA. This should be done by 31 December of the preceding financial year of which the BFP relates.

⁹¹ Sect 9(6)(a) and (b) of the PFMA; See also sect 9(1) of the PFMA.

committee to ensure technical compliance.⁹² I opine that the human rights committee of parliament should evaluate the BFP too to ensure the human rights compliance and responsiveness to the several human rights obligations of the state.

That aside, the oversight role of parliament in the budgetary process has come under scrutiny with allegations of discrepancies between the BFP approved by the budget committee and what the Minister of Finance presents for approval.⁹³ There are concerns of lack of transparency in the process. Illustratively, disparities have been noted between the sectoral BFP, the ministry BFP, the draft budget, approved budget, and the presented budget.⁹⁴ This brings into scrutiny the effectiveness of the check processes in place for ensuring a transparent budget and expenditure system. Are these processes mere rubber stamps? Do they play any role in ensuring transparency and citizen participation? If parliament's oversight role was effectively executed, such scenarios would be avoided. Parliament is enjoined to review economic related government policies and programmes and the annual budget, and to make alternative proposals to the Minister of Finance, where appropriate.⁹⁵ It is also the responsibility of parliament to 'ensure that public resources are held and utilized in a transparent, accountable, efficient, effective and sustainable manner and per the *CFR* and the *BFP*'.⁹⁶ Transparency, accountability and participation challenges exist in other consultative processes.

NGOs and civil society organisations (CSOs) have equally decried the lack of consultation of key stakeholders including the citizens and civil society actors in the budget process.⁹⁷ In one of the consultative engagements that I attended, I noticed that CSOs were not accorded enough time to meaningfully engage.⁹⁸ There was also a general lack of capacity to appreciate the

⁹² Sect 9(7) & (8) of the PFMA.

⁹³ After the 2020/2021 budget reading, there were media reports that some of the budget allocations that the Minister of Finance read differed from what the budget committee had approved. The particular queried allocations were to Uganda Development Corporation (UDC) where the Minister of Finance read an allocation of UGX 1 trillion instead of a lesser approved amount in the budget. See NBS @ 9 Prime News of on 16 June 2020, Kampala.

⁹⁴ Mr. Ramathan Goobi, Zoom meeting by HURIPEC, School of Law, Mak. University, held on 17 June 2020 from 10-11:40 am under the theme of Budget and Covid-19.

⁹⁵ Sect 12(2) of the PFMA.

⁹⁶ As above; See Art 156 of the Constitution on the procedure of coming up with Appropriation Bills that contain the budgets to the respective MDAs. Each year, Appropriation Acts are passed to implement the budgetary allocations.

⁹⁷ Ms. Leah Eryenyu, Zoom meeting by HURIPEC, School of Law, Makerere University, held 17 June 2020 from 10-11:40 am under the theme of Budget and Covid-19. For the role of CSOs for a human rights rights compliant budget, see Budoo (n 82 above) 38.

⁹⁸ Tax Justice Alliance Consultative Meeting to discuss the 2021 tax bills held at Esella on 6 and 7 April 2021 just a few days before the tax bills would be discussed by the parliamentary committee on finance, planning and economic development.

rather technical tax proposals within the timeframe given.⁹⁹ The consultation heavily relied on an expert from URA to provide guidance through the tax amendment proposals, which could have been a reflection of internal capacity gaps.

On another note the PMFA grants the Minister of Finance power to write off any bad debts due to the government with the approval of parliament —by way of resolution.¹⁰⁰ It is not clear if these include tax-related debts. If they do, this would contradict the Tax Procedure Code Act 2014 (TPCA) that grants the Minister of Finance wide discretion to pay/write off or wave taxes — also considered debts to the government on the recommendation of the Commissioner-General if in their view the taxes are not recoverable.¹⁰¹ The TPCA does not require parliamentary approval for such write-offs which would be ideal.¹⁰² Tax related debts ought to be treated like any other debt as mentioned in the PFMA, and should be waived with parliamentary approval to avoid abuse .

Related to the above are the legal contradictions and challenges of tax expenditure reporting. Although the PFMA requires each budget to contain a statement of tax expenditure detailing the forms and the revenue foregone as a result, among other provisions,¹⁰³ this has not been consistently done as such information remains secretive at the ministries, departments and agencies (MDAs) level.¹⁰⁴ I propose that the tax expenditure report should contain a human rights evaluation on how the several tax expenditures affect the ESRs realisation. More so, while the law requires parliament to consider the tax incentives' report periodically, the same is made after the grant, and the legislature may not be able to reverse the same.¹⁰⁵ Besides, the reporting is expected of only discretionary tax incentives, which would not give a holistic picture.¹⁰⁶ This is a major gap since the general tax incentives situation may be ignored. I argue that since the contractual discretionary tax incentives are not granted under any specific law, but by contracts between the government and the benefiting taxpayer, these may escape the

⁹⁹ As above.

¹⁰⁰ Sect 35(1) and (2) PFMA.

¹⁰¹ Sect 40A of the TPCA.

¹⁰² This is discussed in details later in this part.

¹⁰³ Sect 13(10) (a) of the PFMA.

¹⁰⁴ This I discuss in detail in sect 1.5.3 as part of the limitations I faced when undertaking the study.

¹⁰⁵ See sect 77(1) & (2) of the PFMA. This section operationalises article 152(2) of the Constitution of the Republic of Uganda, 1995 which provides that where a law empowers any person or authority to waive or vary a tax imposed by that law, that person or authority shall report to parliament periodically on the exercise of those powers. The report includes the taxpayer exempted, the reasons for exemption, revenue forgone as a result, and benefits accrued as a result of the tax expenditure if any. The same concern was raised in the KII with IA, MoFPED.

¹⁰⁶ Sect 77 of the PFMA.

scrutiny required under the provision above. This would ultimately result in the violation of the obligations to respect and fulfil using the tax structure. Recently, parliament demanded a full list of all beneficiaries of tax incentives, which points to lack of involvement in these critical decisions.¹⁰⁷ According to the Hansards, the Minister of Finance only reports to parliament when there is the need to write off unpaid debts in taxes, and not as required under the Act.¹⁰⁸ These challenges are exacerbated by the lack of a tax expenditure governance framework, and clear assessment criteria of the above indicators, which makes it hard to come up with a proper tax expenditure report. Given this background information on the history and current issues affecting the tax incentives framework and PFMF, in the next part, I discuss the current legal and policy framework on tax incentives from the global, regional, and domestic perspectives.

5.2 The international framework on tax incentives

Suffice to note from the onset that there are limited tax incentives related initiatives at the international scene except for advanced economic corporation agencies such as the Organisation for Economic Co-operation and Development (OECD). The OECD relevant efforts include strategies relevant to tax competition and harmful tax practices or harmful preferential taxation practices adopted in 1998. Though not binding on Uganda, below I discuss some of the relevant initiatives that developing countries could draw lessons from. The fundamental lesson that countries such as Uganda could learn from the OECD is the value of economic cooperation, especially when dealing with cross-cutting issues that are affecting nations with similar circumstances and interests. This is important as discussions in this section point to a reluctance of African countries to cooperate on tax incentives and tax competition issues in general.

Related to the OECD initiatives, it is important to note that at the United Nations level, there is a proposal for the United Nations Convention on Tax (UNCT).¹⁰⁹ In March 2022,

¹⁰⁷ Wadero (n 81 above).

¹⁰⁸ According to the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may-2019> (accessed 15 February 2020).

¹⁰⁹ These include the Africa Group lead by Senegal, the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (the FACTI Panel); see TM Ryding 'The Proposed United Nations Convention on Tax' (2022) *Global Alliance for Tax Justice* 4.

stakeholders met and commenced discussions on this initiative.¹¹⁰ The spirit of the proposals can be highlighted in the statement below, which forms the basis of the March 2022 meeting:¹¹¹

Through existing UN agreements, governments have recognised that fair, progressive and effective tax systems are vital for the achievement of other UN goals and commitments. The proposal for a UN Convention on Tax aims to build on these agreements, as well as strengthen the links between taxation and existing government obligations and commitments in relation to human rights, environmental protection, equality and the Sustainable Development Goals (SDGs). The underlying aim is to propose a UN Tax Convention that can increase economic justice at the global level, and at the same time respond to the urgent need for new and additional public resources to combat the major global challenges of our time.

The adoption of this framework would address many of the legal and structural challenges that have resulted from the lack of an express international framework that recognises the intrinsic nature of fiscal policy and human rights. Until this adoption, I review the instruments that presently have a bearing on the discourse below.

5.2.1 At the international scene

a) The OECD Action Plan on Base Erosion and Profit Shifting¹¹²

I discuss these international anti-tax avoidance schemes bearing in mind that in the Ugandan context, the tax incentives framework could be classified as tax avoidance. The OECD Action Plan on Base Erosion and Profit Shifting 2013 (BEPS) recognises that globalisation has opened up domestic economies, and led to the expansion of corporations.¹¹³ This has not been without demerits. Globalisation has for instance negatively affected the corporate income tax regime and led to the loss of tax revenue largely caused by corporate tax avoidance.¹¹⁴ Tax avoidance has several effects including reduced revenues for governments, higher taxes for individual taxpayers, and reputational risks for businesses.¹¹⁵ I argue in this chapter that companies avoid tax by mainly exploiting the tax incentives legal framework.¹¹⁶

¹¹⁰ See draft available at https://www.globaltaxjustice.org/sites/default/files/un-tax-convention-mar09-final_0.pdf (accessed 17 May 2022).

¹¹¹ See draft available at https://www.globaltaxjustice.org/sites/default/files/un-tax-convention-mar09-final_0.pdf (accessed 17 May 2022).

¹¹² Available at <https://www.oecd.org/ctp/BEPSActionPlan.pdf> (accessed 20 March 2020).

¹¹³ OECD, BEPS Action Plan (2013) 7, 8.

¹¹⁴ As above.

¹¹⁵ OECD, (n 113 above) 8.

¹¹⁶ Sect 5.2 of the thesis.

To deal with the challenges above, and specific to tax incentives, is action point four that recognises preferential tax regimes that lead to the race to the bottom as potentially problematic.¹¹⁷ Reference is made to an earlier 1998 OECD report on the subject. BEPS and the report predict a situation where the income tax on mobile capital would one day reduce to zero because of tax competition.¹¹⁸ Relatedly, the OECD has developed guidelines for identifying ‘harmful preferential tax regimes’.¹¹⁹ These include tax regimes that impose low or zero rates of tax on income, and have ring-fenced tax regime where the beneficiaries are a particular class of investors whether intentionally or effectively.¹²⁰ The other characteristics include lack of transparency, and proper exchange of information (EoI) with other countries facilitated by prohibitive access to information laws and processes.¹²¹ A closer look at Uganda’s tax incentive regime as discussed in section 5.4 of this chapter places the same under this category.

In addition to the classification above, the test of whether the tax regime is harmful or not is whether its effects substantially encroach on a country’s tax base.¹²² This will be the case even when the actual economic effects are difficult to quantify.¹²³ From the foregoing, even for developed international economic blocs like the OECD, the evaluations of the impact of tax incentives or other harmful tax practices are seen from a purely economic assessment. Even then, from the preliminary statistical data presented in the background of this study,¹²⁴ it can be concluded that the current tax incentive framework in Uganda negatively affects the tax base, DRM, and public expenditure on ESRs. This is worse as the legal and policy framework, as assessed in section 5.4 below, lacks mechanisms for evaluating the actual economic, human rights-related, or other impacts arising from the grant of the several tax incentives.

To rectify these anomalies, the OECD calls upon both member and non-member states to address the issue of harmful tax competition through ‘transparency and substance’.¹²⁵ Transparency in this context envisages ‘compulsory spontaneous exchange on rulings’ related

¹¹⁷ OECD, (n 113 above) 17.

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ As above.

¹²¹ As above.

¹²² OECD, (n 113 above) 16.

¹²³ OECD, (n 113 above) 17.

¹²⁴ See sect 1.1 of this thesis.

¹²⁵ OECD, (n 113 above) 18.

to preferential regimes, and requiring the ‘substantial activity for any preferential regime’.¹²⁶ This would require a holistic approach. This calls for engagements with non OECD members based on the existing framework, and considering amendments to the same.¹²⁷ Cooperation at the continental level by improving transparency, and access to and the EoI is critical in dealing with tax competition. Currently, such efforts have not yielded much success in Africa.¹²⁸ Below I review other efforts that could be helpful for both states and non-state actors.

b) *The United Nations Guiding Principles on Business and Human Rights*¹²⁹

Though non-binding, the United Nations Guiding Principles on Business and Human Rights 2011 (UNGPs) were drafted in recognition of the tripartite obligation on states to protect, respect, and fulfil human rights.¹³⁰ The UNGPs apply to both state and non-state actors.¹³¹ Although the duty to protect is seen as a ‘standard of conduct’ in the UNGPs, states may be in violation of the same if they, by their actions, policies, laws, regulations or adjudications, fail to adopt measures to redress human rights abuses.¹³² Even though taxation is not an area of focus in the UNGPs, this is relevant given the relationship between tax revenues and the realisation of ESRs. The human rights abuses, for example, could take the form of tax avoidance schemes partly facilitated by the tax incentives legal regime, which depletes the revenue for ESRs financing. Relatedly, the Committee on Economic, Social and Cultural Rights (Committee on ESCR) has clarified some of the business and human obligations in General Comment 24 discussed below.

¹²⁶ As above.

¹²⁷ As above.

¹²⁸ In the Ugandan context, sect 88 of the ITA, as amended in 2021 allows the Commissioner General to facilitate automatic exchange of information (AEOI) if provided for in international tax treaties.

¹²⁹ The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011; available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 14 May 2022).

¹³⁰ Pg 1 of the UNGPs.

¹³¹ As above.

¹³² Principle 1.A.1 of the UNGPs.

*c) General Comment 24 of the Committee on ESCR on State obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities*¹³³

General Comment 24 draws inspiration from, among others, the UNGPs.¹³⁴ It recognises the role of businesses in the realisation of ESRs through the creation of employment opportunities, and generally contributing to the development of the countries in which they operate.¹³⁵ General Comment 24 however points out that states have often failed to properly monitor the activities of businesses, with the effect that their operations have sometimes affected the realisation of ESRs.¹³⁶ The General Comment, therefore, seeks to clarify the obligation of state parties in such a situation with the view of ensuring that business activities do not adversely affect ESRs.¹³⁷

It emphasises that business actors are obliged to observe the rights in the International Covenant on Economic, Social, and Cultural Rights (CESCR) whether the same are effectively implemented in the countries of their operations or not.¹³⁸ The tripartite obligation to respect, protect, and fulfil ESRs is underscored.¹³⁹ It is for instance a violation for the state to pursue policies that adversely affect ESRs or to prioritise the interests of business actors without reasonable cause at the expense of ESRs realisation. This will be a violation of the obligation to respect.¹⁴⁰ As is demonstrated in previous chapters, tax incentives largely serve the interests of the businesses and to some extent the regime but most times negatively affect the realisation of ESRs.¹⁴¹ This is a violation of the provisions of General Comment 24.

Furthermore, recognising that most of the business relationships with the states are contained in trade and investment treaties, General Comment 24 calls upon states to undertake human rights assessments before executing such treaties as these sometimes have provisions relevant to tax incentives.¹⁴² This would enable the assessment of both the positive and negative impacts

¹³³ Adopted on 10 August 2017, E/C.12/GC/24, available at: <https://www.refworld.org/docid/5beaecba4.html> (accessed 14 March 2021).

¹³⁴ Para 2 of General Comment 24 of the Committee on ESCR.

¹³⁵ Para 1 of General Comment 24 of the Committee on ESCR.

¹³⁶ As above.

¹³⁷ As above.

¹³⁸ Para 5 of General Comment 24 of the Committee on ESCR.

¹³⁹ Para 10 of General Comment 24 of the Committee on ESCR.

¹⁴⁰ Para 12 of General Comment 24 of the Committee on ESCR.

¹⁴¹ This discussion is prominent in chapter one, two, three and five of the thesis majorly.

¹⁴² Para 13 of General Comment 24 of the Committee on ESCR.

of such treaties on ESRs.¹⁴³ The Committee on ESCR emphasises the need for regular monitoring and assessment of trade and investment treaties.¹⁴⁴ The General Comment recommends that human rights obligations of states should be borne in mind for any future interpretation of such treaties.¹⁴⁵ The treaties should equally have clauses that allow for any disputes to be resolved while bearing in mind the potential impact on human rights.¹⁴⁶ Uganda has signed many such treaties including the double taxation agreements (DTAs).¹⁴⁷ The obligation under General Comment 24 requires that human rights-based impact assessments are made before these treaties are entered into while calling for the continuous human rights monitoring and evaluation, which has not been done in the past. Uganda has also had international and domestic tax disputes arising from the interpretation of tax laws or tax treaties or both.¹⁴⁸ Many times these are resolved using the black letter of the law without assessing the impact the decisions could have on the realisation of human rights. This obligation if respected would change the perspective through which these disputes are resolved. Aside from these broader soft law standards that though instrumental may not have a direct bearing on issues tax incentives related, below I review instruments that are specific to tax justice concerns.

d) *The Lima Declaration on Tax Justice and Human Rights*,¹⁴⁹

¹⁴³ As above.

¹⁴⁴ As above.

¹⁴⁵ As above.

¹⁴⁶ As above.

¹⁴⁷ According to Price Water House Coopers (PwC), by 1 February 2019, Uganda had DTAs and bilateral agreements with the following countries: Denmark, India, Italy, Mauritius, Netherlands, Norway, South Africa & United Kingdom available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwj4nISCnYTkAhUL6qQKHfO8BhIQFjABegQICxAE&url=http%3A%2F%2Ftaxsummaries.pwc.com%2FID%2FUganda-Individual-Foreign-tax-relief-and-tax-treaties&usg=AOvVaw1pT8UVM-rpBoNT0yD1z7Bs> (accessed 15 August 2019), current list is also available the Uganda Revenue Authority online portal at <https://www.ura.go.ug/header/headerMain.jsp?viewPageNo=7> (accessed 14 October 2019).

¹⁴⁸ See the cases of *Heritage & Gas Limited v Uganda Revenue Authority*, Tax Appeals Tribunal Tax Application No 26/2010 & *Tullow Uganda Ltd v Heritage Oil and Gas Ltd, Heritage Oil plc*, (2013) EWHC 1656 (Comm).

¹⁴⁹ The Lima Declaration on Tax Justice and Human Rights, The Lima Declaration emerges from the international strategy meeting, ‘Advancing Tax Justice through Human Rights,’ held in Lima, Peru in 2015, convened by the Center for Economic and Social Rights, the Global Alliance for Tax Justice, Oxfam, Red Latinoamericana sobre Deuda, Desarrollo y Derechos (LatinDADD), Red de Justicia Fiscal de América Latina y el Caribe and the Tax Justice Network 1 available at https://www.cesr.org/sites/default/files/Lima_Declaration_Tax_Justice_Human_Rights.pdf (accessed 8 June 2021).

The Lima Declaration on Tax Justice and Human Rights 2015 (Lima Declaration) was a result of deliberations by various stakeholders in the field of tax policy and human right, and is part of the few soft law standards that tackle the discourse using an integrated approach.¹⁵⁰ In the absence of an explicit legally binding international human rights instrument that is deliberate on tax justice and human rights, I find the Lima Declaration, though not binding, closest to the concerns of this study. The Lima Declaration is premised on the recognition that tax revenue is the most sustainable way of raising resources for the realisation of human rights, especially ESRs, from which the states derive their legitimacy to impose further tax.¹⁵¹ This is in line with the discussion in chapters one, two and three on fiscal legitimacy and the role of taxation in avoiding a fiscal crisis.¹⁵² Human rights compliant tax policies are critical to this end.

The Lima Declaration is premised on the background that a just tax system is critical to attaining accountability between the state and citizens, and enabling the government to be responsive to the needs of its people.¹⁵³ In my view, the discussion of what amounts to a just tax system in any country is incomplete without an honest review of the tax incentives framework. Unjust tax systems such as those that favour unjustified tax incentives are globally and domestically seen as contributing to a regressive tax structure that among others leads to a shift of the tax incidence to the poor and vulnerable.¹⁵⁴ This worsens the marginalised's capacity to afford critical ESRs in developing economies such as Uganda, which are largely private sector-led, with the forces of demand and supply playing a critical role in the ability of the poor and vulnerable to afford and as such realise ESRs.¹⁵⁵

Notably, the Lima Declaration is essential at many fronts. Firstly, it treats tax policy not only as public policy but as part and parcel of human rights. It thus recognises the need for the same to bear in mind principles of accountability, transparency, and participation as required under

¹⁵⁰ These included broad-based community of experienced advocates, practitioners, activists, scholars, jurists, and litigators.

¹⁵¹ Lima Declaration, pg 1.

¹⁵² See sect 1.8.2, 2.1 & 3.3.1 of the thesis.

¹⁵³ Lima Declaration, pg 1.

¹⁵⁴ As above.

¹⁵⁵ United Nations Human Rights Office of the High Commissioner 'Realizing Human Rights Through Government Budgets' (2017) 29 available at <https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf> 65; See also RE López & EB Figueroa 'On the nexus between Fiscal Policies and Sustainable Development' *Sustainable Development (Sust. Dev.)* 24 (2016) 201-202 available at <https://login.research4life.org/tacsgr1onlinelibrary.wiley.com/doi/epdf/10.1002/sd.1622> (accessed 20 June 2021).

international human rights law.¹⁵⁶ This in turn would enable countries to abide by the obligations to respect and protect, by ensuring the generation of enough resources to realise ESR obligations using the maximum available resources, and without discrimination.¹⁵⁷

Secondly, the Lima Declaration sends a strong warning against ‘socially-useless tax incentives’ that ultimately result in the shifting of the tax incidence from the rich to the poor and marginalised.¹⁵⁸ These are discriminatory and in violation of the right to equality.¹⁵⁹ I would classify such tax incentives as those that unjustifiably absolve the economically able from paying their fair share of tax, which ultimately reduces revenue for the realisation of ESRs.

Thirdly, the Lima Declaration makes a case for a human rights-based impact assessment of tax policies to avoid the negative effects of fiscal policies such as the ones on tax incentives.¹⁶⁰ Fourthly, it challenges the current international tax framework as being outdated having been crafted without due regard for states’ human rights obligations to realise resources for human rights.¹⁶¹ This is one of the conclusions I make in this study. The international framework is also criticised for favouring the privileged multinationals at the expense of the states’ ESRs obligations.¹⁶² All these loopholes are seen as primarily arising from the general treatment of fiscal policy as only economic and ignoring the human rights approach to the same, as advocated by the human rights-based theory of fiscal sociology developed by Waris.

Fifthly, the Lima Declaration additionally draws linkages with the protect, respect, and access to a remedy framework under the UNGPS.¹⁶³ Lastly, it concludes with a call on relevant stakeholders to treat tax laws as instruments of ‘tax and fiscal justice’ by defying unjust fiscal policies that negatively affect the realisation of human rights.¹⁶⁴ Tax incentive policies would fall under such categorisation.

The above discussion points to the conclusion that most of the discussion relevant to the tax incentives discourse at the international level are not only contained in soft law standards but also not explicit on the subject. This is a big lacuna for which I make suggestions for reform in

¹⁵⁶ Lima Declaration, pg 1.

¹⁵⁷ As above.

¹⁵⁸ Lima Declaration pg 1&2.

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ Lima Declaration, pg 2.

¹⁶² As above.

¹⁶³ As above.

¹⁶⁴ Lima Declaration, pg 3.

chapter six of the study.¹⁶⁵ Below I seek to ascertain if this position changes at the regional level.

5.2.2 Relevant continental initiatives

a) The African Union efforts on Illicit Financial Flows and their relationship with tax incentives

The definition of illicit financial flows (IFF) has generated debate globally with no clear consensus on a universal understanding. The United Nations Conference on Trade and Development (UNCTAD) notes that even with the lack of a global definition of IFF, the term illicit should not be equated to illegal or ‘forbidden by law’ but rather extended to apply to what is unacceptable by ‘rules or custom’.¹⁶⁶ Accordingly, ‘illicit financial flows are not necessarily illegal’.¹⁶⁷ A contrary school of thought asserts that IFF involves illegality in either the way the funds are obtained, how they are transferred, or the purpose of the transfer.¹⁶⁸ I find the latter understanding doubtful as firstly the word used is ‘illicit’ not ‘illegal’ and secondly because tax avoidance is classified as an example and driver of IFF as discussed later in this section, yet in many African countries the same is legal. In an attempt to clarify this confusion, a recent warning not to misinterpret the term ‘illicit’ to mean ‘illegal’ has been sounded by the Independent Commission for Reform of International Corporate Taxation, which, in a letter to the United Nations Secretary-General pointed out as follows:¹⁶⁹

We understand that some actors within the United Nations system are lobbying for a redefinition of the term ‘illicit financial flows’ in order retrospectively to exclude tax avoidance by multinational companies from the definition. Such a course of action represents a clear threat to the [Sustainable Development Goals] contribution of domestic resource mobilization, and will also undermine confidence in the [United Nations’] ability to deliver honestly on what member States have previously agreed upon.

¹⁶⁵ See sect 6.2.3 of the thesis.

¹⁶⁶ A Cobham & P Janský ‘Measurement of Illicit Financial Flows’ Background paper of the UNODC-UNCTAD Expert consultation on the SDG Indicator on Illicit financial flows 12-14 December 2017, 5, available at https://www.unodc.org/documents/data-and-analysis/statistics/IFF/Background_paper_B_Measurement_of_Illicit_Financial_Flows_UNCTAD_web.pdf (accessed 31 May 2021).

¹⁶⁷ As above.

¹⁶⁸ United Nations Economic commission for Africa ‘Illicit financial flows: why Africa needs to “track it, stop it and get it”’ 4 available at https://www.uneca.org/sites/default/files/PublicationFiles/illicit_financial_flows_why_africa_needs.pdf (accessed 1 October 2020).

¹⁶⁹ United Nations Conference on Trade and Development (UNCTAD) ‘Tackling Illicit Financial Flows for Sustainable Development in Africa’ Economic Development Report in Africa (2020) 5 available at https://unctad.org/system/files/official-document/aldcafrica2020_en.pdf (accessed 31 May 2021).

From the preceding discussion, it is clear that legal mechanisms, such as tax incentives that are relied on by multinationals to avoid tax liability, could amount to IFF given their impact on the capacity of the states to meet their developmental and human rights obligations.

Aside from the definition debates of the term, at the continental level, several IFF related strides have been made towards realising DRM as a way of fulfilling the different development goals and human rights aspirations. These include the African Commission on Human and Peoples' Rights' (African Commission) efforts on Illicit Financial Flows from Africa. During the fourth joint African Union Commission/United Nations Economic Commission for Africa (AUC/ECA) Conference of African Ministers of Finance, Planning and Economic Development held in 2011, the idea of establishing the High-Level Panel on IFF from Africa was conceived.¹⁷⁰ This was based on the need for Africa to achieve sustainable development using its resources, given that many countries were not on track to attaining the Millennium Development Goals (MDGs) by the 2015 deadline.¹⁷¹ This effort recognised that internally generated resources are a more suitable option for achieving sustainable development. These initiatives were based on studies that have indicated that many countries, especially in the global south and Africa in particular, were losing immeasurable resources due to IFF.¹⁷² The effects of IFF are substantial as explained below.

¹⁷⁰ African Union 'Illicit Financial Flows IFF- Report of the High Level Panel on Illicit Financial Flows from Africa'

Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development 2, available at https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 17 June 2020), United Nations Economic Commission for Africa 'Illicit financial flows: why Africa needs to "track it, stop it and get it"' 1 available at https://www.uneca.org/sites/default/files/PublicationFiles/illicit_financial_flows_why_africa_needs.pdf (accessed 1 October 2020).

¹⁷¹ African Union (n 170 above) 2.

¹⁷² B Muchhala 'The Right to Development and Illicit Financial Flows: Realizing the Sustainable Development Goals and Financing for Development' (2018) Report of the 19th session of the Human Rights Council Working Group on the Right to Development, 1. The Global Financial Integrity (GFI) of 2015-2017 for example, estimated that developing countries lost approximately \$7.8 trillion in IFF between 2004 and 2013. Since 2011, such flows have surpassed US \$1 trillion per annum and in 2013 reached a new peak of \$1.1 trillion. According to the African Union (n 164 above); see also A Mosioma 'Panama papers and the looting of Africa' (2016) *Tax Justice Network-Africa & Others* 8 available at <https://taxjusticeafrica.net/wp-content/uploads/2019/06/Panama-papers-and-the-looting-of-africa.pdf> (accessed 12 February 2020), estimated that Africa lost about USD 50 billion annually in IFF. This figure is said to accumulate to USD 1 trillion for the last half of the century. Of the losses, it is estimated that 87.4% are attributable to tax avoidance schemes of transfer pricing which lead to otherwise taxable finances being taken away from jurisdictions where such amounts were generated. See the United Nations Economic Commission for Africa 'Illicit financial flows: why Africa needs to "track it, stop it and get it"' 3 available at https://www.uneca.org/sites/default/files/PublicationFiles/illicit_financial_flows_why_africa_needs.pdf (accessed 1 October 2020) estimates that Africa loses on average between USD 40 billion to USD 148 billion annually in IFF, the greatest percentage comprising of losses related to tax evasion, trade, and services mispricing, and transfer pricing. These practices are related to tax avoidance schemes, where tax incentives and holiday initiatives are classified. These practices (especially from trade mispricing) were most prevalent in the extractives and mining sectors.

IFF affects the capacity of states to mobilise resources to finance development programmes especially in developing and less developed countries, and worsens the global inequality challenges.¹⁷³ Consequently, tackling IFF ‘would enlarge domestic resources available for the realisation of human rights, especially economic, social and cultural rights, and the right to development’.¹⁷⁴ This is important to this study. Furthermore, IFF ultimately affects the ability of nations, especially the least developed ones, to realise Sustainable Development Goals (SDGs) including SDG Four on quality and equitable education, and many other global and regional development plans, including the African Union Agenda 2063: The Africa We Want (Agenda 2063).¹⁷⁵ Given these effects, it would be of concern to know what causes IFF.

According to the United Nations Economic Commission for Africa, fiscal deficits contribute to macroeconomics drivers of IFF.¹⁷⁶ These deficits might be gaps within the domestic legal and policy framework or administrative ones that make IFF drivers like tax avoidance thrive.¹⁷⁷ Tax incentives scheme should at the very least be seen as drivers of IFF, though as tax avoidance mechanisms they could also be classified as ways in which IFF manifests and persists. Consequently, the African Commission’s efforts that later led to the declaration discussed below recognise the legality of tax avoidance initiatives but calls upon countries to assess them from a human rights lens. The discussion below delves into the relationship between IFFs and tax incentives, a matter that should be of utmost importance to Uganda given its obligations under the African Charter on Human and Peoples’ Rights (ACHPRs) and other human rights treaties. It is equally important to note that the High-level Panel of the African Commission on IFF in Africa has classified tax avoidance schemes as IFF because of the unfair impact they have on the revenue for the realisation of resource dependent ESRs. The panel makes a correlation between IFF, particularly through tax avoidance schemes, revenue, and the ability of states in Africa to achieve their development agendas and realise ESRs. This is the lens through which the issue of tax incentives in Uganda should be considered.

Given the background above, below I highlight the relationship between IFF and tax incentives in concrete terms. Globally, IFF is connected to tax planning initiatives including aggressive

¹⁷³ Muchhala (n 172 above) 2.

¹⁷⁴ As above.

¹⁷⁵ As above. It is against this background that the report of the high-level panel on IFF aimed at assessing the magnitude of the issue by identifying the volume and sources of the outflows, documenting individual case studies, and making short and medium-term recommendations on resolving the challenge.

¹⁷⁶ United Nations Economic Commission for Africa (n 168) 1.

¹⁷⁷ As above.

tax avoidance mechanisms such as tax holidays, tax waivers, trade mis invoicing, and transfer pricing that account for 60% of the practice.¹⁷⁸ I find that in Uganda, tax avoidance using legally available tax incentives has not been accorded due attention more so as a contributor to IFF. This might partly explain why annually tax incentive schemes keep getting more generous. More so, many of the KIIs conducted with participants from MDAs analysed tax incentives from a purely economic angle.¹⁷⁹ They saw a correlation with revenue foregone or revenue leakages as myopic and not taking into account the perceived long-term benefits of the incentives.¹⁸⁰ This could be contributing to the lax approach adopted to deal with tax incentives, which I see as akin to handling such a grave matter lightly.

The African Commission report on IFF led to the later adoption of the African Union Declaration on Illicit Financial Flows (The African Union Declaration).¹⁸¹ The African Union Declaration recognises the role played by prudent legal, policy, and regulatory fiscal measures that encourage transparency, and fight secrecy and corruption in resolving the IFF crisis.¹⁸² These are at the heart of the discussion on tax incentives as many of the participants interviewed for the study pointed out transparency, secrecy issues, corruption, and influence-peddling as major factors affecting the grant and administration of both statutory and discretionary tax incentives.¹⁸³ These challenges are worse for discretionary tax incentives.¹⁸⁴ A few participants opined that corruption also played a role in the selection of the entities and sectors that benefit from the statutory tax incentives.¹⁸⁵ The current legal, policy framework, and administrative shortcomings discussed later in this chapter demonstrate that the discussion on IFF is relevant in the context of tax incentives in Uganda, which calls for further human rights scrutiny of these issues.¹⁸⁶ The context is better appreciated when tax incentives are analysed from the potential impact they have on the realisation of ESRs, the goals and priority areas of Agenda 2063 and SDGs.

¹⁷⁸ United Nations Economic Commission for Africa (n 168) 5.

¹⁷⁹ KII with IA, Ministry of Finance, Planning and Economic Development (MoFPED) held in Kampala on 18 March 2021, KII with MM, Uganda Investment Authority, (UIA) held in Kampala on 23 March 2021.

¹⁸⁰ As above.

¹⁸¹ Assembly/AU/17(XXIV), available at https://au.int/sites/default/files/documents/29831-doc-assembly_declaration_on_illicit_financial_flow_-_english.pdf (accessed 17 June 2020).

¹⁸² Preamble to the Declaration.

¹⁸³ At least 5 participants anonymously mentioned this.

¹⁸⁴ D Holland & RJ Vann 'Income Tax Incentives for Investments' in V Thuronyi (ed) *Tax Law Design and Drafting 2* (1998) 995.

¹⁸⁵ At least 3 participants anonymously mentioned this.

¹⁸⁶ See sect 5.3 & 5.4 of the thesis.

b) *The African Union Agenda 2063: The Africa We Want*¹⁸⁷

Agenda 2063 aims at an Africa that is more cohesive, self-reliant, and integral with enhanced revenue mobilisation at the fore.¹⁸⁸ The Agenda aims at ‘a shared strategic framework for inclusive growth and sustainable development’¹⁸⁹ and contains ‘key objectives and targets... including the realisation of the place of in development’.¹⁹⁰ This can be achieved by addressing the prevalent fiscal gaps and fighting IFF among other strategies.¹⁹¹ Agenda 2063 is a grand and ambitious plan that if realised would boost the quality of life of the people on the continent through the realisation of ESRs. Taxation would play a critical and more sustainable role in ensuring economic growth, development, and transformation in line with the aspirations of Agenda 2063.¹⁹² The ability of developing countries to achieve the ambitious global and regional development agendas in addition to their domestic plans largely depends on prudent DRM strategies.¹⁹³ This calls for the scrutinising of tax incentives initiatives given their impact on DRM.

Despite progressive provisions above, Agenda 2063 is not without shortcomings. It for example in the first place, it falls short of recognising the role of tax revenue in this grand plan. DRM is discussed in passing without addressing key fiscal strategies pertinent to its attainment. Had it been better crafted, this could have marked a starting point to having Africa united and collaborating on issues of resources for and the realisation of ESRs. This initiative could also have devised ways of handling the present fiscal deficits, arising mainly from tax competition. This could be by establishing policy, legal, and institutional frameworks like the OECD to deal with issues such as tax competition that leads to unwarranted tax incentives, which greatly affect DRM.

Secondly, it can be argued that the gaps in Agenda 2063 demonstrate that at a strategic leadership level, key stakeholders have not appreciated the role of harmful fiscal policies,

¹⁸⁷ (The First Ten-Year Implementation Plan 2014 – 2023), adopted, in January of 2015, in Addis Ababa, Ethiopia by the 24th African Union (AU) Assembly of Heads of State and Government, available at <https://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> (accessed 24 March 2021).

¹⁸⁸ A Mosioma ‘Panama papers and the looting of Africa’ (2016) *Tax Justice Network-Africa & Others* 6 available at <https://taxjusticeafrica.net/wp-content/uploads/2019/06/Panama-papers-and-the-looting-of-africa.pdf> (accessed 12 February 2020).

¹⁸⁹ Agenda 2063 (n 187 above) 10.

¹⁹⁰ Agenda 2063 (n 187 above) 28 & 33.

¹⁹¹ As above.

¹⁹² Mosioma (n 188 above) 6.

¹⁹³ Mosioma (n 188 above) 7.

coupled with tax competition, on DRM initiatives in Africa. There is oblivion to how the challenge above would affect any plans, current or future, that are aimed at improving the livelihoods of people through the realisation of ESRs. Agenda aspiration two, for example, envisages a united Africa, economically and politically, yet the priority areas, targets, and actions required to achieve the same are silent about the need for collaboration or integration for fiscal purposes.¹⁹⁴ Ironically, Africa has the most regional trade agreements and economic collaborations on several matters but not tax.¹⁹⁵ Many countries are members of multiple regional economic communities, which creates a ‘spaghetti bowl’ of having to comply with the different laws and regulations in the different member communities.¹⁹⁶ This creates confusion and multiple reporting obligations that are time consuming, and at times come with contradictory obligations. To solve this, tax competition could be handled at the African level as opposed to the sub-regional level to avoid complicating the ‘spaghetti bowl’ even further. This thus makes relevant calls to rationalise the different regional economic blocs for better impact and to avoid operational and administrative issues like costs, and the conflicts that arise from having multiple memberships.¹⁹⁷ Agenda 2063 is a missed opportunity for a discussion on pressing economic issues such as tax competition. Despite the missed opportunity, not all hope is lost on the continent. There have been some concrete efforts to link development on the continent with resources, especially domestically generated financial resources as elaborated below.

c) The Third International Conference on Financing for Development¹⁹⁸

The Third International Conference on Financing for Development 2015 (Addis Ababa Action Agenda) addresses at a political level the ‘challenge of financing and creating an enabling environment at all levels for sustainable development in the spirit of global partnership and solidarity’.¹⁹⁹ It is based on the 2002 United Nations Monterrey Consensus on Financing for

¹⁹⁴ Agenda 2063 (n 187 above) 63.

¹⁹⁵ B Vickers *A Handbook on Regional Integration in Africa: Towards Agenda 2063* (2017) 5.

¹⁹⁶ Vickers (n 195) 6.

¹⁹⁷ As above.

¹⁹⁸ The Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda). The final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015, available at https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf (accessed 20 January 2020).

¹⁹⁹ Addis Ababa Action Agenda (n 198) 1.

Development and the 2008 United Nations Doha Declaration on Financing for Development.²⁰⁰ The Addis Ababa Action Agenda focuses on devising concrete means to ensure and strengthen the post-2015 SDGs financing agenda, and generally improve financing for the development framework.²⁰¹ It recognises the role of finances in the attainment of several of African's development plans and aspirations.

Among the areas of focus is the need to strengthen DRM and resource utilisation as a contributor to sustainable development.²⁰² This would be achieved by amongst others, improving sound economic and fiscal policies, and enhancing good governance at all levels.²⁰³ Improved, transparent, progressive, and effective tax systems and policies are critical to this end.²⁰⁴ Basic strategies include first of all, those geared towards widening the tax base, and setting domestic targets and timelines for enhancing DRM as part of the national sustainable development strategies.²⁰⁵ Secondly, cooperation and assistance from member states as critical for attaining these aspirations.²⁰⁶ Specific to tax incentives, the Addis Ababa Action Agenda underscores the importance of international cooperation as follows:²⁰⁷

We commit to scaling up international tax cooperation. We encourage countries, in accordance with their national capacities and circumstances, to work together to strengthen transparency and adopt appropriate policies, including multinational enterprises reporting country-by-country to tax authorities where they operate; access to beneficial ownership information for competent authorities; and progressively advancing towards automatic exchange of tax information among tax authorities as appropriate, with assistance to developing countries, especially the least developed, as needed. Tax incentives can be an appropriate policy tool. However, to end harmful tax practices, countries can engage in voluntary discussions on tax incentives in regional and international forums.

International tax cooperation, transparency, automatic exchange of information between states for tax purposes, and an honest discussion on how to handle tax incentives regionally and internationally are underscored above. The need for a regional approach towards international tax cooperation, together with the importance of considering the peculiar circumstances of different countries are emphasised.²⁰⁸

²⁰⁰ As above. Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.198.11.pdf and https://www.un.org/esa/ffd/wp-content/uploads/2014/09/Doha_Declaration_FFD.pdf respectively (accessed 12 May 2022).

²⁰¹ Addis Ababa Action Agenda (n 198) 1.

²⁰² Addis Ababa Action Agenda (n 198) Para 20, pg10.

²⁰³ As above.

²⁰⁴ Addis Ababa Action Agenda (n 198) Para 22, pg 11.

²⁰⁵ As above.

²⁰⁶ As above.

²⁰⁷ Addis Ababa Action Agenda (n 198) Para 27, pg 13.

²⁰⁸ Addis Ababa Action Agenda (n 198), Para 28, pg 13.

Thirdly, during the Addis Ababa Action Agenda conference, heads of states were equally committed to substantially reducing IFF by 2030 while devising mechanisms to completely eradicate the vice.²⁰⁹ Equally important are efforts geared towards ensuring that all companies, including multinationals, pay their fair share of tax in the countries in which they operate per domestic and international laws and policies.²¹⁰ The challenge in the Ugandan context that I discuss in detail in section 5.4 below is that domestic laws allow for tax incentives without a proper framework for assessing their likely impact on revenue for ESRs realisation. The domestic legal framework ignores several of Uganda's international obligations and attendant efforts towards realising the same. Additionally, the framework does not reflect the desires of the promoters of the human rights-based theory of fiscal sociology.

To bring the discussion home, in Uganda, some of these efforts are reflected in the successive National Development Plans (NDPs), and the recently adopted Domestic Revenue Mobilisation Strategy (DRMS) discussed in section 5.3.1 of this chapter. These initiatives are in line with the obligation on states not to derogate from their human rights commitments even in times of resource scarcity recognised under the CESC. States ought to do their best in terms of DRM for the realisation of SDGs, ESRs, and regional and domestic development plans including the goals of Agenda 2063. Domestically for example, the DRMS recognises that tax incentives affect DRM hence the need to come up with interventions to address it decisively.²¹²

The Addis Ababa Action Agenda is important in as much as it recognises the place of resources in development and the largely negative role tax incentives play in its realisation. It additionally underscores the need to address revenue losses and leakages from all sources including tax incentives and IFF. Equally important is the need for global and regional economic cooperation in addressing these concerns, bearing in mind their complexities and the role of tax competition in the prevalence of tax incentives.

The efforts of the three soft law regional instruments could yield progress if they are perceived as complementary. As noted from the discussion, each instrument makes a contribution albeit with peculiar gaps. Dealing with IFF is critical to the discussion on DRM, as is having an economic growth and development agenda as a continent. I find the Addis Ababa Action

²⁰⁹ Addis Ababa Action Agenda (n 198) Para 23, pg 11.

²¹⁰ As above.

²¹¹ The obligation is discussed in detail under part 3.2 of the thesis.

²¹² Sect 5.3.1 of the thesis.

Agenda as the missing link that could connect the different continental efforts for better outcomes. Having discussed the international framework on tax incentives, I now analyse how adequate the domestic policy and legal framework is in addressing the challenges tax incentives related.

5.3 Applicable Domestic Policies

5.3.1 The Domestic Revenue Mobilisation Strategy²¹³

This is the major domestic policy on revenue mobilisation that recognises the role of taxation and tax incentives in DRM. The DRMS is premised on the need to move from piecemeal *ad hoc* annual tax policy changes to long-term plans that fit within the strategy so as to create a certain and predictable policy.²¹⁴ The ultimate desired goals of the DRMS include achieving citizen welfare and sustainability in revenue collection.²¹⁵ This is in recognition of the relationship between fiscal policy and the wellbeing of citizens, through the realisation of ESRs in line with the human rights-based theory of fiscal sociology.

Notably, the DRMS underscores the need to address revenue reduction challenges caused by revenue leakages arising from unjustified tax exemptions.²¹⁶ This can be done by publishing ‘a full tax expenditure framework to better understand the fiscal cost of supporting investment and social welfare’.²¹⁷ The DRMS recognises tax incentives as potentially limiting to the expansion of the tax base and revenue collection.²¹⁸ I opine that this is worsened by the lack of a clear tax expenditure reporting framework that would reflect the actual cost of the tax expenditure and its impact on revenue. Unfortunately, the recent legislative efforts in the Tax Procedure Code Act 2019 and subsequent amendments have not been sufficient to create an implementable framework and as a result to date no legislative effort has attempted to achieve this.²¹⁹ It is however important that the DRMS and eventual tax expenditure governance framework consider human rights issues, which are broader than social welfare, in line with

²¹³ 2019/20 – 2023/24, Ministry of Finance, Planning and Economic Development (MoFPED) Domestic Revenue Mobilisation Strategy (DRMS) (2019) available at https://www.finance.go.ug/sites/default/files/Publications/NEW%20DOMESTIC%20REdxVENUE%20MOBILISATION%20STRATEGY_FEB%202020_0.pdf (accessed 4 January 2021).

²¹⁴ MoFPED (n 213) 2.

²¹⁵ As above.

²¹⁶ As above.

²¹⁷ As above.

²¹⁸ MoFPED (n 213) 66.

²¹⁹ The TPCA is discussed in part 5.4.3 this chapter.

the human rights-based theory of fiscal sociology. These should additionally acknowledge the negative role played by tax incentives in the realisation of ESRs so as to decisively deal with the same.

Concretely, the DRMS proposes interesting recommendations. These include the outright prohibition of discretionary tax incentives as they undermine the tax system and complicate tax administration.²²⁰ This is what the post-1997 tax legislation had anticipated. However, some technocrats insist that discretionary tax incentives are still relevant as the tax codes may limit the attainment of several of government's fiscal objectives due to lack of flexibility.²²¹ Indeed as discussed in section 5.4, the policy and legal framework in this regard are at cross purpose. There is also a disconnect between the DRMS and the CFR discussed in section 5.1(b) above. The MoFPED for instance indicates that they have abandoned the grant of contractual discretionary incentives but still need the appropriate legal provision maintained for 'more deserving cases'.²²² This reflects the policy, legal, and practical confusion regarding discretionary tax incentives in Uganda.

The DRMS additionally recommends that for each tax incentive proposal, a cost and benefit analysis with a proper evaluation of the likely impact is done before the same is passed into law, for evidence based proposals.²²³ However, for this to be beneficial for the realisation of ESRs, I propose a human rights-based analysis of the real impact, especially on the several state's human rights commitments. The need to ensure transparency by having a public assessment of the relevance of existing tax incentives has prominence in the DRMS as does the need to establish a 'ceiling on VAT exemptions and propose sunset clauses on existing exemptions'.²²⁴ The VAT Act has been singled out as possessing overly generous tax incentives.²²⁵

On a positive note, the DRMS is commended for proposing citizen participation in tax incentives decisions, which has hitherto been lacking.²²⁶ In my view, the relevant stakeholders

²²⁰ MoFPED (n 213) 68.

²²¹ Interviews with MM UIA and IA MoFPED (n 213 above); see also D Holland & RJ Vann 'Income Tax Incentives for Investments' in V Thuronyi (n 184 above) 995.

²²² KII with IA, MoFPED.

²²³ MoFPED (n 213) 68.

²²⁴ As above.

²²⁵ As above.

²²⁶ According to the KII with MM, UIA, there is the need to consult key stakeholders like the Private Sector Foundation Uganda, (PSFU), audit firms, URA, the Free Zones Authority, (FZA), the Uganda Registration Services Bureau (URSB) during legal and policy formulation on tax incentives to benefit from divergent expertise.

to involve in this process should include the UHRC given their expertise and mandate, so as to expedite the realisation of ESRs through appropriate financing, as well as the citizens especially the poor and marginalised. This reflects the spirit of the human rights-based theory of fiscal sociology. To demonstrate the passive role currently played by the UHRC, I reviewed several of their annual reports and none reported on any tax bills reviewed in any of the years of reporting.²²⁷ This essentially means that the UHRC does not advise on tax legislation yet they are constitutionally mandated to do so.²²⁸

The policy direction depicted from the DRMS is to delimit statutory incentives to only those that are vital, and to outlaw non-statutory ones. This aspiration is however not reflected in practice as annually, the law and practice on tax incentives portray the contrary. In an attempt to draw a distinction between statutory and non-statutory incentives, as well as the advantages and shortcomings of each, the DRMS notes as follows:²²⁹

Statutory exemptions allow Government the discretion to vary the conditions of the incentives, such as the timing and the scope, by changing the law. Discretionary exemptions, however, are ad hoc, are determined subjectively, create non-neutralities and administrative complexities, and put non-targeted firms at a disadvantage. Both types risk the integrity of the tax system, are not well-monitored currently, and their application and true cost is opaque. Finally, they can lead to a harmful “race to the bottom”, where nations adopt new tax incentives to remain regionally competitive in attracting private and foreign investments.

The current legal framework as is discussed in section 5.4 of the study does not reflect this aspiration.

New as it is, the DRMS has been faced with some challenges. These include the lack of political will to have a framework that could hold the state accountable since it is only a policy strategy and not legally binding. There is need to have the aspirations reflected in the tax codes, for the same to be implementable. Unfortunately, the recently passed tax amendments are silent on the DRMS proposals, a strong indicator that they will remain as aspirations without a binding character for some time, further defeating the realisation of an inclusive human rights-based perspective to tax policy.

Once this is done, the DRMS and subsequent tax code amendments could address challenges such as; firstly, blurriness in governance, which is especially aggravated by the lack of a

²²⁷ See UHRC annual reports available at <https://www.uhrc.ug/uhrc-reports/> (accessed 31 October 2021).

²²⁸ See Art 52(1)(d) of the Constitution of the Republic of Uganda, 1995.

²²⁹ MoFPED (n 213) 67.

monitoring and evaluation framework to gauge the actual tax expenditure.²³⁰ This has negatively affected the capacity of administrators and policymakers to come up with a cost and benefit analysis of revenue forgone on tax expenditure *vis-à-vis* the accruing benefits.²³¹ The monitoring and evaluation framework ought to be included in the statutes for certainty and for ease of compliance.²³² Connected to the above is the general lack of ‘a comprehensive Tax Expenditure Governance Framework’ that limits the capacity of the state to monitor tax expenditure, exacerbates tax abuse, and negatively affects the governance of tax incentives.²³³ This additionally limits the process of tax incentive assessment and approvals, which aggravates revenue leakages with no corresponding capacity by the URA to monitor tax expenditure in its annual tax exemptions reports.²³⁴

The DRMS proposes the establishment of ‘an appropriate, evidence-based Tax Expenditure Governance Framework to limit leakages and improve transparency’.²³⁵ This would assist in the generation of a tax expenditure report that would be published annually as part of the national budget process.²³⁶ The same would consider the components discussed above and demonstrate the degree of ‘compliance with exemption ceilings ... being achieved’.²³⁷ The above proposals are yet to be implemented.

The second gap that the DRMS could address is the lack of a research-based appraisal to back up tax incentives-related decisions.²³⁸ This absence makes it hard to account for foregone tax or get empirical data to influence legal and policy reform. It is proposed that this appraisal could be supplemented with proper research and a legal requirement for reporting given the contradictions discussed in section 5.1.2(b) of the thesis, on tax expenditure reporting generally.²³⁹

The MoFPED indicates that they are working with the URA to come up with a tax expenditure governance framework that should include a depository of tax expenditure, the law that provides for the same, the rationale, and a rigorous monitoring, evaluation, and reporting

²³⁰ MoFPED (n 213) 68.

²³¹ As above.

²³² KII with IA, MoFPED, KII with SR, URA held in Kampala on 1 March 2021.

²³³ MoFPED (n 213) 68.

²³⁴ As above.

²³⁵ As above.

²³⁶ As above.

²³⁷ As above.

²³⁸ KII with IA, MoFPED.

²³⁹ As above.

framework.²⁴⁰ I would propose that a collaboration with the UHRC and EOC could enrich this process. The other proposal flowing from the DRMS and relevant stakeholders is to have a careful scrutiny of statutory incentives, especially the ones on income tax to constantly reassess and evaluate their eligibility and appropriateness.²⁴¹ This would get rid of redundant provisions that could have achieved their purpose.

Lastly, it can be said that the current policy design on tax incentives is plainly inconsistent.²⁴² The government cannot purport to grant tax incentives while at the same time seeking to expand the tax base.²⁴³ This inconsistency is equally evidenced in the CFR in which the negative role played by tax incentives in the attaining of the objectives therein, is not recognised. The result has been overly burdening a very limited stream of taxpayers, while the well-placed continue to live largely tax-free.²⁴⁴ This in turn affects tax-payers' morale and could breed bad practices like evasion, avoidance, non-declaration, and under declaration, among others.²⁴⁵ Taxpayer apathy further affects the capacity of the state to raise revenue through taxation. It is worse when taxes are not commensurate with the benefit in terms of social services provision. Below I discuss if the latest policy is helpful on the issues under study.

5.3.2 The National Action Plan on Business and Human Rights²⁴⁶

The National Action Plan on Business and Human Rights 2021 (NAP on BHRs), which was recently adopted to streamline business and human rights related issues, indicates a situation analysis divided into different thematic areas. Tax incentives are discussed under the sub theme of 'Revenue Transparency, Tax exemptions and corruption'.²⁴⁷ The NAP on BHRs attributes Uganda's vintage position in attracting FDI, as first in East Africa, to among others, the

²⁴⁰ As above. This was expected by end of June 2021 but has not yet been adopted to date.

²⁴¹ MoFPED (n 213) 68. This concern has also been sounded by some CSOs like the Civil Society Budget Advocacy Group (CSBAG) and The Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI-Uganda)

²⁴² KII with Mr. Festus Akunobera, KII with Ms. Regina Navuga, SEANITI- Uganda, KII with Mr. Julius Mukunda, CSBAG held in Kampala on 30 March 2021.

²⁴³ KII with Mr. Festus Akunobera.

²⁴⁴ KII with Mr. Festus Akunobera, KII with Ms. Regina Navuga, SEANITI- Uganda, KII with Mr. Julius Mukunda, CSBAG.

²⁴⁵ As above.

²⁴⁶ The Ministry of Gender, Labour and Social Development 'The National Action Plan on Business and Human Rights' August 2021 available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjczstzohKT1AhUk8uAKHbk8CUIQFnoECAIQAO&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FNationalPlans%2Fuganda_approved-national-action-plan-on-business-and-human-rights_august-2021.pdf&usq=AOvVaw1FdiMjL8JUaJQYVqGCvUID (accessed 9 January 2022).

²⁴⁷ Sect 3.4, pg 16 of the NAP on BHRs.

generous tax incentives for strategic sectors such as energy, oil and gas, and manufacturing.²⁴⁸ It can thus be confirmed that Uganda grants tax incentives in sectors such as energy and oil and gas where the country has comparative advantage compared to her counterparts in the region. This is wasteful as discussed in section 1.8.1 and 1.8.2 of the study. That aside, the situational analysis indicates critical issues pertinent to this study. For example, from the consultations made prior to the NAP on BHRs, stakeholders found that tax incentives were awarded in a less transparent and discriminatorily manner in favour of large and foreign investors.²⁴⁹ This, according to the stakeholders, leads to competition between the businesses benefiting from tax incentives and those that are not, which eventually breeds unjustifiable revenue losses and leakages.²⁵⁰ Stakeholders recommended that tax incentives ought to only be granted where it is strategically imperative and if they can contribute to the realisation of human rights.²⁵¹ This would call for a social and human rights impact assessment of tax incentives, which is currently missing.²⁵² The NAP on BHRs calls for citizen participation in tax incentives decisions especially by relevant stakeholders for a better informed framework.²⁵³ This is equally still lacking.

Despite the progressive provisions, like with the DRMS, the NAP on BHRs is a policy document that lacks legal enforceability mechanisms in its current form. The efforts therein ought to be reduced into a legally enforceable law by mainly amending the existing laws, especially on taxation, to reflect the aspirations therein. The challenge so far is that the legal amendments have not reflected the policy aspirations, which points to a lack of political will to resolve the tax incentives related challenges. Below I present some of these inconsistencies in the review of the domestic legal framework.

5.4 The legal framework on tax incentives in Uganda

I analyse legal provisions particularly aimed at attracting FDI for reasons discussed in section 1.5.2 of this study. The particular focus on tax incentives for FDIs is based on the evidence in the literature, which concludes that while tax incentives do not attract or retain FDI they are

²⁴⁸ As above.

²⁴⁹ As above.

²⁵⁰ As above.

²⁵¹ As above.

²⁵² As above.

²⁵³ As above.

prevalently relied on by states due to tax competition.²⁵⁴ Because of this evidence, revenue forgone from the grant of tax incentives particularly for FDI is classified as wasteful tax expenditure or revenue leakages and losses. Below I review the legal framework on tax incentives contained in several legislations.

5.4.1 Tax incentives in the Income Tax Act (ITA)

a) Tax exemptions for locally manufactured exports

According to the ITA, a taxpayer is entitled to a tax exemption of ten years on income derived from the exportation of finished consumer or capital goods.²⁵⁵ In the case of a new investment, the taxpayer should have applied in writing to the Commissioner General at the beginning of the investment while for an existing one, the application should have been made by 1 July 2007.²⁵⁶ A detailed procedure for the application and grant of this certificate of entitlement for exemption is provided.²⁵⁷ The certificate is specific to a taxpayer and the income derived from the export of designated products, and valid for ten years from the date of issue.²⁵⁸ The incentive is only available for the years when taxpayer fulfils the required conditions.²⁵⁹ These include keeping proper books of accounts and exporting at least 80% of the finished capital or finished goods, regardless of whether the raw materials are sourced from Uganda or not.²⁶⁰ This is largely aimed at export promotion by incentivising local enterprise. The exemption entitlement certificate may be revoked for failure to adhere to the set conditions.²⁶¹ It may also be due to the insolvency of the holder, for the failure to file returns within two years of the grant, and negligently or knowingly furnishing false information, among other reasons.²⁶²

Although the tax incentives granted to local export manufacturers are based on sound motivation, they lack proper monitoring mechanisms which has led to abuse. There was an

²⁵⁴ For the detailed discussion on this issue see sect 1.8.1 of the thesis.

²⁵⁵ Sect 4 of the Income Tax (Amendment) Act No. 4 of 2008 which inserts Sect 21y(i) & (ii) to the Principal Act; commenced on 1 July 2008, available at <https://ulii.org/ug/legislation/act/2015/4> (accessed 6 June 2020).

²⁵⁶ As above. The conditions for the grant of the certificate include capacity to exports at least 80% of their produce, and fulfilling the conditions of the grant outlined in the regulations made by the Minister.

²⁵⁷ Reg 4 of the Income Tax (Tax Incentives for Exporters of Finished Consumer and Capital Goods) Regulations, SI 34 of 2009. These regulations though made on 11 March 2009 are deemed to have come into force on the 1 July 2007.

²⁵⁸ Reg 4(6) & Reg 5(1), (2) & (3) of SI 34 of 2009 of SI 34 of 2009.

²⁵⁹ As above.

²⁶⁰ Reg 6 of SI 34 of 2009.

²⁶¹ Reg 8 of SI 34 of 2009.

²⁶² Reg 8 of SI 34 of 2009.

indication that some of the said exports are imported goods, repackaged within Uganda to benefit from this provision.²⁶³ There is no legal, policy, or institutional mechanism to monitor whether the conditions for the grant are complied with. This defeats the purpose of the provision. The process of granting tax incentives, especially the ones with conditionalities, is a perfunctory one, requiring a mere ticking of boxes.²⁶⁴ There is no mechanism for ascertaining the extent of fulfilling of the condition precedents or follow up mechanisms on adherence to the set terms or verification of possible benefits.²⁶⁵ Without proper monitoring, the law in its current form may not achieve the intended objectives, and yet the same leads to avoidable revenue loss and leakages that could have been used to realise ESRs. This frustration has been sounded by a tax expert who asserts that:²⁶⁶

The challenge is that we end up foregoing revenue without proper policy justification or commensurate benefit. For example, if a country foregoes revenue on a policy that fails to work, or on a project which fails to deliver the anticipated social and economic benefits either for the community or for the region, and yet the foregone revenue could have helped to achieve those same objectives, that's a double loss.

Consequently, the state needs to make a clear choice on the kind objectives the several tax incentives policies and laws should serve. Using a human rights-based theory to fiscal sociology, it is possible to have a framework that serves both economic and ESRs realisation aspirations. This is what this thesis advocates for.

b) Income Tax exemption relevant to operations industrial parks or free zones

The ITA exempts 'the income derived by a person from letting or leasing facilities whose investment capital' is at least USD 50 million for a foreigner or USD 10 million for a citizen in an industrial park or free zone for ten years.²⁶⁷ The exemption applies from the date of commencement of construction for a new investor or in the case of an existing developer, from the date on which the developer makes an additional investment equivalent to the required capital threshold.²⁶⁸ The current provision lowered the capital threshold for investors and included persons renting and leasing facilities as opposed to the repealed provision that focussed on 'developers' thereby widening the eligibility bracket.²⁶⁹ This would have been a

²⁶³ KII with SEATINI-Uganda.

²⁶⁴ KII with Mr. Festus Akunobera.

²⁶⁵ As above.

²⁶⁶ As above.

²⁶⁷ Sect 21(1)(ae) as amended by the Income Tax (Amendment) Act of 2019.

²⁶⁸ As above.

²⁶⁹ In 2018, the Income Tax Act was amended by inserting an exemption of income tax of a developer of an industrial park or free zone who invests at least USD 100 million for five years from the time of commencement of construction. (see Sect 21(1)(ae) of the Income Tax (Amendment) Act, 2018).

great provision if it enabled citizens especially to invest in industrial parks and free zones, which is not necessarily the case as is discussed below.

Also exempt is the income of an operator in an industrial park or free zone or income of any person carrying on business outside the industrial park or free zone.²⁷⁰ This is conditioned on the investment capital for ten years from the date of commencement of that business being at least USD 10 million for foreigners and USD 300,000 for citizens, or USD 150,000 for a citizen whose investment is placed upcountry.²⁷¹ Existing operators or investors would qualify for the exemption from the time an additional investment is made to attain the required capital threshold in the various categories.²⁷² The benefiting tax payer is required to use at least 70% of locally sourced raw materials, employ at least 70% citizens who earn an aggregate wage of at least 70% of the total wage bill.²⁷³ These would have been great affirmative action provisions.

However, the incentives above are not without criticism. For instance, the meaning of ‘outside industrial parks’ is vague and open to abuse as it is not clear if the framers of the law meant in the precincts or anywhere in the country.²⁷⁴ Such ambiguous provisions lead to a lack of

²⁷⁰ Sect 21(af) as amended by the Income Tax (Amendment) Act of 2020.

²⁷¹ As above; See earlier provisions under Sect 21(1)(af) as amended by the Income Tax (Amendment) Act of 2019. The income of ‘an operator in an industrial park or free zone or other person carrying on business outside the industrial park or free zone’ is exempt. For one to qualify, they must be carrying on any of the businesses referred to in paragraph (ag), investment capital’ is at least USD 10 million in the case of a foreigner or USD 1 million in the case of a citizen for ten years from the date of commencement of business or, in the case of an existing operator, from the date on which the operator makes an additional investment equivalent allowed threshold. The earlier provision covered the income of an operator in an industrial park or free zone or other business outside the industrial part or free zone whose investment capital for the sake of a foreigner was at least USD 15 million and USD 5 million for a citizen for five years from the date of commencement of business. (See Sect 21(1)(af) of the Income Tax (Amendment) Act, 2018). The 2019 amendment additionally inserted clause (ag) which exempts the income of an operator within an industrial park, free zone or an operator who owns a single factory or other business outside the industrial park or free zone whose minimum investment capital is USD 10 000 000 USD for a foreigner or 1,000,000 USD for a citizen, who, subject to availability, uses at least 50% of locally sourced raw materials and employs at least 60% of citizens and carries out any of the following businesses; processing agricultural goods, manufacturing or assembling medical appliances, medical sundries or pharmaceuticals, building materials, automobile, household appliances; manufacturing furniture, pulp, paper, printing and publishing of instructional materials, establishes or operates vocational or technical institutes; or carries on business in logistics and warehousing, information technology or commercial farming. This provision was eventually repealed just a year later.

²⁷² Sect 21(af) as amended by the Income Tax (Amendment) Act of 2020.

²⁷³ As above. The other conditions include the taxpayer processing agricultural goods, manufacturing or assembling medical appliances, sundries, pharmaceuticals, building materials, automobiles, household appliances, manufactures furniture, pulp, paper, printing and publishing of instructional materials, establishes or operates vocational or technical institutes, carries out business in logistics and warehouse, information technology or commercial farming, or manufactures tyres, footwear, mattresses or toothpaste. Citizens under the Act include members of the East African Community.

²⁷⁴ KII with Mr. Festus Akunobera.

uniformity in their interpretation and application, and the reliance on the implementer's discretion for enforcement, which can be abused. This needs to be clarified. Additionally, as discussed above, income tax-related incentives in industrial parks have notably become more generous. The annual amendments to this provision demonstrate a policy and legal struggle regarding how to handle of the issue of operations in the industrial parks and free zones. This could be aimed at encouraging strategic investments in this area. It has been argued that the thresholds have been reducing to encourage more investment in the manufacturing industry given the strategic ripple effects this could have on the economy.²⁷⁵ The ripple benefits cannot, however, be verified with the current structure. The legal lacuna inherent in these provisions could be as a result of rushed amendments as enunciated below:²⁷⁶

...but specifically on tax incentives, we need to commence on a process of proper estimation of the effects from the same. My sense is that we attempt to do so but we have never really focused on what that impact is because the budget process is many times rushed. Tax officials do not have enough time to see the impact of what they are proposing and sometimes the problem comes from the top. The problem with this is that the technical people are not given the opportunity to digest, analyse and come up with proper recommendations. So there is some dysfunction which needs to be dealt with by allowing the policy makers time to do their job to estimate the impact of these tax incentives.

I would add that the expertise needed for a proper assessment of fiscal and PFM policies and laws should include human rights-related technical knowhow, so as to incorporate a human rights evaluation. The other changes created by the annual amendments include the lowering of the capital threshold for citizens, which came from the realisation that the provisions had not translated into the locals benefiting as the requirements were unaffordable.²⁷⁷ The PSFU still finds the thresholds high especially for the majority of small scale and medium enterprises (SMEs).²⁷⁸ In essence the provisions continue to largely benefit FDIs.

Despite the gaps discussed above, policy makers justify tax incentives targeting industrial parks as a strategic way to get these developed since the government had failed to do so for long.²⁷⁹ This would result into benefits as has been witnessed in Kapeeka industrial park, which is seen as a success story as follows:²⁸⁰

Tax incentives or holidays targeting industrial parks have had some success stories. Kapeeka industrial park for example employs approximately 98% of locals, has increased exports, and foreign exchange. Secondly, since tiles can now be manufactured locally, using local materials, we have been able to successfully lobby at the regional level for the increase on excise duty on imported tiles which brings in more revenue.

²⁷⁵ KII with IA, MoFPED.

²⁷⁶ KII with Mr. Festus Akunobera.

²⁷⁷ As above.

²⁷⁸ KII with Mr. Gideon Badagawa, PSFU held on 23 March 2021.

²⁷⁹ KII with IA, MoFPED.

²⁸⁰ As above.

This illustrates that not all tax incentives are wasteful. Thus the government is encouraged to honestly reconsider the likely ripple effects of the tax incentives before granting them.

The other incentives are contained in provisions for accelerated deductibility of mineral and petroleum exploration expenditure.²⁸¹ Equally recognised are exemptions on initial allowance which allows a taxpayer to access tax relief on tangible capital expenditure by allowing for it to be expensed against the annual pre-tax income.²⁸² Lastly, the income of a person derived from the operation of aircraft in domestic and international traffic or the leasing of aircraft, among others is equally exempt.²⁸³ These particular tax incentives in this part have come with some implementation and interpretation challenges.

Firstly, as pointed out earlier in this chapter, except for a few projects that could be classified as strategic, there is mostly no criteria for determining exempt undertakings or taxpayers. This is worsened by the disparities in the benefiting sectors as the MoFPED priority sectors defer from those of the UIA, and those contained in the NDP III.²⁸⁴ Secondly, aside from these challenges and attendant negative public perceptions about tax incentives, there are administrative challenges that are worse when certain criteria has to be met for an investment to qualify.²⁸⁵ These, for example, relate to the practical verification that applicants qualify and meet mandatory capital thresholds, or the several condition precedents set in the ITA like the capacity to employ a certain number of locals, pay a particular percentage of the wage bill to locals and the use of local raw materials, among others. These challenges have been manifested in the cases arising out of the interpretation and/or application of the provisions. In some cases, it is hard to ascertain the extent of the fulfilment of the criteria set.²⁸⁶ The disputes where the interpretation and application of some of the condition precedents for the grant of exemption certificates, especially by the URA, are evidence of some of these challenges.²⁸⁷ These challenges coupled with the numerous generous tax incentives point to the fact that ultimately

²⁸¹ Sect 89 D and 89 GB of the Income Tax Act.

²⁸² Sect 27A of the Income Tax Act

²⁸³ Sect 21(1)(x) of the Income Tax Act.

²⁸⁴ KII with SR, URA.

²⁸⁵ E Gulg & GR Zodrow 'International tax competition and tax incentives in developing countries' in J Alm, J Martinez-Vazquez & M Rider (eds) *The challenges of Tax Reform in a Global Economy* (2005) 168.

²⁸⁶ KII with Mr. Festus Akunobera.

²⁸⁷ See *International School of Uganda Vs URA* (TAT and High Court cases), *Registered Trustees of Freemasons hall v URA* (Taxation Application-2017/20) [2018], among others that challenged the application of sect2 (bb) of the ITA on who qualifies as an exempt organisation. There were several conflicts on who qualifies under this section until the 2021 ITA amendment clarified this issue by guiding that benefiting taxpayer must be a not for profit organisation.

there is unjustified revenue loss or leakages. Such revenue would have made a significant contribution to the realisation of ESRs, including the financing of free and compulsory UPE as a component of the right to basic education. The challenges are worsened by the further reduction of the capital threshold annually since the introduction of the provisions under review. This makes many otherwise eligible taxpayers exempt from tax which reduces revenue further.

Thirdly, there has also been a general concern that tax incentives will be redundant unless the business environment bottlenecks are fixed. Tax incentives are not worth much in the private sector if they are not accompanied by infrastructure and human capital development.²⁸⁸ There is therefore an urgent need to eliminate factors that create investment bottlenecks in Uganda. Fourthly and related to the above concern is the lack of clarity on the exact timing of taxpayer eligibility to the tax incentives. As such, experts have advised that it is critical to strategically define when the taxpayer becomes eligible for the tax incentives.²⁸⁹ Is it at the beginning of production, or the first year when profits are made, or the first year the business posts accumulated profits?²⁹⁰ This is important to avoid the redundancy of the incentives as they may be statutorily awarded to a business that would not have been eligible to tax anyway.²⁹¹ This is not that clear in the current legal framework. URA notes that as a result of the current framework, many tax incentives are redundant and accordingly taxpayers could be seeking tax incentives in ignorance or as a way of ‘taking a break from the taxman’.²⁹²

The other related tax design issue is the length of the incentive.²⁹³ Should these be short or long-term exemptions?²⁹⁴ The dilemma is that short-term exemptions may not substantially benefit the business and yet long-term ones affect potential state revenues more.²⁹⁵ Tax formulators therefore need to strike a balance between the two and maybe advocate for medium-term tax incentives in the interim. In Uganda, some companies have been granted tax exemptions for as long as 25 years, which ties up the revenue for financing of the realisation

²⁸⁸ KII with Gideon Badagawa, PSFU; see also D Holland & RJ Vann ‘Income Tax Incentives for Investments’ in V Thuronyi (n 184 above) 787 & 788.

²⁸⁹ D Holland & RJ Vann ‘Income Tax Incentives for Investments’ in V Thuronyi (n 184 above) 990.

²⁹⁰ As above.

²⁹¹ D Holland & RJ Vann ‘Income Tax Incentives for Investments’ in V Thuronyi (n 184 above) 991.

²⁹² KII with SR, URA.

²⁹³ D Holland & RJ Vann ‘Income Tax Incentives for Investments’ in Thuronyi, V (n 184 above) 991.

²⁹⁴ As above.

²⁹⁵ As above.

of ESRs for an unnecessarily long period, without any guarantees or evidence of indirect economic or ESRs benefits.

To address some of these lacunas, some entities have recommended that rather than award tax incentives, especially discretionary ones selectively to companies, thus breeding discrimination and unfair business competition, sectors could be targeted.²⁹⁶ This could improve clarity and fairness in tax incentives administration.²⁹⁷ These benefiting sectors need to align with the priority sectors recognised in the NDP III, and by the UIA.²⁹⁸

5.4.2 Tax incentives in the Value Added Tax Act²⁹⁹ and the East Africa Community Customs Management Act 2004³⁰⁰

The Value Added Tax (VAT) Act was first enacted in 1996 to provide for the imposition and collection of the VAT and other incidental matters.³⁰¹ VAT is essential to DRM initiatives as it contributes substantially to total revenue. In 2016 for example, it was the third highest contributor to total revenue and contributed 4% to the GDP.³⁰² The Act provides for several VAT exemptions including exempt supplies³⁰³ and exempt import.³⁰⁴ Import services which would have been exempt if they were supplied in Uganda are also exempt.³⁰⁵ Some of the VAT exempt supplies include the supply of financial services, health, life, micro, and reinsurance services, including brokerage services.³⁰⁶ The others include the supply of livestock, unprocessed livestock foodstuffs and agricultural products, supply of unimproved land, educational services, supply of social welfare services, supply of construction materials for a

²⁹⁶ KII with Gideon Badagawa, PSFU.

²⁹⁷ As above.

²⁹⁸ KII with IA, MoFPED. The MoFPED notes that efforts are underway to resolve the inconsistencies in the 2021 tax proposals. They stress that the MoFPED's strategic sectors will be aligned with those of UIA and NDP III to achieve more transparency.

²⁹⁹ Cap 349, Commenced on 1 July 1996.

³⁰⁰ Date of Assent, 31 December 2004, date of commencement, 1 January 2005.

³⁰¹ Long title to the VAT Act.

³⁰² World Bank 'Financing Growth and Development: Options for raising more domestic revenue' 11th edition (2018) 24 available at <http://documents1.worldbank.org/curated/en/425631526323380885/pdf/126184-WP-PUBLIC-FinalReportUgandaEconomicUpdate.pdf> (accessed 3 March 2021).

³⁰³ Sect 18, 19 & the second schedule to the Act

³⁰⁴ Sect 20 of the VAT Act. These are goods that are exempt from customs duty under the East African Community Customs Management Act 2004 or if the imports would otherwise be exempt had they been supplied in Uganda.

³⁰⁵ Sect 20A of the VAT Act as amended by the 2011 amendment. See the third schedule to the Act.

³⁰⁶ See the second schedule to the VAT Act, as amended.

developer of an industrial park or free zone whose investment is not less than USD 100 million, among others.³⁰⁷

The other exemptions in the VAT Act include zero-rated tax on supplies.³⁰⁸ These include the supply of international cargo and passenger transport or their tickets, supply of export goods or services, supply of drugs and medicines, educational materials, supply of fertilizers, pesticides, hoes, and seeds, among others.³⁰⁹ These attract no VAT. The items listed in the 5th schedule of the EACMA are also exempt from excise duty as per section 2 and the second schedule of the Excise Duty Act 11 of 2014.³¹⁰ It has been argued that the fifth schedule to the East African Community Customs Management Act 2004 (EACMA) contains VAT-related exemptions that may have become obsolete and no longer make legal sense.³¹¹ These include exemptions of imported goods when locally manufactured equivalents are not exempt.³¹² An amendment to the schedule to address this concern would be timely.

Specific to the EACMA, the same was mainly enacted to ‘make provisions for the management and administration of customs’ in the East African Community (EAC).³¹³ Some of the exempt goods in the Act include those listed in parts A and B of the fifth schedule to the Act.³¹⁴ These include goods entering the boundaries of the East Africa Community (EAC) for re-exportation that are duty exempt,³¹⁵ and those entering any export or airport zone within the jurisdiction,³¹⁶ among other incentives. Other exempt taxpayers include importers of fish, ships, and other vessels, mosquito nets and materials for their manufacture, agriculture, and educational related imports, manufacturers of pharmaceuticals, air conditioning, and other ventilation materials, among others.³¹⁷

Consequently, Uganda’s policy gap on tax incentives stands at about 1% as a result of the VAT-related exemptions discussed above, with the most tax expenditure arising from the agriculture-

³⁰⁷ As above.

³⁰⁸ Sect 24(4) of the VAT Act.

³⁰⁹ As above.

³¹⁰ Commenced on 1 July 2014, commenced on <https://www.ura.go.ug/Resources/webuploads/GNRART/The%20Excise%20Duty%20Act%202014%20.pdf> (accessed 11 June 2020).

³¹¹ World Bank (n 302) 35.

³¹² As above.

³¹³ Long title to the EACMA.

³¹⁴ Sect 114 of the EACMA.

³¹⁵ Sect 115 of the EACMA.

³¹⁶ Sect 167 (2) of the EACMA.

³¹⁷ As above.

related sector since many manufacturers rely on such inputs.³¹⁸ This discussion underscores the argument that the tax incentives framework is too broad and wasteful, and has not meaningfully impacted the economy. The wasteful expenditure from tax incentives has affected Uganda's capacity to adequately finance critical ESRs with the result that the country lags behind in most of the set international funding benchmarks.

5.4.3 Tax incentives under the Tax Procedure Code Act³¹⁹

The Tax Procedure Code Act 2014 (TPCA) was first enacted to provide and harmonise the procedure for tax administration though later amendments attempted to 'codify' and legitimise discretionary tax incentives.³²⁰ For instance, the TPCA grants the Minister of Finance the power to pay tax on behalf of a taxpayer arising from either government contractual commitments or other contractual obligations or counterpart funding of foreign-funded projects.³²¹ As noted in section 5.2.1 and 5.2.2, discretionary tax incentives were allegedly reintroduced as a result of the shortcomings of the statutory incentives, which could not cater for the evolving strategic objectives that could be achieved using an appropriate fiscal strategy.³²² Since the law had in effect outlawed discretionary tax incentives, government relied on contracts with would be taxpayers where the former guaranteed and actually paid the latter's tax obligations.³²³ A careful scrutiny of the beneficiaries of these incentives, points to the conclusion that the MoFPED largely considered economic considerations for their grant, without much attention to the need for ESRs realisation.³²⁴ Initially, annual budget appropriations to the MoFPED covered these arrangements until the intervention of the tenth

³¹⁸ CP Lakuma & B Sserunjogi 'Value Added Tax (VAT) analysis for Uganda' (2018) *Economic Policy Research Centre (EPRC) Research series* No. 145, 2, 9 & 13, available at https://media.africaportal.org/documents/145_Value_Added_Tax_Analysis_Uganda.pdf (accessed 22 May 2021). The policy gap shows the efficiency of VAT policy structure by calculating the difference between theoretical revenue given a hypothetical policy framework and potential revenue given the current policy framework.

³¹⁹ No. 8 of 2014 as amended.

³²⁰ The long title of the TPCA No. 8 of 2014 and See Sect 3 of the TPC (Amendment) Act, 2019 which introduces section 40A (1), commenced on 1 July 2019.

³²¹ As above.

³²² KII with IA MoFPED & KII with MM, UIA; D Holland & RJ Vann 'Income Tax Incentives for Investments' in V Thuronyi (n 184 above) 995.

³²³ KII with IA, MoFPED. The contracts would sometimes be conditional on the investor fulfilling some requirements such as the use of locally generated raw materials, exportation of the finished products, or the employment of a particular number of locals.

³²⁴ Beneficiaries included BIDCO Uganda Limited was for example granted a 25-year holiday on all taxes that expires in 2030. Many of the other companies have been granted ten years of tax holidays mainly on corporate taxes, withholding taxes, value-added tax, and import duty. The other companies that have benefited from tax holidays include Roofing's Rolling Mills, Cipla Quality Chemicals Limited, Steel and Tube Industries Limited, Kingdom House, among others. The list of benefiting companies can be accessed from the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may-2019> (accessed 15 February 2020).

parliament.³²⁵ To remedy the dire situation then arising from accumulated unpaid tax commitments, the State Minister of Finance tabled a proposal in parliament to write off the tax arrears, which was done after a heated debate.³²⁶ Still unclear is the process and factors relied upon to pay the benefiting entities' tax liability. What I could establish is that these are highly political decisions that the cabinet was later required to sanction to protect the officials at the MoFPED.³²⁷ I could not independently verify if this now is the practice. As of 31 March 2018, a debt of approximately USD 135.2 million in respect to tax commitments was written-off with parliamentary approval, citing a lack of resources.³²⁸ The fact that parliamentary approval to waive unpaid discretionary tax incentives was sought after the grant was one of the bones of contention in parliament.³²⁹ This clearly highlighted the powerlessness of, and the lack of effective parliamentary oversight over the tax incentives regime and processes.³³⁰ The law unfortunately allows for such an occurrence. When parliamentarians are not involved in such critical decisions, it becomes questionable if the principle of taxpayer democracy and participation, especially through consultation is adhered to. This role should not be ignored even when dealing with discretionary tax incentives. In my view, this sidestepping of parliament could partly explain the challenges in ensuring human rights-based fiscal and PFM frameworks, since these concerns would have been raised by citizens had they been involved either directly or through their elected representatives.

Equally of concern was that the tax write-off process lacked an evaluation mechanism that could have considered the human rights or other impacts that this decision could have had.³³¹ This could have enabled relevant stakeholders to make better informed decisions on the future applications of or considerations for discretionary tax incentives. Indeed, there is an absence of checks within the legal framework that makes discretionary tax incentives susceptible to abuse and as such statutory tax incentives more ideal. Other gaps include the intricacies of accounting for revenue forgone from this category by URA since they are not directly in charge

³²⁵ KII with IA, MoFPED.

³²⁶ See Sec 40A of the Tax Procedure Code (Amendment) Act of 2019, see also the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may-2019> (accessed 15 February 2020).

³²⁷ KII with IA MoFPED.

³²⁸ According to the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may2019> (accessed 15 February 2020).

³²⁹ As above.

³³⁰ Hon. Muhammad Nsereko, Member of Parliament, Kampala Central, According to the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may-2019> (accessed 15 February 2020).

³³¹ See the discussion on the Parliament of Uganda Hansards of 7 May 2019 above.

of the arrangement.³³² For avoidance of doubt, with this current framework, a tax will be paid in respect of the tax payer; the challenge though is that it will be paid by the government, from funds appropriated from the consolidated fund. I argue that the fact that the government pays the tax obligations of private tax payers is of concern and points to a violation of its various human rights obligations. This additionally demonstrates whose interests these arrangements serve even at the expense of revenue losses and leakages for the realisation of ESRs. It is equally harder to have a proper cost and benefit analysis of discretionary incentives as compared to the statutory incentives. The wastage of resources is evidenced by the fact that government paid both income tax and corporate income tax (CIT) for the benefiting taxpayers, which raised suspicion as follows:³³³

I would not mind counterpart funding in respect of Government projects. However, these individuals are earning income and you have given them tax holidays and land. Then, you again commit to pay for them income tax and you want us to write it off. How sure are we that this money is not being shared somewhere?

As evidenced above, contractual discretionary tax incentives have led to public perceptions of corruption due to the lack of a clear criteria followed to identify the benefiting sectors or tax payers.³³⁴ According to the Minister of Finance, the government reached this situation largely because of the lack of a law on discretionary incentives and exemptions in the past.³³⁵ This has been confirmed by technocrats who indicate that the existing legal framework on statutory tax incentives has been limiting.³³⁶ They have expressed hope that since these limitations have been resolved through amendments, discretionary tax exemptions may be a practice of the past.³³⁷ I could however still independently verify from anonymous follow up KIIs that this has not been the case to date. Worse still, this has led to statutory incentives becoming more generous which reduces, with statutory backing, the revenue basket for the realisation of ESRs further.³³⁸ These issues have been raised in audit reports that decry the lack of policy and

³³² Interview with SR, URA.

³³³ Hon. Wilfred Niwagaba, MP, Ndorwa East, According to the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may-2019> (accessed 15 February 2020).

³³⁴ A Titus & T Gutuza 'The Relationship between Tax Incentives and Human Rights Obligations in the Drive to Attract Foreign Direct Investment: Are Developing Countries in Africa Getting it Right? Foreign Direct Investment and the Law: Perspectives from Selected African Countries' (2018) *Acta Juridica* 149 178.

³³⁵ Hon. David Bahati, Minister of State for Finance and Economic Development, Hon. Wilfred Niwagaba, MP, Ndorwa East, According to the Parliament of Uganda Hansards of 7 May 2019 available at <https://ulii.org/ug/hansard/7-may-2019> (accessed 15 February 2020).

³³⁶ KII with IA, MoFPED.

³³⁷ As above, KII with Julius Mukunda, CSBAG, KII with Gideon Badagawa, PSFU & KII with SEATINI Uganda.

³³⁸ As above. See also discussions in this part on the several tax codes annual amendments.

resource backing for discretionary tax incentives.³³⁹ The checks available like the requirement for the Minister of Finance to publish in the gazette a list of all discretionary tax expenditure is merely for information purposes and cannot redress the negative effects arising there from, especially on revenue for ESRs realisation.³⁴⁰

Connected to the above is the general perception that tax incentives, especially discretionary ones, favour foreigners as opposed to local investors.³⁴¹ This was highlighted as follows:³⁴²

... several Ugandans are facing challenges and yet foreign investors are benefiting from the exemptions. He cites foreign rice importers who were exempted at the expense of Ugandan farmers. Three companies; Gotovate Uganda Limited, Willix commodities and Akhom were exempted from taxes to import rice during this period of COVID-19.

What I could confirm from technocrats is the fact that tax incentives are not transparent.³⁴³ ‘They are discriminatory and have created unfair competition with no way of economically assessing their impact’.³⁴⁴ They are selectively awarded and promote implementation inequalities.³⁴⁵ This is disputed by the URA.³⁴⁶ In my assessment, the focus for URA could be the statutory incentives that they have direct control over. In my opinion, such transparency and accountability issues, if not addressed, could lead to a fiscal crisis, where citizens lose confidence in the fiscal system, which causes taxpayer apathy and further negatively affects DRM.

Further, in addition to the lack of transparency in the selection of beneficiaries,³⁴⁷ the absence of a clear eligibility criteria has left the Minister of Finance with broad powers that are susceptible to abuse.³⁴⁸ In other words, ‘the Minister of Finance is still at liberty to decide whom to grant tax incentives, how much to exempt, the type, and the duration. All this is still within his/her prerogative’.³⁴⁹ This has fuelled public perceptions that Uganda is more

³³⁹ 2017/18 AG report 48 available at <http://www.oag.go.ug/wp-content/uploads/2019/01/Report-of-the-Auditor-General-to-Parliament-for-the-FY-ended-30-June-2018.pdf> (accessed 27 January 2021). In this audit report, for example, it was noted that the policy of the Ministry of Finance of paying taxes on behalf of companies in some sectors was not accompanied by a corresponding budget and as such, this worsened domestic arrears by 83% from USD 22.4 million to USD 41.4 million.

³⁴⁰ Sect 3(3) of the TPC(Amendment) Act, 2019.

³⁴¹ KII with participant who preferred anonymity.

³⁴² The Independent (Kampala) 24 October 2020 available at <https://www.independent.co.ug/ura-to-assess-impact-of-tax-exemptions/> (accessed 7 January 2020).

³⁴³ KII with IA, MoFPED.

³⁴⁴ As above.

³⁴⁵ KII with Julius Mukunda, CSBAG.

³⁴⁶ KII with participant who preferred anonymity.

³⁴⁷ KII with Mr. Gideon Bagadawa, ED, PSFU held in Kampala on the 22 March 2021.

³⁴⁸ KII with Hon. Gerald Kafureeka Karuhanga, Parliament of Uganda held in Kampala on 20 February 2021.

³⁴⁹ KII with Julius Mukunda, CSBAG.

concerned with attracting investments than collecting revenue, as well as feelings of unfairness and an underlying belief that some privileged groups are exempted from taxation.³⁵⁰ It is also critical to note that in addition to the shortcomings above within the fiscal policy design and implementation of tax incentives, the social contract remains weak due to poor service delivery.³⁵¹

To demonstrate the challenges of discretionary tax incentives, the case of BIDCO Oil Refinery Limited is reviewed. The relevant extract from the 2016 Auditor General's Report is reproduced here for emphasis.³⁵²

In April, 2003, (the) government and BIDCO Oil Refineries Limited entered into an agreement for the development of oil palm industry in Uganda. Under article 5(7) of the agreement, GOU was required to pay VAT on the product of the project from all companies envisaged under the project from the first year of the project activities and ending after a period of eleven (11) years from the year of handing over the 26,500 hectares of land at a cost of UGX.27.79Bn (*USD 75.1m*) after which, the company would then refund the VAT paid by government with interest over a period of eight (8) years in eight equal instalments. Government has however failed to provide the balance of the 10,000 hectares of land as had then been envisaged. As result, the Ministry has continued to settle all tax obligations on behalf of BIDCO and during this year alone, a total of UGX.12.4Bn (*USD 3.35m*) was paid. There is a risk that the funds government has paid as VAT on behalf of BIDCO since the date of signing the agreement may not be recovered. I advised government to expedite the process of acquiring all the required land for BIDCO to enable recovery of VAT payments that amounted to UGX.22.07Bn (*USD 5.96m*) as initially agreed (based on OAG records).

This issue attracted high public outcry culminating into a constitutional petition challenging the agreement as unconstitutional.³⁵³ The constitutional provisions in issue included articles 2(2) and 21 of the Constitution, by promoting inequality between the company and other citizens. The other constitutional provisions included article 154 that prohibits the government from entering into undertakings of such a nature without parliamentary approval as well as article 159 that prohibits the government from guaranteeing any liabilities without an Act of parliament.³⁵⁴ Other issues of contention included the constitutionality of exemptions on withholding tax and stamp duty made in contravention of the law, and undertakings to pay fees, levies, duties, and VAT.³⁵⁵ Also granted were additional concessions lasting 25 years with the government being liable in penalties in case of breach.³⁵⁶ It was argued for the petitioners that

³⁵⁰ World Bank (n 302 above) xii; See also Titus & Gutuza (n 334 above) 178.

³⁵¹ As above.

³⁵² Office of the Auditor General 'Annual Report Of The Auditor General On The Financial Statements Of GOU For The Financial Year Ended 30th June 2016' available at <http://www.oag.go.ug/wp-content/uploads/2017/01/Annual-Auditor-Generals-Report-on-Government-And-Statutory-Bodies-For-The-FY15-16.pdf> (accessed 28 March 2021).

³⁵³ *Hon. Issa Kikungwe & Anor v. AG* Constitutional Petition No. 30 of 2006.

³⁵⁴ Pg 1 & 2 of the Judgement.

³⁵⁵ Pg 2 of the Judgement.

³⁵⁶ Pg 14 of the judgement.

all the monies payable by the government on behalf of BIDCO were from the consolidated fund and hence needed the Auditor General's and parliamentary approval, neither of which was sought.³⁵⁷ The Attorney General's response was a denial.³⁵⁸

In its judgement, the court noted that joining BIDCO as co-respondent would have enabled the petitioners to establish liability since the dispute was in respect of an agreement signed on its behalf.³⁵⁹ The case was dismissed on the grounds that it would offend against the non derogable right to a fair hearing if BIDCO, was condemned unheard.³⁶⁰ This was especially so since the Attorney General had not done much to defend the matter as they only filed a reply and not written submissions.³⁶¹ The court additionally found that the petitioners failed to demonstrate the unconstitutionality test. The case, however, highlights the serious issues embedded in the management and administration of discretionary tax incentives. Unfortunately, this case presents a missed opportunity to clarify the powers of the Minister of Finance regarding the award of discretionary tax incentives, and the several related procedural and administrative issues such as the role of the oversight and approval institutions.

Some of the proposals that have been suggested to refine the transparency in discretionary tax incentives include having the power to grant tax incentives vested in a board that is composed of persons with impeccable character and high repute, perhaps at the level of Justices of the Supreme Court, and not with a single political head.³⁶² This should be coupled with a legal requirement for frequent reporting to the relevant parliamentary committee; at least quarterly.³⁶³

5.4.4 Tax incentives in the Free Zone Act³⁶⁴

Free zones, also known as Special Economic Zones (SEZs), Export Processing Zones (EPZs), or Free Trade Zones (FTZs) are defined in the Act as:³⁶⁵

³⁵⁷ Para 25 (i), Pg 4 of the judgement.

³⁵⁸ Pg 5-7 of the judgement.

³⁵⁹ Pg 21 of the judgement.

³⁶⁰ Pg 23 of the judgement.

³⁶¹ Pg 24 of the judgement.

³⁶² KII with Hon. Gerald Kafureeka Karuhanga.

³⁶³ As above.

³⁶⁴ Assented to on 2 February 2014.

³⁶⁵ Sect 2 of the FZA. In other jurisdictions they are defined as geographically designated areas of a country set aside for specially targeted economic activities, supported through special arrangements (that may include laws) and systems that are often different from those that apply in the rest of the country. See Department of Trade and Industry 'Policy on the development of Special Economic Zones in South Africa', available at <http://www.thedti.gov.za/industrial-development/sez.jsp> (accessed 6 March 2021). They are also defined as

...designated area(s) where goods introduced into the designated area are generally regarded, so far as import duties are concerned, as being outside the customs territory and includes an export processing zone or free port zone.

Consequently, the Free Zones Act 2014 (FZA) was passed to streamline the legal and institutional framework for the establishment, management, development, control, marketing, and supervision of free zones in Uganda.³⁶⁶ Under the FZA, the Minister of Finance can by statutory instrument declare any area, building, or land a free zone.³⁶⁷ The Act provides for tax incentives for developers or operators of free zones:³⁶⁸

...from taxes and duties on all export processing imported inputs that are for the exclusive use in the development and production output of the business enterprise including machinery and equipment, spare parts, raw materials and intermediate good, subject to the limitation of goods specified in the East African Customs Management Act.

The Act emphasises that all goods brought into the free zone shall be free from import duties and taxes³⁶⁹ and equally, all goods exported from the zone are exempt from import duty, and other taxes applicable in the process.³⁷⁰ These exemptions are in addition to any other incentives that a developer or operator of a free zone may be entitled to in any other relevant law.³⁷¹ Also exempt from customs duty are machinery, plants, and other equipment brought into the free zone as long as they are used and remain there.³⁷² Currently accessing the free zones requires at least USD 1 million which is quite high for Uganda's SMEs as discussed earlier in this chapter.³⁷³

The other concern is the suspicion that some of the goods purportedly produced in these free zones are imported from neighbouring countries, repackaged and 'exported' free of duty, which defeats the purpose of the legislation.³⁷⁴ This could happen due to the lack of a proper legal and institutional framework for the supervision and monitoring of the free zones.³⁷⁵ Further,

demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory. These differential rules principally deal with investment conditions, international trade and customs, taxation, and the regulatory environment; whereby the zone is given a business environment that is intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory. (see T Farole, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience* (2011) 23.

³⁶⁶ Long title to the FZA.

³⁶⁷ Sect 3, read together with Sect 2 (Interpretation section) of the FZA.

³⁶⁸ Sect 48 of the FZA.

³⁶⁹ Sect 53(1)(a) of the FZA.

³⁷⁰ Sect 53(2)(a) of the FZA.

³⁷¹ Sect 71(1) of the FZA.

³⁷² Sect 69(1) of the FZA.

³⁷³ KII with Julius Mukunda, CSBAG.

³⁷⁴ KII with participant who preferred anonymity.

³⁷⁵ KII with MM, UIA.

although sound fiscal policies are critical to the success of free zones, experts recommend that developers and operators of zones ought to be moderately taxed rather than being granted overly generous tax incentives.³⁷⁶ Equally recommended is the need for the government to ascertain the costs and benefits of the tax incentives offered in the free zones.³⁷⁷ This would enable the proper evaluation of what works and what does not.

Free zones aim at scaling up manufacturing and export-oriented growth in addition to generating more economic activities, and encouraging investment in agro-processing and value addition, mostly.³⁷⁸ Success stories include China which established SEZ in 1979 which were originally intended as experiments.³⁷⁹ By 2010, these had grown to 2,000 SEZs due to sound fiscal policies and accounted for 46% of FDI, 60% of export, and employed about 30 million people.³⁸⁰ Experts warn, however, that there have been failures in this model too. These include India, Ghana, and Kenya.³⁸¹ It would as such be dangerous for Uganda to replicate the China model without caution, as the success of the free zones depends on whether other factors would lead to a huge demand for investors to invest in a particular country.³⁸² It is hence advisable that the policy justification for SEZs does not solely rest on the desire for job creation and a surge in exports, but rather largely consider overcoming the structural bottlenecks that affect private sector development.³⁸³ Comparably, the Kenyan SEZs policy and initiative failed partly because of the high cost of tax incentives that was not commensurate with the economic benefits from the intervention.³⁸⁴ Many of the companies set up in the SEZs did not survive beyond the ten-year tax holidays granted.³⁸⁵ Uganda is a new comer in this intervention and as

³⁷⁶ World Bank 'Prem notes on export processing zones' (1998) 11 3 available at <http://www1.worldbank.org/prem/PREMNotes/premnote11.pdf> (accessed 8 March 2021).

³⁷⁷ World Bank '(n 389 above) 4.

³⁷⁸ E Laryea *et al* 'Kenya's Experience with Special Economic Zones: Legal and Policy Imperatives' (2020) 28.2 *African Journal of International and Comparative Law* 171 171.

³⁷⁹ PMM Teachout 'Special Economic Zones Policy considerations for Uganda' (2020) *International Growth Centre (IGC)* 2 available at https://www.theigc.org/wp-content/uploads/2020/02/Special-Economic-Zones-in-Uganda-28.01.20_format.pdf (accessed 1 March 2021).

³⁸⁰ As above. Korea, Malaysia, Mauritius, Dubai, and Poland have registered similar levels of success.

³⁸¹ As above.

³⁸² As above.

³⁸³ Teachout (n 379) 3, same view is reiterated in the KII with Mr. Gideon Bagadawa, PSFU.

³⁸⁴ Laryea *et al* (n 378) 185.

³⁸⁵ As above and J. N. Kuria, Effects of Tax Incentives on the Performance of Export Processing Zones (EPZ) Firms in Kenya, published *Doctor of Business Administration thesis* (United States International University Africa 2016) 117. Available at < <http://erepo.usiu.ac.ke/bitstream/handle/11732/3650/JOHN%20NJOROGGE%20KURIA%20DBA%202017.pdf?sequence=1&isAllowed=y> > (accessed 15 March 2021). In Kenya it was found that an analysis of EPZ firms' survival rate found that out of the 66 EPZ firms registered in 2003 only 22 were still in existence after the initial ten-year period ended in 2012. Similarly, 48 EPZ firms had existed between 2004 and 2013, and another 41 between 2005 and 2014. Despite this, there was a high entry rate of new EPZ firms with 60 firms registering between 2004 and 2013, and another 59 between

such needs to invest in research, so as to be able to adopt an appropriate model that suits its economic situation and needs.

Currently, Uganda has 27 industrial parks managed by the UIA, and 19 free zones run by the Uganda Free Zones Authority (UFZA), 17 of which are single-owned.³⁸⁶ Developers and operators in both industrial parks and free zones are entitled to ten years' tax exemptions on CIT, among other tax-related incentives.³⁸⁷ The development of public multi-firmed free zones in Entebbe and Jinja is underway.³⁸⁸

Despite the several advantages of free zones discussed above, fiscal incentives in the form of tax incentives may not be a determining factor in their success, but may only contribute to tax competition and the 'race to the bottom'.³⁸⁹ There is, as such, the need to have a clear policy objective for free zones in Uganda, and to devise a working strategy to achieve the same.³⁹⁰ The cost-benefit analysis including the revenue foregone is another consideration that is crucial in the determination of the success of free zones.³⁹¹ This would require an investment in monitoring and evaluation mechanisms.³⁹² As discussed in detail in section 1.8.1 and 1.8.2 of the study, tax incentives in free zones like elsewhere are mainly justified by the 'race to the bottom' which is caused by tax competition. This in essence means that whatever revenue is foregone in such circumstances is wasteful, and negatively affects the realisation of ESRs. Below I review how the framework presented above affects the revenue basket for financing for critical rights ESRs.

5.5 Revenue forgone from the grant of tax incentives for the period under study

Generally, the statistics regarding tax expenditure are hard to secure partly due to the transparency issues discussed throughout this study. Although these should be publicly available on the URA and MoFPED websites, this is hardly done. I was, however, able to

2005 and 2014. The findings suggested that the tax holiday was a strong incentive in attracting new firms. However, it did not guarantee any long-term benefits to the economy as roughly 60% of the firms would leave just before the ten-year period was about to expire, either to avoid paying taxes or because of the poor state of communication and infrastructure.'

³⁸⁶ Teachout (n 379) 6.

³⁸⁷ As above.

³⁸⁸ As above.

³⁸⁹ Teachout (n 379) 9.

³⁹⁰ Teachout (n 379) 8.

³⁹¹ Teachout (n 379) 12.

³⁹² Teachout (n 379) 13.

secure the reports for the years I review below from URA. The figures in some of the reports were a little contradictory but within acceptable margins of errors. It was not possible to get all the data from 1997 but I use the years below to draw the necessary deductions. The data I secured was from the financial year 2004/05 to 2019/20 with a few years missing in between. I hereunder present the data:

In the financial year 2004/05 approximately USD 107.7 million was foregone in tax incentives.³⁹³ In the years 2005/06 approximately USD 186.7 million, which is about double the revenue in the preceding year was foregone.³⁹⁴ In the subsequent years, the revenue foregone was as follows: In 2006/7 USD 221.5 million, 2007/8, USD 297.8 million and 2008/09, USD 375.1 million.³⁹⁵ In 2013/14, approximately USD 439 million, which was a 5.91% growth from the preceding year was tax foregone in tax incentives.³⁹⁶ In 2014/15 a total of approximately USD 489 million was forgone with income tax and international trade related exemptions high on the list.³⁹⁷

The revenue loss trends continued to worsen over the years until the years between 2015/16 and 2017/18 when a slight decline is witnessed. In the financial year 2015/16, for example, a total of approximately USD 476 million was forgone.³⁹⁸ In 2016/17, approximately USD 358 million was foregone.³⁹⁹ In 2017/18, approximately USD 376 million was forgone.⁴⁰⁰ This year coincides with the period when discretionary tax incentives were at their peak. Since the statistics presented here are largely of statutory tax incentives that can be quantified by URA, there could be a relationship between the grant of discretionary tax incentives and the revenue forgone from statutory tax incentives. The periods when discretionary tax incentives were at their peak coincide with high revenue leakages and losses from statutory tax incentives.

In the year 2018/19, approximately USD 716 million representing a 15.08% of the overall net revenue collected was forgone in statutory tax incentives alone.⁴⁰¹ Of this revenue, Value

³⁹³ URA 'Tax incentives analysis 2008/09' 1.

³⁹⁴ As above.

³⁹⁵ As above.

³⁹⁶ URA 'Tax exemption report of 2013/14' 2015 7.

³⁹⁷ Computations made from the URA Tax Exemption Report of 2018/19 available at <https://www.ura.go.ug/index.jsp> (accessed 13 November 2021).

³⁹⁸ As above.

³⁹⁹ As above.

⁴⁰⁰ As above.

⁴⁰¹ See URA Tax Exemption Report of 2018/19 available at <https://www.ura.go.ug/index.jsp> (accessed 13 November 2021).

Added Tax (VAT) related exemptions accounted for 47.78%, while international trade related ones accounted for 30.04%, waivers related to government tax arrears were at 19.95% and with income tax ones at 1.14%.⁴⁰² From the above, the year government wrote off tax waives accounts for the highest revenue forgone in the history of tax incentives. This means that if contractual discretionary tax incentives between government and tax payers were considered in this data, the situation would be worse.

It is interesting to note that from the years 2016/17 to 2019/20, the available report on the URA website with the figures indicated above defers from the figures from another report obtained internally from URA. The later indicates approximately USD 735 million as revenue forgone in 2016/17, USD 855.3 million for 2017/18, USD 1.351 trillion for 2017/18, and USD 1.398 billion (for 2019/20).⁴⁰³ These figures represented a 2.44%, 2.67%, 3.97%, and 3.91% tax expenditure to GDP ratio respectively for the same years.⁴⁰⁴ In the financial year 2020/21, USD 2.145 billion representing a 5.21% rise was foregone.⁴⁰⁵

The figures above demonstrate a steady and consistent upsurge in revenue foregone in tax incentives over the years. These statistics do not include losses arising from discretionary tax incentives because of the way they are awarded as is discussed in section 5.4.3 above. This is against a consistently decreasing expenditure towards the education sector and the basic education subsector specifically.⁴⁰⁶ There is, therefore, an inverse relationship between the amount of tax revenue forgone through tax incentives and the public expenditure for basic education especially the free and compulsory UPE component that requires government funding.

⁴⁰² As above.

⁴⁰³ URA 'Tax exemption report of 2019/20' 2020 3.

⁴⁰⁴ URA 'Tax exemption report of 2019/20' 2020 3.

⁴⁰⁵ URA 'Tax exemption report of 2020/21' 2021 3.

⁴⁰⁶ See sect 4.3 of the thesis.

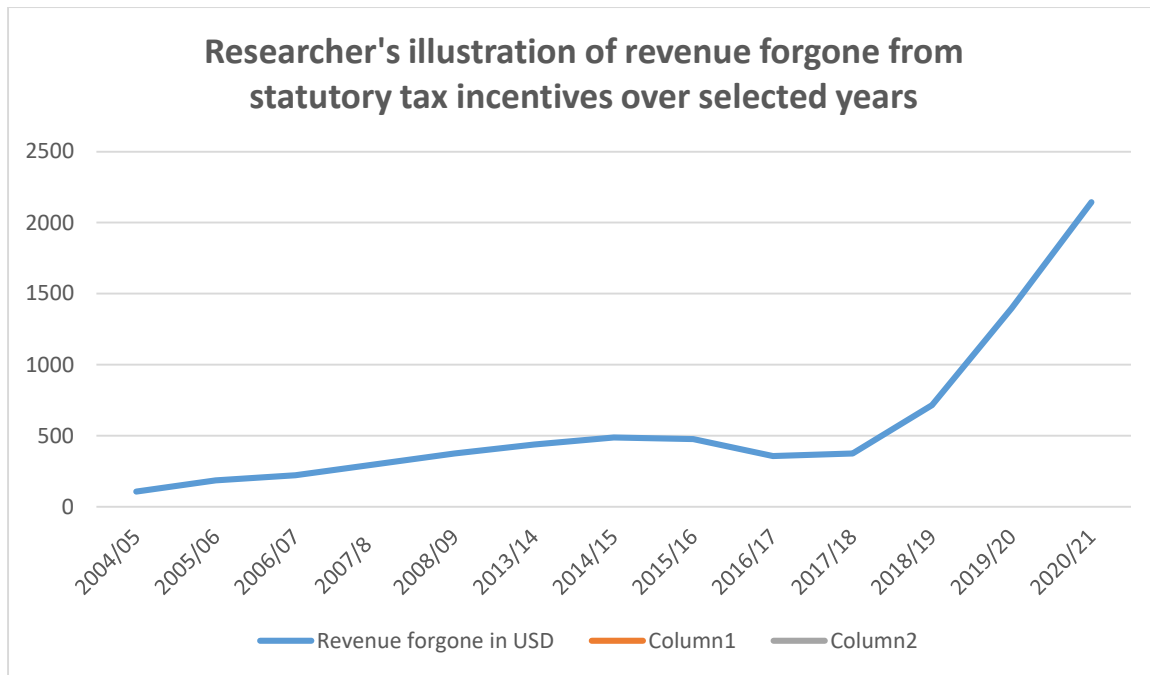


Figure 1: The researcher’s illustration of the revenue forgone through mainly statutory tax incentives for the years under study.

5.6 Conclusion

In this chapter, I set out to establish the adequacy of the legal and policy framework on tax incentives in Uganda. The analysis of the international legal framework revealed that although several standards have been adopted to deal generally with the concerns related to resource mobilisation for ESRs realisation, the same have not addressed the critical issues of tax competition, and the race to the bottom decisively. As such, it is hard to conclude that there is a clear global or regional framework on the subject. The international human rights instruments are not explicit on tax resources or tax incentives while tax related instruments lack a human rights assessment of issues related to DRM, and the role of tax incentives in its realisation. The available efforts, however, can still be relied upon broadly to hold states accountable especially where their fiscal policies related to tax incentives affect the realisation of ESRs obligations. This would however depend on progressive stakeholders such as the judiciary through judicial activism. The challenge though is that many of the standards are soft law thus affecting their enforceability domestically. The proposed UNCT is timely and once adopted will address some of these concerns. There is urgent need to fast track this process.

The relevant domestic fiscal policy framework is progressive, though it faces implementation gaps as it contradicts the legal direction the country seems to be taking. Though the policies are relatively new, there appears to be a lack of political will to implement them. The domestic legal framework has the gravest concerns. The same is shrouded with transparency and accountability issues, alleged corruption, and negative public perceptions such as to the fairness of the grants especially of the discretionary tax incentives, among other challenges. Citizen participation directly or through their representatives still leaves a lot to be desired. Accordingly, the issues with the domestic framework could largely be as a result of a framework that treats human rights as peripheral while ignoring critical stakeholders such as the UHRC. The framework does not reflect the desires of the expounders of the human rights-based theory of fiscal sociology. The administrative and legal gaps highlighted include the lack of a tax expenditure governance framework, cost and benefits framework, and monitoring and evaluation framework, among others. Specific to the domestic legal framework on tax incentives are issues such as the same not being appropriate for local investors and as such discriminatory, the inherent abuses with discretionary tax incentives, the contradictions in approvals and reporting, the secrecy, and a lack of access to information and participation. These affect fiscal legitimacy and eventually DRM. There is, therefore, an urgent need to scrutinise the domestic legal framework and align the same with the aspirations of the DRMS, the NAP on BHRs, the NDP III, as well as the several international applicable human rights standards. This is important if taxation is to play its rightful place in DRM for the realisation of ESRs.

Critical to the discussion is the realisation that the government could be relying on tax incentives to achieve a private sector-led development agenda, a position that challenges many human rights aspirations and principles that Uganda is obliged to respect.

Lastly, but most importantly, the chapter demonstrates a desperate situation with the ever rising revenue losses and leakages curve from the grant of tax incentives. This is against a lack of evidence of the presumed benefits from the award of the same. I conclude that this revenue would have been used to improve ESR financing generally, but especially for free and compulsory UPE given its pivotal role in the realisation of the non derogable right to basic education, SDG four, Agenda 2063, the right to development, and other human rights especially for the poor and vulnerable.

Chapter Six

Conclusion and Recommendations

6.0 Conclusion

The study set out to broadly establish how tax incentives affect the government's capacity to realise economic and social rights (ESRs), with a focus free and compulsory universal primary education (UPE) as a component of the right to basic education in Uganda. To achieve this broad objective specific questions are raised. These include what the relationship between tax incentives and the realisation of ESRs is: this relationship is assessed against the impact tax incentives have on the realisation of basic education in Uganda, especially the UPE component. As part of this question, I review the relationship between tax incentives and states' ESRs obligations, states' financing obligations broadly and how tax incentives affect them. The other research questions include; what is Uganda's status of realisation of the right to basic education through the free and compulsory UPE, and how finances have impacted it. To respond to this, the tenets of the right to basic education are clarified, with states' specific obligations distinguished from the general right to education obligations. The status of the realisation of the right to basic education for learners who attend UPE schools is highlighted and the place of resources in this discourse analysed. Lastly, I review the adequacy of the legal and policy framework on tax incentives in Uganda and how this affects revenue for ESRs financing but specifically for free and compulsory UPE. This chapter is a walk through the global, regional, domestic legal and policy framework as I highlight the strength and flaws in the various provisions. Critical to this chapter and the study is the presentation of the statistics that depict the revenue losses and leakages from the grant of tax incentives over the years in Uganda. Below I detail the conclusion on these questions and the recommendations I deduce from the study.

6.1 Tax incentives derail domestic revenue mobilisation efforts to the detriment of economic and social rights realisation

Tax incentives policies are critical to any country's fiscal, public finance, public policy, and human rights policy direction. In Uganda, tax incentives have adversely affected domestic revenue mobilisation (DRM) by causing avoidable revenue leakages and losses. This is largely

through incoherent laws and political discretion that do not speak to the spirit of the Domestic Revenue Mobilisation Strategy (DRMS), the recently adopted National Action Plan on Business and Human Rights (NAP on BHRs), and the National Development Plan III.¹ The laws are largely influenced by misconceived motivations such as the desire to attract foreign direct investment (FDI) when evidence points to contrary. The role of tax competition in the prevalence of tax incentives is real. Regardless of the motivation of tax incentives, the concern of policy and law makers should be the evidence that points to the fact that increased revenue through revamped DRM strategies enrich the public expenditure on critical ESRs such as education and health. This the study presents this evidence in section 1.0, 1.1 and 1.2. This makes the discussion on tax incentives a human rights issue even as it is a fiscal and economic one. This is in line with the human rights-based theory of fiscal sociology. Suffice to note that the Organisation for Economic Co-operation and Development (OECD)'s test on whether a tax incentives regime is harmful or not is its ability to substantially affect a country's tax base even when the economic effects of the same are difficult to quantify. Uganda's tax incentives policy would clearly be harmful given the evidence in chapters one, four, and five that point to unjustified revenue losses and leakages.² To deal with tax competition, there should be efforts at the regional level that enhance transparency, access to and exchange of information for tax purposes, and tax cooperation, among others. Currently these efforts are largely insufficient. The study makes other critical conclusions regarding tax incentives as highlighted here below:

6.1.1 Discretionary tax incentives are more prone to abuse, worsen the revenue leakages and losses, and contradict the progressive domestic policy direction of the state

Although both statutory and discretionary tax incentives have shortfalls, the prevalence of the latter post the 1997 legislative efforts to outlaw them, is particularly problematic. The contractual commitments by government to pay taxes for selected taxpayers from funds appropriated from the consolidated fund defeat the strategic direction Uganda had taken at the time of streamlining its fiscal policy on tax incentives.³ The same contradicts the policy direction depicted in the DRMS and the NAP on BHRs.⁴ These call for the limiting of statutory incentives to only those that are inevitable, and doing away with discretionary ones all

¹ See sect 5.3 and 5.4 of the thesis.

² See sect 1.2, 1.3, 1.8, 4.3 & 5.5 of the thesis.

³ See detailed discussion of these in sect 5.1.1 & 5.4.3 of the thesis.

⁴ See sect 5.3 of the thesis.

together.⁵ These policy and legal proposals notwithstanding, the study reveals a systematic attempt to make statutory tax incentives more generous while devising ‘innovative’ ways of cushioning taxpayers not covered by the law, by paying their tax liabilities. Both statutory and discretionary tax incentives have been negatively affected by the lack of a tax expenditure governance framework that would detail monitoring and evaluation mechanisms, a cost and benefits analysis, tax expenditure ceilings, and be used as a litmus test for future tax incentives policy decisions. This framework has been advocated for in both the DRMS and the NAP on BHRs, which are non-binding policy aspirations.⁶ There are indications that this could soon be adopted. Tax incentives that are tagged on the fulfilment of particular conditionalities are further limited by the lack of a monitoring and evaluation mechanism to assess adherence to the set standards. This has caused further abuse.

6.1.2 Tax incentives affect the realisation of economic and social rights including financing obligations

From the human rights perspective, resources are critical for the actualisation of ESRs since these are positive rights that require action for their fulfilment. Although human rights are equal, interrelated, interdependent and indivisible, this study focusses on the right to education, particularly basic education, as it is critical in many aspects. The right to education is essential for the realisation of other rights, the goals of the African Union Agenda 2063: The Africa We Want (Agenda 2063), the United Nations Sustainable Development Goals (SDGs) and in the Ugandan context basic education is the only domesticated minimum core obligation.⁷ The study as such makes a correlation between revenues forgone from the grant of tax incentives and the financing gaps for the realisation of free and compulsory UPE as a component of the right to basic education because of the prominence given to the right.⁸ The study makes a case for the right to basic education being a high policy and funding priority for the government given its legal status. Relatedly, tax incentives affect the capacity of states to protect, respect, and fulfil their ESRs obligations.⁹ States are as such called upon to craft fiscal policies that bear in mind this tripartite obligation. This would be a check for the use of discretionary powers by politicians for selfish motives, which affect the states’ capacity to generate enough resources

⁵ See sect 5.3.1 specifically.

⁶ See (n 4 above).

⁷ I engage with this discourse in sects 1.8.3, 4.1 & 4.2 of the thesis.

⁸ Compare sect 5.5 with 4.3 of the thesis.

⁹ Sect 3.2 of the thesis.

for ESRs realisation. This would also be in line with the human rights-based theory of fiscal sociology.

6.1.3 Tax incentives policies that contravene human rights processes affect fiscal legitimacy

World over, fiscal policies play a significant role in the realisation of ESRs. Taxation broadly and well-crafted tax incentives policies specifically, contribute to: income and wealth redistribution; the generation of revenue to finance ESR; encouraging strategic sector development that could generate more employment opportunities, and raise house hold incomes.¹⁰ For these aspirations to be achieved, the tax incentives framework must be crafted bearing in mind critical human rights principles and processes. These include participation, inclusion, fairness, equity, and transparency. Policy and legal frameworks that ignore these could be a boomerang. This is especially when the same lacks a monitoring and evaluation mechanism for assessing its likely impact. In Uganda, due to the lack of a tax expenditure governance framework and other enabling legal framework like a strong minimum wage legislation, it has not been possible to assess how tax incentives have contributed to the objectives above. What is clear is that transparency and public participation in tax incentives decisions and policies still leaves a lot to be desired. Although this has affected both statutory and discretionary tax incentives, it is worse with the latter. Ultimately, this has led to a framework that is perceived as unjust, unfair, and inequitable especially against the poor and vulnerable. This contributes to taxpayer apathy, affects fiscal legitimacy, and ultimately negatively affects the capacity of the state to generate more revenue domestically. This could lead to a fiscal crisis.

6.1.4 The government policy on a private sector-led economy could lead to a fiscal crisis

Tax incentives in Uganda have generally led to unwarranted revenue losses and leakages without the policy achieving its other objectives, which presumes a private sector-led economy with benefits that lead to more disposable income. The revenue losses and leakages negatively affect the capacity of the state to realise its ESRs obligations including the unqualified ones such as the right to basic education. This study reveals that the challenges of realising the most

¹⁰ Sect 1.1 of the thesis.

basic form of education in UPE schools in Uganda are largely related to financing gaps.¹¹ This is worse given the shortcomings mentioned in this study, including the fact that tax incentives have not been strategically crafted to benefit public goods and services provision. They are thus incapable of improving the economic lives of the vulnerable, and as such increase their disposable income so as to afford ESRs privately.

Relatedly, the impact of the losses and leakages from tax incentives have been shouldered by the poor and marginalised through a regressive tax structure. There is evidence that points to the conclusion that tax incentives contribute to higher consumption taxes as a way of minimising revenue losses. This conclusion is easier to make since year in year out as tax incentives become more generous, there is an annual introduction and increase of the value added tax (VAT) and excise duty especially on essential commodities such as fuel, and the internet, among others.¹² This reduces the disposable incomes and the capacity of the most vulnerable to afford ESRs such as the right to basic education privately, and yet the conditions in the publicly available options are lacking. It has been more challenging during the pandemic when learning was largely virtual. Tax incentives lead to a private sector that is not substantially contributing to public revenue for the public goods and services they too rely on. This eventually creates a private sector that does not essentially contribute to the realisation of ESRs that all citizens, but especially those on the margins depend on. This is a violation of the obligation on states to protect, respect, and fulfil human rights, and a great indictment to the principle of fiscal legitimacy.¹³ Uganda could be headed for a fiscal crisis if nothing is done to address these concerns.

The challenges above should lead to an evaluation of the state's policy position on an unregulated private sector-led economy on which the fulfilment of critical rights is dependent. This has affected the education and health sectors most. The glaring challenges have been manifested in the Covid-19 pandemic where for two years, the government's efforts to ensure continued remote learning for UPE learners failed even when their counterparts in private schools were progressing. These challenges have widened the gap between the haves and have nots in society. The unregulated private sector has led to evident inequities in the realisation of the right to basic education with those at the societal margins hit the most. The available option

¹¹ Sect 4.1, 4.2 & 4.3 of the thesis.

¹² See sect 5.4 of the thesis and Parliamentary Hansard discussions.

¹³ See sect 3.2 and 3.4 of the thesis.

for the poor and vulnerable for free and compulsory UPE faces financing bottlenecks that affect its viability.¹⁴

6.1.5 The lack of a clear economic and social rights financing obligation on states is at the centre of these concerns

The other broader challenge is the lack of a clear mandate at the international level in the several human rights instruments on financing for ESRs realisation. The challenge stems from the original categorisation of rights with different importance attached to civil and political rights as opposed to ESRs. Different principles also apply to the different categories of rights. The principle of progressive realisation of ESRs within the ‘maximum available resources’ has been relied on by states to justify ESRs financing related violations. The minimum core obligations principle as modified by the reasonableness review approach has not resolved the controversies either. The conceptual and interpretative challenges attached to the understanding of these principles have negatively affected the realisation of ESRs. Notably, there are several exemptions that states can hide behind to justify their failure to realise ESRs. These include the defence of limited resources, the margin for discretion of states in policy and financial matters for ESRs realisation, and the reasonableness approach test used to justify the failure to meet the minimum core obligations. These principles make the realisation of ESRs illusory. Worse still, there is no single human rights instrument that expressly recognises the role of tax resources in the realisation of ESRs. This points to a disconnect between international human rights treaties and fiscal and public finance policies. The lack of an express legal provision coupled with the margin of discretion granted to states in fiscal and public finance policies and choices based on the principles of state sovereignty have negatively affected optimum financing for ESRs. In my view, even the Declaration on the Right to Development (DRD) is not explicit or implicit on the issue of financing for ESRs or the right to development for that matter. With these challenges, the financing for the realisation of ESRs remains at the unfettered discretion of states and yet ESRs as positive right are dependent on state resources. The available solutions so far include judicial activism that allows for the generous interpretation of the current framework by reading into the intention and mind of the framers of the different instruments for the eventual realisation of ESRs. The proposed United Nations Convention on Tax (UNCT) additionally presents a great opportunity.

¹⁴ See sect 4.3 of the thesis.

Notably, at the international and continental levels, there has not been a single instrument that directly discusses issues related to tax competition, the role of resources in the realisation of ESRs and the place of tax expenditure and tax incentives. This is a big gap. There is a disconnect between human rights instruments and economic related ones. As a result, one has to read into existing regional efforts on illicit financial flows (IFFs), DRM, and financing for development, tax incentives related discussions to make the connection. Specifically, this study reveals how destructive the evil of tax competition can be, and yet there is no binding instrument on the continent dealing with the issue. The study emphasises the need to have such efforts at the continental level to avoid complicating the ‘spaghetti bowl’ effect where countries have multiple sub-regional reporting obligations as a result of belonging to several groups.¹⁵

6.1.6 Tax incentives policies favour foreign direct investment more than local investors

Tax incentives have historically not benefited local investment but foreigners. This is largely attributed to the legal and policy gaps that have not adequately covered local investment by recognising the economic realities of the local investors. The exclusion arises either due to the economic activities that the local entrepreneurs engage in or the products, goods and services that are relevant to them are not exempted, or the capital threshold requirements are too high to be afforded by an ordinary citizen. This has been the case even when annually the capital threshold for notably the income related tax incentives have been reducing. If the private sector indicates that an average small and medium enterprise (SME) cannot afford a particular capital threshold, it does not make sense to pass a law with the same under the pretext of attracting local investment. Otherwise the legal provisions become redundant. This has been blamed on the failure to have inclusive participatory tax incentives consultative processes before the legal and policy formulation. The law and policy makers have not deliberately thought through the likely impact of the outcomes on the most vulnerable. The failure to infuse human rights in these processes has negatively affected the capacity of the ordinary citizens to benefit from tax incentives, which continue to be seen as only appropriate for FDI. This is what the human rights-based theory of fiscal sociology would cure. This situation has led to discrimination, and a fiscal policy and public finance management framework (PFMF) that is unfair, and unjust.

¹⁵ Sect 5.2 of the thesis.

6.1.7 The public finance management and fiscal policy framework that are not human rights compliant lead to further violations

The PFMF has defaulted on incorporating human rights in its processes. The PFMF is adopted after a largely economic and technical process which ignores human rights principles.¹⁶ The role of human rights in achieving a PFMF that works for all but especially the poor and marginalised has not been comprehended. There is, for example, no requirement for the charter of fiscal responsibility (CFR) critical as it is in the PFMF, to reflect ESRs obligations that bind Uganda.¹⁷ The PFMF outcomes lack a human rights face largely due to the processes adopted, but also for not being alive to the intrinsic connection between public finance management (PFM) and human rights.¹⁸

From the tax formulation process, the side stepping of the human rights committee of parliament and the Uganda Human Rights Commission (UHRC) could explain the existing human rights gaps.¹⁹ Recognising that fiscal policy should reflect critical human rights standards is key and once this is done, bodies with the requisite expertise ought to be involved in the fiscal and PFM formulation processes. Furthermore, this lack of involvement is also witnessed in the budgetary processes. Although the Equal Opportunities Commission (EOC) is required to issue a certificate of gender and equity compliance, the UHRC's plays no role in the process.²⁰ This confirms the earlier position that the PFMF lacks a human rights face, yet it is central to the realisation of ESRs. For both processes, it is noted that there is lack of meaningful consultation; the process is rushed and the capacity of the non-governmental organisations (NGOs) and civil society organisations (CSOs) to meaningfully engage is limited.²¹ These challenges have not only affected public participation but also the capacity of the legal and policy framers to pass a framework that is human rights compliant.

6.1.8 The tax incentives reporting and monitoring framework is shrouded in secrecy

Although the budget should contain a statement of tax expenditure, the budgets reviewed do not give a detailed report. Data on tax expenditure generally is hard to secure which points to

¹⁶ See sect 5.1.2 of the thesis.

¹⁷ As above.

¹⁸ As above.

¹⁹ Sect 5.1 of the thesis.

²⁰ Sect 5.1.2 of the thesis.

²¹ Sect 5.1 of the thesis.

secrecy in the framework. Notably, the tax incentives reporting framework is weak, with legal inconsistencies as discussed in chapter five.²² These include which kind of incentives to report on. The stage of reporting is also problematic as many times the same is required after the grant. As a result, key stakeholders like parliament may not have much input especially over the discretionary tax incentives decisions. This could lead to the abuse of the process.

6.1.9 Tax incentives are modern day examples of illicit financial flows from Africa

This study makes a correlation between tax incentives and IFF.²³ It is clear from the definition that IFF includes initiatives that are legal, if the same have the capacity to unreasonably erode a country's revenue base, and negatively affect its capacity to realise human rights, the goals and priority areas of Agenda 2063, SDGs, and other developmental aspirations.²⁴ The current legal framework on tax incentives is a true reflection of the above. Multinationals use the gaps within the legal framework to avoid tax which adversely affects the states' revenue base. The continental efforts to fight IFF are as such relevant to this discourse and some of the proposals are highlighted in the recommendation section below. The framework is shrouded with transparency challenges, high levels of secrecy, limited access to tax expenditure related information, perceived and real corruption in the selection of the beneficiaries of especially the discretionary tax incentives, and influence peddling.²⁵ These challenges affect the legality and legitimacy of the tax incentives framework and as a result, the revenue loss out of such arrangements can rightly be classified as IFF.

6.1.10 Progressive provisions on tax incentives are contained in non-binding policy documents

At the domestic policy level, there is progress as discussed in section 5.3 of the study. The DRMS contains progressive proposals for the proper management of tax incentives. It advocates for the limiting of statutory tax incentives to only those that are obligatory, and totally outlawing discretionary tax incentives. The DRMS is categorical on the negative impact of tax incentives on DRM for the realisation of ESRs. These are restated in the NAP on BHRs.²⁶ These are some of the few policy instruments so far that detail the challenges related to tax

²² Sect 5.1 & 5.4 of the thesis.

²³ See sect 5.2.2 of the thesis.

²⁴ As above.

²⁵ See sect 5.4 broadly of the thesis.

²⁶ Sect 5.3.2 of the thesis.

incentives. They highlight the effects of the lack of a tax expenditure governance framework, and the need for proper monitoring and evaluation of the tax incentives regime. The DRMS details the challenges of both statutory and discretionary tax incentives, and makes progressive proposals for the management of the same. The progress with the DRMS and the NAP on BHRs notwithstanding, there are implementation gaps: Firstly, these are only policy aspirations and lack legal force unless the aspirations are replicated in a legally binding law, which has not been done. Secondly, from the evident policy and legal inconsistencies regarding tax incentives, there seems to be a lack of political will to adopt the DRMS and NAP on BHRs proposals into a legally binding instrument. The policy proposals and the annual legal amendments relating to tax incentives are at cross purpose. The DRMS and NAP on BHRs as such appear to only provide lip service to the tax incentives related challenges. The DRMS could also provide better proposals if it incorporated a human rights-based analysis and approach. The same is currently lacking. It places more emphasis on citizen welfare as opposed to the need to realise ESRs. The DRMS adopts the original theory of fiscal sociology which misses the human rights-based approach that I recommend in this study.

6.1.11 Without resources, the realisation of the right to free and compulsory universal primary education is illusory

With regards to the status of realisation of the right to basic education, through the free and compulsory UPE and impact of tax incentives on the same in Uganda, the study makes the following conclusions: The international legal framework is clear on what the right to basic education entails. This flows from the right to education but additionally imposes higher obligations. Some of these include the expectation that the right to basic education should be sound, inclusive, and a concrete basis on which further education could be based. The study emphasises the need for the same to be cognisant of fiscal resources needed for its delivery bearing in mind that a right is capable of realisation only and if sufficient resources are available for its actualisation. Uganda has domesticated the right to basic education in its constitution and domestic legislation. This is the only minimum core obligation so far domesticated. The right to basic education is as such high on the government's policy and funding priorities or at least should be. The same is implemented largely through UPE which unfortunately lacks a clear written policy, which is a major gap. Furthermore, the delivery of a sound, inclusive, basic education through UPE has greatly been hampered by resource constraints as highlighted in detail in chapter four. Learners have sometimes had to study in undeserving conditions, with

teachers having to make constant adjustments to achieve a semblance of a basic education. These gaps have led to poor learning outcomes, and school drop outs among other challenges. Amidst these overarching challenges, the state has not demonstrated that enough is being done to bridge the funding gaps so as to ensure a sound and inclusive basic education. This is an indictment on the country especially with the evident revenue losses and leakages from tax incentives.²⁷ As a matter of fact, the country has witnessed regressive percentage budget allocation to the education sector and basic education subsector. The current budget is at 8.6% as indicated in section 4.3 of the study. Regression has also been experienced in the education sector budget allocations as a fraction of gross domestic product (GDP) which has not kept pace with the aspirations of the Education Sector Strategic plan and the international soft law standards. This currently stands at 2.7% as indicated in section 4.3 of the study. There is, therefore, the need for Uganda to adjust the fiscal policy on tax incentives to reflect the need to realise critical ESRs, especially the domesticated minimum core obligations through adequate funding through sufficient budgetary allocations. With better policies on tax incentives, the revenue saved could be used to widen and deepen the revenue basket for the realisation of all ESRs, but most importantly the right to free and compulsory UPE as part of the right to basic education.

Relatedly but at the heart of this study is the revelation that there is an inverse relationship between the revenue forgone from tax incentives and the resources available to finance the right to basic education.²⁸ The study reveals that annually, the revenue losses and leakages from tax incentives have increased considerably and yet the expenditure to the education sector has consistently reduced. This demonstrates that poorly crafted tax incentives policies and laws negatively affect the capacity of the state to realise critical ESRs such as the right to basic education through financing for free and compulsory UPE.

It is against this background and conclusions that I recommend the following to the various stakeholders.

6.2 Recommendations

Based on the finding above, the study makes the following recommendations.

²⁷ See sect 5.5 of the thesis.

²⁸ Compare the findings in sect 5.5 with sect 4.3 of the thesis.

6.2.1 To policy and law markers

a) Adopt guiding principles on human rights in fiscal policy

Given the absence of a clear framework that links fiscal policy with human rights, Uganda could borrow a leaf from the Caribbean and Latin America which have adopted the Guiding Principles on Human Rights in Fiscal Policy (GPs on HRs in FP).²⁹ These could be standalone principles or incorporated in a policy or legal framework. The recently adopted NAP on BHRs could be an option. If the GPs on HRs in FP are to be incorporated in the later, this could call for its amendment which might be problematic since it was only adopted in August 2021. The same may equally lack the necessary legal force. Either way, there is urgent need for a legal framework that recognises the place of human rights in fiscal policy. The GPs on HRs in FP should be deliberate on the need to adopt fiscal policies that are human rights compliant. This is by states recognising the need to use their fiscal sovereignty optimally in a way that resists wasteful tax competition. It is important that the GPS on HRs in FP are developed as part of an implementable framework for ease of enforcement. Having the same in the soon to be adopted Tax Expenditure Governance Framework could be another option if the same will eventually be incorporated into a law.

b) The Uganda Human Rights Commission should get involved in fiscal and public finance policy and legal formulation

Connected to the above is the need for more involvement by the UHRC in fiscal policy, PFMF, and legal formulation. The UHRC could work with the relevant ministries, departments and agencies (MDAs) by reviewing policy and legal proposals just as they do with other laws to ensure compliance with human rights standards. For the UHRC to meaningfully engage, their capacity needs to be enhanced so as to appreciate the relationship between fiscal policy, tax incentives and human rights especially ESRs. This study has revealed that the relationship between ESRs realisation and the fiscal policy on tax incentives is not a clear one. The fact that UHRC does not review tax bills speaks volumes about its roles in fiscal policy, legal formulation, and implementation. There is need to view fiscal policy as related to human rights in all aspects.

²⁹ Detailed discussion of this found in sect 3.1, 3.2 & 3.4 of the thesis.

c) Capacity enhancement for relevant stakeholders

Relatedly, there is additional need to strengthen the capacity of relevant state holders at the various MDAs including at the UHRC, the Ministry of Finance, Planning, and Economic Development (MoFPED), Uganda Revenue Authority (URA), the legislature and the judiciary to appreciate the key concerns in the agenda for realising human rights compliant fiscal policies. This would for instance ensure that dispute resolution for related conflicts is not based on the black letter of the law but on the likely impact such decisions would have on the realisation of ESRs especially. Capacity enhancement along these lines would lead to judicial activism that could contribute to the eventual legal reform of the tax incentives policy direction of Uganda. Some of the critical tax incentives disputes presented great opportunities for the judiciary to contribute to rectifying tax incentive policy and legal anomalies though these were missed. This I attribute to capacity gaps within the judiciary on the relationship between tax incentives policies and human rights. There is equally need to recruit human rights compliance officers or personnel at the various MDAs that would coordinate with the UHRC to ensure that human rights are mainstreamed in fiscal policy and PFM processes.

d) Tax expenditure reporting should reflect the impact on economic and social rights realisation

It is recommended that the annual and other periodic tax expenditure reports that are legally required should include an analysis on how the several tax incentives especially affect the realisation of ESRs. This would call for the proper monitoring and evaluation of the framework which is currently inadequate. The reports should also be filed as required and publicised. The public should be given an opportunity to debate issues of tax expenditure with the view of informing better strategies.

Relatedly, the legal contradictions regarding tax incentives reporting in the Tax Procedure Code Act (TPCA) and the Public Finance Management Act (PFMA) discussed in detail in section 5.1 and 5.4 of the study should be ironed out to enable more frequent reporting for both statutory and discretionary tax incentives. Parliamentary approval should equally be sought for discretionary tax incentives before the grant. This should be a stop-gap measure as concrete proposals are made for their outlaw. Parliamentary involvement would enhance transparency, accountability, and public participation to avoid a fiscal crisis.

e) The Tax Expenditure Governance Framework should be adopted urgently

There is an urgent need to adopt the Tax Expenditure Governance Framework to allow for the proper monitoring and evaluation of tax incentives. The same should contain a cost and benefits analysis, tax incentives ceilings, and mechanisms to monitor and evaluate tax expenditure. This should be part of an implementable framework, by for example amending the PFMA or the TPCA to incorporate the same. This study noted that many of the challenges related to tax incentives stem from the lack of such a framework. An additional policy or guidelines may not achieve the desired objectives. This framework should equally be human rights compliant.

f) Delimit statutory tax incentives and outlaw discretionary ones

It is recommended that discretionary tax incentives are completely outlawed and a limit is placed on the new tax incentives introduced in the annual amendments to tax codes. The current framework should be amended to include sunset provisions, and tax incentives ceilings in the interim. This should be adopted for each and every subsequent tax incentives proposals. Uganda could draw lessons from other jurisdictions to grant short term tax incentives in the interim so as to reduce the negative effects of overly long ones. Uganda could also decide what type of incentives to offer rather than over-reliance on tax exemptions. The options include considering reduced rates rather than total exemptions, among other proposals. The use of non-fiscal incentives could equally be less problematic. These include fixing the business environment by ensuring infrastructural development, rule of law, and timely access to justice. Other enticements could include exemptions on government levies, relaxation on work permits requirements, or reduction in fees for Environmental Impact Assessment, permission to employ a higher limit of expatriates, granting citizenship, permission to own freehold land for non-citizens, among others.³⁰ Equally important is the need to decide between the grant of cost based or profit based incentives. Assessment should be made to determine the most appropriate option before implementation. The eligibility criteria for benefiting from tax incentives should also be evaluated and improved. The current framework has many gaps. In other jurisdictions such as the Philippines for instance, tax incentive rates broadly appear comparative to neighbouring jurisdictions such as Thailand, Cambodia, Malaysia, Indonesia, and Vietnam.³¹

³⁰ KII by Mr. Festus Akunobera held on 21 April 2021 in Kampala.

³¹ A Klemm, *et al* 'Investment Incentives and Effective Tax Rates in the Philippines: A comparison with neighboring countries' (2008) *IMF Working paper* 4. The duration ranges from three to eight years, commencing

Some countries offer ‘loss carryover provisions’ which range from three years, ten years, or are unlimited in some instances.³² In Thailand and Vietnam, a reduced Corporate Income Tax (CIT) rate is granted for some years, about five, after the end of the tax holiday to allow for the business’ stability.³³ Thailand and Vietnam rely more on reduced rates rather than complete exemptions.³⁴ States could consider such options to address the challenges that come with long term blanket tax incentives.

Furthermore, proper public participation aimed at soliciting views from key stakeholders including the poor and vulnerable should be encouraged. These views should be reflected in the policy and legal framework on tax incentives.

g) Revamp the investment climate

Related to the preceding discussion, states including Uganda need to devise mechanisms that create a conducive investment climate rather than relying on tax incentives as a cover up for the lack of the same. This would include improving infrastructure, resolving registration bureaucracies and bottlenecks, and improving the rule of law, governance, and access to justice systems, among other strategies. This study found that these are the real factors that attract FDI, not tax incentives. In the short term, tax incentive decision should be inclusive, equitable, and bear in mind their likely impact on human rights especially for those on the societal margins. In the mid-term, statutory tax incentives need to be limited to only those that are inexorable, and discretionary tax incentives outlawed. In the long term, countries need to cooperate to wipe out tax competition and totally do away with tax incentives. There is need for coordination between states to achieve this ultimate goal.

h) Respect human rights in fiscal policy and legislative processes

Above all, as mentioned earlier, states need to adopt and respect human rights principles of inclusiveness, participation, and access to information in policy and legal formulation. Citizen participation in policy and legal formulation would ensure better crafted laws and policies, and

with the start of the project. Emphasis is placed on export and technological firms, and investment in not so developed locations.

³² As above, for example Philippines and Lao offer 3-5 years, Indonesia, 10 years while Malaysia offers unlimited loss carry over provisions.

³³ Klemm *et al* (n 31) 4.

³⁴ Klemm *et al* (n 31) 4, 5.

ultimately achieve fiscal legitimacy, thereby averting a fiscal crisis. Efforts should be made to boost the capacity of citizens and their representatives to ensure meaningful participation.

6.2.2 Specific to the Education Sector

a) Adopt a comprehensive UPE Policy

There is urgent need to adopt a comprehensive UPE policy to concretely address the challenges highlighted in the study. The current policy and implementation strategies cannot deliver a basic education to the most vulnerable. The challenges highlighted in this study largely emanate from resource deficits. The government should consider raising the UPE budget to match the enrolment rates and the resources needed to deliver a sound and inclusive basic education. The budget needs to be brought into conformity with the soft law funding targets discussed in detail in this study.³⁵ These are having at least 4-6% of gross domestic product (GPD) or 15-20% of the national budget channelled to the education sector. The budget to the basic education subsector needs to reflect the policy and legislative importance accorded to the right by the state. This will enrich actual commitment to realising basic education through the free and compulsory UPE.

b) Adopt and implement regulations for private providers of basic education

As revealed in the study, the liberalisation and privatisation of the education sector without the adequate regulation and supervision have worsened the challenges of delivering basic education in Uganda. Private education is too expensive to be afforded and accessed by those on the margins. This worsened with the scrapping of tax incentives to private schools. Although the tax incentives had not guaranteed an affordable alternative, outlawing them affected private schools' affordability as the tax incidence is still borne by the parents and guardians even when this is an income tax. Given this background, the government needs to rethink its liberalisation policy and how it affects the realisation of critical ESRs. The starting point could be the proper regulation, maintenance of standards, and enhancing the inspection functions of schools. This would be timely since the study found that in the post Covid-19 pandemic era, many parents and guardians opted for public schools because of the prevailing economic hardships.

³⁵ Sect 1.2 of the thesis.

6.2.3 To international actors

a) Adopt an instrument that unequivocally recognises the role of fiscal policy in ESR realisation

There is need to adopt an international binding instrument that addresses tax competition and the place of tax incentives in the realisation of ESRs. The quick adoption of the UNCT that is human rights compliant would go a long way in addressing this gap. There is, however, the need to make the process participatory for ownership by all states. This would enable fast ratification, domestication and implementation. The African Union could consider this option since as discussed in the thesis continental efforts are more appropriate and would limit the ‘spaghetti bowl’ effect.³⁶ These efforts notwithstanding, the same would be relevant even at the international level. These could start by considering the gaps in the current framework reviewed in chapter five to ascertain entry points.

Although tax incentives are legal, there is the need for the discourse on IFF to expressly recognise tax incentive regimes as destructive given their negative role on the realisation of ESRs. This could be a strong wake up call to countries like Uganda whose domestic framework does not appreciate the impact. The discussion would also be pertinent as states adopt and implement the United Nations Guiding Principles on Business and Human Rights (UNGPs) into their NAPs on BHRs and other binding instruments.

b) Enhance state coordination and cooperation for tax purposes

Countries additionally need to cooperate more for tax purposes. Since tax incentives are facilitated by tax competition, redressing the anomalies caused by the same cannot be achieved by individual country efforts. Coordination could be achieved through harmonisation of tax incentive regimes through the sub-regional economic blocs. This could be followed up by continental efforts aimed at addressing tax competition. Ultimately, these small building blocks would be critical to do away with tax competition.

³⁶ Sect 5.2.2 of the thesis.

6.2.4 Recommendations to Civil Society Organisations, academia and the judiciary

a) Capacity building, research, and public interest litigation

Given the knowledge gaps identified in the study, there is need for capacity building of CSOs and NGOs working in this field. The capacity enhancement should include the nexus between fiscal policy and human rights and other related issues such as IFFs, the right to development and their interplay with fiscal policy and the PFMF. Capacity enhancement of CSOs would ensure that they in turn assist communities and citizens to actively and meaningfully participate in relevant legal and policy discussions. This would in turn amplify their capacity to demand for their rights in this field. The judiciary could also benefit from capacity enhancement so as to ensure that the adjudication of tax disputes considers the broader human rights state obligations beyond the black letter of the law.

Relatedly, more research is needed in this field to form a literature base on which to base further advocacy plans and strategies. Not much has been written in the area of fiscal policy and human rights in Africa.

These efforts above could be complimented by public interest litigation on tax incentives and human rights, or any other fiscal policy issues that affect ESRs realisation. The cases would give the judges an opportunity to exercise judicial activism by the judicial officers pronouncing themselves on critical policy and legal gaps in this area. Research and capacity enhancement are critical to this end. With proper capacity, judges could be assisted by amicus curie experts on the matter. These efforts could slowly feed into broader international and domestic policy reform on the issues at hand.

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Appendices

Appendix A: Key informant interviewees

1. Respondents from the Uganda Revenue Authority (URA) (2)
2. Ministry of Finance, Planning and Economic Development (MoFPED) (1)
3. Ministry of Education and Sports (MoES) (1)
4. Parliament of Uganda (1)
5. Uganda Investment Authority (1)
6. The Private Sector Foundation- Uganda (1)- Uganda Manufacturers' Association is a member of PSFU (1)
7. The Initiative for Social and Economic Rights (ISER) (2)
8. The Civil Society Budget Advocacy Group (CSBAG) (1)
9. The Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI- Uganda) (2)

Appendix B: Interview guides used

Interview Guides

Project of study: The impact of tax incentives on the realisation of economic and social rights:
A focus on tax holidays and the right to basic education in Uganda

Candidate: Dianah Ateenyi Ahumuza (U12227944), University of Pretoria

Interview guides for the various participants

A: Ministry of Finance Planning and Economic Development, Uganda Revenue Authority and Parliament and other related Finance related MDAs on tax incentives/holidays

1. What is the current legal and policy framework for the administration of tax incentives and Tax holidays in Uganda? Is it adequate?
2. What role does the Ministry/institution/authority play in the management of tax incentives/Tax holidays?
3. How are these decisions to grant tax holidays made?
4. Why are tax incentives generally and tax holidays specifically granted?
5. Do you see a relationship between tax incentives/holidays and the total tax revenue collected in Uganda? Does this affect social services?
6. Does the entity/authority face challenges in its work related to tax incentives and how can they be addressed?
7. How do you suggest tax incentives and tax holidays specifically should better be managed?
8. Any other thoughts?

B: To MoFPED, CSBAG and budgeting related respondents- on budgeting

1. What role does the entity play in budgeting?
2. How are revenue-expenditure decisions made? What determines the priorities?
3. How do revenue shortfalls affect budgeting?
4. How, in your opinion, can Uganda achieve optimum budget financing for basic education?
5. Any other thoughts on the matter?

C: Tax experts, scholars and NGOs working on the issues of tax policy

1. Which interventions does your institution/organisation have in the field of taxation tax incentives generally and tax holidays specifically?
2. What, in your opinion, is the justification for the grant of tax incentives/tax holidays?
3. Is the current legal and policy framework on tax incentives generally and tax holidays specifically adequate? Explain your opinion.
4. In your opinion, what category of tax incentives are more prone to abuse and why?
5. Do you see any relationship between tax incentives/holidays and the total tax revenue collected in Uganda?
6. What do you consider to be the impact of tax incentives/tax holidays on the delivery of social services?
7. Are there any recommendations you would make for the better management of tax incentives generally and tax holidays specifically?
8. Any other thoughts on the issue?

D. Ministry of Education and Sports, Local Government officials in charge of UPE oversight, Head teachers of selected UPE Schools, NGOs working on issues of the right to basic education

1. What is your/entity's/ department's/ organisation's role in implementing basic education?

2. Do you see a relationship between basic education financing and the performance of basic education since 1997?
3. What are the key challenges in achieving basic education for all?
4. What role does education financing play in these challenges?
5. What recommendations would you suggest for the better realisation of the right to basic education for all in Uganda generally and education financing specifically?
6. Any other thoughts on the issue?

Appendix C: Ethical Clearances



Uganda National Council for Science and Technology
(Established by Act of Parliament of the Republic of Uganda)

Our Ref: SS666ES

25 February 2021

Dianah Ahumuza
School of Law, Makerere University
Kampala

Re: Research Approval: The impact of tax incentives on the realisation of economic and social rights: A focus on tax holidays and the right to basic education in Uganda

I am pleased to inform you that on **25/02/2021**, the Uganda National Council for Science and Technology (UNCST) approved the above referenced research project. The Approval of the research project is for the period of **25/02/2021** to **25/02/2022**.

Your research registration number with the UNCST is **SS666ES**. Please, cite this number in all your future correspondences with UNCST in respect of the above research project. As the Principal Investigator of the research project, you are responsible for fulfilling the following requirements of approval:

1. Keeping all co-investigators informed of the status of the research.
2. Submitting all changes, amendments, and addenda to the research protocol or the consent form (where applicable) to the designated Research Ethics Committee (REC) or Lead Agency for re-review and approval **prior** to the activation of the changes. UNCST must be notified of the approved changes within five working days.

3. For clinical trials, all serious adverse events must be reported promptly to the designated local REC for review with copies to the National Drug Authority and a notification to the UNCST.
4. Unanticipated problems involving risks to research participants or other must be reported promptly to the UNCST. New information that becomes available which could change the risk/benefit ratio must be submitted promptly for UNCST notification after review by the REC.
5. Only approved study procedures are to be implemented. The UNCST may conduct impromptu audits of all study records.
6. An annual progress report and approval letter of continuation from the REC must be submitted electronically to UNCST. Failure to do so may result in termination of the research project.

Please note that this approval includes all study related tools submitted as part of the application as shown below:

No.	Document Title	Language	Version Number	Version Date
1	Approved interview guides	English	PDF	25 June 2020
2	Approved consent form	English	PDF	25 June 2020
3	Project Proposal	English	MICROSOFT WORD	
4	Approval Letter	English	MICROSOFT WORD	2020-06-25
5	Administrative Clearance	English	MICROSOFT WORD	2020-06-25
5	LLD Admission letter from the University of Pretoria	English	PDF	05 March 2019

Yours sincerely,



Hellen Opolot

For: Executive Secretary

UGANDA NATIONAL COUNCIL FOR SCIENCE AND TECHNOLOGY

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COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

SCHOOL OF SOCIAL SCIENCES

RESEARCH ETHICS COMMITTEE

Our Ref: MAKSS REC 06.20.416/AR

10th August 2020

Ahumuza Dianah Ateenyi

Principal Investigator (MAKSS REC 06.20.416)

University of Pretoria

Telephone contact: +256 7731 11751

Email: ahumuzadianah@yahoo.co.uk

Dear Madam,

Initial — Full Board

Subject: Xprmal of Protocol titled: "The impact of tax incentives on the realization of economic and social rights: A focus on tax holidays and the right to basic education in Uganda"

This is to inform you that the Makerere University School of Social Sciences Research Ethics (Committee V 1K SS RLC) granted to the above referenced study the MAKSS REC reference number 06.20.416/AR. You should submit the request six (6) to eight (8) days before the review. The committee reviewed the proposal using the full board review on 26th June 2020. This has been done in line with the

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inscugalor s subsequent letter addressing comments and suggestions.

Your stud} protocol number with MAKSS REC is MAKSS REC 06.20.416. Please bc sure to relercnce this number in any correspondence with MAKSS REC. Note that. the initial approval date for **your** proposal MAKS.S REC was 26th June 2020. This is an annual approval and therefore: approx al expires on 25^t June 2021. Please note that, final approval should bc done by Uganda National Council for Science and Technology. You should use stamped consent forms and stucft tools/instruments "hile executing your field activities at all times. However. continued appro\al is conditional upon your compliance with the following requirements.

Continued ievs

In order to continue on this study (including data analysis) beyond the expiration date. **Makere**

l [IA crsin School of Social Sciences (VIAKS.S RF.C) must re-approve 'he protocol after **conduct** substantive meaningful. continuing re\ieuz This means that you must submit a continuing report i orm as a request for continuing review. •10 au)id a lapse, you should

(8) v,ceks before the lapse date. Please use the forms supplied by

lease also note the follou ing:

- No other consent tornus). questionnaires and should be used. I he ('onsent form(s) be signed by each subject initiation ol' lily protocol procedures In . add i lion. each research pafleipant should be given a copy 01 signed form.

\rnedments

I)urine the al period. iC you propose any changes to the protocol such as its

Research and I uhtcs Cornmittee (M AK SS REC) approval beli)re inoplcnunting it.

Please sununarise the proposed change and the rationale for it in a letter to the Makcrerc University.

School of Social Sciences Research and Ethics Committee. In addition, submit three (3) copies of an updated \ ersion of your original protocol application- one showing

all proposed changes in bold or "track changes" and the other without bold or track changes.

Reporting

Among other things which must be reported in writing to the Makerere University School of Social

Sciences Research and Ethics Committee include:

i. Suspension or termination of the protocol by you or the grantor. ii. Unexpected problems involving risk to participants or others.

iii. Adverse events, including unanticipated or anticipated but severe physical harm to participants.

Do not hesitate to contact us if you have any questions. Thank you for your cooperation and commitment to the protection of human subjects in research.

The legal requirement in Uganda is that, all research activities must be registered with the National Council for Science and Technology. The forms for this registration can be obtained from their website

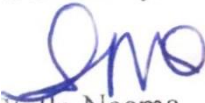
www.unsct.go.ug

Please contact the Administrator of Makerere University School of Social Sciences Research and Ethics

Committee at makssrec@gmail.com OR bjjulied@yale.edu if you encounter any problem.

bjjulied@yale.edu or telephone number +256 712 207926 if

Yours sincerely,


Stella Neema
Chairperson
Makerere University School of Social Sciences Research and Ethics Committee



Yours

Research and Ethics Committee

c.c.: [he Executive Secretary, tJg',mda-National Council for Science and
"I*cchnology



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1 November 2020

Approval Certificate

New Application

Ethics Reference No.: L040/19

Title: The impact of tax incentives on the realisation of economic and social rights: A focus on tax holidays and the right to basic education in Uganda

Dear Miss DA Ahumuza

The **New Application** as supported by documents received between 2019-10-13 and 2020-11-01 for your research, was approved by the Faculty of Law Research Ethics Committee.

Please note the following about your ethics approval:

- Please remember to use your protocol number (L040/19) on any documents or correspondence with the Research Ethics Committee regarding your research.
- Please note that the Research Ethics Committee may ask further questions, seek additional information, require further modification, monitor the conduct of your research, or suspend or withdraw ethics approval.

Ethics approval is subject to the following:

- The ethics approval is conditional on the research being conducted as stipulated by the details of all documents submitted to the Committee. In the event that a further need arises to change who the investigators are, the methods or any other aspect, such changes must be submitted as an Amendment for approval by the Committee.

We wish you the best with your research project.

Yours sincerely



Ms Rani Pillay

Chairperson: Research Ethics Committee

Faculty of Law